January 18, 1990

MEMORANDUM

TO: The Honorable Roger A. Ulveling
Director of Business and Economic Development

FROM: Martha L. Young, Staff Attorney

SUBJECT: Proposed HECO Confidentiality Agreement Relating to Geothermal Interisland Transmission Project

Your December 20, 1989, memorandum to Attorney General Warren Price, III, requesting an advisory opinion regarding a proposed "confidentiality agreement" with Hawaiian Electric Company, Inc. ("HECO") relating to the Geothermal Interisland Transmission Project, was forwarded to the Office of Information Practices ("OIP") for a response, in accordance with established protocol.

By this opinion, OIP will interpret the impact of the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, on proposed agency "confidentiality agreements" and provide advice regarding any public records implications. Additionally, although OIP has no authority to approve state agreements as to form or legality, we will suggest sample language that could be included in such agreements, if your department believes it necessary to enter into a "confidentiality agreement."

ISSUES PRESENTED

I. Whether a government agency may enter into a "confidentiality agreement" providing that certain information maintained by the government agency remain confidential, when the agreement is contrary to the UIPA.

II. Whether a government agency may enter into a "confidentiality agreement" providing that certain information

maintained by the government agency remain confidential, when the agreement does not violate the UIPA.

III. Whether the UIPA provides any exceptions to disclosure that may apply to the contents of proposals submitted to HECO for the geothermal interisland transmission project, copies of which are maintained by a government agency.

BRIEF ANSWERS

I. No. A government agency may not enter into confidentiality agreements which would have the effect of circumventing the mandate of the UIPA. Nor may it enter into agreements that contravene the UIPA. If it does, the parts of the agreement that contravene the UIPA will be void.

II. If it is imperative that the agency enter into such an agreement, then we urge careful drafting to ensure compliance with the UIPA, and note that even the UIPA's exceptions may not last indefinitely.

III. Yes. Proposals submitted to a government agency in response to Requests for Proposals ("RFP"s) may be confidential until the State has made a final selection regarding which submitter will receive a government contract, if releasing them before the final decision is made would frustrate a legitimate government function in accordance with section 92F-13(3), Hawaii Revised Statutes. In addition, the UIPA provides for the confidentiality of certain types of information in government records, such as proprietary information, trade secrets, and confidential commercial or business information, if the release of such information would frustrate a legitimate government function.

FACTS

DBED is participating with HECO in the evaluation of proposals submitted in response to HECO's RFP to finance, develop, own, and operate a geothermal interisland cable system, and in the negotiation of a HECO power purchase agreement and other agreements to which the State may be a party. Because the proposal submitters and HECO were concerned about the confidentiality of the material submitted in the proposals, on November 24, 1989, DBED executed an agreement with HECO

concerning confidentiality of certain information and documents received by DBED between November 1, 1989, and December 31, 1989.

DBED plans to meet with HECO and the five proposal submitters between January 16-18, 1990, and desires to enter into a new agreement with HECO which would govern the confidentiality of copies of the proposals to be provided to the State. You have written the Attorney General for an interpretation of the UIPA regarding the upcoming January meetings and any related materials the State receives from HECO and/or the proposal submitters. Attached to your request were three confidentiality agreements, marked as "Attachment B," "Proposed," and one unmarked. In accordance with established protocol, your request has been forwarded to OIP for a response.

DISCUSSION

I. Whether a government agency may enter into a "confidentiality agreement" providing that certain information maintained by the government agency remain confidential, when the agreement is contrary to the UIPA.

The UIPA's legislative history directs us to "rely on developing common law" for "balancing competing interest [sic] in the grey areas and unanticipated cases, under the guidance of the legislative policy." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988). We can thus analogize similar fact situations and UIPA provisions to case law interpreting the federal Freedom of Information Act ("FOIA") and other states' information acts.

It is a well-settled principle of public records law that government promises of confidentiality cannot override the FOIA in its mandate of public access to government records.

> It will obviously not be enough for the agency to assert simply that it received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature can not, in and of themselves, override the Act.

Ackerly v. Ley, 420 F.2d 1336, 1340, n. 3 (D.C. Cir. 1969).

