June 24, 1994

Honorable Robert A. Marks
Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Attention: George E. Hilty
Deputy Attorney General
Asbestos Litigation Division

Dear Mr. Marks:

Re: Access to Expert Witness Contracts Related to the Hawaii Asbestos Cost Recovery Litigation

This is in reply to a memorandum to the Office of Information Practices ("OIP") dated April 12, 1994 from Deputy Attorney General George E. Hilty, requesting an advisory opinion concerning the above-referenced matter.

Mr. Hilty's opinion request was precipitated by a letter dated April 8, 1994 from The Honolulu Advertiser reporter James Dooley, who requested to inspect contracts related to twelve individuals and organizations who have been awarded consultant or legal services contracts by the Department of the Attorney General ("Department") in connection with asbestos litigation.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), contracts between the Department and testifying and non-testifying expert witnesses in connection with Hawaii's asbestos cost recovery litigation must be made available for public inspection and copying upon request.

BRIEF ANSWER

The UIPA provides that "[a]ny provision to the contrary notwithstanding, each agency shall make available for public inspection and copying," the contracts of "consultants" and "the amount of compensation, the duration of the contract, and the objectives of the contract." Haw. Rev. Stat. ə 92F-12(a)(10) (Supp. 1992). The term "consultant" is commonly understood to mean one who gives professional or technical advice to another.

In contrast, under Rule 26, of the Hawaii Rules of Civil Procedure, except upon motion or upon a showing of exceptional circumstances, a party need only disclose to another party, upon request, the name of each person that it expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, and a summary of the grounds for each opinion.

While expert witnesses who may or may not provide trial testimony on behalf of the State are "consultants" as this term is commonly understood, we do not believe that the Legislature intended the term "consultant" to apply to testifying and non-testifying expert witnesses retained by a governmental agency. Were an agency required to disclose, under the UIPA, the contracts and compensation paid to expert witnesses, a party in litigation with the agency could use the access provisions of the UIPA to obtain information from the agency that would only be available upon motion, or a showing of exceptional circumstances. Haw. R. Civ. Pro. 26(b)(4)(A), (B).

Section 92F-13(2), Hawaii Revised Statutes, and the legislative history of section 92F-13(3), Hawaii Revised Statutes, provide evidence that the Legislature could not have intended the term "consultant" as used in section 92F-12(a)(10), Hawaii Revised Statutes, to apply to expert witnesses. Specifically, these exceptions strongly indicate that the Legislature would not have intended to permit third parties in litigation with an agency to use the access provisions of the UIPA to evade discovery protections available to the agency under the rules of discovery.

Accordingly, it is our opinion that the contracts of expert witnesses providing expertise to the State of Hawaii need only be made available for public inspection and copying upon the conclusion of the litigation for which they were retained.

Alternatively, should the court permit discovery of the contracts before the conclusion of the litigation, the contracts should be made available for public inspection and copying before the termination of the litigation.

FACTS

By letter dated April 8, 1994, James Dooley, a reporter for The Honolulu Advertiser, requested, under the UIPA, copies of the contracts awarded to twelve organizations or individuals in connection with the Department's Hawaii asbestos cost recovery litigation. Mr. Dooley's letter stated that he was not seeking access to any reports or work product generated under the contracts, only the contracts themselves.

In a memorandum dated April 12, 1994, Deputy Attorney General George E. Hilty requested an advisory opinion from the OIP concerning whether the contracts requested by Mr. Dooley must be made available for public inspection and copying. Except for one of the contracts involving the engagement of Martin W. Dies as a special deputy attorney general, all of the consultants were engaged to provide their expertise, and possible expert testimony in connection with Hawaii's cost recovery litigation.

In his memorandum to the OIP, Mr. Hilty expressed concern over the disclosure of the contracts on the basis that the identities of expert witnesses would not be fully available under Rule 12(b) of the Hawaii Rules of Civil Procedure:

> All of those named [by Mr. Dooley] (except P.W. Stephens Contractors, with which we have no contract) were engaged to help us with our litigation. Most are those with particular forms of expertise who may be forensic experts or who may be non-testifying consultants.
>
> At the earliest, we would be required by Rule 12(b) Haw. R. Cir. Cts. to disclose the names of experts one year after filing the complaint, i.e., not until October 27, 1994. However, since the case has been designated complex litigation, it is likely that disclosure of the names of experts would not be required even then. Even so, the Rule

> requires only the name, address and field of expertise of each witness expected to testify and a general statement concerning the nature of the testimony expected.
>
> Moreover, since all those named [by Mr. Dooley] (except Martin Dies, a lawyer) are "experts"--some of whom may testify and some of whom may not--Rule 26(b)(4) Haw. R. Civ. Pro. governs the scope of discovery concerning these people. Under that rule, all that must [be] disclosed--and all that may be asked by interrogatory--is the identity of each person expected to be called as an expert at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Beyond an interrogatory seeking that information, any other discovery must be upon motion; . . . .

