February 1, 2002

Mr. Tim Ruel
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Senior Vice President for Legal Affairs
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University of Hawaii
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Re: Request for Disclosure of Settlement Agreement Between an Agency and a Private Party

Dear Messrs. Ruel and Kirimitsu:

This letter is in response Mr. Tim Ruel's letter of November 28, 2001, to the Office of Information Practices ("OIP") requesting an opinion concerning public access to the settlement agreement between Anthony Perry and the University of Hawaii ("UH") in Civil No. 99-2852-07, Circuit Court of the First Circuit, State of Hawaii the ("Settlement Agreement").

The OIP has examined the Settlement Agreement in accordance with section 92F-42(5), Hawaii Revised Statutes. The OIP also conducted an inquiry regarding compliance by the UH with section 92F-11, Hawaii Revised Statutes, and investigated the actions of the UH in connection with the request for disclosure of Settlement Agreement, in accordance with section 92F-42(4), Hawaii Revised Statutes. Accordingly, the OIP addresses this opinion to both Mr. Ruel and the UH.

ISSUES PRESENTED

PART I – THE RECORD REQUEST

1. Whether the UH responded as required pursuant to the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), and chapter 2-71, Hawaii Administrative Rules, to a request for a government record.

PART II – EXCEPTIONS TO REQUIRED DISCLOSURE OF GOVERNMENT RECORDS

2. Whether disclosure of the Settlement Agreement would be a clearly unwarranted invasion of personal privacy.

3. Whether the Settlement Agreement may be withheld because it is a document that would not be discoverable in a judicial or quasi-judicial action to which the UH is or may be a party.

4. Whether disclosure of the Settlement Agreement would cause the frustration of a legitimate government function.

5. Whether government agencies may enter into confidentiality agreements absent a basis for withholding disclosure as allowed by section 92F-13, Hawaii Revised Statutes.

PART III – IN CAMERA REVIEW

6. Whether an agency has a duty to promptly deliver a government record to the OIP for the purposes of examination of the record by OIP.

BRIEF ANSWERS

PART I – THE RECORD REQUEST

1. Yes. The UH's denial of Mr. Ruel's request was provided in a timely manner. The response was a denial of access pursuant to section 2-71-11(b)(2), Hawaii Administrative Rules. Also, upon being advised of the requester's disagreement with the UH's denial, the UH advised the requester of the option of submitting a formal request, as is required by section 2-71-11(b)(4), Hawaii Administrative Rules.

PART II – EXCEPTIONS TO REQUIRED DISCLOSURE OF GOVERNMENT RECORDS

2. No. The Settlement Agreement contains no information that would qualify as a significant privacy interest. Neither does the Settlement

Agreement contain information clearly identifiable to the individual claiming a privacy interest. Finally, the individual did not identify any specific information claimed to be private and the reason the information was private.

3. No. The Settlement Agreement does not contain information that reflects the mental impressions, conclusions and opinions of an attorney, nor does it discuss matters which an attorney's client could claim a privilege to not disclose such that it would not be discoverable in a judicial or quasi-judicial action to which the UH is or may be a party.

4. No. The UH did not describe how disclosure of the Settlement Agreement would frustrate a government function. Neither did the UH describe what government function would be frustrated by disclosure of the Settlement Agreement. Therefore, the OIP must conclude that the exception does not apply.

5. No. A confidentiality provision in a settlement agreement that contravenes the agency's duty to the public is impermissible under Hawaii law.

PART III – IN CAMERA REVIEW

6. Yes, a government agency has a statutory duty, under the UIPA, to provide the OIP with documents for examination by the OIP for the purpose of conducting inquiries regarding compliance with the UIPA by an agency, and for the investigation of possible violations by an agency.

FACTS

On July 27, 1999, Anthony C. Perry ("Perry") filed a lawsuit in the Circuit Court of the First Circuit, State of Hawaii, Civil No. 99-2852-07 ("Lawsuit") against the UH, and its then-president, Kenneth P. Mortimer:

> . . . for declaratory relief asking the court to find that he owns the rights and interests to his inventions developed during his fellowship at the University. Perry filed his First Amended Complaint on August 12, 1999, seeking damages for, inter alia, the University's and Mortimer's violation of 42 U.S.C. § 1983 and the 5th, 13th and 14th Amendments to the United States Constitution.

> On September 2, 1999, the University filed Counterclaim against Perry and a Third-party Complaint against Felix for, inter alia, conspiracy and tortious interference with contractual relations.

First Amended Pretrial Statement of Plaintiff Anthony C.F. Perry and Third-Party Defendant John Henry Felix, p. 9, filed Apr. 10, 2000, in the Lawsuit.

The UH's claim to ownership of the inventions is based on an alleged employer/employee relationship between Perry and the UH.[1]

On October 26, 2001, the attorneys for the UH filed a Stipulation for Dismissal With Prejudice of All Claims Against All Parties in the Lawsuit.

On November 26, 2001, Mr. Ruel made a verbal, informal request to the UH to disclose a copy of the Settlement Agreement. On the same date, the UH refused, in writing, to disclose the Settlement Agreement, stating only that it was "confidential." Memorandum from Walter S. Kirimitsu, Esq., Senior Vice President for Legal Affairs and University Legal Counsel, University of Hawaii, to Tim Ruel, Honolulu Star-Bulletin, dated November 26, 2001. Mr. Kirimitsu subsequently advised the OIP, in response to a query to the UH, that the UH had advised Mr. Ruel of his option to submit a written, formal request.