Ackerly was later cited by Robles v. EPA, 484 F.2d 843, 846 (4th Cir. 1973), and Petkas v. Staats, 501 F.2d 887, 889 (D.C. Cir. 1974) ("[n]or can a promise of confidentiality in and of itself defeat the right of disclosure"), and expanded upon by Washington Post Co. v. United States Dep't of HHS, 690 F.2d 252, 263 (D.C. Cir. 1982) ("to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate"). Thus, it is clear that "agencies cannot alter the dictates of the [FOIA] by their own express or implied promises of confidentiality." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1287 (D.C. Cir. 1983).

This same principle has also been extended by state courts to state freedom of information acts.[1] See San Gabriel Tribune v. Superior Court, 143 Cal. App. 3d 762, 776, 192 Cal. Rptr. 415, 423 (App. 2 Dist. 1983) ("assurances of confidentiality are insufficient in themselves to justify withholding pertinent public information from the public"); Register Div. of Freedom Newspapers, Inc., v. County of Orange, 158 Cal. App. 3d 893, 909, 205 Cal. Rptr. 92, 102 (App. 4 Dist. 1984) ("assurances of confidentiality by the County regarding the settlement agreement are inadequate to transform what was a public record into a private one"); Hechler v. Casey, 333 S.E.2d 799, 809 (W.Va. 1985) ("an agreement as to confidentiality between the public body and the supplier of the information may not override the Freedom of Information Act"); Daily Gazette Co. v. Withrow, 350 S.E.2d 738, 746 (W.Va. 1986) ("[a]ssurances of confidentiality do not justify withholding public information from the public; such assurances by their own force do not transform a public record into a private record for the purpose of the State's Freedom of Information Act"); and Anchorage School Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989) ("a public agency may not circumvent the statutory disclosure requirements by agreeing to keep the terms of a settlement agreement confidential . . . . a confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statutes").

[1]See OIP Op. Ltr. No. 89-10, 8, n. 6 (December 12, 1989) ("[s]uch confidentiality provisions have been declared void to the extent they conflict with state Freedom of Information Acts").

With the above principles in mind, we reviewed all of the sample agreements included with your December 20, 1989, memorandum. We note that the agreement marked "Attachment B" includes the following paragraph:

> 4. State agrees that all information provided hereunder is not a public record, public document or anything else which may subject such information to public disclosure.

It is our opinion that no state agency can bind the State to such a provision. The UIPA provides a definition of "government record," and the UIPA's provisions determine which government records are confidential or public. Agencies simply may not override these basic principles of the UIPA by contract.

II. Whether a government agency may enter into a confidentiality agreement" providing that certain information maintained by the government agency remain confidential, when the agreement does not violate the UIPA.

The UIPA speaks for itself, thereby making agreements restating the law unnecessary. However, there is certainly no legal prohibition against an agreement to simply "follow the law." But such an agreement's terms would have to be very carefully worded to ensure that the agreement and its provisions do not violate the UIPA. Also, we caution that the UIPA's exceptions do not apply indefinitely.

> Exemption from the reach of FOIA cannot be extended to mandate perpetual confidentiality of the documents in the hands of the government. [The government] need preserve the confidentiality only so long as the nature of the information is deserving of protection . . . .

Audio Technical Serv. Ltd. v. Dep't of the Army, 487 F. Supp. 779, 784 (D.D.C. 1980).

The agreement submitted to OIP with your December 20, 1989, memorandum to the Attorney General that was marked "Proposed" provides that the State not accept any copies or create any government records during the meetings with HECO. However, you express a desire for the State to receive copies of the

geothermal proposals from HECO, in order to facilitate the State's involvement in the evaluation and selection process. To that end, you wish to draft a new agreement.

Our best advice to you in drafting an agreement that will not violate the UIPA is to reference the UIPA and its exceptions to disclosure, such as proprietary information, trade secrets, and confidential commercial or business information, if frustration of a legitimate government function would result, and to emphasize that the State will at all times follow the UIPA's mandate. Any attempts to agree to or promise confidentiality that violate the UIPA would, in our opinion, be found void as in contravention of law.

