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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Sophie Cocke
Agency: Public Utilities Commission
Date: December 8, 2016
Subject: Public Utility Commission Applicant Records (RECON-G 17-01)

REQUEST FOR OPINION

Requester seeks a decision under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), as to whether the Public Utilities Commission (PUC) properly denied Requester's request for a submittal filed in PUC Docket No. 2010-0304.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's e-mail correspondence dated July 15, 2013, and attached materials; a letter to OIP from the PUC dated July 30, 2013, and attached materials; a phone message from the PUC to OIP dated November 19, 2015; e-mails to OIP from the PUC dated January 7 and May 2, 2016; a letter from the PUC to Sandwich Isles Communications (SI) dated July 5, 2016; a letter from the PUC to OIP dated July 13, 2016; two letters from SI to OIP dated July 15, 2016; and a letter from OIP to the PUC, SI, and Requester dated August 17, 2016.

QUESTIONS PRESENTED

1. Whether PUC's issuance of a protective order justifies withholding information that does not fall within any exception to the UIPA.

2. Whether cost and overhead information submitted to the PUC may be withheld as confidential commercial and financial information under the UIPA's exception for government records that must be confidential to avoid the frustration of a legitimate government function. HRS § 92F-13(3) (2012).

3. Whether narrative descriptions, correspondence, loan agreements, and other non-cost information submitted to the PUC may be withheld as confidential commercial and financial information under the UIPA's exception for information which, if disclosed, would frustrate a legitimate government function. HRS § 92F-13(3).

4. Whether technical information and detailed information regarding the location of network infrastructure and types of equipment may be withheld to prevent compromising the physical or electronic security of critical telecommunication infrastructure under the UIPA's exception for information which, if disclosed, would frustrate a legitimate government function. HRS § 92F-13(3).

5. Whether direct business contact information may be withheld under the UIPA's exception for information which, if disclosed, would frustrate a legitimate government function. HRS § 92F-13(3).

BRIEF ANSWERS

1. No. Section 6-61-50, HAR, allows a party to seek a protective order by the PUC "to protect the confidentiality of information that is protected from disclosure under chapter 92F, HRS, or by law." HAR § 6-61-50. The UIPA itself protects information that is made confidential by state or federal law. HRS § 92F-13(4) (2012). Thus, because a PUC protective order is limited to information protected from disclosure under the UIPA, it may not be used to justify withholding information that does not fall within any exception to the UIPA.

2. Yes. OIP has consistently found that disclosure of detailed financial information such as cost and overhead information is likely to cause substantial competitive harm, especially where it could be combined with known figures such as a government contract price to estimate actual profit. E.g., OIP Op. Ltrs. No. 97-4 and 94-14. OIP therefore finds that with limited exceptions, the cost, overhead, and revenue information expressed in dollar amounts may be withheld as confidential commercial and financial information under the UIPA's frustration exception.

3. No. Non-cost information submitted to the PUC including narrative descriptions, correspondence, and loan agreements is, in some instances, already public knowledge and generally constitutes mundane information of a sort that is

not considered confidential commercial or financial information. See OIP Op. Ltr. No. 92-17 at 12-13.

4. Yes. Information about switch and microwave radio types by specific model, detailed network diagrams, and local-level scaled maps showing locations of network infrastructure could be used in planning either a physical or electronic disruption to the network and as such their disclosure could reasonably be expected to cause damage to the security of the network. The PUC may therefore withhold such information under the UIPA's frustration exception to prevent compromising the physical or electronic security of critical telecommunication infrastructure. See OIP Op. Ltr. No. 07-05.

5. Yes. Direct business contact information that has not already been made public may be withheld under the UIPA's "frustration of a legitimate government function" exception. See OIP Op. Ltr. No. 07-11 fn. 9.

