June 16, 1992

The Honorable John C. Lewin, M.D.
Director, Department of Health
Kinau Hale
1250 Punchbowl Street
Honolulu, Hawaii 96813

Attention: Francine Wai Lee, Executive Director
Commission on Persons with Disabilities

Dear Dr. Lewin:

Re: Document Reviews Prepared by the Commission on Persons with Disabilities

This is in response to your letter to the Office of Information Practices ("OIP") concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), Document Reviews prepared by the Commission on Persons with Disabilities ("Commission") must be made available for public inspection and copying upon request.

BRIEF ANSWER

The UIPA generally provides that all government records must be made available for public inspection and copying, upon request, unless protected from disclosure by one of the exceptions set forth in section 92F-13, Hawaii Revised Statutes. See Haw. Rev. Stat. □92F-11(b) (Supp. 1991).

A Document Review is a Commission prepared memorandum reviewing the plans for construction of any public building or

facility by the State or the counties. The Commission is concerned that the Document Reviews may possibly be used by future litigants against government agencies who believe that such agencies have failed to comply with federal laws requiring government buildings to be accessible to the disabled. While the UIPA does not require the disclosure of government records that would not be discoverable in a civil action to which the agency is or may be a party (section 92F-13(2), Hawaii Revised Statutes), a fear that a record may be relevant to future litigation is not, in and of itself, a valid exception to required agency disclosure under the UIPA.

Further, while the OIP has previously found that certain deliberative and predecisional inter-agency memoranda may be withheld under the UIPA's frustration of a legitimate government function exception, we do not believe that the Document Reviews constitute inter-agency memoranda protected by this exception. Although the Document Reviews are arguably predecisional and deliberative documents, disclosure would not chill the free exchange of ideas between the Commission and the agency. Because agencies are required by statute to submit their building plans to the Commission for review, it is highly unlikely that the disclosure of the Document Reviews would inhibit the Commission's recommendations regarding compliance with the Uniform Federal Accessibility Standards, 41 C.F.R. □101-19.6, Appendix A.

Our review of the remaining exceptions contained in section 92F-13, Hawaii Revised Statutes, reveals that none of the exceptions apply to the Document Reviews drafted by the Commission. In addition, it is important to note that the Commission made the Document Reviews available for public inspection before the adoption of the UIPA. The UIPA's legislative history specifically states that it was not the intent of the Legislature that the UIPA's exceptions be used to withhold access to records that were available before the adoption of the UIPA. Accordingly, we conclude that, under the UIPA, the Commission must make the Document Reviews available for public inspection and copying upon request.

FACTS

The Commission is a State agency attached to the Department of Health ("DOH") for administrative purposes only. The Commission reviews, evaluates, and assesses the needs of the disabled population and also collects information on activities, programs, laws, and standards relating to the disabled.

Pursuant to section 103-50, Hawaii Revised Statutes, the Commission on Persons with Disabilities also provides a written review of the plans for construction of any public building or facility by the State or the counties. Section 103-50, Hawaii Revised Statutes states in pertinent part:

> **§103-50 Building design to consider needs of handicapped.** (a) Notwithstanding any law to the contrary, all plans and specifications for the construction of public buildings and facilities by the State or any political subdivision thereof subject to this chapter shall be prepared so the buildings and facilities are accessible to and usable by the physically handicapped. The buildings and facilities shall conform to the Uniform Federal Accessibility Standards, 41 C.F.R. §101-19.6, Appendix A.
>
> (b) All agencies subject to this section shall seek advice and recommendation from the commission on the handicapped on any construction plans.

Haw. Rev. Stat. §103-50(a), (b) (Supp. 1991) (emphasis added).

After reviewing an agency's construction plans, the Commission drafts a Document Review that itemizes deficiencies and sets forth the Commission's recommendations for changes in the building design so that the building conforms with the Uniform Federal Accessibility Standards, 41 C.F.R. §101-19.6, Appendix A ("UFAS") requirements. A copy of the Document Review is given to the agency responsible for overseeing construction of the project ("responsible agency"), whereupon the responsible agency is required to respond, in writing, to each of the Commission's recommendations for changing the construction plans contained in the Document Review. See Haw. Administrative Directive No. 90-16.

However, because the Commission lacks enforcement powers, the responsible agency is not required to follow or execute the recommendations contained in the Commission's Document Reviews. Often, the changes recommended by the Commission result in increased construction costs and we are informed by the Commission that some agencies complete their construction projects without revising the construction plans as recommended by the Commission.

In some situations, where the construction plans do not conform to the UFAS, the responsible agency will seek a variance because it has provided an alternate means of access for the disabled. Pursuant to section 103-50.5(b), Hawaii Revised Statutes, the Architectural Access Committee, an entity separate from the Commission, has "the authority to vary specific requirements of section 103-50 when the variance will ensure an alternate design that provides equal access for persons with disabilities."

