May 11, 1998

Ms. Sharon L. Kimura

Re: Request for Records Containing Attorney Work Product

Dear Ms. Kimura:

This letter is in response to Sharon Kimura's letter of October 23, 1996, to the Office of Information Practices ("OIP") requesting a written opinion concerning public access to an interdepartmental work request and internal memoranda maintained by the Department of the Prosecuting Attorney, City and County of Honolulu ("Prosecutor's Office").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), an interdepartmental work request and internal memoranda in the Buddy H. Kimura file at the Prosecutor's Office are public records subject to disclosure.

BRIEF ANSWER

No. Upon review of the documents in question, which were submitted to the OIP for *in camera*[1] review, the OIP finds that these documents are primarily

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[1] The term *in camera* is usually used in judicial proceedings. *Black's Law Dictionary* defines *in camera* as follows:

> In chambers, in private. A cause is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom.

Black's Law Dictionary 684 (5th Ed. 1979). *Black's Law Dictionary* also defines *in camera inspection* as follows:

> Under certain circumstances, a trial judge may inspect a document which counsel wishes to use at trial in his chambers before ruling on its admissibility or its use.

(Continued)

comprised of work product that would not be discoverable pursuant to Hawaii Rules of Civil Procedure ("HRCP") Rule 26. Thus, they are exempt from public disclosure under section 92F-13(2), Hawaii Revised Statutes, which protects information that would not be discoverable in judicial or quasi-judicial action to which the State or county is or may be a party. However, any factual information within the requested documents that has previously been made available to Ms. Kimura should be provided, insofar as such information is reasonably segregable, as the OIP has determined that factual information that has already been disclosed is not protected under the attorney work product privilege. OIP Op. Ltr. No. 92-14 at 8-9 (Aug. 13, 1992).

In addition, as the requested documents contain attorney work product that is protected from disclosure by judicial rule, these documents are also exempt from disclosure because release would cause the frustration of a legitimate government function under section 92F-13(3), Hawaii Revised Statutes. See OIP Op. Ltr. No. 92-14 at 9 (Aug. 13, 1992) (citing S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988)).

FACTS

Ms. Kimura's brother, Buddy H. Kimura, died after being struck by a truck on August 29, 1988. See Letter to the OIP from Sharon Kimura dated March 19, 1993. The Honolulu Police Department ("HPD") investigated Buddy Kimura's death. No criminal prosecution has been pursued.

After Buddy Kimura's death, Sharon Kimura made requests to several government agencies for records pertaining to the investigation into his death. Ms. Kimura has received some records about her brother from different agencies,

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Black's Law Dictionary 684 (5th Ed. 1979). The OIP makes *in camera* inspection of documents in situations like this one, where there is a dispute between a public requester and the agency involved as to whether certain records are public. After the OIP makes its determination, the records are returned to the agency, even if the OIP deems them public. The agency has the ultimate responsibility to release those documents if they are found to be public.

including the Department of the Medical Examiner ("Medical Examiner"),[2] the HPD, and the Prosecutor's Office. However, Ms. Kimura has had to make repeated record requests, spanning a period of several years simply to obtain copies of the documents currently in her possession.

Based on its communications with her via telephone and letters, the OIP understands that Ms. Kimura believes several documents still have not been made available to her by the HPD and the Prosecutor's Office. Regarding the HPD's records, in a letter dated August 1, 1996, to Ms. Kimura, the HPD stated that its "total report retained" by the HPD had been given to Ms. Kimura as an enclosure. In another letter dated August 23, 1996, the HPD stated it had made "extensive checks" and could not locate any documents beyond those already given to Ms. Kimura, aside from thirty-three photograph negatives which the HPD offered to make available. In a telephone conversation of October 16, 1996, Lt. William Chur of the HPD Police Records Division informed the OIP that a thorough search had been made for the records Ms. Kimura requested, and that the only records not already sent to her were some photographs. The following day, the OIP informed Ms. Kimura over the telephone of this conversation with Lt. Chur. In a follow-up letter addressed to the OIP dated October 23, 1996, the HPD stated that it made a diligent search for her brother's records, and that the only records still in its possession that were not already provided to Ms. Kimura are some photographs from the scene of the accident. The HPD offered to make the photographs available to Ms. Kimura upon her request. Therefore, this opinion letter specifically addresses only whether certain documents at the Prosecutor's Office are subject to public disclosure under the UIPA.