FACTS

In a written request made on June 17, 2013, Requester sought disclosure of the redacted portions of a document dated April 15, 2011, containing SI's responses to questions posed by the Hawaii Consumer Advocate regarding the company's application for recertification as a telecommunications carrier. The PUC previously had disclosed a redacted version of that record. The PUC denied Requester's June 17 request in its Order Number 31341 Denying Motion to Compel (PUC Denial), filed July 2, 2013. Requester then appealed that denial to OIP (U APPEAL 14-3), and OIP issued a Notice of Appeal dated July 22, 2013. The Appeal Procedures and Responsibilities of the Parties attached to the Notice of Appeal included a requirement that the agency's written response must include, for OIP's *in camera* review, an unredacted copy of the records to which access was denied.

The PUC responded to the appeal in a letter dated July 30, 2013, relying on SI's arguments for withholding the redacted material made in a letter from SI to the PUC dated June 25, 2013. The PUC's response included a copy of that letter, along with the PUC's letter to SI dated June 19, 2013, seeking SI's position on Requester's request, but notably did **not** include the unredacted copy of the records to which access was denied. Notwithstanding reminders from OIP, the PUC failed to produce to OIP the unredacted copy of the records to which access was denied.¹ Thus, OIP decided the appeal without having had the opportunity to review the specific

¹ On November 19, 2015, the PUC notified OIP via telephone that SI would provide OIP with the unredacted copies of the records at issue for OIP's *in camera* review. SI did not do so, despite the PUC's reminders to it over a period of more than five months. OIP finally advised the PUC in an e-mail dated May 2, 2016, that OIP would have to proceed with an opinion without reviewing the unredacted copies of the records at issue.

information to which the PUC denied access. In memorandum decision U MEMO 16-7, OIP found that all records must be disclosed as the PUC had failed to meet its burden to justify its denial of access.

The PUC subsequently provided the records at issue for OIP's *in camera* review. At the same time the PUC sought, and OIP granted, reconsideration of U MEMO 16-7. In its letter granting reconsideration, OIP cautioned the PUC that the "other compelling circumstances" standard² under which OIP granted reconsideration should not be used by an agency to request reconsideration after the agency initially failed to timely provide records for *in camera* review, and that the PUC should not assume that reconsideration would be granted in a future appeal where an agency or other party seeks to provide records or other evidence or arguments that were available and should have been presented during the original appeal. Reconsideration was granted here because a cursory review of the *in camera* records indicated that at least some of the information contained therein consisted of confidential business information that is protected under the frustration exception.

The records at issue consist of a 34-page set of questions from the PUC and answers by SI in narrative form, and over 700 pages of attachments that include narrative discussions, some correspondence, schedules of cost and overhead figures, information about specific brands and models of equipment to be used, network diagrams and locations of network infrastructure at varying levels of specificity. The records also included loan contracts between SI and the Rural Utility Bank (RUB), a now-defunct part of the Rural Utility Service (RUS), which in turn is part of the United States Department of Agriculture (USDA), as well as information about disbursements from, and references to, the RUB and the Universal Service Fund (USF), which is part of the Federal Communications Commission (FCC).³ The PUC redacted portions of the questions and all the answers except those that read "not applicable" and a single sentence stating that redacted information was available on the website of the Department of Hawaiian Home Lands (DHHL).⁴ The PUC also withheld all attachments.

OIP is aware of recent litigation involving SI that may result in some of the information in the records at issue being placed into the public domain as evidence in litigation. See, e.g., Kevin Dayton, Sandwich Isles Communications faces \$76M

² OIP's rules allow reconsideration of a decision based on a change in the law, a change in the facts, or other compelling circumstances. HAR § 2-73-19.

³ As discussed infra at 9-10, SI's involvement with these federal agency programs is already public knowledge, so OIP refers to them by name in this opinion.

