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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: Ms. Nancy Cook-Lauer
Agency: Department of Defense – Civil Defense Division
Date: May 10, 2018
Subject: Tsunami Inundation Maps (APPEAL 15-15)

REQUEST FOR OPINION

Requester seeks a decision as to whether the State of Hawaii, Department of Defense, Civil Defense Division (CDD) properly denied Requester's request for tsunami inundation maps under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA).

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email correspondence to OIP dated October 23, 2014, and attached materials, and a letter from CDD to OIP dated November 12, 2014.

QUESTION PRESENTED

Whether tsunami inundation maps may be withheld from the public under the UIPA's exception for records that, by their nature, must be confidential in order for the government to avoid frustration of a legitimate government function. See HRS § 92F-13(3) (2012).

BRIEF ANSWER

No. Even though there has been public confusion as to the difference between tsunami inundation maps, tsunami evacuation zone maps, and flood hazard zone maps, that confusion does not mean that public disclosure of the information could reasonably be expected to cause damage to public security, as was argued by CDD. See OIP Op. Ltr. No. 07-05 at 3. Disclosure of the tsunami inundation maps would also promote the UIPA's purposes of providing for accurate government records and enhancing governmental accountability. See HRS § 92F-2(2012). While it may require time and resources on the part of CDD to respond to public questions and to educate the public as to the difference between a tsunami evacuation zone map and a tsunami inundation map, responding to public questions and educating the public is one of the functions of a government agency and does not constitute a frustration of a legitimate government function. See HRS § 92F-13(3). Thus, the tsunami inundation maps do not fall under the UIPA's frustration exception or any other exception to disclosure, and must be disclosed.

FACTS

Requester made a request to CDD under the UIPA for the most recent tsunami inundation maps for Hawaii County. CDD denied her request in full, arguing that the maps needed to be withheld from the public to avoid the frustration of a legitimate government frustration. See HRS § 92F-13(3).¹

In its Notice to Requester and its response to this appeal, CDD asserted that based on its experience from tsunami warnings in 2010, 2011, and 2012, as well as routine public inquiries, there is public confusion as to

the difference between tsunami inundation mapping, which shows the likely horizontal measurement of the path of a tsunami; tsunami evacuation zones, which are based off tsunami inundation mapping and are determined by local jurisdictions; and, flood hazard zones, which estimate flood risk based off rainfall, river-flow and tidal-surge data, topography, flood-control measures, and changes to micro-topography from building and development.

¹ CDD cited as its statutory basis section 92F-13(1), HRS, which is the UIPA's exception for information whose disclosure would be a clearly unwarranted invasion of personal privacy, rather than section 92F-13(3), HRS, the frustration exception. However, as CDD referred to the need to avoid frustration of a legitimate government function, and made an argument based only on the frustration exception and did not claim that the maps included any information affecting personal privacy, it appears that CDD simply mistyped the citation for the frustration exception.

CDD argued that this public confusion could lead the public to question law enforcement personnel charged with evacuating tsunami evacuation zones, which CDD argued would frustrate its functions of warning and evacuating the public in the case of a tsunami, and could endanger law enforcement and first responder personnel charged with evacuating tsunami evacuation zones.

In response, Requester contended that tsunami inundation maps have been widely distributed among state and county employees; that both inundation and evacuation maps are made public by other states; that any public confusion “may be resolved by warnings and explanations from the agencies regarding the different purposes for the maps,” as is the practice in other states; and that CDD’s contention that release of the tsunami inundation maps could endanger first responders is conclusory and lacks factual support.

DISCUSSION

OIP has previously held that, in appropriate circumstances, the potential for damage to public security provides a basis for withholding information under the UIPA’s exception to public disclosure for information whose disclosure would frustrate a legitimate government function. OIP Op. Ltr. No. 07-05; see also HRS § 92F-13(3). However, “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.” OIP Op. Ltr. No. 07-05 at 3. The agency has the burden of proof to establish facts demonstrating that disclosure of the information in question could reasonably be expected to cause damage to public security. Id. at 3-4.

