

JOHN WAIHEE
GOVERNOR

WARREN PRICE, III
ATTORNEY GENERAL



KATHLEEN A. CALLAGHAN
DIRECTOR

PH. (808) 586-1400
FAX (808) 586-1412

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
OFFICE OF INFORMATION PRACTICES
426 QUEEN STREET, ROOM 201
HONOLULU, HAWAII 96813-2904

August 13, 1992

The Honorable Russel S. Nagata
Comptroller
Department of Accounting and
General Services
Kalanimoku Building, Room 412
1151 Punchbowl Street
Honolulu, Hawaii 96812

Dear Mr. Nagata:

Re: Report on Claim Against the State

This is in response to your letter requesting an advisory opinion from the Office of Information Practices ("OIP") regarding the public's right to inspect and copy reports concerning a "Claim for Damage or Injury" ("Claim") filed with the State Department of Accounting and General Services ("DAGS").

ISSUE PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the DAGS must make its "Report on Claim Against the State" ("DAGS Claim Report") available for public inspection and copying by either the public or the individual who filed the Claim ("Claimant").

II. Whether, under the UIPA, the DAGS must make a report received from the Department of Education ("DOE") concerning the Claim ("DOE Report") available for inspection and copying by either the public or the Claimant.

BRIEF ANSWER

We find that the UIPA's "clearly unwarranted invasion of personal privacy" exception to required disclosure does not

The Honorable Russel S. Nagata
August 13, 1992
Page 2

apply to either the DOE Report or the DAGS Claim Report. In our opinion, the public interest in the disclosure of these records outweighs any privacy interest that the Claimant may have in them.

Yet, we believe that the DOE Report in its entirety and the recommendations and comments contained in the DAGS Claim Records are protected by the UIPA exception that permits agencies to withhold access to government records "to the extent that such records would not be discoverable." Haw. Rev. Stat. § 92F-13(2) (Supp. 1991). Specifically, in our opinion, these Reports are protected by the attorney work-product doctrine because we find that they were "prepared in anticipation of litigation." Haw. R. Civ. P. 26(b)(3).

However, the attorney work-product doctrine does not extend to the summary of facts, the amount of the Claim, and the DAGS' final decision to deny the Claim as set forth in the DAGS Claim Report. This information has already been disclosed to the Claimant.

Further, the UIPA's "frustration of a legitimate government function" exception also applies to the DOE Report and those portions of the DAGS Claim Report protected by the attorney work-product doctrine since these records are "protected by judicial rule." Because these Reports fall within the scope of two UIPA exceptions, DAGS may, but is not required to, make them available for public inspection and copying.

Additionally, we believe that the DOE Report and the DAGS Claim Report constitute "personal records" of the Claimant because they make reference to the Claimant's name and contain "information about" the Claimant and the Claim filed on his behalf. Haw. Rev. Stat. § 92F-3 (Supp. 1991). However, these records are not required to be disclosed to the Claimant, who is the individual to whom they pertain, because we find that they are "authorized to be so withheld by constitutional or statutory privilege." Haw. Rev. Stat. § 92F-22(5) (Supp. 1991).

FACTS

A person claiming personal injury or property damage by the State under the State Tort Liability Act, chapter 662, Hawaii Revised Statutes, may file a claim directly with the DAGS without having to file a lawsuit. See Haw. Rev. Stat. § 41D-3 (Supp. 1991); see also H. Stand. Comm. Rep. No. 718,

The Honorable Russel S. Nagata
August 13, 1992
Page 3

15th Leg., 1989 Reg. Sess., Haw. H.J. 1092 (1989); S. Stand. Comm. Rep. No. 1347, 15th Leg., 1989 Reg. Sess., Haw. S.J. 1311 (1989). Such claims are filed on a DAGS form entitled "Claim for Damage or Injury" ("Claim").

The DAGS, or its agent, routinely investigates each claim received by the DAGS and, thereafter, the DAGS makes a determination of whether the claim should be denied or settled. If the DAGS finds that a claim should be settled, the DAGS is authorized to informally settle and pay the claim if the amount of the claim does not exceed \$10,000, or, in the case of a claim relating to a State vehicle, if the claim does not exceed the medical-rehabilitative limit established pursuant to section 431:10C-308, Hawaii Revised Statutes. Haw. Rev. Stat. § 41D-3 (Supp. 1991). Claims filed with the DAGS that exceed \$10,000 are generally referred to the Attorney General for investigation and disposition.