On November 28, 2001, on behalf of his employer, the Honolulu Star-Bulletin, Mr. Ruel requested the OIP's assistance to obtain the Settlement Agreement and issue an advisory opinion[2] "regarding the public's right to know and responsibilities of the University of Hawaii." Letter from Tim Ruel, Honolulu Star-Bulletin, to OIP, dated November 28, 2001.

In a letter dated November 30, 2001, the OIP asked the UH to provide the Settlement Agreement to OIP for its *in camera*[3] review, pursuant to its

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[1] Defendant/Counterclaimants/Third-Party Plaintiffs University of Hawaii and Kenneth P. Mortimer, Individually and in His Capacity as President of the University of Hawaii's Responsive Pretrial Statement, p. 2, filed June 7, 2000 in the Lawsuit.

[2] Under the UIPA, the OIP, upon request by any person, may provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under this chapter. Haw. Rev. Stat. 92F-42(3) (Supp. 2001).

[3] *In camera* review is defined as: "under certain circumstances, a trial judge may inspect a document which counsel wishes to use at trial in . . . chambers before ruling on its admissibility or its use." *Black's Law Dictionary* 684 (5th Ed. 1979). The OIP makes *in*

duties under section 92F-42, Hawaii Revised Statutes, along with UH's legal bases for withholding access to the Settlement Agreement.[4]

In response, the UH advised the OIP that the "settlement agreement cannot be disclosed for in camera view or otherwise." Letter from Walter S. Kirimitsu, Esq. to OIP dated December 5, 2001.

In a telephone conference on December 7, 2001, between the OIP and counsel for the UH, the OIP was advised that, absent a court order requiring disclosure, the UH refused to disclose the Settlement Agreement. Letter from OIP to Bert T. Kobayashi, Jr., Esq. dated December 7, 2001.

The OIP thereafter arranged to file a lawsuit seeking an order that would allow it to review the Settlement Agreement. [5]

Five days after the lawsuit was prepared for filing against the UH, counsel for the UH contacted the OIP and advised that if Mr. Perry's counsel was willing to waive the confidentiality clause for the purposes of an *in camera* review, that it was willing to provide the Settlement Agreement to the OIP. Letter from Bert T. Kobayashi, Jr., Esq., to the OIP dated December 12, 2001. The OIP's legal counsel advised the UH that the confidentiality clause was contrary to law and public policy, and that the UH had an obligation to provide a copy of the Settlement Agreement with or

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camera inspection of documents in situations 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. See, OIP Op. Ltr. No. 98-3 at 2 (May 11, 1998).

[4] The OIP advised the UH that, when maintained by government agencies, settlement agreements between agencies and members of the public are public documents required to be disclosed under the UIPA. The OIP also advised the UH that three OIP Opinion Letters have addressed settlement agreements: OIP Op. Ltrs. No. 89-10 (Dec. 12, 1989); No. 92-21 (Oct. 27, 1992); and No. 94-17 (Sept. 12, 1994). The OIP also provided UH with relevant case law authority: Painting Industry of Hawaii Market Recovery Fund v. Alm, 69 Haw. 449, 746 P.2d 79 (1987); SHOPO v. Soc. of Professional Journalists, 83 Haw. 378, 927 P.2d 386 (1996). Letter from OIP to UH, dated November 30, 2001.

[5] The OIP contacted the State of Hawaii, Department of the Attorney General, ("AG"), and requested that a deputy attorney general be assigned to represent the OIP in obtaining an order directing the UH to turn over to the OIP, under sections 92F-42(4) and (5), Hawaii Revised Statutes, the Settlement Agreement. A deputy attorney general was thereafter appointed by the AG and drafted a Petition to Examine Records of Agency for filing in the Circuit Court of the First Circuit, State of Hawaii. Letter from OIP to Earl Anzai, Esq., dated December 7, 2001; interoffice electronic mail from OIP to John P. Dellera, Esq., deputy AG; and replies thereto, dated December 11 through 17, 2001.

without the consent of any party to the Settlement Agreement. Letter from John P. Dellera, Esq., to Bert T. Kobayashi, Jr., Esq., dated December 13, 2001.

Twelve days after the initial refusal to provide the Settlement Agreement for *in camera* review, on December 17, 2001, counsel for the UH advised the OIP's counsel that his client would provide a copy of the Settlement Agreement to the OIP for the purpose of an *in camera* review. Letter from Bert T. Kobayashi, Jr., Esq., to John P. Dellera, Esq., dated December 17, 2001.

Three days later, on December 20, 2001, the Settlement Agreement was delivered to the office of the AG, and subsequently to the OIP. On December 20, 2001, the OIP advised counsel for UH of his client's burden to establish that an exception to disclosure of a government record existed. In that correspondence, the OIP gave the UH until January 7, 2002, to provide the OIP with the legal and factual bases for UH's denial of Mr. Ruel's record request.[6]

Prior to the deadline to respond, in a letter dated December 27, 2001, the UH advised the OIP that it intended to rely on the following three exceptions to disclosure as permitted section 92F-13, Hawaii Revised Statutes. The UH stated that:

- Dr. R. Yanagimachi, the head of the UH department that included cloning research, had independent counsel representing his interests in the litigation which resulted in the settlement and that . . . [the OIP] should consider the position and input of Mr. Bill Meyer of the Dwyer law firm in Honolulu in terms of [the] exception . . . [for government records which if disclosed, would constitute a clearly unwarranted invasion of personal privacy.]

