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The Office of Information Practices (OIP) is authorized to issue decisions and advisory opinions under the Uniform Information Practices Act (Modified), Hawaii Revised Statutes (HRS) chapter 92F (2012) (the UIPA), pursuant to HRS §§ 92F-27.5 and 92F-42 (2012), and Hawaii Administrative Rules (HAR) chapter 2-73 (2012).

DECISION

Requester: Mr. Carroll Cox
Agency: Department of Planning and Permitting
City and County of Honolulu
Date: June 5, 2014
Subject: Denial of Access to a Corporation Counsel Opinion (APPEAL 11-26)

REQUEST FOR DECISION

Requester asked whether the Department of Planning and Permitting, City & County of Honolulu (DPP), is required by the UIPA to disclose an opinion issued by the Department of the Corporation Counsel, City & County of Honolulu (Corporation Counsel), regarding the permitted uses of the "Waikele Caves" and upon which DPP relied to issue a Notice of Violation.

Unless otherwise indicated, this determination is based solely upon the facts presented in an e-mail from Requester to OIP dated April 25, 2011 that included an e-mail from DPP's former Director of Planning and Permitting, Mr. David K. Tanoue, dated April 25, 2011; a letter from DPP to OIP dated May 10, 2011; a memorandum from the Corporation Counsel to Mr. Tanoue dated March 12, 2010 (Memorandum) that DPP provided to OIP for its *in camera* review; and a telephone conversation with DPP's Director, Mr. George Atta, on April 3, 2014.

QUESTIONS PRESENTED

1. Whether the Memorandum is subject to mandatory disclosure under section 92F-12(a)(1) or (2), HRS.

2. Whether the Memorandum contains communications protected by the attorney-client privilege, as recognized under the UIPA's exceptions to public disclosure of government records at section 92F-13(2), (3), and (4), HRS.

3. Whether any privilege protecting confidential communications from disclosure was waived by OIP's *in camera* review.

BRIEF ANSWERS

1. No. The Memorandum is not subject to mandatory disclosure under section 92F-12(a)(1) or (2), HRS.

2. Yes. The Memorandum contains confidential communications between DPP and the Corporation Counsel that are protected from disclosure by the attorney-client privilege under Rule 503, Hawaii Rules of Evidence (HRE), and, as such, are also protected from public disclosure under section 92F-13(2), (3) and (4), HRS.

3. No. DPP did not voluntarily waive the attorney-client privilege, which protects the Memorandum from disclosure under Rule 503, HRE, because DPP was required by the UIPA to provide the Memorandum to OIP for an *in camera* review. Moreover, the mandatory disclosure of the Memorandum by DPP to OIP for an *in camera* review is, in itself, a privileged communication under Rule 502, HRE, and not subject to waiver under Rule 511, HRE. Consequently, the Memorandum is protected from disclosure under OIP's administrative rules at subsections 2-73-15(c) and (d), HAR, and the UIPA at section 92F-13(2) and (4), HRS.

FACTS

Requester filed a complaint with DPP that asked DPP to investigate alleged unauthorized uses of the "Waikele Caves." Requester was subsequently informed by DPP that it would seek an opinion from the Corporation Counsel regarding the complaint. DPP thereafter issued a Notice of Violation (NOV) dated October 4, 2010 to the "Department of the U.S. Navy, Naval Facilities Engineering Command Pac" (Navy) and to the Ford Island Ventures, LLC (FIV), as the owner and lessee, respectively, for a zoning violation on property located at 94-990 Pakela Street (Property) and within a district zoned for preservation use. The Carroll Cox Show: 1080 AM, Podcast, Sunday, April 24, 2011,http://carrollcox.com/show042411.htm; NOV, http://carrollcox.com/Documents/Waikele%20NOV%20803788.pdf (both last

visited May 1, 2014). In a letter dated December 3, 2010 from Deputy Corporation Counsel Don S. Kitaoka to Messrs. Edward E. Case, Esq., and R.G. Ress, Office of Counsel, Naval Facilities Engineering Command Pacific, the Navy was informed that the NOV was withdrawn because FIV's lease of the Property was for the express purpose of furthering a federal interest. http://carrollcox.com/Documents/Waikele%20NOV%20withdrawal.pdf (last visited May 1, 2014).