Memorandum from George E. Hilty to OIP Director Kathleen A. Callaghan dated April 12, 1994.

With respect to the State's contracts with Martin W. Dies, his services were engaged by the State under two contracts. The first contract, dated September 1991 (Contract No. 31498), engaged Mr. Dies as legal counsel, and allowed Mr. Dies to hire an engineering firm as an expert. An amendment to this contract executed in May 1992, authorized Mr. Dies to retain physicians and investigators.

Mr. Dies was later retained as a special deputy attorney general in a contract dated October 4, 1993 (Contract No. 36526). This contract establishes hourly rates to be paid to Mr. Dies depending on the attorneys or paralegals within his law firm who are providing services. According to Mr. Hilty, Mr. Dies is to present the Department with quarterly billing statements for payment.

Additionally, the contract contains provisions permitting Mr. Dies to earn incentive compensation depending upon the gross amount recovered by the State through compromise, settlement, or

trial. In particular, this contract provides that Mr. Dies' hourly rates shall be multiplied by a factor or multiplier, depending on the amount of any gross recovery in the millions of dollars. Six multipliers are set forth in the contract based on possible ranges of recovery. For example, if the State recovers between A million and B million, the contract sets forth a multiplier. If the State recovers between C million and D million, a different multiplier is established, and so on. Mr. Hilty has informed the OIP that at such time as the State obtains a recovery through compromise, settlement, or trial with one or more of the defendants, Mr. Dies will submit a billing statement setting forth the incentive compensation owed, and an amount equal to the payments already made to Mr. Dies will be subtracted as a credit.

Since Mr. Dooley's April 8, 1994 request, the Department has made contracts between the Department and Mr. Dies available for inspection and copying by Mr. Dooley and, therefore, in this opinion we shall only address the public's right to inspect the Department's contracts with expert witnesses who may or may not testify at trial.

DISCUSSION

I. INTRODUCTION

The UIPA, the State's public records law, states "[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. ə 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. ə 92F-3 (Supp. 1992).

At the outset, it is useful to state a few principles that guide our resolution of the issue raised by this opinion request. First, our construction of the UIPA must be guided by the policy favoring disclosure, and the UIPA's exceptions to access must be narrowly construed. See OIP Op. Ltr. No. 93-10 at 2 n.1 (Sept. 2, 1993).[1] This rule of construction, however, is not

[1]As the United States Supreme Court has noted, the purpose of freedom of information laws is to facilitate public access to government information and "to pierce the veil of administrative

determinative. Indeed, as a general matter, although the UIPA was intended to promote openness in government, see section 92F-2, Hawaii Revised Statutes, the UIPA also recognizes competing interests, and the need for some governmental records to remain confidential. See Haw. Rev. Stat. ə 92F-13 (Supp. 1992 & Comp. 1993). Finally, as with similar state and federal open records laws, under the UIPA, the burden of establishing that a government record is protected by one of the Act's exceptions is upon the agency. Haw. Rev. Stat. ə 92F-15(c) (Supp. 1992).

II. DISCOVERY PROVISIONS APPLICABLE TO EXPERT WITNESSES

Rule 26 of the Hawaii Rules of Civil Procedure sets forth the methods and scope of discovery in civil proceedings in the courts of the State of Hawaii. With regard to expert witnesses, this rule provides in pertinent part:

> (4) TRIAL PREPARATION: EXPERTS. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision

---

secrecy and to open agency action to the light of public scrutiny." John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989). Consistent with these purposes, the strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents. Id.; see also, Haw. Rev. Stat. əə 92F-11(b) and 92F-15(c) (Supp. 1992).

> (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
>
> (B) A party may discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Haw. R. Civ. Proc. 26(b)(4)(A), (B).

III. GOVERNMENT RECORDS THAT MUST BE PUBLICLY AVAILABLE ANY PROVISION TO THE CONTRARY NOTWITHSTANDING

In section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of records that must be made available for public inspection and copying during an agency's regular business hours, "[a]ny provision to the contrary notwithstanding." Section 92F-12(a), Hawaii Revised Statutes, provides in pertinent part:

> ə**92F-12 Disclosure required.** (a) Any provision to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:
>
> . . . .
>
> (10) Regarding contract hires and consultants employed by agencies: the contract itself, the amount of compensation, the duration of the contract, and the objectives of the contract; . . . .

Haw. Rev. Stat. ə 92F-12(a) (10) (Supp. 1992) (emphases added).