- There is also ongoing consideration that the University of Hawaii through its current licensee, ProBio, might be involved in federal patent litigation which should be considered pursuant to [the] exception . . . [for

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[6] In that letter the OIP advised UH that it has been OIP's practice, as a courtesy, to review affected private parties' explanations of legal and factual bases for withholding of government records when confidential business information or trade secrets may be in issue, and that if the Settlement Agreement contained confidential business information or trade secrets, that the UH may contact the parties to the Settlement Agreement or parties who appeared in the litigation and invite them to submit an explanation. Letter from OIP to Bert T. Kobayashi, Jr., Esq., dated December 20, 2001.

> government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county may be a party, to the extent that such records would not be discoverable].

- Mr. Meyer as counsel to the University for matters dealing with intellectual property and who succeeded Mr. Aldo Test, Esq., in that capacity should also be consulted for his position and input as to [the] exceptions . . . . [for government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county may be a party, to the extent that such records would not be discoverable] and [for government records that, by their nature, must be confidential for the government to avoid the frustration of a legitimate government function].

Letter from Bert T. Kobayashi, Jr., Esq., to OIP dated December 27, 2001.

The OIP again advised UH that it must provide the legal and factual bases for its claim that the settlement agreement is exempt from disclosure pursuant to the UIPA, and stated that the OIP would assume that the December 27, 2001 letter quoted above was not intended to provide such bases. Letter from OIP to Bert T. Kobayashi, Jr., Esq., dated December 27, 2001. No further response was provided to the OIP by the UH or any other party to the Lawsuit.

However, on January 7, 2002, the OIP received a letter from William G. Meyer, III, Esq., attorney for Dr. Ryuzo Yanagimachi, who was not a party to the lawsuit nor to the settlement agreement. Mr. Meyer advised as follows:

> I represent Dr. Ryuzo Yanagimachi in connection with the above-referenced litigation and the University of Hawai'i generally with respect to intellectual property maters. My input has been invited in connection with the pending request for disclosure of the subject Settlement Agreement.
>
> Please be advised that I agree with and join in the positions taken by Mr. Kobayashi on behalf of the University of Hawai'i in his various correspondence to you in connection with this matter.

Letter from William G. Meyer, III, Esq., to the OIP dated January 7, 2002.

No other party to the Lawsuit or to the Settlement Agreement provided the OIP with any legal bases as to why the Settlement Agreement should not be disclosed.

DISCUSSION

I. INTRODUCTION (RELEVANT LEGAL STANDARDS)

A. The UIPA and its Purposes

One of the purposes of the UIPA is to ensure that the formation and conduct of public policy is as open as possible. See, Haw. Rev. Stat. 92F-2 (1993). The UIPA provides that government records are open to public inspection and copying unless access is restricted or closed by law. Haw. Rev. Stat. § 92F-11(a) (1993). Government records maintained by a State or county agency are subject to the disclosure requirements of the UIPA.

As a matter of public policy, the UIPA must be construed to "[p]rovide for accurate, relevant, timely and complete government records." Haw. Rev. Stat. § 92F-2 (1993). In particular, the UIPA requires that 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) (1993). The OIP has previously opined that the UH is an agency subject to the UIPA. OIP Op. Ltrs. No. 90-16 (Apr. 24, 1990); No. 89-9 (Nov. 20, 1989).

The UIPA requires that government records be open to public inspection unless access is restricted or closed by law. Haw. Rev. Stat. § 92F-11(a) (1993). When an agency decides to withhold a record from public disclosure, it has the burden to establish that the withholding of the record is proper under the law. OIP Op. Ltr. No. 94-17 at 9 (Sept. 12, 1994), citing Haw. Rev. Stat. §§ 92F-11(b) and 92F-15(c) (1993).

In this instance, the UH has stated the following three provisions as its authority for withholding disclosure of the requested record from

Mr. Ruel:

> **§92F-13 Government records; exception to general rule**. This part 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) (1993).

B. The OIP's Powers and Duties

To implement and administer the UIPA, the OIP was given certain powers and duties. Among those powers and duties the OIP:

> (1) [s]hall, upon request, review and rule on an agency denial of access to information or records, . . .
>
> . . .
>
> (3) Upon request by any person, may provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under this chapter;
>
> (4) May conduct inquiries regarding compliance by an agency and investigate possible violations by an agency;
>
> (5) May examine the records of any agency for the purpose of paragraph (4) and seek to enforce that power in the courts of this State; . . .

Haw. Rev. Stat. § 92F-42(1)(3)(4)(5) (Supp. 2001).

C. Administrative Rules

As required by the UIPA, administrative rules have been adopted to assist agencies in implementing Hawaii's public records law. The purpose of those rules is, in relevant part, to establish:

> [p]rocedures and time limits that agencies shall follow when processing requests to inspect or copy government records under part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes;

Haw. Admin. R. 2-71-1(1) (1999).

Any person may make a request for government records. This request can either be an informal request or a formal request. To qualify as a formal request, the request must meet certain elements under section 2-71-12(b), Hawaii Administrative Rules.[7] No requirements exist for an informal request. In most circumstances, an informal request is simply an oral request for records. It is defined as "a request, in any form, that a person submits to an agency for access to records and to which the agency responds in accordance with 2-71-11." Haw. Admin. R. 2-71-2 (1999). The administrative rules for processing an informal request are found at section 2-71-11, Hawaii Administrative Rules, which provide, in relevant part:

> **§2-71-11 Informal requests for access to government records; agency response.**
>
> (a) Any person may, during an agency's regular business hours, submit an informal request for access to records.