Requester requested from DPP a copy of the Corporation Counsel opinion it relied on to issue the NOV. In an e-mail dated April 25, 2011, DPP denied Requester's request for a copy of the Corporation Counsel's opinion relating to the land use jurisdiction of the "Waikele Gulch."[1] DPP's e-mail of April 25, 2011 stated:

> This is to confirm that your request for a copy of the Corporation Counsel's opinion to the department relating to the land use jurisdiction of the Waikele Gulch is respectfully denied. The opinion from the corporation counsel is confidential attorney-client communication between the department and its attorney.

In response to DPP's claim that the Memorandum is a confidential attorney-client communication, Requester stated in his e-mail dated April 25, 2011 that the Memorandum should be disclosed because "[t]here are no lawsuits" and "no enforcement action" and that there are "hundreds of Corporation Counsel opinions regarding land use laws on file and available for viewing by the public." DPP reaffirmed its position in a letter to OIP dated May 10, 2011, that the Corporation Counsel's opinion was a "confidential attorney-client communication" and further stated as follows:

> Moreover, this opinion was prepared in anticipation of the landowner taking an adversarial position against the City.
>
> For your information, the City has in the past released selected opinions by [the Corporation Counsel]; however, in these limited situations, the agency-clients consented to the release. The DPP will not consent to the release of the confidential opinion by our attorney.

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[1] To the extent that DPP responded to the Requester's document request related to the "Waikele Caves" by referring to the "Waikele Gulch," OIP understands that the "Waikele Caves" are within the land parcel DPP identified as the "Waikele Gulch." The Waikele Gulch land parcel appears to be the location where an explosion and fire occurred inside an underground storage bunker that killed five employees of Donald Enterprises while they were taking apart commercial grade fireworks on April 8, 2011. Hawaii News Now, "State Completes Investigation Into Waikele Bunker Explosion" (September 30, 2011), http://www.hawaiinewsnow.com/story/15592160/state-completes-investigation-into-waikele-bunker-explosion (last visited May 1, 2014). The NOV was dated October 4, 2010, prior to the explosion and fire that occurred on April 8, 2011.

In response to OIP's request for an *in camera* review of the Corporation Counsel's opinion, DPP provided a copy of the Memorandum that included a heading identifying it as a "CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT COMMUNICATION DO NOT CIRCULATE."

DISCUSSION

I. The Memorandum is Not Subject to Mandatory Disclosure Under the UIPA.

The UIPA prescribes various categories of government records that shall be made available for public disclosure, notwithstanding any UIPA exception to such disclosure. Section 92F-12, HRS, requires, as a matter of law, the mandatory disclosure of any agency statement of general policy or interpretation of general applicability and also any final opinion made in the adjudication of cases, as it states in pertinent part:

> **§92F-12 Disclosure Required.** (a) Any other provision in this chapter to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:
>
> (1) Rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency;
>
> (2) Final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases, except to the extent protected by section 92F-13(1)[.]

HRS § 92F-12(a)(1), (2) (2012). See, e.g., OIP Op. Ltr. No. 90-34 (discussing Department of Public Safety Manual containing interpretative statements that explain, clarify or implement existing statutes or regulations); OIP Op. Ltr. No. 90-40 at 1 (concluding that lease rent arbitration awards by an agency constituted "final opinions" or "orders made in adjudication of cases").

Upon an *in camera* review of the Memorandum, OIP confirmed DPP's assertion that the Memorandum is not a statement of general policy nor is it an interpretation of general applicability adopted by DPP, as the Memorandum was limited to the facts presented and only related to the Waikele Gulch. Additionally, the Memorandum was not a final opinion made by DPP while acting in a quasi-

judicial or adjudicatory capacity that determined the legal rights, duties, privileges or other legal interests of specific persons. See OIP Op. Ltr. No. 90-40 at 9-11.

Consequently, OIP finds disclosure of the Memorandum is not required under section 92F-12(a)(1) and (2), HRS, or any other provision of the UIPA requiring mandatory disclosure as a matter of law.

II. The Memorandum Contains Confidential Communications Subject to the Attorney-Client Privilege that are Protected from Public Disclosure by the UIPA.