The following two sample paragraphs are included as suggested language for any "confidentiality agreement":

> 1. "Government record" shall be as defined in section 92F-3, Hawaii Revised Statutes, and shall include information in written, auditory, visual, electronic, or other physical forms, and the disclosure of such records shall only be in accordance with chapter 92F and any other applicable laws.
>
> 2. To the extent that any of the records referenced in this Agreement and collected or compiled by the State constitute public records which are not exempt from disclosure and therefore are open to inspection and duplication under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, neither the State nor any "agency" thereof as defined in the UIPA shall be in breach of this Agreement by performing or permitting any of the acts necessary to comply with the UIPA.

We suggest that DBED review the materials submitted as part of the HECO geothermal proposals to determine if any of them qualify for exempt status under the UIPA's frustration exception, such as proposals necessarily confidential during the selection process, proprietary information, trade secrets, or confidential commercial and business information. Guidance on these matters is provided herein below and will be the subject of future OIP

advisory opinions. In addition, upon request, OIP will assist an agency with any determination regarding exceptions to the UIPA's general rule of disclosure.

If the agency determines that a government record contains proprietary information, a trade secret, or confidential commercial and business information, and that the release of such information would frustrate a legitimate government function of the agency, then the agency may keep that information confidential in accordance with the UIPA. Thus, we find that a government agency is not prohibited from entering into an agreement providing that certain information maintained by the government agency remain confidential, if the agreement does not violate the UIPA or its intent.

III. Whether the UIPA provides any exceptions to disclosure that may apply to the contents of proposals submitted to HECO for the geothermal interisland transmission project, copies of which are maintained by a government agency.

The UIPA states that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. Þ 92F-11(a) (Supp. 1989). Section 92F-13(3), Hawaii Revised Statutes, provides that disclosure is not required if the government records in question "must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1989).

This exception to the general rule of disclosure cannot be invoked whenever it just so happens that disclosure of records or information would be "frustrating" to a government agency. Rather, the State Legislature had some very definite ideas regarding instances which would rise to the level of "frustration of a legitimate government function."

Senate Standing Committee Report No. 2580, dated March 31, 1988, introduced the UIPA's concept of "frustration of legitimate government function" by stating:

> The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.
>
> . . . .

> (3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining;
>
> . . . .
>
> (6) Proprietary information, such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;
>
> (7) Trade secrets or confidential commercial and financial information;
>
> . . . .
>
> (9) Information that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule.

S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (emphasis added).

Manifestly Unfair Advantage

The exception to the UIPA's mandate of public disclosure for information which would "give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency" was discussed in OIP Opinion Letter No. 89-15 (November 20, 1989) concerning the Aloha Tower Development proposals. That opinion stated that "[t]he development proposals may remain confidential under the `frustration exemption' in section 92F-13(3), Hawaii Revised Statutes, until" the selection procedure is completed and a developer chosen. This same frustration exception for proposals submitted and still under consideration may apply in the DBED/HECO situation, if the State is going to enter into an agreement with the submitter of the chosen proposal and release of the proposals before a final

decision is made would provide a proposer with a manifestly unfair advantage, thereby "frustrating" the ability of the agency to secure the best possible agreement for the taxpayers. However, if the State will not be entering into such an agreement, and release of the proposals would not frustrate the decision-making or negotiation process, then this exception would not apply.

Proprietary Information

"Proprietary information"[2] applies to information which already has the protection of an exclusive legal ownership mechanism, such as copyright or trademark, before becoming a government record. These intellectual property protection mechanisms extend not only to the more traditional literary and artistic works, but also to research and scientific methods and computer software. "There is no dispute that this material [trade secrets and proprietary information] is entitled to protection." Vol. I Report of the Governor's Committee on Public Records and Privacy 122 (December 1987) (emphasis added). If any of the geothermal proposals submitted to HECO and given to the State contain information that is already protected under an exclusive legal right, and the release of such information would frustrate a legitimate government function, then the UIPA exempts such information from public disclosure.

For example, if a computer program that is protected by "exclusive legal right" is submitted to the State as part of a proposal, its release to the public would undoubtedly prevent future submitters from including such programs with their proposals, unless already in the public domain. Thus, if the State needed to review and evaluate such a computer program to make the best decision regarding which proposal to accept, frustration would apply and the computer program would be protected from disclosure.