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[7] A formal request shall be in written, electronic, or other physical form and shall contain the following information:

(1) Information that would enable the agency to correspond with or contact the requester;
(2) A reasonable description of the requested record to enable agency personnel to locate it with reasonable effort. The description should include, if known, the record name, subject matter, date, location, and any other additional information that reasonably describes the requested record;
(3) If applicable, a request for a waiver of fees for searching for, reviewing, or segregating the requested record, when the requester believes that a waiver would serve the public interest . . . and
(4) A request to inspect or obtain a copy of the records described and, if applicable, the means by which the requester would like to receive the copy.

Haw. Admin. R. § 2-71-12(b) (1999).

> (b) Upon receiving an informal request under this section, an agency shall respond to the request by doing one or more of the following:
>
> > (1) Provide access to any disclosable record requested pursuant to part II of chapter 92F, HRS, in a reasonably timely manner; . . .
> >
> > (2) Deny access to all or any part of the records requested that are confidential under section 92F-13, HRS, or any other law; provided that if the requester disagrees with the agency's denial, the agency shall advise the requester of the option of submitting a formal request.
> >
> > (3) Inform the requester that the agency does not maintain the record; or
> >
> > (4) Inform the requester to submit a formal request in accordance with section 2-71-12.
>
> (c) When a requester is not satisfied with the agency's response, or failure to respond, to the informal request, the requester may make a formal request for access to records in accordance with section 2-71-12.
>
> (d) A request that complies with section 2-71-12 shall be treated as a formal request under this chapter, unless otherwise agreed upon by the requester and the agency.

Haw. Admin. R. § 2-71-11 (1999).

PART II – THE RECORD REQUEST

II. AGENCIES' DUTIES IN RESPONDING TO AN INFORMAL RECORD REQUEST

The UIPA and the OIP's administrative rules set out the procedures agencies must follow in processing record requests.

Agencies are required to make their records available for inspection and copying during regular business hours to any person. Haw. Rev. Stat. § 92F-11 (1993); Haw. Admin. R. §§ 2-71-11(a), -12(a) (1993).

Mr. Ruel has advised the OIP that he telephoned Mr. Kirimitsu at the UH and asked for a copy of the Settlement Agreement on November 26, 2001. Under the UIPA's administrative rules, this verbal request was an "informal request," which "means a request, in any form, that a person submits to an agency for access to records . . ." H. Admin. R. § 2-71-2 (1999).

On that same day, Mr. Kirimitsu, in a written memorandum dated November 26, 2001, denied access to the government record, stating that the Settlement Agreement was "confidential." Mr. Ruel subsequently advised the OIP that he expressed disagreement with Mr. Kirimitsu's position. Under section 2-71-11, Hawaii Administrative Rules, Mr. Kirimitsu was then required to inform Mr. Ruel of his option of submitting a "formal request." Mr. Kirimitsu has advised the OIP that Mr. Ruel was informed of his option to submit a formal request, in compliance with the OIP administrative rules.

Therefore, the OIP concludes that the UH's response to Mr. Ruel's record request was provided on the same day as the record request and was, therefore, timely. The OIP also concludes that the UH did advise Mr. Rule of his option of submitting a formal request.

PART II - EXCEPTIONS TO REQUIRED DISCLOSURE OF GOVERNMENT RECORDS

A. The UIPA and Settlement Agreements

The OIP has previously opined that, when maintained by government agencies, settlement agreements between agencies and members of the public are public documents required to be disclosed under the UIPA. OIP Op. Ltrs. No. 94-17 (Sept. 12, 1994); No. 92-21 (Oct. 27, 1992); 89-10 (Dec. 12, 1989).

In Opinion Letter Number 89-10, a settlement agreement was entered into between the State and two steel manufacturers, suppliers of steel used in construction of the Aloha Stadium. The State had also sued other design professionals and material suppliers, and had only reached an agreement to settle the lawsuit with the two steel manufacturers. The OIP determined that, when the State's claims against all parties to the lawsuit were settled,[8] that the terms of all settlement agreements must be made available for

[8] The OIP determined that the settlement agreement could not be released until the State had settled with all the parties it sued in the lawsuit. That is because disclosure of the settlement terms may "give the remaining defendants a distinct advantage in the settlement process," which would frustrate the legitimate government function of obtaining settlement with the best results for the state's taxpayers. OIP Op. Ltr. No. 89-10 at p. 8 (Dec. 12, 1989).

public inspection under the UIPA, "except those portions, if any, which would constitute a 'clearly unwarranted invasion of personal privacy' under section 92F-13(1), Hawaii Revised Statutes." OIP OP. Ltr. No. 89-10 at 2 (Dec. 12, 1989).

In Opinion Letter No. 92-21, the OIP opined that:

> unless information in a settlement agreement is itself protected from disclosure by one of the exceptions in section 92F-13, Hawaii Revised Statutes, a confidentiality provision or clause in a settlement agreement to which the State or a county is party must yield to the provisions of the UIPA, because such a clause or provision would be void as against public policy. It must be made available for public inspection and copying upon request, notwithstanding the fact that such settlement agreement contains mutual promises of confidentiality.

OIP Op. Ltr. No. 92-21 at 6 (Oct. 27, 1992).

In Opinion Letter No. 94-17, the OIP opined that the information contained in a termination for convenience settlement proposal[9] was subject to disclosure under the UIPA. The information had to do with government purchasing information. In that circumstance, the private parties to the settlement proposal did not supply the agency or the OIP with meaningful evidence that would protect the information from disclosure under 92F-13, Hawaii Revised Statutes. The OIP therefore concluded that the termination for convenience settlement proposal was a public document. OIP Op. Ltr. No. 94-17 at 11, 16 (Sept. 12, 1994).