The attorney-client privilege is codified by chapter 626, HRS, in Rule 503, HRE, which provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," where the confidential communications were made between the client and the client's attorney or their respective representatives. Rule 503(b), HRE; see Save Sunset Beach Coalition v. City and County of Honolulu, 102 Haw. 465, 484-85, 78 P.3d 1, 21-22 (2003) (citing Sapp v. Wong, 62 Haw. 34, 38, 609 P.2d 137, 140 (1980), which described how an attorney-client communication becomes privileged).[2]

In Opinion Letter Number 91-23, OIP discussed how government records covered by the attorney-client privilege are treated under the UIPA as follows:

> The attorney-client privilege was developed to promote full and complete freedom of consultation between clients and their legal advisors without fear of compelled disclosure, except with the client's consent. The privilege is applicable to communications from the

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[2] In holding that a county council's executive session minutes need not be disclosed under the UIPA, the Hawaii Intermediate Court of Appeals (ICA) also cited the importance of the attorney-client privilege by stating:

> The ability of a public body to confer freely with its counsel is so critical that even where the open meeting law did not specifically provide for such protection, one court has held that "[w]hile exceptions to right-to-know legislative provisions are to be strictly construed, the right of a public agency privately to consult legal counsel on the settlement or avoidance of litigation is an activity properly excepted from the right-to-know acts. A public agency should neither be given an advantage, nor placed at a disadvantage in litigation."

County of Kauai vs. OIP, 120 Haw. 34, 45, 200 P.3d 403, 414 (2009), aff'd, No. 29059, Hawaii Supreme Court, 2009 WL 1783770 (2009) (citing ICA's dicta in O Ko'Olau v. Pacarro, 4 Haw. App. 304, 313-14, 666 P.2d 177, 184-84 (1983), which quoted Port of Seattle v. Rio, 16 Wn. App. 718, 724, 559 P.2d 18, 22 (1977)).

> attorney to the client, as well as communications to the attorney from the client.
>
> This privilege is also unquestionably applicable to the relationship between government attorneys and government agencies and administrative personnel. The protection of communications made in confidence between an attorney and a governmental client serves an important public policy purpose.

OIP Op. Ltr. No. 91-23 at 8-9 (citations omitted) (concluding that letters of advice and counsel by the Department of the Attorney General to the Environmental Council were protected from disclosure by the attorney-client privilege).

Opinion Letter Number 91-23 determined that various UIPA exceptions to disclosure of government records recognize the attorney-client privilege. Section 92F-13(2), HRS, provides an exception for "[g]overnment 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" as under the attorney-client privilege. Section 92F-13(3), HRS, provides an exception for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function" such as the attorney-client privilege. Section 92F-13(4), HRS, excepts "[g]overnment records, which, pursuant to state or federal law. . . are protected from disclosure" as under the attorney-client privilege. OIP Op. Ltr. No. 91-23 at 8-9.

In its letter dated May 10, 2011, DPP advised OIP that the Memorandum "was prepared in anticipation of the landowner taking an adversarial position against the City." OIP's *in camera* review of the Memorandum confirms that a legal analysis was provided by the Corporation Counsel to DPP, as its government client,[3] for the purpose of determining DPP's powers, duties, privileges, immunities and liabilities in preparation for the prosecution or defense of an action in which DPP may be a party.

Consequently, OIP concludes that the Memorandum contains confidential and privileged attorney-client communication under Rule 503, HRE, which is protected from public disclosure under section 92F-13(2), (3) and (4), HRS.[4]

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[3] The Corporation Counsel is the chief legal adviser and legal representative of all agencies of the City and County of Honolulu, according to section 5-203, the Revised Charter of the City and County of Honolulu.

[4] Documents prepared by an attorney in anticipation of litigation are an attorney's work product and as such deemed a privileged matter not subject to discovery. Hawaii Rules of Civil Procedure Rule 26(b)(3) (1980); see also OIP Op. Ltr. No. 01-05 (concluding that a legal memorandum prepared by a deputy attorney general in

III. DPP's Disclosure of the Memorandum to OIP for *In Camera* Review did Not Operate as a Voluntary Waiver of the Attorney-Client Privilege Under Rule 511, HRE, and is, in Itself, a Privileged Communication Under Rule 502, HRE, Protected from Disclosure.