In each fiscal year, the DAGS must submit to the Legislature a report of all claims that were arbitrated, compromised, or settled for amounts under \$10,000 and that were paid from the State's Risk Management Fund ("Legislative Report"). Haw. Rev. Stat. § 41D-4 (Supp. 1991). The Legislative Report sets forth a brief description of the claims paid, the name of each claimant, and the amount paid in settlement of each claim. The Legislative Report is made available for public inspection by the DAGS.

While attending summer school at a public school operated by the DOE, a student was injured when he was knocked off a playground slide at the school by another student. The injured student's parents, on behalf of the student ("Claimant"), filed a Claim with the DAGS seeking payment of the medical costs that resulted from the student's injury. As part of its routine claim investigation, the DAGS submitted to the DOE, for its reply, a list of standard questions concerning the incident upon which the Claim was based. In response to the DAGS' questions, the DOE submitted a report, in memorandum form, setting forth facts and opinions to assist the DAGS' investigation ("DOE Report").

As with all claims that it receives and investigates, the DAGS personnel prepared a "Report on Claim Against the State" ("DAGS Claim Report") that set forth a summary of the facts upon which the Claim was based, a recommendation to pay or deny the claim, the basis of the recommendation, and the supervising risk management officer's approval of the recommendation.

Because the claim involved in this case was for an amount that was less than \$5,000, the DAGS did not submit either its DAGS Claim Report or the DOE Report to the Attorney General for review and approval.

The DAGS informed the Claimant in writing of its decision to deny the Claim, and pointed out the two-year statute of limitations if the Claimant wished to file a lawsuit based on the incident. Thereafter, the Claimant requested the DAGS to disclose the reports concerning the Claim. In response to this request, the DAGS requested an advisory opinion from the OIP regarding the disclosure of both the DAGS Claim Report and the DOE Report.

DISCUSSION

I. PUBLIC ACCESS UNDER PART II OF THE UIPA

The UIPA requires that "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1991). Thus, unless protected by one or more of the exceptions in section 92F-13, Hawaii Revised Statutes, the DAGS Claim Report must be made available for public inspection and copying.

Section 92F-13, Hawaii Revised Statutes, provides in pertinent part:

§92F-13 Government records; exceptions to general rule. This chapter shall not require disclosure of :

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party to the extent that such records would not be discoverable;
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

Haw. Rev. Stat. § 92F-13(1), (2), (3) (Supp. 1991). We will examine each of the above exceptions to required disclosure in order to determine whether they apply to the DAGS Claim Report and the DOE Report in this case.

A. Clearly Unwarranted Invasion of Privacy

The UIPA's "clearly unwarranted invasion of personal privacy" exception does not apply when "the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1991); see also Haw. Rev. Stat. § 92F-2 (Supp. 1991). Notably, the UIPA only recognizes "the privacy interests of the individual." Id. (emphasis added). The UIPA defines the term "individual" to mean a "natural person." Haw. Rev. Stat. § 92F-3 (Supp. 1991). In the facts before us, the Claimant is an "individual" and may arguably have a privacy interest in the Claimant's identity and information about the Claim contained in the DAGS Report. See, e.g., Haw. Rev. Stat. § 92F-14(b)(1) (Supp. 1991) (individual's significant privacy interest in information relating to medical condition and treatment).

However, we believe that the public has a strong countervailing interest in the disclosure of records concerning the DAGS' decisions regarding whether to deny or to settle and pay claims filed with the DAGS. See The Register Division of Freedom Newspapers, Inc. v. County of Orange, 205 Cal. Rptr. 92 (Ca. App. Ct. 1984). In The Register Division, the court determined that under California's public records law, certain records regarding the settlement of an inmate's out-of-court tort claim against the County must be disclosed to the public. Among other things, the court held that the settlement agreement and payments must be publicly disclosed because the disclosure of this information serves "the public interest in finding out how decisions to spend public funds are formulated," and this public interest "clearly outweigh[s] any public interest served by conducting settlements of tort claims in secret." Id. at 102. Further, as The Registrar Division court noted, "opening up the . . . settlement process to public scrutiny will, nevertheless, put prospective claimants on notice that only meritorious claims will ultimately be settled with public funds." Id.