The Supreme Court of Hawaii has held that a confidentiality agreement that prevents a government agency from performing its duties under the UIPA is unenforceable. State of Hawaii Organization of Police Officers v. Soc. of Professional Journalists, 83 Haw. 378, 406 (1996) ("SHOPO"). In SHOPO, the Society of Professional Journalists requested police disciplinary records. The union representing the police, SHOPO, argued that its bargaining agreement with the City and County of Honolulu prevented the release of the disciplinary records. The Supreme Court of Hawaii stated:

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[9] This settlement had to do with claims against the City and County of Honolulu ("City") filed by Oahu Transit Group Joint Venture ("OTG"). The City had notified OTG that it was terminating a contract between the City and OTG "for convenience," and, pursuant to the contract, OTG was entitled to submit a termination claim. OIP Op. Ltr. No. 94-17 at p. 1-3 (Sept. 12, 1994).

> The interpretation . . .[that a collective bargaining agreement may preempt a statute] would . . . lead to an absurd result: the requirements of HRS chapter 92F and, in effect, all statutes, rules, or regulations, may be avoided or contradicted by private contractual agreement reached by collective bargaining. As this court recently noted, "[p]arties may not do by contract that which is prohibited by statute."

Id. at 404-405 (citation omitted).

B. The UH Has a Duty to Justify Withholding Access to the Settlement Agreement

It is the agency's burden to establish that a requested government record is protected from disclosure. OIP Op. Ltr. No. 94-17 at 9 (Sept. 12, 1994), citing Haw. Rev. Stat. §§ 92F-11(b) and 92F-15(c) (1993). The UIPA provides for judicial enforcement: "[a] person aggrieved by a denial of access to a government record may bring an action against the agency at any time within two years after the agency denial to compel disclosure." Haw. Rev. Stat. § 92F-15(a) (1993). When an aggrieved party brings a lawsuit, "[t]he agency has the burden of proof to establish justification for nondisclosure." Haw. Rev. Stat. § 92F-15(c) (1993).

The Legislature established the powers and duties of the OIP in section 92F-42, Hawaii Revised Statutes. The first of the listed powers and duties is a requirement that the OIP:

> [s]hall, upon request, review and rule on an agency denial of access to information or records, or an agency's granting of access.

In connection with the mandatory power to rule on agency denial of access, the OIP has followed the procedure established by the statutory scheme for judicial review, and required that agencies carry the burden of establishing that the requested record is protected from disclosure. See, also, OIP Op. Ltrs. No. 98-5 at 11 (Nov. 24, 1998); 98-4 (June 17, 1998); 95-21 at 8 n. 1 (Aug. 28, 1995); 95-5 at 3 n. 1 (Mar. 9, 1995); 94-18 at 10 (Sept. 20, 1994); 94-11 at 5 n.1 (June 24, 1994); 91-15 at 8 (Sept. 10, 1991).

In interpreting issues under the UIPA, the Legislature provided that the OIP should look to federal case law under the Freedom of Information Act ("FOIA") for guidance. OIP Op. Ltrs. No. 99-9 at 5 (Dec. 3, 1999) and 95-21 at 16 (Aug. 28, 1995). Under the federal law, as with the state UIPA,

> [a]n agency bears the burden to justify exemptions under FOIA . . . Among the reasons that . . . [justification] may be insufficient are a lack of detail and specificity, bad faith, and failure to account for contrary record evidence.

Campbell v. United States Dept. of Justice, 164 F.3d 20, 30 (D.C. Cir. 1998).

C. The UIPA Must Be Applied to Promote the Public Interest in Disclosure

The OIP has concluded that the UIPA must be "liberally construed to '[p]romote the public interest in disclosure, . . . and any doubts in the application of the UIPA's disclosure provisions must be resolved in favor of disclosure." OIP Op. Ltrs. No. 99-5 at 4 (Oct. 19, 1999), No. 90-20 at 6 (June 12, 1990).

Under the UIPA, there are five categories of exceptions to the general rule of disclosure. An agency has discretion to withhold records: (1) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy (unless the public interest in disclosure outweighs the privacy interest of the individual); (2) 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) records that must be confidential, by their nature, in order for the government to avoid the frustration of a legitimate government function; (4) records protected by disclosure pursuant to State or federal law, including any order of any State or federal court; and (5) certain legislative materials, such as records of investigating committees closed pursuant to legislative rules and drafts of worksheets, reports, and legislators' personal files. Haw. Rev. Stat. §§ 92F-13 (1993), 92F-14 (Supp. 2001).

The UH has alleged that the 92F-13(1), (2) and (3) give the UH the discretion to withhold the Settlement Agreement from disclosure.

1. Clearly Unwarranted Invasion of Personal Privacy.

Counsel for UH alleged that Dr. Yanagimachi may have a privacy interest. Neither the UH nor Mr. Meyer identified what specific information carried a significant privacy interest. Although section 92F-14(b), Hawaii Revised Statutes, lists the types of privacy interests that would justify withholding access to a government record, the UH did not cite a specific, privacy interest.

The UIPA recognizes that certain types of information carry significant privacy interests. These include financial and medical information. See 92F-14(b)(1)(6), Hawaii Revised Statutes. This information may be disclosed to the public, however, when the public interest outweighs the privacy interest.