⁴ SI's business focus is on providing telecommunications service on Hawaiian Home Lands.

penalty, December 06, 2016, <http://www.staradvertiser.com/2016/12/06/hawaii-news/sandwich-isles-communications-faces-76m-penalty/>; Sophie Cocke, Suit blames PUC for loss of U.S. funds, December 1, 2016, <http://www.staradvertiser.com/2016/12/01/hawaii-news/suit-blames-puc-for-loss-of-u-s-funds/>. Information and records that have been made public through court filings cannot generally be withheld from the public under the UIPA. However, as this litigation arose well after the original appeal request was made to OIP and even after OIP's grant of reconsideration in this matter, and OIP is not aware of specific information at issue here that has been made public in the course of litigation, OIP will not consider in this opinion whether the litigation has made the PUC's and SI's arguments for withholding information moot.

DISCUSSION

I. Protective Order

Because the PUC relied largely on SI's submittals to set out its arguments for why the redacted information was properly withheld both in the PUC Denial and its response to this appeal, OIP will focus on SI's arguments. First, SI argued that the redacted information cannot be disclosed because it is subject to a Protective Order entered by the PUC on November 22, 2010, pursuant to section 6-61-50, Hawaii Administrative Rules (HAR) (Protective Order). Section 6-61-50 allows a party to seek a protective order "to protect the confidentiality of information that is protected from disclosure under chapter 92F, HRS, or by law." HAR § 6-61-50. In other words, the protective order rule is limited to information protected from disclosure under UIPA⁵, and as SI acknowledged, the Protective Order itself requires non-disclosure of the protected information "except as may be directed by (a) an order of court, (b) an order of the Commission, and (c) the UIPA, including any ruling of the Office of Information Practices."⁶ Protective Order at page 9. Whether the Protective Order

⁵ The UIPA itself protects information that is made confidential by state or federal law. HRS § 92F-13(4).

⁶ In seeking reconsideration, the PUC argued that HAR § 6-61-50 prevented it from providing records for OIP's *in camera* review until after OIP's decision requiring disclosure of all records, because the UIPA had not required disclosure until that point. The PUC is incorrect in its understanding of the UIPA. The UIPA does in fact require disclosure of records to OIP for *in camera* review in a pending appeal. HRS § 92F-42(5) (2012) (stating that OIP "[m]ay examine the records of any agency" for the purpose of UIPA appeals and may enforce that right in court); HAR § 2-73-15(c) (recognizing that OIP "may require any party to submit to OIP the original or a copy of one or more documents necessary for its ruling" and "examine the documents *in camera* as necessary to preserve any claimed exception"); OIP Op.

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applies to protect the redacted information thus depends on the same question raised by this appeal: whether any of the UIPA's exceptions apply to the redacted information. That question remains to be answered.

SI argued that OIP Opinion Letter Number 92-02 held that an agency may enter into confidentiality agreements protecting information from disclosure. SI significantly misread OIP's holdings on this issue. OIP Opinion Letter Number 92-02 in fact concluded that

[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.

OIP Op. Ltr. No. 90-02 at 2. The opinion goes on to recommend that if an agency does enter into a confidentiality agreement, the agreement should be carefully drafted to ensure compliance with the UIPA. Consistent with this advice, the Protective Order made clear (as discussed above) that information subject to the order may be disclosed if so required by the UIPA. Thus, again, we are brought back to the question of whether the information subject to the Protective Order falls within the UIPA's exceptions to disclosure.

II. Frustration: Confidential Commercial and Financial Information

SI apparently argued that because the information in its submissions to the PUC relates to a privately held company, it has a right to protect that information from disclosure. The definition of a government record subject to the UIPA, however, is not limited to information created by the government, and instead applies to all records "maintained by an agency." HRS § 92F-3 (2012).

SI also argued that information in the submissions was its confidential information, which it would not choose to share with a daily newspaper and had a right to protect from disclosure. Information that is not of a type customarily disclosed by the company is a relevant factor in determining whether the information is confidential commercial or financial information protected by the UIPA's exception

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Ltr. No. 14-01 (determining that an agency must comply with OIP's UIPA authority to review records at issue *in camera* to determine applicability of exceptions, so such disclosure does not waive the attorney-client or other privileges). Thus, as the UIPA requires disclosure of records for OIP's *in camera* review in an appeal, by its own rules the PUC can disclose to OIP records subject to a protective order in such a situation.

to disclosure for information that must be confidential to avoid the frustration of a legitimate government function under section 92F-13(3), HRS, but this factor is not sufficient by itself to justify nondisclosure.