Although the attorney-client privilege protecting the disclosure of information is provided by law, it can be voluntarily waived. OIP Op. Ltr. No. 91-23 at 9-10). If any privilege protecting a government record from public disclosure is found to have been waived, then the UIPA would require the disclosure of the record so long as no other exception applies.

Rule 511, HRE, recognizes that the waiver of a privilege protecting a confidential communication applies when the disclosure was voluntary but that the waiver does not apply when the disclosure itself was a privileged communication, and states:

> **Rule 511 Waiver of privilege by voluntary disclosure.** A person upon whom these rules confer a privilege against disclosure waives the privilege if, while the holder of the privilege, the person or the person's predecessor voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is a privileged communication.

HRE Rule 511 (1993) (emphases added); see Save Sandy Beach Coalition v. City and County of Honolulu, 102 Haw. at 486, 78 P.3d. at 22 (rejecting the traditional test of waiver by inadvertent disclosure when Rule 511, HRE, provides that a disclosure must be voluntary).

DPP has consistently asserted its attorney-client privilege over the Memorandum, and OIP is not aware of any conduct by DPP indicating any circumstance reflecting a voluntary waiver of its attorney-client privilege. In response to OIP's request for an *in camera* review, DPP provided the Memorandum which included the heading: "CONFIDENTIAL AND PRIVILEGED ATTORNEY-CLIENT COMMUNICATION DO NOT CIRCULATE." DPP's continued assertion of its attorney-client privilege evidenced its clear intent to not waive the privilege by complying with OIP's request for *in camera* review of the documents.

While some courts have held that a client may waive the attorney-client privilege by voluntarily disclosing the confidential communication to the government as part of a government investigation of the client,[5] DPP's disclosure

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anticipation of litigation was properly withheld under HRS § 92F-13(2)). While the work product privilege may also be applicable, it is unnecessary to resolve this case.

[5] See In re Steinhardt Partners, L.P., 9 F.3d 230 (2d Cir. 1993) (involving a voluntary disclosure as part of SEC investigation); Pacific Pictures

here was mandated by law and was not voluntary, as will be further discussed below. Moreover, regardless of any waiver, the disclosure by DPP of the Memorandum to OIP for an *in camera* review was itself a privileged communication between DPP and OIP under Rule 502, HRE, and not subject to waiver under Rule 511, HRE. See Boston Auction Co., Ltd. vs. Western Farm Credit Bank, 925 F. Supp. 1478, 1481 (D. Haw. 1996) (holding that the release of attorney-client communications by a bank to the bank examiner was a privileged communication in its own right).

Rule 502, HRE, recognizes a qualified privilege held by a person or entity to prevent the unauthorized disclosure of information that was required by law to be provided to a public agency. This rule further recognizes that the public agency receiving the information required by law to be provided to the agency similarly holds a qualified privilege to refuse the disclosure of the information it has received. Rule 502, HRE, states in relevant part:

> **Rule 502 Required reports privileged by statute.** A person, corporation, association, or other organization or entity, either public or private, making a return or report required by law to be made has a privilege to refuse to disclose and to prevent any other person from disclosing the return or report, if the law requiring it to be made so provides. A public officer or agency to whom a return or report is required by law to be made has a privilege to refuse to disclose the return or report if the law requiring it to be made so provides. . . .

HRE Rule 502 (1993) (emphases added).

The commentary to Rule 502, HRE, offers the following guidance:

> A number of Hawaii statutes requiring that reports be made or information be supplied incorporate provisions against unauthorized

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Corp. vs. USDC, 679 F.3d 1121 (9th Cir. 2012) (finding that an attorney did not assert the privilege nor redact
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confidential information when offered the opportunity during government investigation).

Cases involving disclosure in the course of a government investigation of the client are distinguishable because OIP is not conducting an investigation of DPP's actions arising from the matters discussed in the Memorandum, but is instead exercising its statutory obligation to "examine" DPP's records and to "rule" on DPP's assertion of the attorney-client privilege as the basis for its denial of access to the requested record under the UIPA. HRS § 92F-42(1) and (2). Thus, DPP provided the Memorandum to OIP for in camera review, not for the purpose of disclosing its substantive contents, but rather to allow OIP to assess DPP's assertion that the Memorandum is confidential under the attorney-client privilege.