In balancing the privacy right of an individual against the public interest in disclosure under the UIPA, the public interest to be considered is that which sheds light upon the workings of government. See OIP Op. Ltrs. No. 98-5 at 18 (Nov. 24, 1998); No. 97-10 (Dec. 30, 1997); No. 95-24 at 11-13 (Oct. 6, 1995); No. 95-14 at 11 (May 8, 1995); : 95-10 at 7-8 (May 4, 1995).

The OIP discussed privacy interests in connection with financial information in OIP Opinion Letter Number 97-3. The question there was whether or not the names of donors to the University of Hawaii Foundation and the amounts of the donation would shed significant light upon the conduct of the University of Hawaii Foundation or its officials. The balancing test was applied. In that test, the Legislature directed that:

> [o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure. If the privacy interest is not "significant," a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy.

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

Therefore, in OIP Opinion Letter Number 97-03, the OIP determined that, as there was no relation between the names of the donors and the amounts donated and the workings of a government agency, the information was not required to be disclosed.

In OIP Opinion Number 95-14, the OIP was asked to decide if the fact that certain confidential financial disclosures were filed, with the Maui County Board of Ethics, was public information. By law, these disclosures are not public record. The OIP was asked to decide if the fact of filing and the date of filing was information that was required to be made available for public inspection and copying. The OIP determined that it was, applying the balancing test, as the OIP "believe[s] there is a strong public interest in the disclosure of the names of the individuals who have filed and the dates of such filings because this would show whether they are complying with the filing requirements and whether the agency responsible for monitoring their

compliance is performing this duty." OIP Op. Ltr. No. 95-14 at 11 (May 8, 1995). Thus, even though the financial disclosures were not, in and of themselves, public documents, the publics right to know entitled it to information as to the fact of filing and the date of filing.

Here, the only submission mentioned a privacy interest of Dr. Ryuzo Yanagimachi, and did not explain the specific privacy interest alleged to have been protected from disclosure. No privacy interest of Mr. Perry nor Mr. Felix was claimed. The Settlement Agreement, since it concerned a dispute as to ownership of the rights to certain inventions alleged to have been made by Mr. Perry while employed by the UH, concerns the disclosure of information related to whether the UH or Mr. Perry owns the rights to certain inventions. There is a strong public interest in disclosure of government purchasing information. Section 92F-12(3), Hawaii Revised Statutes, requires the disclosure of "[g]overnment purchasing information, including all bid results, except to the extent prohibited by section 92F-13."[10] The ownership of such inventions is sufficiently similar to government purchasing information, that there is a strong public interest in disclosure of the ownership of such inventions.

Based upon an *in camera* review, the Settlement Agreement contains no information which is clearly identifiable to Dr. Yanagimachi, nor any information which implicates a privacy interest of any individual. Therefore, the OIP cannot conclude that Dr. Yanagimachi has a privacy interest in the Settlement Agreement. Moreover, the OIP concludes that the public interest in disclosure of the Settlement Agreement is significant. Therefore, it is not

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[10] The OIP has previously noted that section 92F-12(a)(3), Hawaii Revised Statutes, was included in the UIPA largely as a result of the recommendations set forth in Vol. I of the Report of the Governor's Committee on Public Records and Privacy (1987). With respect to government purchasing information, this report states:

> Also raised was the availability of government spending information. The basic thrust is that anytime taxpayer money is spent, the taxpayers have a right to see how it was spent. . . . such information should be available to monitor abuse. . . . There is also, however, a desire to ensure that all State and county purchasing information is available . . . As a Committee member put it: "Government should never stop short of complete openness in this area." If for no other reason, taxpayers need the assurance of knowing that this information is accessible. Moreover, it is unlikely that this information should be much of a concern and vendors who do business with the state should not have an expectation of privacy as to that sale.

Vol. I, Report of the Governor's Committee on Public Records and Privacy at 114 (1987) (emphasis in original).

protected from disclosure as a "[g]overnment record which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (1993).

2. Government Records Pertaining to the Prosecution or Defense of Any Judicial or Non-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

The UH has stated that there is concern that the UH's licensee, ProBio, may be involved in federal patent litigation. This possible lawsuit is cited as the one basis for withholding the Settlement Agreement under section 92F-13(2), Hawaii Revised Statutes. Parties may obtain discovery regarding "any matter, not privileged, which is relevant to the subject matter" in a lawsuit. Haw. R. Civ. P. 26(b). The OIP has previously opined in OIP Opinion Letter Number 98-3 that impressions and recommendations of an attorney are attorney work product protected from disclosure, with the exception that factual information within those records previously made available must be segregated. See, also, OIP Op. Ltr. No. 01-05 (Dec. 14, 2001).

The OIP has reviewed the Settlement Agreement and finds that it consists of standard settlement language and does not contain any "mental impressions, conclusions and opinions." Haw. R. Civ. P. 26(b)(3). Nor does it appear to be "prepared in anticipation of litigation." OIP Op. Ltr. No. 01-05 at 4 (Dec. 14, 2001).

In this case, the UH stated that its current licensee, ProBio, might be involved in federal patent litigation. The UH did not provide any other information or explanations. The OIP has previously stated that the "application of the UIPA's exceptions should not rest upon tenuous, conclusory, or speculative arguments." OIP Op. Ltr. No. 93-5 at 14 (June 14, 1993). Therefore, as the UH has provided a tenuous, conclusory, speculative statement unsupported by any argument, the OIP concludes that the UH has failed to meet its burden of justifying non-disclosure of the Settlement Agreement as a "[g]overnment record 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." Haw. Rev. Stat. § 92F-13(2) (1993).

