LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAI'I 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.hawaii.gov/oip

LESLIE H. KONDO
DIRECTOR

OPINION

Requester: Energy Planning & Policy Branch
Agency: Department of Business, Economic Development & Tourism
Date: April 13, 2007
Subject: Information on Energy Infrastructure Security (U RFO-G 07-55)

REQUEST FOR OPINION

Requester seeks an advisory opinion on whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"), the Department of Business, Economic Development & Tourism ("DBEDT") must disclose sensitive information reported to it by energy companies regarding the physical security of Hawaii's critical energy infrastructure.

Unless otherwise indicated, this determination is based solely upon the facts presented in Requester's e-mail correspondence dated February 9, 2007.

QUESTION PRESENTED

Whether DBEDT must disclose sensitive information reported to it by energy companies regarding the physical security of Hawaii's critical energy infrastructure.

BRIEF ANSWER

No. To the extent that public disclosure of information about the physical security of critical energy infrastructure would compromise the security of that infrastructure and expose it to hazards such as vandalism, copper or equipment theft, or other criminal activity, DBEDT may withhold the information under the UIPA's exception for information whose disclosure would frustrate a legitimate government function. See Haw. Rev. Stat. § 92F-13(3) (1993).

FACTS

By and large, Hawaii's critical energy infrastructure facilities are owned by private industry. H.B. No. 1267 proposes amendments to chapters 125C and 196, HRS, which would expand the scope and quantity of information that Hawaii energy companies would be required to report to DBEDT to support implementation of DBEDT's responsibilities for both energy emergency preparedness under chapter 125C and longer-term planning and policy analyses regarding Hawaii's energy security under chapter 196. More specifically, energy companies would be required to report information about the physical security of critical energy infrastructure. DBEDT anticipates using the reported information to support its implementation of both chapters, particularly chapter 125C. DBEDT provides State Civil Defense with energy-related emergency support for all energy industry sectors and all emergency hazards, i.e., emergencies caused by disasters, natural or otherwise, including terrorist attack.

DBEDT is concerned about the risks to the physical security of critical energy infrastructure that could stem from disclosure of the reported information about the physical security of the facilities making up the critical energy infrastructure. Disclosure of physical security information, DBEDT argues, could lead to problems such as damage from vandals, thefts of equipment, copper wiring, and other metals, or other criminal acts that could compromise the operational viability of the facilities. Thus, DBEDT contends that sensitive information about the physical or operational security of the critical energy infrastructure may be withheld from public disclosure to protect that infrastructure against criminal activity.

DISCUSSION

The UIPA's frustration exception does not describe a specific type of information that may be withheld. Rather, it categorically provides an agency with the right to withhold information whose disclosure would frustrate a legitimate government function – in other words, it gives an agency a legal basis for withholding information to protect its ability to do its job. See Haw. Rev. Stat. § 92F-13(3). The exceptions to disclosure found in the federal Freedom of Information Act ("FOIA"), on which the UIPA is indirectly based, generally are more specific and apply to specific types of records described in the law, but under the UIPA many of the situations covered by a specific FOIA exception would fall under the general umbrella of frustration.

The legislative history of the UIPA offers examples of the application of the frustration exception to specific types of information, but this list is provided for guidance and is not exclusive. S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094-5. The legislature intended the exception's application in other situations to ultimately be defined by common law, which it considered

"ideally suited to the task of balancing competing interest[s] in the grey areas and unanticipated cases. . . ." Id. Thus, OIP looks to the examples provided by the UIPA's legislative history and to FOIA case law for guidance in determining how the frustration exception applies to particular types of records, but the frustration exception is not limited to types of information for which the UIPA's legislative history or a particular FOIA exception gives guidance. Any type of information may potentially fall within the exception, so long as its disclosure would meet the essential element of frustration of a legitimate government function.

In this instance, the information in question concerns the physical security of Hawaii's critical energy infrastructure, and DBEDT argues that disclosure of the information would frustrate its function of ensuring Hawaii's energy security by impairing the physical security of the critical energy infrastructure. In the FOIA case law, FOIA's national security exception has been held to protect information about the physical security of nuclear power facilities on the theory that disclosure would increase the probability of a successful attack against a facility. Abbots v. Nuclear Regulatory Commission, 766 F. 2d 604 (D.C. Cir. 1985).

DBEDT's argument is analogous, but not identical, to FOIA's national security exception, which protects information that is authorized by executive order to be kept secret in the interest of national defense or foreign policy, and is properly classified pursuant to executive order. See 5 U.S.C. § 552(b)(1) (2000). As the Abbots court noted, the then-current executive order made "confidential" information "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." Abbots, 766 F. 2d at 606 (citing Executive Order 12,356, 47 Fed. Reg. 14875 (1982)). OIP agrees with DBEDT that ensuring Hawaii's public security, including the physical security of critical energy infrastructure, is a legitimate function of government. The information at issue here would not meet FOIA's national security exception, since it is not classified. However, OIP believes it would be inappropriate to require that information be classified as a precondition to withholding it in the interest of public security at the state level. The state may be privy to some federal classified information but does not have its own system of security classification comparable to the federal system. Thus, the absence of security classification on a piece of information does not necessarily suggest that disclosure of the information would not cause damage to public security at the state level.

Rather, it is OIP's opinion that where an agency seeks to withhold information in the interest of public security, the agency must show that public disclosure of the information could reasonably be expected to cause damage to public security. Here DBEDT argues that disclosure of information about the physical security of critical energy infrastructure would compromise the security of that infrastructure and expose it to hazards such as vandalism, copper or equipment theft, or other criminal activity, which result would clearly be contrary

to the interest of public security. However, DBEDT will still be required to establish facts supporting that argument if faced with a challenge to its nondisclosure of information in response to a request. See Haw. Rev. Stat. § 92F-15(c) (1993) (agency has the burden of proof to establish justification for nondisclosure). Assuming that DBEDT can meet its burden to show that disclosure of a particular piece of information would indeed compromise the physical security of critical energy infrastructure, DBEDT may withhold that information under the UIPA's exception for information whose disclosure would frustrate a legitimate government function. See Haw. Rev. Stat. § 92F-13(3) (1993).

OFFICE OF INFORMATION PRACTICES

Jennifer Z. Brooks
Staff Attorney

APPROVED:

for Leslie H. Kondo
Director