SI argued that the redacted information is confidential commercial financial information falling under the UIPA's frustration exception. In its Opinion Letter Number 98-2, OIP discussed this form of frustration at length. While OIP's analysis is in many respects similar to that of federal courts interpreting the federal Freedom of Information Act (FOIA), it is not identical. See generally FOIA, 5 U.S.C.A. § 552 (2016). As OIP wrote in that opinion,

[n]ote that under FOIA, once commercial or financial information is found to be confidential or privileged, the agency is not required to disclose it. Under the UIPA, however, Hawaii state and county agencies must go one additional step and show that this confidential commercial or financial information, if disclosed, would also frustrate an agency's legitimate government function.

OIP Op. Ltr. No. 98-2 at 10. To find that commercial or financial information is "confidential or privileged," OIP looks to whether its disclosure would either likely (1) impair the government's future ability to obtain necessary information; or (2) substantially harm the competitive position of the person who provided the information. Id.

A. Impairment of Ability to Obtain Information

The redacted information includes cost estimates, business plans, loan contracts, and network information, which broadly qualifies as being commercial or financial in nature. OIP will first turn to the impairment prong of the analysis.

To determine whether disclosure would impair the agency's ability to obtain similar information in the future, OIP first looks to whether the person submitting the information did so voluntarily. When information is required to be disclosed by law, or to obtain a benefit (such as a contract or a permit), there is a rebuttable presumption that its disclosure will not impair the agency's ability to obtain similar information in the future. Id. at 12-13; see also OIP Op. Ltr. No. 94-14 at 6 (disclosure of information required for permit will not impair government's future ability to obtain such information); OIP Op. Ltr. No. 91-16 at 11 (disclosure of information required as part of contract negotiations will not prevent other companies from competing for government contracts).

OIP Op. Ltr. No. 05-13 at 3. Here, the information was not submitted to the PUC voluntarily, but to obtain the benefit of certification. Further, OIP sees no reason to find that SI's submissions included information only tangentially related to the application that could be left out of future filings without jeopardizing the prospect of obtaining the benefit applied for, which might give rise to an argument that disclosure of the tangentially related information could impair the PUC's ability to obtain similar information in the future. Rather, all of the material submitted appears directly related to SI's application for PUC certification as an eligible telecommunication carrier. For these reasons, OIP finds that the impairment prong does not apply.

B. Substantial Competitive Harm

We thus turn to the substantial competitive harm prong of the analysis. The PUC asserted, and OIP accepts, that SI operates within a competitive marketplace, with Hawaiian Telcom aka GTE Hawaiian Telephone, which also provides services on Hawaiian Home Lands, as its primary competitor. SI argued that disclosure of the redacted information relating to SI's business model, to SI's actual and projected cost and revenue data, and to SI's network would be likely to cause SI substantial competitive harm.

The only previous OIP formal opinion considering materials filed with the PUC by a regulated utility determined that monthly and annual financial reports filed with the PUC by regulated utilities under chapter 269, HRS, were not protected from public disclosure by any of the UIPA's exceptions. OIP Op. Ltr. No. 93-4 at 10. That opinion relied in part on the PUC's historical practice of disclosing such reports, noting that the Legislature had not intended the UIPA to cut off access to previously public records. *Id.* at 8-10. As the records at issue in this opinion are not part of a monthly or annual financial report filed by SI, and are not of a type that has been historically treated as public record by the PUC, that opinion is of limited applicability to the records at issue here.