> disclosure of such reports or information. This has the effect of creating a qualified privilege for the reporting party and for the recipient on the reporting party's behalf.

HRE Rule 502 cmt. (1993) (emphases added).

Section 92F-42, HRS, provides the statutory authority for OIP to require an agency to disclose the requested records as part of OIP's statutory duty to rule on an agency's compliance with the UIPA by examining the agency's records. HRS § 92F-42 (2012). Section 92F-42, HRS, enumerates the various powers and duties of OIP, stating in relevant part:

> **§92F-42 Powers and duties of the office of information practices**. 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, or an agency's granting access;
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> . . . .
>
> (4) May conduct inquiries regarding compliance by an agency and investigate possible violations by any agency;
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> (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;
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> . . . .
>
> (9) Shall review the official acts, records, policies, and procedures of each agency;
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> . . . .
>
> (18) Shall take action to oversee compliance with part I of chapter 92 by all state and county boards[.]

HRS § 92F-42 (2012). In order to conduct inquiries regarding compliance by an agency and investigate possible violations by any agency regarding the UIPA and Sunshine Law, section 92F-42(5), HRS, specifically gives OIP the judicially enforceable power to examine the records of any agency.[6]

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[6] OIP has the judicially enforceable power to examine agency records under both the UIPA and the Sunshine Law. The Sunshine Law, Part I of chapter 92, HRS, was enacted in 1975, and the Department of the Attorney General was given the authority to enforce it. However, it was apparent from the original language of the Sunshine Law that

While giving OIP the power to examine records, the UIPA also requires OIP to be subject to the same restrictions on disclosure to which the agency from whom the records have been received is subject. As section 92F-19(b), HRS, specifies, when an agency is authorized to provide government records to another agency, the receiving agency "shall be subject to the same restrictions on disclosure of the records as the originating agency." HRS § 92F-19(b) (2012).

Pursuant to its statutory authority under HRS §92F-42(12), OIP adopted administrative appeal rules under chapter 2-73, HAR (effective 2012), which prescribe the procedures for appealing an agency's denial of requested documents, including rules authorizing OIP to conduct an *in camera* review and requiring OIP to maintain the confidentiality of the documents being reviewed.[7] Section 2-73-15, HAR, authorizes OIP to require agencies to provide documents for *in camera* review, while providing for safeguards from disclosure, by stating in relevant part:

§2-73-15 Other procedures for appeal.

. . . .

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it was not designed to accommodate complaints from the public, except in a court setting. OIP did not exist at the time, and was not created until 1988 when the UIPA was enacted.
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In 1998, the Legislature increased OIP's open government responsibilities by requiring OIP to administer the Sunshine Law as well as the UIPA. Act 137, SLH 1998. Besides specifying in section 92-1.5, HRS, that OIP would be administering the Sunshine Law, OIP's powers enumerated in the UIPA were increased by the addition of section 92F-42(18), HRS, which requires OIP to oversee compliance with the Sunshine Law. By extending the powers set forth in the UIPA to also apply to OIP's Sunshine Law duties, the Legislature empowered OIP to resolve Sunshine Law complaints from the public, thus finally giving the public a mechanism to ensure compliance with the Sunshine Law without the requirement of filing a court action.

[7] Even before the adoption of chapter 2-73, HAR, in 2012, OIP's legal authority to require an *in camera* review of documents was unquestioned. In OIP Opinion Letter Number 02-01 at 25, OIP required the University of Hawaii to provide a settlement agreement for OIP's *in camera* review and opined that "under chapter 92F, Hawaii Revised Statutes, agencies have a duty to turn documents over to OIP for review." Similarly, in OIP Opinion Letter Number 04-07, footnote 3, OIP cited section 92F-42(5), HRS, as the statutory authority for OIP to conduct an *in camera* review of an evaluation of a University of Hawaii President.

Notably, in County of Kauai vs. OIP, 120 Haw. 34, 200 P.3d 403 (2009), aff'd, No. 29059, Hawaii Supreme Court, 2009 WL 1783770 (2009), the ICA had the opportunity to question OIP's authority to conduct an *in camera* review of an agency's executive meeting minutes, but did not do so, nor did it find that the Kauai County Council waived its attorney-client privilege by providing the minutes to OIP for *in camera* review.