In a letter to the Prosecutor's Office dated March 17, 1995,[3] Ms. Kimura requested all records pertaining to her brother's death. The Prosecutor's Office

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[2] In a letter to Ms. Kimura dated October 10, 1996, the Medical Examiner stated he had "no further documents other than what you already have in your possession." The OIP was not asked by Ms. Kimura for further assistance regarding the Medical Examiner's records.

[3] Ms. Kimura did not provide the OIP with a copy of this letter, and we are only aware of its existence due to reference made to it in a letter to Ms. Kimura from the Prosecutor's Office dated March 29, 1995.

responded in a letter dated March 29, 1995, that Ms. Kimura's request was denied because the records it maintains are confidential and exempt from disclosure under the UIPA. On August 8, 1996, Ms. Kimura made another written request to the Prosecutor's Office for release of all records pertaining to her brother. This time, the Prosecutor's Office responded by releasing copies of some of its records to Ms. Kimura. However, based on a subsequent letter by Ms. Kimura dated August 31, 1996, to the Prosecutor's Office, the OIP understands that she believed the records provided did not include all the documents maintained by the Prosecutor's Office on her brother. In her August 31, 1996, letter to the Prosecutor's Office, Ms. Kimura made another records request to the Prosecutor's Office, this time listing specific documents she believed were still omitted from the records already released to her: (1) police photographs taken the night of the accident, (2) the "second diagram" of the accident scene which should have been attached to Officer Saki's report, and (3) the final report of Dr. Flynn at the Medical Examiner's.

On October 8, 1996, on Ms. Kimura's behalf, the OIP sent a letter to the Prosecutor's Office asking for the release of the documents referenced in her August 31, 1996, letter, and for any other documents relating to her brother that were not previously made available to her. In response, the Prosecutor's Office sent Ms. Kimura and the OIP separate letters dated October 22, 1996, which both stated that the only documents the Prosecutor's Office still maintains on Buddy Kimura that were not already turned over to Sharon Kimura are: (1) one interdepartmental work request including impressions and recommendations dated September 20, 1991; and (2) three internal memoranda dated December 17, 1991, August 15, 1995, and September 18, 1996. The Prosecutor's Office claimed that these documents are exempt from disclosure under the UIPA because they all consist of attorney work product. Based on this assertion of confidentiality by the Prosecutor's Office, Ms. Kimura asked the OIP for an opinion, in a letter dated October 23, 1996, stating, "I guess the OIP will yet again have to issue an opinion on this case, this time on what would constitute 'work product'."

Deputy Prosecuting Attorney Charlotte Duarte provided copies of the four documents being withheld for the OIP's *in camera* review. Along with these copies, Ms. Duarte sent a letter dated February 13, 1997, in which she asserted the Prosecutor's Office's position on nondisclosure of these documents. The letter of February 13, 1997, stated, in part, that the Prosecutor's Office believes that Sharon

Kimura may be obtaining information to determine whether she may proceed with a civil cause of action against the City and County of Honolulu. The February 13, 1997, letter also asserted that the documents the Prosecutor's Office has not disclosed to Ms. Kimura were prepared in anticipation of such a possible future litigation, and that it would object to discovery of the documents at issue.

Upon inquiry by the OIP in a telephone conversation with the Prosecutor's Office on March 10, 1998, the Prosecutor's Office withdrew its objection to disclosure of the internal memorandum dated December 17, 1991. This withdrawal was confirmed by letter dated March 10, 1998, in which the Prosecutor's Office also authorized the OIP to release the December 17, 1991 memorandum to Ms. Kimura. The OIP mailed a copy of this memorandum to Ms. Kimura along with a cover letter dated March 19, 1998.

In that March 10, 1998, telephone conversation, the Prosecutor's Office noted that it continues to assert that the documents maintained by the Prosecutor's Office, dated September 20, 1991, August 15, 1995, and September 18, 1996, contain work product which is protected from disclosure under section 92F-13(2), Hawaii Revised Statutes. Accordingly, the discussion below applies only to the documents dated September 20, 1991, August 15, 1995, and September 18, 1996.