OIP accepts CDD’s assertion that, based on its past experience, there is public confusion as to the difference between tsunami inundation maps, tsunami evacuation zone maps, and flood zone hazard maps. However, CDD has not presented evidence that such confusion has caused people not to evacuate, who should have evacuated, or otherwise endangered members of the public, law enforcement personnel, or others. Rather, CDD’s argument that this may happen appears to be entirely speculative, for which reason OIP does not believe CDD has met its burden to demonstrate that public disclosure of the tsunami inundation maps could reasonably be expected to cause damage to public security. To the contrary, while there is a possibility that some may be confused, OIP believes disclosure would enhance public safety by providing inundation zone information to people likely to be affected by a tsunami. OIP also takes notice that all the other states bordering the Pacific Ocean publish tsunami inundation maps online, which

further undermines CDD's argument that public access to such information could damage public security.² See HAR 2-73-15(f).

However, even if CDD had presented evidence of, for instance, a past instance when members of the public did not evacuate when they should have in response to a past tsunami warning because they were relying on a tsunami inundation map instead of a tsunami evacuation zone map, OIP does not believe this would justify CDD in withholding the tsunami inundation maps under the UIPA's frustration exception. OIP understands the tsunami inundation maps to be essentially factual, representing the current scientific understanding of how a tsunami would affect the area mapped, whereas the tsunami evacuation zone maps represent a governmental policy decision as to what portions of the area mapped should be evacuated in the face of a tsunami warning. CDD's argument that, in essence, the public cannot safely possess such factual information about the likely horizontal measurement of the path of a tsunami, contradicts the purposes of the UIPA. See HRS § 92F-2 (2012).

The UIPA's purposes include "[p]rovid[ing] for accurate, relevant, timely, and complete government records," and "[e]nhanc[ing] governmental accountability through a general policy of access to government records." HRS § 92F-2. Disclosure of the tsunami inundation maps would serve the UIPA's purpose of providing for accurate government records by allowing knowledgeable members of the public to assess whether the tsunami inundation maps accurately represent the current scientific understanding of the likely horizontal measurement of the path of a tsunami, and to alert the relevant agencies to any errors or inconsistencies. Disclosure would further the UIPA's purpose of enhancing governmental accountability by allowing members of the public to assess and comment on the decisions made by local government agencies as to where to set the evacuation zones, which could not effectively be done without the ability to compare the tsunami evacuation zone maps to the tsunami inundation maps on which they are based.

² See State of California Department of Conservation, Official Tsunami Inundation Maps (May 9, 2018), http://www.conservation.ca.gov/cgs/geologic_hazards/Tsunami/Inundation_Maps; State of Oregon Department of Geology and Mineral Industries, Publications Center, Tsunami Inundation Map Series (May 9, 2018), <http://www.oregongeology.org/pubs/tim/p-TIM-overview.htm>; Washington State Department of Natural Resources, Geologic Hazard Maps (May 9, 2018), <https://www.dnr.wa.gov/programs-and-services/geology/geologic-hazards/geologic-hazard-maps#tsunami-inundation>; Alaska Department of Natural Resources, Division of Geological & Geophysical Surveys, Tsunami Inundation Mapping (May 9, 2018), <http://dggs.alaska.gov/pubs/tsunami>.

Further, OIP agrees with Requester that the remedy for public confusion about the difference between different types of maps is education, to publicize the tsunami evacuation zone map as the map to follow in the event of an evacuation and to make clear that the tsunami inundation map is not the same thing as a tsunami evacuation map. While it may require time and resources on the part of CDD to respond to questions about why the evacuation zones were set as they were, and to educate the public as to the difference between a tsunami evacuation zone map and a tsunami inundation map, responding to public questions and educating the public is one of the functions of a government agency and does not constitute a frustration of a legitimate government function.

Thus, for the reasons stated above, OIP concludes that tsunami inundation maps do not fall under the UIPA's frustration exception, or any other exception to disclosure under the UIPA, and therefore 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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APPROVED:

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