As we have previously noted, many of the records identified in section 92F-12(a), Hawaii Revised Statutes, were included in response to recommendations set forth in the Report of the Governor's Committee on Public Records and Privacy (1987)

("Governor's Committee Report"). With respect to agency contract hires and consultants, the Governor's Committee Report states:

> There was also interest in ensuring that information on **state and county contract hires** is available to the public. This information is generally assumed to be public. James Wallace (I(H) at 16-17), who raised this issue, said that he just wanted to be sure that it was public.
>
> This is an area of potential concern since contract hires avoid the normal civil service hiring mechanisms or bidding processes and thus there is a justification for monitoring the actions of public officials. At a minimum, the names, salaries, and scope of services should be available in all cases, though a strong argument can be made that these contracts should be completely open.
>
> . . . .
>
> The last issue raised concerns **consultant reports**. The problem raised concerned a report which was left in a draft stage for an extended period of time (ten months). This was raised by Desmond Byrne (II at 317 and I(H) at 57-59) and he also felt that the amounts paid to consultants should be disclosed. The latter point appears covered by the earlier discussion of contract hires, or if not, the discussion would be identical.

Vol. I Governor's Committee Report at 110, 116 (1987) (boldface in original, emphases added).

With respect to the list of records set forth in section 92F-12, Hawaii Revised Statutes, the UIPA's legislative history provides:

> In addition, however, the bill will provide, in Section -12, a list of records (or categories of records) which the Legislature declares, as a matter of public policy, shall be disclosed. As to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable. This list should not be misconstrued to be an exhaustive list of the records which will be disclosed . . . [t]his list merely addresses some particular cases by unambiguously requiring disclosure.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (emphases added).

In OIP Opinion Letter No. 92-10 (Aug. 1, 1992), we examined whether records set forth in section 92F-12(a), Hawaii Revised Statutes, must be made available for public inspection and copying when the records were protected from disclosure, under section 92F-13(4), Hawaii Revised Statutes, by specific State statutes. We concluded that where an agency record falling within the provisions of section 92F-12, Hawaii Revised Statutes, is protected from disclosure by a specific state statute, it may be withheld, reasoning:

> [T]he structure of the UIPA itself reflects that the Legislature intended the provisions of the UIPA to yield to specific State statutes, that either expressly restrict, or that expressly authorize the disclosure of government records. See Haw. Rev. Stat. ə 92F-12(b)(2) (Supp. 1991) (requiring the disclosure of government records that pursuant to "a statute of this state" that are authorized to be disclosed); Haw. Rev. Stat. ə 92F-13(4) (Supp. 1991) (protecting from disclosure government records that are protected from disclosure by State law); Haw. Rev. Stat. ə 92F-22(5) (Supp. 1991) (protecting from disclosure any personal record that is "[r]equired to be withheld from the

individual to whom it pertains by statute").

> Furthermore, our conclusion is supported by the existence of section 92F-17, Hawaii Revised Statutes, which makes it a criminal offense for any person to "intentionally disclose[] or provide[] a copy of a government record, or any confidential information explicitly described by specific confidentiality statutes, to any person or agency with actual knowledge that disclosure is prohibited." Haw. Rev. Stat. ∋ 92F-17 (Supp. 1991) (emphasis added). Notwithstanding the provisions of section 92F-12, Hawaii Revised Statutes, a person would be subject to criminal prosecution for disclosing a record that is explicitly described by specific confidentiality statutes, with actual knowledge that disclosure is prohibited.

OIP Op. Ltr. No. 92-10 at 11-12 (Aug. 1, 1992) (emphasis in original).

To our knowledge, there is no Hawaii statute that would expressly prohibit the disclosure of the contracts at issue in this opinion letter.

IV. ARE THE HAWAII ASBESTOS COST RECOVERY LITIGATION CONTRACTS "CONSULTANT CONTRACTS?"

The fundamental starting point for the interpretation of a statute is the language in the statute itself. Kaiser Found. Health Plan Inc. v. Dep't of Labor & Industrial Relations, 70 Haw. 72 (1988). The words of a statute "are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." Haw. Rev. Stat. ∋1-14 (1985).

It is another cardinal rule of statutory construction that the literal construction of a statute should be avoided if it would produce an absurd or unreasonable result, or an unjust result clearly inconsistent with the purposes and policies of the statute. Franks v. City and County of Honolulu, 74 Haw. 328, 843

P.2d 668 (1993); William S. Richardson, et al. v. City and County of Honolulu, ___ Haw. ___, 868 P.2d 1193 (1994).

Webster's Ninth New Collegiate Dictionary 282 (1988) defines the term "consultant" as:

> **1** : one who consults another **2** : one who gives professional advice or services : EXPERT

It defines the adjective "consulting" as:

> **1** : providing professional or expert advice <a . architect> **2** : of or relating to a consultation or a consultant

Id.