Because of the overriding public interest in the disclosure of information regarding the DAGS' decisions in resolving claims, the DAGS appropriately makes available for

public inspection its Legislative Report containing descriptions and amounts of paid claims and the claimants' names. For similar reasons, we believe that, regardless of whether the decision in the DAGS Claim Report was to settle or deny the Claim, the public interest in the disclosure of this record and the DOE Report outweighs the Claimant's privacy interest, if any, because these records shed substantial light upon the conduct of a government agency, namely the DAGS' resolution of the Claim pursuant to chapter 41D, Hawaii Revised Statutes. See OIP Op. Ltr. No. 89-16 (Dec. 27, 1989) (discussion of the "public interest" to be considered under the UIPA's balancing test).

Therefore, in our opinion, the disclosure of the DAGS Claim Report and the DOE Report would not constitute a clearly unwarranted invasion of personal privacy. See Haw. Rev. Stat. § 92F-13(1) (Supp. 1991). Other exceptions to required disclosure, however, may apply to these records.

B. Records that Are Not Discoverable

The DAGS Claim Report and the DOE Report may arguably constitute government records "pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party." Haw. Rev. Stat. § 92F-13(2) (Supp. 1991) (emphases added). However, government records that fall within the exception set forth in section 92F-13(2), Hawaii Revised Statutes, are protected only "to the extent that such records would not be discoverable." Id. We previously opined that this UIPA exception protects from disclosure those government records which would be protected under Rule 26 of the Hawaii Rules of Civil Procedure. See OIP Op. Ltr. No. 89-10 (Dec. 12, 1989); OIP Op. Ltr. No. 91-23 (Nov. 25, 1991). Thus, this section preserves the confidentiality of documents covered by the attorney-client privilege, attorney work-product doctrine, or other judicially recognized discovery protections.

We find that, based upon the specific facts presented, the attorney-client privilege does not apply to the DAGS Claim Report or the DOE Report in the case before us. Specifically, because these records were not communicated or delivered to the DAGS' legal counsel, the Attorney General, or an agent thereof, in this case, no portion of either record would constitute an attorney-client communication that may be privileged under rule 503, Hawaii Rules of Evidence, chapter 626, Hawaii Revised

The Honorable Russel S. Nagata
August 13, 1992
Page 7

Statutes. See generally Epstein, The Attorney-Client Privilege and the Work-Product Doctrine at 13 (2d ed. 1988) (elements of the attorney-client privilege).

The attorney work-product doctrine was first established in Hickman v. Taylor, 329 U.S. 495 (1947), in which the U.S. Supreme Court recognized a qualified immunity from pretrial discovery for material prepared by counsel for litigation. The work-product doctrine was codified in the Federal Rules of Civil Procedure and similarly in the Hawaii Rules of Civil Procedure. The attorney work-product doctrine, as codified, prevents a party from obtaining documents that are prepared (1) "in anticipation of litigation or for trial" and (2) "by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent)." Haw. R. Civ. P. 26(b)(3).

Even if a lawsuit has not yet been filed, the attorney work-product doctrine, as codified, may be invoked so long as the documents were "prepared in anticipation of litigation." Epstein at 117. "The test of when matters and documents are prepared 'in anticipation of litigation or for trial' is, not whether an action has been commenced, but whether 'in the light of the nature of the document and factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" State ex. rel. Day v. Patterson, 773 S.W.2d 224, 228 (Mo. App. Ct. 1989), quoting 8 Wright & Miller, Federal Practice and Procedure at 198 (1970) (emphasis added).

According to the facts, the Claim was not brought in a lawsuit but was filed directly with the DAGS for informal resolution under chapter 41D, Hawaii Revised Statutes. Yet, the Claim sets forth specific allegations of liability on the part of the State that, upon denial of the Claim by DAGS, may lead to litigation. The DOE Report and the DAGS Claim Report respectively set forth the DOE's and the DAGS' assessments of the State's alleged liability. We believe that such assessments of liability directly respond to the prospect of litigation that is inherent in the Claim and, therefore, were "prepared in anticipation of litigation." See Delaney, Migdail & Young Chartered v. Internal Revenue Service, 826 F.2d 124 (D.C. Cir. 1987).