Although agencies submit their construction plans to the Commission during the Document Review process, these plans are returned to the respective agency upon completion of the Document Review and are not kept by the Commission. Therefore, this opinion will only address the disclosure of the Commission's Document Reviews. See OIP Op. Ltr. No. 90-20 (June 12, 1990) for a discussion of the public's right to inspect and copy building plans and building permit information.

The Commission's Document Reviews are kept on file at the Commission's office and, by Commission custom, have been made available for public inspection upon request. However, the DOH and the Commission have inquired whether the UIPA, which took effect July 1, 1989, contains any restrictions on the public disclosure of the Document Reviews. The DOH is concerned that someone may file a lawsuit against a government agency for failure to comply with the design standards set forth in the UFAS. The Commission's Document Reviews, which itemize possible deficiencies in the government agency's construction plans in relation to the UFAS, might be relevant to the issues raised in such a lawsuit.

DISCUSSION

The UIPA generally provides that "[a] ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. □92F-11(a) (Supp. 1991). Consequently, "[e] xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. □92F-11(b) (Supp. 1991).

Our review of the five exceptions listed in section 92F-13, Hawaii Revised Statutes, reveals that subsections (1) and (5) of section 92F-13, Hawaii Revised Statutes, do not apply to the facts presented. Further, our research has not revealed any statutes, State or federal, that protect the Document Reviews

from disclosure. Thus, we also conclude that section 92F-13(4), Hawaii Revised Statutes, which provides an exception to required agency disclosure for "[g] overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure," does not permit the Commission to withhold access to the Document Reviews.

Section 92F-13(3), Hawaii Revised Statutes, provides an exception to required agency disclosure 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." In previous advisory opinions, the OIP held that this UIPA exception permits agencies to withhold access to certain inter-agency and intra-agency memoranda. See OIP Op. Ltr. No. 90-8 (Feb. 12, 1990) (drafts and staff notes); OIP Op. Ltr. No. 90-21 (June 20, 1990) (consultant's report); OIP Op. Ltr. No. 91-16 (Sept. 19, 1991) (draft master plan); OIP Op. Ltr. No. 91-24 (Nov. 26, 1991) (interview panelists' notes).

In these advisory opinions, we stated that an inter-agency memorandum is protected from required disclosure when it is covered by the common law "deliberative process privilege." To be subject to this privilege, an inter-agency memorandum must be both "predecisional" and "deliberative."

In the OIP advisory opinions cited above, this office found that there are various policy reasons behind the "deliberative process privilege." In OIP Opinion Letter No. 90-8 (Feb. 12, 1990), we found that disclosure of predecisional and deliberative records "would frustrate agency decision-making functions, such as the resolution of issues and the formulation of policies." Further, the "candid and free exchange of ideas and opinions within and among agencies is essential to agency decision-making and is less likely to occur when all memoranda for this purpose are subject to public disclosure." OIP Op. Ltr. No. 90-8 at 5.

To be "predecisional," a government record must be "received by the decisionmaker on the subject of the decision prior to the time the decision is made." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1984) . To be "deliberative," the government record must reflect the "give and take" of the agency's consultative process. See OIP Op. Ltr. No. 91-24 at 7 (Nov. 26, 1991).

Document Reviews prepared by the Commission contain a list of deficiencies and recommendations concerning compliance with

the UFAS in the construction of a public facility. Upon receipt of the Document Review, the agency may or may not decide to revise its building plans to follow the Commission's recommendations. In some circumstances, an agency may find that it is impossible to alter the specifications, or the agency may choose to comply with UFAS provisions but in a manner different from that suggested by the Commission. Thus, because the Document Reviews are received by the agency before the agency finalizes its construction plans, it can be argued that the Document Reviews are "predecisional."

In our determination concerning whether the Document Review is "deliberative," we note that the Document Review is used by the agency to finalize its construction plans. Consequently, it could be argued that the Document Review is also a "deliberative" document used by the agency in its decisionmaking process.

However, in our opinion the policy reasons underlying the "deliberative process privilege" would not be served or furthered by withholding access to the Document Reviews. As we have explained previously, the primary purpose of the "deliberative process privilege" is to "prevent injury to the quality of agency decisions." See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975). The "deliberative process privilege rests most fundamentally on the belief that were agencies forced to `operate in a fishbowl', the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." Dudman Communications v. Dep't of the Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987), quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

In Dudman, the D.C. Circuit Court of Appeals held that a historical work prepared and published by the Department of the Air Force "was exempt from [the] FOIA's general disclosure requirements because release of the draft would reveal the Department's deliberative process." Dudman at 1566. The Dudman court, in its discussion of the evolution of the deliberative process privilege, noted that:

> Courts [sic] began to focus less on the nature of the materials sought and more on the effect of the material's release: the key question in Exemption 5 cases became whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within

> the agency and thereby undermine the agency's ability to perform its functions.