3. Frustration of A Legitimate Government Function

The UH claims that the Settlement Agreement should be withheld from discovery because it is a "[g]overnment record that, by ... [its] nature,

must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (1993). The UH did not address what government function would be frustrated and how disclosure would frustrate that function.

Examples of records that may be withheld due to frustration of a legitimate government function found in the Legislative History are:

(1) Records or information compiled for law enforcement purposes;

(2) Materials used to administer an examination which, if disclosed, would compromise the validity, fairness or objectivity of the examination.

(3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining.

(4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;

(5) Administrative or technical information, including software, operating protocols and employee manuals, which, if disclosed would jeopardize the security of a record-keeping system;

(6) Proprietary information, such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;

(7) Trade secrets or confidential commercial and financial information;

(8) Library, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed by the contributor; and

> (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. 1095 (1988).

An agency's burden is to articulate why a record is exempt from disclosure. OIP Op. Ltr. No. 94-17 at 9 (Sept. 12, 1994), citing Haw. Rev. Stat. §§ 92F-11(b) and 92F-15(c) (1993). The Legislature, in setting out the above list, simplified the agency's task by providing specific, concrete examples of the types of information that would allow an agency to invoke the "frustration" exception. As stated in OIP Opinion Letter Number 01-02, at p. 6:

> [t]he factual situation will vary depending upon the records, their uses and value, and the government function at issue, and the records' eligibility to be withheld will vary with the factual situation. A conclusory statement by the agency is not a substitute for specific facts pertaining to the records at issue.

The UH has not provided sufficient evidence to justify withholding access to the Settlement Agreement under the frustration of a legitimate government function exception. As the UH has failed to provide specific reasons for nondisclosure of the Settlement Agreement, the OIP must find that the "frustration" exception does not apply.

The OIP has determined that none of the three cited exceptions to disclosure apply to the Settlement Agreement. The OIP has determined that Dr. Yanagimachi has no privacy interest in the Settlement Agreement and that the public interest in its disclosure is significant. The OIP has determined that the Settlement Agreement does not contain impressions or recommendations of an attorney, nor does it appear to be prepared in anticipation of litigation. The OIP has determined that the UH did not provide specific examples of how disclosure of the Settlement Agreement would frustrate the UH from its performance of its legitimate government functions, and that it therefore it must disclose the Settlement Agreement.

E. The UIPA and Private Confidentiality Agreements

The OIP advises that, before a government agency enters into a confidentiality agreement with a member of the public, the agency should first establish whether the confidentiality agreement would require the

agency to fail to perform its duty to disclose government records under the UIPA.[11]

In SHOPO v. Soc. of Professional Journalists, 83 Haw. 378, 405, 927 P.2d 386 (1996) ("SHOPO") the Supreme Court of Hawaii held that "a public employer is not free to bargain with respect to a proposal which would authorize a violation of a statute."

In SHOPO, the Society of Professional Journalists sought, pursuant to chapter 92F, Hawaii Revised Statutes, to obtain information concerning suspended or discharged Honolulu Police Department ("HPD") officers. A collective bargaining agreement in effect between the HPD and its union, State of Hawaii Organization of Police Officers, prohibited the release of the requested information. The Court held that the confidentiality provision of the collective bargaining agreement was unenforceable, as it prevented the HPD from performing its duties under the UIPA. Id. at 406.

The SHOPO Court stated:

> [w]ith respect to public records statutes, the virtually unanimous weight of authority holds that an agreement of confidentiality cannot take precedence over a statute mandating disclosure.

Id. at 405-406 (citations omitted).

The OIP has also opined that a government agency cannot bargain away its duties under the UIPA, nor can an agency require a record requester to assume responsibility and hold the State harmless in any civil suit arising from the misuse of the requested information. See OIP Op. Ltrs. No. 99-03 at 17 (June 1, 1999); No. 92-21 at 6-7 (Oct. 27, 1992); No. 90-39 (Dec. 31, 1990); No. 89-10 (Dec. 12, 1989). .

In a case citing to SHOPO with approval, the North Dakota Supreme Court reached the same result as the SHOPO Court. Toth v. Disciplinary Board of the Supreme Court of North Dakota, 562 N.W.2d 744 (1997), involved an assistant attorney general, JoAnn Toth, who was admonished by the state disciplinary board for disclosing information from a settlement agreement with a confidentiality clause. The attorney for a party to the

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[11] For future reference, agencies should refer to the index of OIP opinion letters, available at the OIP's website, www.state.hi.us/oip, for assistance, before entering into confidential agreements with a member of the public.

settlement agreement filed a grievance against Ms. Toth. On appeal, the Court found the confidentiality clause could not bind Ms. Toth, who had responded to a press inquiry with information contained in a settlement agreement between a state agency and a member of the public. The North Dakota Supreme Court stated:

> [t]he confidentiality clause says the "Settlement Agreement is considered confidential except as otherwise provided by North Dakota law . . . ." North Dakota's open records law provides that, unless specifically exempted by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state are "open and accessible for inspection during reasonable office hours."

Toth at 748 (citations omitted).

In Toth, the attorney that filed the grievance agreed with Ms. Toth that a government agency cannot "circumvent the open records law with a confidentiality clause in a settlement agreement." Id. at 749. The Court therefore dismissed the complaint, and rejected the argument that there could be an "implicit" agreement.

In the instant case, the Settlement Agreement contains a contract clause indicating that its drafters were well aware that confidentiality clauses cannot circumvent any State law. According to UH's counsel, the:

> settlement agreement . . . contains the following language to insure that the University was not acting contrary to the law. "Furthermore, that the only exceptions are that such information can be revealed to only to each parties' officers, managers, directors, regents, accountants and attorneys, and such other parties as approved by any court **or as required by law**."