DISCUSSION

I. INTRODUCTION

The UIPA provides that government records are open to public inspection unless access is restricted or closed by law. Haw. Rev. Stat. § 92F-11(a) (1993). There are five general exceptions to disclosure of public records under the UIPA. Agencies need not disclose: (1) government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy; (2) government records that would not be discoverable in a judicial or quasi-judicial action to which the State or county is or may be a party; (3) government records that must be kept confidential to avoid the frustration of a legitimate government function; (4) government records that are protected from disclosure by State or federal law, including State or federal court orders; or (5) personal files of legislative members, draft working papers of legislative committees, including unfiled committee reports

and budget worksheets, and records of investigating committees of the Legislature that are closed pursuant to legislative rules. Haw. Rev. Stat. § 92F-13 (1993).

II. RECORDS THAT WOULD NOT BE DISCOVERABLE IN A JUDICIAL OR QUASI-JUDICIAL ACTION TO WHICH THE STATE OR COUNTY IS OR MAY BE A PARTY

Of the five exceptions to disclosure under the UIPA, only one has been asserted by the Prosecutor's Office. In a letter to the OIP dated February 13, 1997, the Prosecutor's Office claimed the documents it has not disclosed to Ms. Kimura contain attorney work product and therefore fall under the exception to disclosure for government records that would not be discoverable in a judicial or quasi-judicial action to which the State or County is or may be a party. Haw. Rev. Stat. § 92F-13(2) (1993). In its letter, the Prosecutor's Office stated the documents were prepared in anticipation of possible civil litigation by Ms. Kimura against the City and County of Honolulu ("City"). The Prosecutor's Office also asserted in its letter dated February 13, 1997, that if Ms. Kimura ever files a civil action against the City,[4] it will seek attorney work product protection under the civil discovery rules for the documents discussed herein, and will argue that the documents were prepared in anticipation of litigation against the City.

A. Discovery and Work Product

Rule 26 of the HRCP governs discovery in civil cases, and provides that, absent substantial need, attorney work product is not discoverable. Rule 26 states "the court shall protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Haw. R. Civ. P. 26 (b) (3).

The OIP has previously opined that section 92F-13(2), Hawaii Revised Statutes, exempts from disclosure any government records that would be protected

[4] Section 657-1(4), Hawaii Revised Statutes, provides that personal actions of any nature that are not otherwise covered by State law must be commenced within six years after the cause of action occurred.

by the civil discovery rule, HRCP Rule 26. OIP Op. Ltrs. No. 92-14 at 6-9 (Aug. 13, 1992) (DOE report and portions of DAGS claim report are exempt from disclosure as attorney work product prepared in anticipation of litigation); No. 89-10 at 5 (Dec. 12, 1989) (section 92F-13(2), Hawaii Revised Statutes, protects information subject to attorney-client, work product, or other judicially recognized privileges).

In OIP Opinion Letter Number 92-14, the OIP interpreted the language "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" in section 92F-13(2), Hawaii Revised Statutes, to mean that there is no legal mandate that the State or county already be a party in a suit for an assertion of work product to be upheld as a reason for nondisclosure under the UIPA. OIP Op. Ltr. No. 92-14 at 6-7 (Aug. 13, 1992) (emphasis added). Citing federal case law, the OIP determined that a lawsuit need not yet have been filed for the attorney work product exception to attach, so long as the requested documents were prepared in anticipation of litigation, in light of the facts and circumstances of each case. Id. at 7 (citing State ex. Rel. Day v. Patterson, 773 S.W.2d 224, 228 (Mo. App. Ct. 1989)).

When analyzing issues under the UIPA, the OIP often looks to federal case law for guidance. See e.g., OIP Op. Ltr. No. 92-14 (Aug. 13, 1992). Some federal courts have categorized two types of work product protected under the Federal Rules of Civil Procedure ("FRCP"): ordinary work product and opinion work product. See In Re Murphy, 560 F.2d 326, 334-336 (8th Cir. 1977). *Ordinary work product* includes materials that do not involve the fruits of an attorney's mental processes. Id. at 334. To overcome the ordinary work product privilege, a party must show a substantial need for the materials and be unable to obtain equivalent information by other means. Id. at 334. On the other hand, *opinion work product* includes mental impressions, conclusions, opinions, and other legal theories. Id. at 335. To overcome the work product privilege for opinion work product, a party must show more than a substantial need because this information enjoys nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. Id. at 336. Federal courts have noted that special treatment for opinion work product is justified because, "at its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." U.S. v. Adlman, 134 F.3d 1194, (U.S. App. 1998) (citing U.S. v. Nobles, 422 U.S. 225, 238 (1975)). Accordingly, opinion work