(c) OIP may require any party to submit to OIP the original or a copy of one or more documents necessary for its ruling, including government records or minutes at issue in an appeal. OIP may examine the documents *in camera* as necessary to preserve any claimed exception, exemption, or privilege against disclosure.

(d) If OIP requires the agency to provide, for OIP's *in camera* review, documents that the agency asserts are protected by the attorney-client privilege as well as the relevant exception or exemption to disclosure, OIP shall:

(1) Review the record submitted solely for the purpose of assessing application of the claimed exception or exemption;
(2) Return or destroy the record as directed by the agency upon issuance of a final decision of the appeal; and
(3) Prevent the voluntary disclosure of the record or information contained in the record.

Upon request, OIP may allow an agency to provide such a record in redacted form for OIP's *in camera* review, if OIP determines that application of the exception or exemption may be determined by review of the redacted record.

HAR § 2-73-15.

Because DPP was required to comply with OIP's legal authority to conduct an *in camera* review of the Memorandum so that OIP could determine the applicability of any exceptions to disclosure in the UIPA, DPP did not voluntarily waive its attorney-client privilege under Rule 511, HRE, by disclosing the Memorandum to OIP for *in camera* review. Moreover, the required disclosure was itself a qualified privileged communication between DPP and OIP under Rule 502, HRE, and would not be subject to waiver under Rule 511, HRE. See Boston Auction Co., Ltd. vs. Western Farm Credit Bank, 925 F. Supp. 1478, 1481 (D. Haw. 1996).

As a privileged communication under Rule 502, HRE, the UIPA allows the Memorandum to be withheld from public disclosure. To the extent that Rule 502, HRE, would not allow the Memorandum to be discovered during the prosecution or defense of any judicial action in which DPP is or may be a party, section 92F-13(2), HRS, would likewise not require the public disclosure of the Memorandum as it would not be discoverable in the judicial action. Additionally, because Rule 502, HRE, as codified under chapter 626, HRS, is a state law preventing the disclosure of the Memorandum, section 92F-13(4), HRS, would similarly protect the public disclosure of the Memorandum as being protected from disclosure under state law.

OIP therefore concludes that DPP did not voluntarily waive its attorney-client privilege when it was required to disclose the Memorandum to OIP for an *in camera* review. The Memorandum is also protected from disclosure under the HRE Rule 502 privilege for reports required by statute as well as OIP's appeal rules requiring records provided for *in camera* review to be kept confidential under section 2-73-15(d), HAR. Thus, OIP finds there was no waiver by DPP of the attorney-client privilege, and the Memorandum was properly withheld under the UIPA, sections 92F-13(2) and (4), HRS.

CONCLUSION

The Memorandum is not an interpretation of general applicability adopted by DPP or a final opinion rendered by DPP in an adjudicatory capacity, and thus, is not subject to mandatory disclosure under section 92F-12(a)(1) and (2), HRS.

During an *in camera* review of the Memorandum, OIP determined that it contains confidential communications protected from disclosure by the attorney-client privilege under Rule 503, HRE, and was properly withheld under the UIPA pursuant to section 92F-13 (2), (3), and (4), HRS.

Because the Memorandum was required by the UIPA to be provided by DPP to OIP for *in camera* review, DPP did not voluntarily waive its attorney-client privilege under Rule 511, HRE. Moreover, regardless of any waiver, the required disclosure of the Memorandum by DPP to OIP was itself a privileged communication under Rule 502, HRE, that can be withheld under section 92F-13 (2) and (4), HRS.

Therefore, the Memorandum may be withheld from public disclosure under the UIPA.

RIGHT TO BRING SUIT

Requester is entitled to seek assistance from the courts when Requester has been improperly denied access to a government record. HRS § 92F-42(1). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d) and (f) (2012). For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This opinion constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review

is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR.

This letter also serves as notice that OIP is not representing anyone in this request for opinion. OIP's role herein is as a third party neutral.

OFFICE OF INFORMATION PRACTICES

_____
Winfred Pong
Staff Attorney

APPROVED:

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Cheryl Kakazu Park
Director