As a general rule, determining whether a UIPA exception to disclosure applies requires factual findings as to what type of information is being withheld, which cannot be based on mere conclusory assertions. OIP Op. Ltr. No. 94-17 at 14-15. To make a determination that the redacted information falls under the UIPA's frustration exception as "confidential commercial and financial information," OIP must conclude that the redacted information would be likely to cause substantial competitive harm to SI such that it could be withheld by the PUC as "confidential commercial or financial information" under the UIPA's frustration exception, and as the agency withholding the requested records, PUC has the burden to establish that an exception to disclosure applies. See HRS § 92F-15(c); see also § 2-73-15(c), HAR. Mundane information about a business, or information that is publicly available, is

not considered confidential commercial or financial information. OIP Op. Ltr. No. 92-17 at 12-13.

Especially when the specific type of information at issue is not one that has been the subject of prior OIP opinions, an agency needs to provide specific and direct evidence of the potential for competitive harm in order to provide a basis for “beneficial scrutiny” of its allegations. OIP Op. Ltr. 94-17 at 14-15; see also OIP Op. Ltr. 98-2 at 12-15 (concluding that because business submitted only conclusory allegations and failed to show how disclosure of information would lead to substantial competitive harm, disclosure would not cause substantial competitive harm). An agency cannot use the presence of some protected information – for instance, cost and overhead information – to justify a wholesale redaction of all information.⁷ See OIP Op. Ltr. No. 94-17 at 15 (noting that information withheld as “costs” also included extensive narration of various events); see also HAR § 2-71-17 (requiring that when a record contains both confidential and public information, agency has a duty to segregate the confidential portion and disclose the rest to the extent reasonably possible) and OIP Op. Ltr. No. 09-09 (stating that “an agency may withhold an entire record only where the record is not reasonably segregable,” citing OIP Op. Ltrs. No. 90-11 and 95-13). Similarly, citations to UIPA case law or OIP opinions that recognize and discuss in general terms the concept of confidential commercial and financial information and the competitive harm standard are not adequate to establish that specific information factually qualifies under that standard.

The records include narrative answers provided by SI to questions from the PUC, as well as narrative descriptions of SI’s plans by a consultant. SI argues that the records include information about its business model, which it describes as “highly unique . . . utilizing state-of-the-art equipment and infrastructure coupled with excellent service and participation in certain telecommunications programs of the federal government.” It appears that SI may be arguing that even the identity of the federal programs it has relied on for its funding is confidential as part of its business plan.

SI did not provide a specific explanation of how its competitors could make use of the withheld information to cause substantial competitive harm. OIP cannot agree that it is highly unique for telecommunication companies to seek to use state-of-the-art equipment and infrastructure and provide excellent service – companies do not as a rule seek to use out-of-date equipment and infrastructure and provide mediocre service – and OIP therefore cannot conclude that references to SI’s anticipated level of service or related information would be likely to cause substantial competitive

⁷ The information redacted from the records at issue included even information specifically described later in the same document as being available on the public website of DHHL, a state agency.

harm if disclosed. Further, OIP takes notice that SI's involvement with specific federal programs is a matter of public knowledge. HAR § 2-73-15(f). The programs, and SI's involvement with them, have been discussed in the media in articles based partly on statements by SI itself. See, e.g., Carleen Hawn, [Dreaming & Scheming Hawaiian Style](#), Forbes, October 28, 2002, <http://www.forbes.com/forbes/2002/1028/172.html>; Anthony Sommer, [Savvy developer wins federal money to wire homelands](#), Honolulu Star-Bulletin, June 4, 2002, <http://archives.starbulletin.com/2002/06/04/news/story2.html>; Kevin Dayton, [Fiber-optic firm taps federal gold mine](#), Honolulu Advertiser, December 31, 2001, <http://the.honoluluadvertiser.com/article/2001/Dec/31/ln/ln07a.html>. Based on the public knowledge of SI's involvement with these programs, their existence cannot be considered a confidential business plan, public knowledge of which would cause substantial competitive harm. Furthermore, because SI's participation in the programs is public information, OIP refers to the programs by name in this opinion.