Similarly, in Brooks v. Orleans Parish School Bd., 550 So. 2d 1267, 1270 (La. Ct. App. 1989), using the dictionary definition of the term "consultant," the court found that the term consultant, as used in a statute, means "a person who gives professional or technical advice as a doctor, lawyer, engineer, editor, etc."

It is the opinion of the OIP that possible expert witnesses retained by the State in the Hawaii asbestos cost recovery litigation are "consultants" since they are providing professional and technical services or advice to the State in connection with the litigation.

The facts presented in this opinion are extremely unusual in that section 92F-12(a)(10), Hawaii Revised Statutes, could conceivably require the Department to disclose information that would otherwise only be available upon motion or upon a showing of exceptional circumstances under discovery rules.

We have serious reservations concerning whether the Legislature could have intended that the contracts of agency consultants retained as possible expert witnesses in connection with civil litigation to which the agency is a party be disclosed under section 92F-12(a)(10), Hawaii Revised Statutes, when such information would not be discoverable under Rule 26 of the Hawaii Rules of Civil Procedure. Specifically, of the wide universe of consultants who provide professional and technical advice to

government agencies, did the Legislature intend the term "consultant" as used in section 92F-12(a)(10), Hawaii Revised Statutes, to apply to consultants who are possible expert witnesses in litigation in which the agency is a party?

Were an agency required, under the UIPA, to disclose the contracts of and compensation paid to consultants who have been specifically retained to provide possible expert testimony, a party in litigation with the agency could use the access provisions of the UIPA to obtain information from the agency that would only be available upon motion, or upon a showing of exceptional circumstances. Haw. R. Civ. Pro. 26(b)(4)(A), (B).

The exception set forth in section 92F-13(2), Hawaii Revised Statutes, is nearly identical to section 2-103(a)(3)[2] of the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws, and upon which the UIPA was modeled by the Legislature of the State of Hawaii. The commentary to this Model Code section states:

> Subsection (a)(3) prevents the use of the access provisions of this Article to evade discovery protections available to an agency in litigation with a third party. As a general rule, these protections consist of the attorney-client privilege and the attorney-work product rule.

Model Code ə 2-103 commentary at 15 (1980) (emphasis added).

Furthermore, the Legislative history of the exception set forth in section 92F-13(3), Hawaii Revised Statutes, reveals:

> (b) Frustration of legitimate

---

[2]Section 2-103(a)(3) of the Model Code, exempts from required disclosure:

> (3) material prepared in anticipation of litigation which would not be available to a party in litigation with the agency under the rules of pretrial discovery for actions in the [designate appropriate court] of this State.

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

We believe that a construction of the term "consultant" in section 92F-12(a)(10), Hawaii Revised Statutes, that would permit a party in litigation with an agency to obtain, under the UIPA, information about experts retained by the agency for litigation would lead to an unreasonable or absurd result, because it would require the agency to make information available to the third-party that would only be available upon motion or upon a showing of exceptional circumstances. The exception created by the Legislature in section 92F-13(2), Hawaii Revised Statutes, and the legislative history of section 92F-13(3), Hawaii Revised Statutes, provide strong indicia that the Legislature would not have intended the UIPA to compel such a result.

Accordingly, based upon elementary principles of statutory construction, we believe that although expert witnesses are "consultants" the information set forth in section 92F-12(a)(10), Hawaii Revised Statutes, need only be made available upon conclusion of the litigation for which such experts were retained. After such time as an agency has designated the experts it expects to call as witnesses at trial, the identities of such consultants, and other information set forth in Rule 26(b)(4)(A) of the Hawaii Rules of Civil Procedure should be made publicly available upon request. The disclosure of this information at such time would not permit a third party in litigation with the agency to use the UIPA to evade the discovery protections afforded by the rules of pretrial discovery. Further, in the event that the court permits, upon motion, or upon a showing of exceptional circumstances, the discovery of the

contracts during the course of the litigation, they should be made publicly available at that time.

CONCLUSION

It is our opinion that the Department is not required to disclose, under the UIPA, the contracts of consultants who have been retained as possible expert witnesses in the Hawaii asbestos cost recovery litigation. We do not believe that the Legislature intended section 92F-12(a)(10), Hawaii Revised Statutes, to permit a party in litigation with an agency to evade the discovery protections afforded to the agency under the Hawaii Rules of Civil Procedure.

The contracts of expert witnesses, or possible expert witnesses, should be made available after the conclusion of the Hawaii's asbestos cost recovery litigation, or before the conclusion of the litigation, if permitted by the court.

If you should have any questions regarding this opinion, please contact me at 586-1404.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
c: James Dooley