In Delaney, memoranda prepared by IRS attorneys advised the IRS of legal challenges that may be raised against a

The Honorable Russel S. Nagata
August 13, 1992
Page 8

proposed statistical sampling program for auditing large accounts. The court found that the memoranda would reveal "the agency's attorneys' assessment of the program's legal vulnerabilities" and, thus, was "precisely the type of discovery the Court refused to permit in Hickman v. Taylor." Id. at 127. Consequently, the court held that the memoranda fell within the exception to required disclosure under the federal Freedom of Information Act ("FOIA") that encompasses the attorney work-product doctrine, namely the exception for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5) (1988). In reaching its conclusion, the court found that the memoranda at issue were unlike the "'neutral, objective analyses of agency regulations,'" that were held not to have been prepared in anticipation of litigation in Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854 (D.C. Cir. 1980). Delaney at 127.

Thus, we find that the attorney work-product doctrine applies to the DOE Report and the DAGS Claim Report because they were "prepared in anticipation of litigation," and also because they were prepared by the party and the party's representative respectively. See Haw. R. Civ. P. 26(b)(3). We reach this conclusion even though these reports were not prepared or reviewed by the State's legal counsel, the Attorney General. Notably, the attorney work-product doctrine, as codified, is not limited to those documents prepared by the party's attorney. Rather, "whether a document is protected as work product depends on the motivation behind its preparation, rather than on the person who prepared it." Epstein at 128.

Further, we believe that the attorney work-product doctrine applies to the factual as well as the deliberative information in the DOE Report. Martin v. Office of Special Counsel, Merit Systems Protection Board, 819 F.2d 1181 (D.C. Cir. 1987). As the Martin court discusses, although deliberative and factual information may be distinguished for purposes of applying another privilege, that distinction is not made when applying the attorney work-product doctrine. "[I]f the work-product privilege protects the documents at issue here, Exemption (b)(5) protects them as well, regardless of their status as 'factual' or 'deliberative.'" Id. at 1187.

However, we do not believe that the attorney work-product doctrine extends to factual information in the DAGS Claim Report that has already been disclosed, specifically the summary of the facts upon which the Claim was based, the amount

The Honorable Russel S. Nagata
August 13, 1992
Page 9

of the Claim, and the DAGS' final decision to deny the Claim set forth in the DAGS Claim Report. The alleged facts and the amount of the Claim were provided by the Claimant and are also set forth in other government records that are made public. The DAGS' final decision to deny the Claim was set forth in a letter by the DAGS to the Claimant.

Thus, we believe that the DOE Report in its entirety and the deliberative portions of the DAGS Claim Report, namely the recommendations and comments contained therein, are protected by the attorney work-product doctrine. Consequently, this information would not be available for public inspection and copying under the UIPA exception for records that "would not be discoverable." Haw. Rev. Stat. § 92F-13(2) (Supp. 1991).

C. Frustration of a Legitimate Government Function

To determine whether the UIPA exception set forth in section 92F-13(3), Hawaii Revised Statutes, applies to the DOE Report and the DAGS Claim Report, the UIPA's legislative history provides guidance concerning information protected by this exception. Specifically, Senate Standing Committee Report, dated March 31, 1988, provides "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function," including "[i]nformation 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).

As previously discussed, the attorney work-product doctrine was codified as Rule 26(b)(3) of the Hawaii Rules of Civil Procedure, which were adopted by order of the Supreme Court of the State of Hawaii. Since we concluded that the DOE Report in its entirety and the DAGS Claim Report in part would be protected by the attorney work-product doctrine, as codified, we also find that these records are "protected by judicial rule." Accordingly, these protected records would fall within the scope of the exception for "government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1991).

II. CLAIMANT'S RIGHT OF ACCESS UNDER PART III OF THE UIPA

Under the UIPA, the term "personal record" is defined as "any item, collection, or grouping of information about an

The Honorable Russel S. Nagata
August 13, 1992
Page 10

individual that is maintained by an agency." Haw. Rev. Stat. § 92F-3 (Supp. 1991). Under the UIPA's definition, the term "personal record" specifically includes "items that contain or make reference to the individual's name." Id.