OIP likewise takes note that it is public knowledge that SI planned a submarine fiber optic transport system, as it has been discussed not only in news articles but also in public filings by government agencies that are available online. See, e.g., Hawaii Dep't of Land and Natural Resources, Final Environmental Assessment/Finding of No Significant Impact for CDUA ST-3176 for the Installation of a Submarine Fiber Optic Telecommunications Cable Project Statewide, http://oeqc.doh.hawaii.gov/Shared%20Documents/EA_and_EIS_Online_Library/Statewide/2000s/2004-06-08-ST-FEA-SANDWICH-ISLES-COMM-SUB-FIBER-OPTIC-1.pdf; FCC, Public Notice of Actions Taken Under Cable Landing License Act, June 2, 2004, https://apps.fcc.gov/edocs_public/attachmatch/DA-04-1602A1.txt; [Savvy developer wins federal money to wire homelands](#), *supra*. Thus, OIP cannot find that disclosure of this already public information would be likely to cause substantial competitive harm, and the references to this system in the records at issue, including the references redacted from the PUC's own questions to SI, cannot be withheld.

SI also raised its small and limited customer base as a basis for withholding information. However, the specific records at issue do not include any information about specific customers, and absent an explanation of how a competitor could use such information to gain a competitive advantage, OIP cannot find that aggregate information about the number of customers SI serves or anticipates serving is likely to cause substantial competitive harm. Further, this information is evidently drawn from DHHL's development plans and does not represent independent market research by SI; at pages 31-32, SI redacted information about DHHL development plans that SI then stated (unredacted) "is contained on DHHL's website . . ." It should be obvious that a state agency's development and construction plans, published on its website, cannot be considered confidential business plans of a private company.

Among the withheld materials was correspondence sent by SI to Hawaiian Telcom. Hawaiian Telcom, however, is the competitor whose existence provides the justification for finding that SI operates in a competitive marketplace, thus allowing consideration of whether disclosure of the withheld information is likely to cause substantial competitive harm. OIP concludes that correspondence sent to SI's competitor is not "confidential" for the purpose of a confidential commercial and financial information analysis, and thus cannot be withheld on that basis.

The withheld records include telephone loan contracts between SI and the RUS. While a loan made under a federal loan program does not fall within 92F-12(a)(8), HRS, which applies specifically to state or county loan programs, OIP has previously found that consistent with the UIPA's policy and purpose and the treatment of similar information in the hands of the federal government, disclosure is required of basic information about a federal government loan, including the borrower's identity and the amount, purpose, and current status of the loan. OIP Op. Ltr. No. 93-1 at 10-11. OIP notes also that, while the exact amounts of SI's loans from the RUS do not appear in online federal publications, a recent Government Accountability Office report on the performance of the federal rural broadband loan program does give exact figures for other specific loans used as examples. U.S. Gov't Accountability Office, GAO-14-471, USDA Should Evaluate the Performance of the Rural Broadband Loan Program (2014), <http://gao.gov/assets/670/663578.pdf>. OIP therefore concludes that the amount, purpose, and status of SI's loans from the RUS cannot be withheld under the UIPA.

The question remains as to whether the loan agreements as a whole must also be disclosed. Having reviewed the terms of the loan agreements, OIP finds that they appear to be standard terms and there is nothing apparently unique to SI's agreements with the RUS, so it is not obvious how their disclosure would cause significant competitive harm to SI. SI has not raised any specific terms as being of particular concern, nor has it explained how disclosure of the contract terms could lead to significant competitive harm. OIP therefore concludes that the telephone loan contracts between SI and the RUS cannot be withheld as competitive commercial or financial information under the UIPA.