Trade Secrets or Confidential Commercial and Business Information

Hawaii House Standing Committee Report No. 342-88, dated February 19, 1988, directs us to the Model Uniform Information

[2]"Proprietary information," such as computer programs, software, and other information protected by exclusive legal right, will be more fully addressed in a separate OIP opinion letter.

Practices Code ("Model Code") commentary to "guide the interpretation of similar [UIPA] provisions." In discussing the Model Code exception for "trade secrets or confidential commercial and financial information," the commentary explains that "[t]he purpose of [this] subsection . . . is to enable an agency to protect the confidentiality expectation of those submitting information. This exemption is fundamental to freedom of information legislation . . . ." Model Code § 2-103 commentary at 17 (1980).

Confidential commercial and business information was discussed in depth in OIP Opinion Letter No. 89-5 (November 20, 1989), and we refer you to that advisory opinion for examples of how the disclosure of such information by a government agency could frustrate a legitimate government function.

In introducing the previously listed examples of records excepted from disclosure if frustration would result, the State Legislature chose to "categorize and rely on the developing common law" rather than list specific records in the statute. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988). We can thus apply the exception for trade secrets to information that meets the following FOIA definition, if release would frustrate a legitimate government function:

> [A] secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.

Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

Hawaii recently enacted the Uniform Trade Secrets Act, chapter 482B, Hawaii Revised Statutes, providing for injunctive relief and damages for misappropriation of a trade secret. This new law also empowers courts to protect trade secrets, which are defined as follows:

> "Trade secret" means information, including a formula, pattern, compilation, program device, method, technique, or process that:

(1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Haw. Rev. Stat. Þ 482B-2 (Supp. 1989).

A future OIP advisory opinion will specifically address and further explain the status of trade secrets under the UIPA.

The determination regarding whether certain records or information constitute a trade secret will be made by the government agency, although OIP will provide assistance in making this determination upon request. Once the information or record is designated a trade secret, then the agency may keep it confidential or limit its use, if disclosure would frustrate a legitimate government function. For example, when an agency has received a bid or proposal containing a trade secret, and disclosure of such information will greatly diminish or make nonexistent the likelihood of the agency's receiving such information in the future, and the agency needs the information to make an informed decision, the result would be the frustration of the legitimate government function of attempting to obtain the particular product or service at the lowest possible cost to the taxpayer.

Protection by State or Federal Law or Judicial Rule

Another example of frustration of a legitimate government function is when information is specifically protected by state or federal law or judicial rule. It is also an exception to the general rule of disclosure. Haw. Rev. Stat. § 92F-13(4) (Supp. 1989). We know of no such law or judicial rule that would apply to the HECO geothermal proposals but, given the subject matter, suggest that you consider whether specific circumstances, such as environmental concerns or federal funding and/or contracting, might invoke any such laws.

CONCLUSION

Government promises or assurances of confidentiality cannot override the UIPA to change the public nature of a government record. Such confidentiality provisions are clearly unenforceable and void.

A government agency is not prohibited from entering into an agreement providing that certain information maintained by the agency remain confidential, if the agreement does not violate the UIPA or imply that confidentiality lasts indefinitely. If the agency insists on a "confidentiality agreement," the best solution would be an agreement that referenced the UIPA and emphasized the agency's intent to follow the UIPA's mandate.

However, the UIPA itself provides an exception to the mandate of open disclosure that may apply to the HECO geothermal proposals. The proposals may be exempt from disclosure in their entirety until the final selection process is completed, if the state is going to enter into an agreement with the submitter of the chosen proposal and release of the proposals before a final selection is made would frustrate the decision-making process by providing a manifestly unfair advantage to a proposer. In addition, proprietary information, trade secrets, and confidential commercial and business information may be exempt from disclosure if the release of such information would frustrate a legitimate government function. If certain proprietary information, trade secrets, or confidential commercial and business information was required by the State to choose among bids or proposals or carry out a legitimate regulatory function, and submitters would refuse to provide such information if it were designated as public, then "frustration" would apply to keep the information confidential. There may also be specific state or federal laws or judicial rules mandating confidentiality that could apply to some of the information contained in the proposals.

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APPROVED:

Kathleen A. Callaghan
Director