product should be "protected unless a highly persuasive showing is made." U.S. v. Adlman, 134 F.3d 1194, (U.S. App. 1998) (citing Upjohn v. U.S., 449 U.S. 383, 402 (1981)). See also Allen v. McGraw, 106 F.3d 582, 607 (4th Cir. 1997) (citing federal case law listing principles of work product doctrine).

The only documents not disclosed to Ms. Kimura by the Prosecutor's Office are one interdepartmental work request including impressions and recommendations, and two internal memoranda.[5] In a letter dated October 22, 1996, the Prosecutor's Office described the documents withheld as work product because they contain "impressions and recommendations," and are "internal memoranda." The Prosecutor's Office provided the OIP with copies of the withheld documents for *in camera* review. After inspecting the three documents, the OIP has determined that they primarily consist of attorney work product and are exempt from disclosure under section 92F-13(2), Hawaii Revised Statutes. The documents in question all appear to have been prepared by Deputy Prosecuting Attorneys or members of the Prosecuting Attorney's legal staff. Specifically, these documents discuss legal strategies behind decisions made regarding the Buddy Kimura case at the Prosecutor's Office. They also describe proposed work to be done on the case, and recommendations of investigations to be made. Some portions discuss results of investigations pertaining to the Buddy Kimura file, or correspondence received from Ms. Kimura. Other portions memorialize conversations.

In the facts of this case, no civil action has been filed against the City, nor was a criminal action pursued after Buddy Kimura's death. However, in a February 13, 1997, letter to the OIP, the Prosecutor's Office stated that it appears Ms. Kimura is collecting information to proceed in a civil cause of action against the City, and the documents were prepared in anticipation of such an action.[6] Thus,

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[5] As was discussed above, the internal memorandum dated December 17, 1991, was made available to Ms. Kimura.

[6] Ms. Kimura did lodge a written complaint dated November 21, 1996, with the U.S. Department of Transportation against the State of Hawaii for failure to comply with federal regulations "concerning pedestrian safety and driving under the influence, as well as state laws." This complaint is based on what occurred prior and subsequent to Buddy Kimura's death. On page twenty-two of her complaint, Ms. Kimura included a section entitled "FAILURE TO PROSECUTE. SEQUENCE OF EVENTS POINT TO MISCONDUCT. POSSIBLE PERJURY OR OBSTRUCTION OF JUSTICE"

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despite the fact that a court action has not been initiated in this case, the OIP finds that the requested documents were prepared in anticipation of litigation. See OIP Op. Ltr. No. 92-14 (Aug. 13, 1992).

The OIP is without sufficient facts or jurisdiction to opine on whether a court of law would find that the documents being withheld from Ms. Kimura would be discoverable for purposes of litigation, as discovery access is separate and distinct from access under the UIPA. See OIP Op. Ltr. No. 95-16 (July 18, 1995). Although documents primarily consisting of attorney work product are exempt from disclosure under section 92F-13(2), Hawaii Revised Statutes, the OIP notes that in discovery, should substantial need for such information be shown, the September 20, 1991 interdepartmental work request and the August 15, 1995 and September 18, 1996 internal memoranda could be ordered disclosed. HRCP Rule 26. In our application of attorney work product protection under HRCP Rule 26 to section 92F-13(2), Hawaii Revised Statutes, the OIP's analysis is consistent with our prior opinion, OIP Opinion Letter No. 92-14 (Aug. 13, 1992). However, in judicial proceedings, a litigant may obtain the protected material upon a showing of substantial need, a determination that is made in the context of a claim of liability and pending litigation, and upon showing that the requested information cannot be obtained by other means without undue hardship. See HRCP Rule 26 (b) (3). A ruling on whether a party requesting documents containing work product has a substantial need for that information is best left to the courts.