Some technical information regarding SI's network may be withheld under the UIPA's frustration exception on the grounds of network security, as discussed in more detail infra, but insofar as SI argues that general information about its network structure and capabilities is generally protected as confidential commercial and financial information, OIP does not find that such information rises to the level of being likely to cause substantial competitive harm to SI if disclosed. Information about matters such as the wire center and network capacity or the general types of equipment being purchased and used to build the network is mundane in nature, and not the sort of detailed information that may be protected as confidential commercial and financial information. See OIP Op. Ltr. No. 97-3 at 8-9. OIP

further notes that such information is highly pertinent to the PUC's duty to review and approve applications such as the one these records were submitted to support, and thus the information carries an elevated public interest as well in that it reflects on how the PUC is performing its duty to critically review applications before it.

Finally, a significant portion of the records at issue includes actual and projected cost and revenue information. OIP has consistently found that disclosure of detailed financial information, such as cost and overhead information, is likely to cause substantial competitive harm, especially where it could be combined with known figures, such as a government contract price, to estimate actual profit. See, e.g., OIP Op. Ltrs. No. 97-4 and 94-14. OIP therefore finds that with limited exceptions as detailed below, the cost, overhead, and revenue information expressed in dollar amounts may be withheld as confidential commercial and financial information under the UIPA's frustration exception.

Some specific dollar amounts may not be withheld. A list of published phone service rates being offered by SI cannot be withheld, as it is not confidential. The estimated costs of a housing project planned by DHHL are not confidential commercial or financial information, as DHHL is a government agency whose budget is public record and that does not operate in a competitive marketplace. The amounts of federal loans and disbursements from the RUS and USF are public information and cannot be withheld, as discussed supra.⁸

While the original loan amounts proposed by SI would arguably reveal SI's pre-contract negotiations with the RUS where they differed from the final amounts, OIP has previously found that a consultant's negotiations with a state agency over contract terms did not qualify as confidential commercial and financial information and could not be withheld under the UIPA after the negotiations were completed and the contract was executed. OIP Op. Ltr. No. 91-16 at 13-14. Following the same logic, the original loan amounts proposed by SI to the RUS may not be withheld even where they differed from the final amount of the loan.

⁸ Information of this sort may be found online in federal publications and search tools. See, e.g., Universal Service Administrative Co., Funding Disbursement Search, <http://www.usac.org/hc/tools/disbursements/default.aspx> (ID number 143002708); FCC, Wireline Competition Bureau Monitoring Report (December 2011), table 2.14 (High Cost Support Fund Disbursements by Holding Company: 2010), <https://www.fcc.gov/reports-research/reports/federal-state-joint-board-monitoring-reports/monitoring-report-december-0> (reporting 2010 High Cost Support Fund disbursements to SI of 25,583,000); FCC, High Cost Support Projected by State by Study Area, <https://www.usac.org/about/tools/fcc/filings/2007/Q1/HC01%20-%20High%20Cost%20Support%20Projected%20by%20State%20by%20Study%20Area%20-%201Q2007.xls>.

Specifically, the PUC may withhold the following dollar amounts:

- In “SIC⁹ Response to CA-IR-4(a) Workpaper 1,” cost and expense figures on pages 2-3 and a specific percentage of project costs on page 17;
- In “SIC Response to CA-IR-4(b) Workpaper 1,” cost and expense figures on pages 2-3;
- In “SIC Response to CA-IR-4(b) Workpaper 2,” figures throughout; and
- In “SIC Response to CA-IR-11 Workpaper 1,” revenue amounts on pages 17-23, costs and cost estimates on pages 31-85, revenue amounts per year on pages 137-150, dollar amounts of itemized expenses on pages 191-275, revenue amounts per year on pages 315-333, amounts on page 357 and 358, and amounts of itemized expenses on pages 364 through 452 and 459 through 582.¹⁰

III. Frustration: Network Security

As discussed supra, OIP has not found a factual basis to conclude that SI’s network is unique or unusual for a telecommunication network such that disclosure of the network’s structure or design would be likely to cause substantial competitive harm. However, OIP has previously concluded that an agency may withhold information under the UIPA’s exception for information which, if disclosed, would frustrate a legitimate government function if its disclosure would compromise the physical security of critical energy infrastructure. OIP Op. Ltr. No. 07-05. Based on the same analysis, OIP concludes that an agency may likewise withhold information whose disclosure would compromise either the physical or electronic security of critical telecommunication infrastructure. As with all UIPA exceptions, the agency must meet its burden to demonstrate that the exception applies: “where an agency seeks to withhold information in the interest of public security, the

⁹ The submittals to the PUC used the abbreviation SIC when referring to SI.