Letter from Bert T. Kobayashi, Jr. to Moya T. Davenport Gray dated December 27, 2001 (emphasis in original).

That such confidentiality agreements are impermissible insofar as they go against state law is well founded; the following cases support this proposition: Washington Post Co. v. United States Dept. of Health and Human Servs., 690 F.2d 252, 263 (D.C. 1982); Anchorage School Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989); Picton v. Anderson Union High School, 50 Cal. App. 4th 726, 57 Cal. Rptr. 2d 829, 832-

833 (1996); Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal. App. 3d 893, 205 Cal. Rptr. 92, 102 (1984); Denver Pub. Co. v. University of Colo., 812 P.2d 682, 685 (Colo.Ct.App. 1990); Lieberman v. State Bd. of Labor Rels., 216 Conn. 253, 579 A.2d 505, 511 (1990); Mills v. Doyle, 407 So.2d 348, 350 (Fla.Ct.App. 1981); Guy Gannett Pub. v. University of Maine, 555 A.2d 470, 473 (Me. 1989); Anonymous v. Board of Educ. for the Mexico Cent. School Dist., 162 Misc.2d 300, 616 N.Y.S.2d 867, 870 (1994); Toledo Police Patrolmen's Ass'n, Local 10, IUPA v. City of Toledo, 94 Ohio App.3d 734, 641 N.E.2d 799, 802 (1994); State ex rel. Sun Newspapers v. Bd. of Edu., 76 Ohio App. 3d 170, 601 N.E.2d 173, 175 (1991); Trombley v. Bellows Falls Union High School Dist. No. 27, 160 Vt. 101, 624 A.2d 857, 862 (1993); Morning Call, Inc. v. Lower Saucon Tp., 156 Pa. Commw. 397, 627 A.2d 297, 299-300 (1993); Yakima Newspapers, Inc. v. City of Yakima, 77 Wash. App. 319, 890 P.2d 544, 547 (1995); Journal/Sentinel v. School Bd. of Shorewood, 186 Wis. 2d 443, 521 N.W.2d 165, 171 (Ct.App. 1994).

Based on the above, the OIP opines that the confidentiality provision contained in the Settlement Agreement is unenforceable in that the provision would require the UH to violate Hawaii's open records law. It is the provisions of chapter 92F, Hawaii Revised Statutes, and not the provisions of an agreement between the public sector and the private sector, which govern access to Settlement Agreements.

PART III – IN CAMERA REVIEW

I. GOVERNMENT AGENCIES' DUTIES WITH RESPECT TO *IN CAMERA* REVIEW

Upon receiving a request from Mr. Ruel for assistance to obtain the Settlement Agreement and for an advisory opinion regarding the public's right to know and responsibilities of the UH, the OIP, on November 30, 2001, advised the UH to provide the Settlement Agreement to OIP for *in camera* review, under section 92F-42(5), Hawaii Revised Statutes (Supp. 2001). On December 5, 2001, the UH refused, stating that the Settlement Agreement could not be disclosed, even for *in camera* review, because of the confidentiality clause.

Sections 92F-42(4) and (5), Hawaii Revised Statutes, provide:

The director of the office of information practices:

. . .

> (4) May conduct inquiries regarding compliance by an agency and investigate possible violations by an agency.
>
> (5) May examine the records of any agency for the purpose of paragraph (4) and seek to enforce that power in the courts of this State.

Haw. Rev. Stat §92F-42 (Supp.2001)

These provisions permit the director of the office of information practices to perform duties as set out in section 92F-42(1), Hawaii Revised Statutes, which provides:

> The director of the office of information practices:
> (1) Shall, upon request, review and rule on an agency denial of access to information or records, . . .

Haw. Rev. Stat. § 92F-42(1) (Supp. 2001).

Simply stated, when a member of the public is denied access to a government record, upon request, the OIP is required to rule on that denial, and may review the record to determine if the agency has properly withheld the record in question.

As a result of the UH's initial refusal on December 5, 2001 to deliver the Settlement Agreement for *in camera* review, the OIP was prevented from performance of these statutory duties. While not explicit, under the statutory scheme adopted in chapter 92F, Hawaii Revised Statutes, agencies have a duty to turn documents over to OIP for review. Certainly, if the OIP is to examine a record, the agency must provide that record for review.

While the UH did eventually, and after a threat of a lawsuit, turn over the Settlement Agreement to the OIP for *in camera* review, the initial refusal by UH was unwarranted. The resources of the OIP and the AG were needlessly consumed by this initial failure to provide the Settlement Agreement to the OIP for an *in camera* review.

CONCLUSION

The UH followed proper procedure in its response to Mr. Ruel's record request. The OIP requested a copy of the Settlement Agreement for *in camera* review, and the UH initially refused. That initial refusal was not in compliance with the UIPA. The subsequent delivery of the Settlement

Agreement to OIP's counsel complied with the UIPA. However, as the UH failed to meet its burden to proof to support the legal and factual bases for withholding access to the public of the Settlement Agreement, the OIP concludes that the UH must make the record available for public inspection and copying.

Finally, the OIP concludes that, unless one of the exceptions to disclosure contained in section 92F-13, Hawaii Revised Statutes, applies, government agencies may not enter into settlement agreements that contain agreements of confidentiality.

Very truly yours,

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Staff Attorney

APPROVED:

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Director

SRK:abs

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