However, although the documents appear to consist primarily of attorney work product, the documents also incorporate certain facts which may not be exempt from disclosure. While the OIP follows the federal premise that "factual" as well as "deliberative" information contained within attorney work product is exempt from disclosure under the UIPA, the OIP has determined that factual information which has already been disclosed is not protected under the attorney work product privilege. OIP Op. Ltr. No. 92-14 at 8-9 (Aug. 13, 1992). Therefore, the Prosecutor's

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in which she discussed the actions and events that she believes support this allegation. On page twenty-six of her complaint in the "SUMMARY" section, Ms. Kimura stated, "I will be challenging HPD and the Department of the Prosecuting Attorney over their false claims."

Office is advised to disclose factual information in the subject documents, if any, that it may have already disclosed to Ms. Kimura to the extent that segregation of protected information is reasonably possible.[7]

As a final note, the protection of attorney work product may not be extinguished after the close of a case. In Re Murphy, 560 F.2d 326, 334 (8th Cir. 1977). While the OIP was unable to find Hawaii case law on this issue, the federal court in In Re Murphy articulated that in order to remain faithful to the policies behind the protection of attorney work product, there must be a "perpetual protection for work product, one which extends beyond the termination of litigation for which the documents were prepared." In Re Murphy at 334. See also In Re: Grand Jury Proceedings, 43 F.3d 966 (U.S. App. 1994) (work product privilege extends to protect documents despite the fact that litigation for which they were prepared terminated); Poelka, Allard, McCowan & Jones v. Superior Court of the County of Santa Clara, 165 Cal. Rptr. 748, 752 (1st Dist. 1980) ("[t]he great weight of federal authority is for continuation of the privilege beyond termination of the action") (citing In Re Murphy 560 F.2d 326 (8th Cir. 1977); W. Virginia v. Canady, 194 W. Va. 431, 445 (1995) (federal case law does not delineate temporal scope for work product doctrine). As attorney work product may survive the expiration of the statute of limitations in this jurisdiction, the OIP believes an exception to disclosure under section 92F-13(2), Hawaii Revised Statutes, based on attorney work product, could also survive the expiration of the statute of limitations.

III. RECORDS WHICH, IF DISCLOSED, WOULD FRUSTRATE A LEGITIMATE GOVERNMENT FUNCTION

Although the Prosecutor's Office did not invoke the UIPA exception that protects government records which, if disclosed, would cause the frustration of a legitimate government function, the OIP noted its application to attorney work product material in a previous OIP opinion letter. The OIP Opinion Letter Number 92-14, cited UIPA legislative history that listed "[i]nformation that is expressly made nondisclosable or confidential under Federal or State law or

[7] As the OIP does not have sufficient facts to determine whether and to what extent any factual information in the subject documents was previously disclosed, we cannot make a determination as to precisely what information, if any, must be disclosed.

protected by judicial rule" as an example of records whose disclosure would frustrate a legitimate government function. OIP Op. Ltr. No. 92-14 at 9 (Aug. 13, 1992) (citing S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (emphasis added in opinion letter)). Thus, the OIP determined that attorney work product information was exempt from disclosure under section 92F-13(3), Hawaii Revised Statutes. Id. The HRCP were adopted by order of the Supreme Court. As the requested documents contain attorney work product protected under HRCP Rule 26, the documents in question therefore contain information protected by judicial rule and are exempt from disclosure under section 92F-13(3), Hawaii Revised Statutes.

CONCLUSION

Based upon an *in camera* review, the OIP concludes that the one interdepartmental work request including impressions and recommendations dated September 20, 1991, and two internal memoranda dated August 15, 1995, and September 18, 1996, contain attorney work product protected from disclosure by HRCP Rule 26 and therefore are exempt from public disclosure pursuant to section 92F-13(2), Hawaii Revised Statutes. However, any factual information within those records which has previously been made available to Ms. Kimura must be disclosed, insofar as it is reasonably segregable.

In addition, the requested records are also exempt from disclosure under the UIPA exception for government records which, if released, would cause the frustration of a legitimate government function because the records are protected by judicial rule, HRCP Rule 26. Haw. Rev. Stat. § 92F-13(3) (1993).

Very truly yours,

Carlotta M. Dias
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

CMD:pm

cc: Keith Kaneshiro, Director of Public Safety, State of Hawaii
Peter Carlisle, Prosecuting Attorney, City and County of Honolulu *via* Deputy Prosecuting Attorney Charlotte Duarte