¹⁰ For “SIC Response to Ca-IR-11 Workpaper 1” pages 31-85, 191-275, 358, 364-452, 459-582, and 595-681 (discussed infra), what would remain after redaction would be lists of types and quantities of equipment and other expense items, blank or nearly blank forms, or larger-scale maps of islands (or the island chain) showing the basic geographical route of major lines. Given the relatively mundane and repetitive nature of this information, Requester may prefer for the PUC to simply withhold these pages rather than incur the fees that the necessary redaction of so many pages would entail. By copy of this opinion, OIP advises Requester to notify the PUC if she would prefer that these pages be withheld rather than redacted.

agency must show that public disclosure of the information could reasonably be expected to cause damage to public security.” OIP Op. Ltr. No. 07-05 at 3.

The records at issue include network maps, network diagrams, and related information. Neither the PUC nor SI provided any kind of detailed factual justification for withholding such information based on security concerns. SI argued that disclosure should not be required for “network capabilities and location, and any perceived technical and financial vulnerabilities,” but did not specify how any specific information could be used to compromise network security, and clearly not all the information is so detailed or technically specific as to raise such concerns. Nevertheless, OIP takes note that information about switch types by specific model, detailed network diagrams, and local-level scaled maps showing locations of network infrastructure would be useful in planning either a physical or electronic disruption to the network and as such their disclosure could reasonably be expected to cause damage to public security by increasing the network’s vulnerability. See HAR § 2-73-15(f). Thus, OIP concludes that the PUC may withhold such information. See OIP Op. Ltr. No. 07-05. More specifically, the PUC may withhold:

- In SI’s “Response to First Submission of Information Requests,” on pages 1-2, the street addresses (but not the towns or zip codes) of wire centers;
- On page 19 of the same, listed wire center switch types showing the brand and model;
- On page 20 of the same, listed microwave radio system types showing the brand and model;
- On pages 21-24 of the same, references to specific switch types by brand and model;
- In “SIC Response to CA-IR-11 Workpaper 1,” pages 593-4 in their entirety, comprising transmission diagrams with technical information; and
- On pages 595-681 of the same, the non-map technical diagrams in their entirety, scale maps of infrastructure locations at a scale of 1” = 2600’ and smaller in their entirety, and for non-scale or larger-scale maps, any technical details such as switch or microwave radio system types.

IV. Frustration: Direct Business Contact Information

Finally, the records include some direct business contact information. While information such as an individual’s direct business e-mail address or telephone number does not carry a privacy interest, OIP has previously opined that such

information (assuming it has not been made public already) may be withheld under the UIPA's "frustration of a legitimate government function" exception. OIP Op. Ltr. No. 07-11 fn. 9. This does not apply to general or switchboard contact information or to any contact information that has already been made public. Specifically, in "SIC Response to CA-IR-11 Workpaper 1," the PUC may withhold the direct e-mail addresses and phone number on pages 283-5 and 357, assuming they have not previously been made public.

Conclusion

The PUC may withhold records based on a Protective Order only to the extent that such records fall within an exception to disclosure under the UIPA. Portions of the records at issue here fall under the UIPA's exception for records whose disclosure would frustrate a legitimate government function. See HRS § 92F-13(3). Specifically, cost and overhead information as identified, specific information about brand and model of network equipment, location of equipment, and other technical information as identified, and non-public direct business contact information may be withheld under the frustration exception. The remaining records do not fall under an exception to disclosure under the UIPA and thus must be disclosed.

RIGHT TO BRING SUIT

Requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d), (f) (2012).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-3(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

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