In their headings, the DOE Report and the DAGS Claim Report expressly state that their subject matter is the Claim filed by the Claimant, who is identified by name. The contents of these Reports set forth facts, opinions, and recommendations relating to the Claim filed by the Claimant. Based upon our review of the DOE Report and the DAGS Claim Report, we believe that they constitute "personal records" of the Claimant because they makes reference to the Claimant's name and contain "information about" the Claimant and the Claim filed on his behalf. Haw. Rev. Stat. § 92F-3 (Supp. 1991).

Part III of the UIPA, entitled "Disclosure of Personal Records," provides:

Upon the request of the individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a copy made within ten working days following the date of the request unless the personal record requested is exempted under section 92F-22.

Haw. Rev. Stat. § 92F-23 (Supp. 1991) (emphasis added). The five exemptions set forth in section 92F-22, Hawaii Revised Statutes, relating to an individual's access to personal records do not parallel the exceptions to required public access set forth in section 92F-13, Hawaii Revised Statutes.

In pertinent part, section 92F-22, Hawaii Revised Statutes, provides:

§92F-22 Exemptions and limitations on individual access. An agency is not required by this chapter to grant an individual access to personal records, or information in such records:

. . . .

- (5) Required to be withheld from the individual to whom it pertains by statute or judicial decision or authorized to be so withheld by constitutional or statutory privilege.

Haw. Rev. Stat. § 92F-22(5) (Supp. 1991) (emphasis added).

The Honorable Russel S. Nagata
August 13, 1992
Page 11

The attorney work-product doctrine is not among those statutory privileges specifically set forth in article V of the Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes. However, chapter 626, Hawaii Revised Statutes, expressly recognizes the discovery immunities provided by court rules as follows:

Rule 501 Privileges recognized only as provided. Except as otherwise required by the Constitution of the United States, the Constitution of the State of Hawaii, or provided by Act of Congress or Hawaii statute, and except as provided in these rules or in other rules adopted by the Supreme Court of the State of Hawaii, no person has a privilege to:

. . . .

- (2) Refuse to disclose any matter; or
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Haw. R. Evid. 501, Haw. Rev. Stat. Ch. 626 (1985) (emphasis added).

Rule 501, Hawaii Rules of Evidence, sets forth those actions that a person "has a privilege" to refuse to perform under the Hawaii Rules of Evidence, as well as under "other rules adopted by the Supreme Court of the State of Hawaii." We believe that where it applies, the attorney work-product doctrine, as set forth in section 26(b)(3), the Hawaii Code of Civil Procedure, in effect, gives a party "a privilege" in the manner recognized by Rule 501 cited above. See 2 Weinstein's Evidence 501-53 (Matthew Bender 1991) (relying upon Rule 501, Federal Rules of Evidence, to find that the work-product doctrine operates as a "privilege").

In view of Rule 501, Hawaii Rules of Evidence, we believe that by using the phrase "statutory privilege" in section 92F-22(5), Hawaii Revised Statutes, the Legislature intended to include those "privileges" provided by the Hawaii Rules of Evidence, as well as those expressly set forth by court rule. Other UIPA provisions reveal the Legislature's apparent

The Honorable Russel S. Nagata
August 13, 1992
Page 12

intention to preserve the discovery immunities provided in court rules for qualifying government records. See Haw. Rev. Stat. § 92F-13(2) and (3) (Supp. 1991). Thus, in our opinion, those parts of the DOE Report and DAGS Claim Report that are protected by the attorney work-product doctrine would not be required to be disclosed to the individual to whom they pertain under Part III of the UIPA because they are "authorized to be so withheld by . . . statutory privilege." Haw. Rev. Stat. § 92F-22(5) (Supp. 1991).

CONCLUSION

The DOE Report in its entirety and the recommendations and comments contained in the DAGS Claim Records are not required to be made available for public inspection and copying because they fall within the scope of the UIPA exception that permits agencies to withhold access to government records "to the extent that such records would not be discoverable," and the UIPA exception for records that must be kept confidential in order to avoid the "frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(2) and (3) (Supp. 1991).

Although these two Reports would constitute "personal records" of the Claimant, we believe that, under Part III of the UIPA, they are not required to be disclosed to the individual to whom they pertain because we find that they are "authorized to be so withheld by constitutional or statutory privilege." Haw. Rev. Stat. § 92F-22(5) (Supp. 1991).

Very truly yours,



Lorna J. Loo
Staff Attorney

APPROVED:



Kathleen A. Callaghan
Director

LJL:sc

c: Wesley Fong, Deputy Attorney General