Dudman at 1568.

We do not believe that the disclosure of the Document Reviews would significantly discourage the candid exchange of ideas and thereby cause injury to the quality of any agency's decisions. Specifically, because section 103-50, Hawaii Revised Statutes, requires agencies to consult with the Commission, and requires the Commission to provide agencies with advice and recommendations concerning UFAS compliance, we are of the opinion that disclosure would not stifle frank communications or inhibit the free flow of information between the agency and the Commission. See Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) and Schell v. United States Dep't of Health and Human Services, 843 F.2d 933, 942 (6th Cir. 1988).

Because the Commission is required by law to provide its advice and recommendations, and because the UIPA exceptions to required agency disclosure are to be narrowly construed in favor of disclosure, see OIP Op. Ltr. No. 90-20 at 5 n.2 (June 12, 1990), we do not believe that the Document Reviews are protected under the "deliberative process privilege." Consequently, we conclude that section 92F-13(3), Hawaii Revised Statutes, does not permit the Commission to withhold access to the Document Reviews.

The Commission and the DOH are also concerned that, if publicly accessible, Document Reviews might be used by litigants in lawsuits under the UFAS. Section 92F-13(2), Hawaii Revised Statutes, provides that agencies are not required to disclose "[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." However, because we can discern no discovery privilege that would operate to protect the Document Reviews, we believe that section 92F-13(2), Hawaii Revised Statutes, does not permit the Commission to withhold access to same.

Also, although the Commission's Document Reviews may be relevant in litigation against an agency concerning its compliance with the UFAS, we do not believe that this possibility requires these records to be kept confidential in order to avoid the frustration of a legitimate government

function. See Haw. Rev. Stat. □92F-13(3) (Supp. 1991). First, the Document Reviews do not fit within the examples provided by the UIPA's legislative history of records that must remain confidential to avoid the frustration of a legitimate government function. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

Moreover, courts in other jurisdictions have uniformly held that the fear of litigation against the government is not a valid exception to disclosure under state public records laws that are similar to the UIPA. For instance, in M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp., 476 N.Y.S.2d 69, 71 (Ct.App. 1984), the New York Court of Appeals held that the possibility that release of records would aid a litigant against the government was not a valid reason for denying access under New York's Freedom of Information Law ("FOIL"). Although the court's discussion focused on the fact that a present or future litigant against the government should not be treated differently from any other FOIL requester, and that access does not depend upon the status of the requester, these principles as well as the holding of the case can be used to conclude that a government agency may not keep an otherwise public document confidential for fear that it may aid a litigant in a lawsuit against the government.

Similarly, in State ex rel. Lank v. Rzentkowski, 416 N.W.2d 635, 637 (Wis. App. 1987), the Court of Appeals of Wisconsin held that the City of Mequon must provide the records to the requester despite pending litigation against the City. The court explained that "the legislature has not carved out an exception to the requirement of disclosure when the public records sought are germane to pending litigation between the requester and the public entity."

The Supreme Court of Arkansas also held that, under the Arkansas Freedom of Information Act, "[t] he public has a right to know about public business, even when the disclosure might benefit an adverse litigant." City of Fayetteville v. Edmark, 801 S.W.2d 275, 281 (Ark. 1990) . The court further stated that "[u] nder the FOIA, the media, as well as adverse litigants are members of the public and are entitled to publicly funded information. . . . Thus, enhanced risk that the City may lose litigation does not constitute an exemption." Id.

Applying the principles set forth in Farbman, Rzentkowski, and Edmark, we believe that, under the UIPA, the Document Reviews are not government records that must remain confidential

in order to avoid the frustration of a legitimate government function on the basis that they may aid a litigant in litigation against a government agency or be germane in such litigation.

Finally, we note that the Commission, by past custom, has allowed the public to inspect and copy the Document Reviews. The legislative history of the UIPA states that the UIPA should not be used to "close currently available records, even though these might fit within" one of the UIPA's exceptions to disclosure. S. Conf. Comm. Rep. No. 235, 14th Leg., Reg. Sess., Haw. S.J. 689, 690 (1988), H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988). Thus, protection of the Document Reviews would not be consistent with the Legislature's intent in adopting the UIPA. See OIP Op. Ltr. No. 90-20 (June 12, 1990) (building permit information made available to the public before the enactment of the UIPA should continue to be made available, even if there is an applicable UIPA exception). Accordingly, we conclude that, under the UIPA, the Commission must make its Document Reviews available, upon request, for public inspection and copying.

CONCLUSION

In our opinion, none of the UIPA's exceptions to required agency disclosure applies to the Document Reviews drafted by the Commission. In addition, it was not the Legislature's intention that the UIPA be used to withhold access to records that were available to the public before the adoption of the UIPA. Consequently, we believe that, under the UIPA, the Commission must make the Document Reviews available for public inspection and copying.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

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