December 14, 2001

Hamid Jahanmir, Economist
Department of Business,
Economic Development, & Tourism
No. 1 Capitol District Building
250 South Hotel Street, 4th Floor
Honolulu, Hawaii 96813

Re: Disclosure of Attorney Work Product

Dear Mr. Jahanmir:

This letter is in response to your letter of March 22, 2001, to the Office of Information Practices ("OIP") requesting an opinion concerning public access to "an opinion from DBEDT or AG … " regarding an agreement you signed on December 29, 2000, entitled "Department of Business, Economic Development and Tourism DBEDT LAN and Online Systems Use Agreement" (the "Legal Opinion") maintained by the Department of Business, Economic Development, & Tourism ("DBEDT") and the Department of the Attorney General ("AG"), both agencies of the State of Hawaii.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), DBEDT must make available for public disclosure the Legal Opinion provided to DBEDT by the AG.

BRIEF ANSWER

No. Upon review of the document in question, which was submitted to the OIP for *in camera*[1] review, the OIP finds that this document is primarily

[1] Under certain circumstances, a trial judge may inspect a document which counsel wishes to use at trial in his chambers before ruling on its admissibility or its use. *Black's Law*

composed of attorney work product that would not be discoverable pursuant to Haw. R. Civ. P. 26. Thus, DBEDT has the discretion to withhold the document from public disclosure under section 92F-13(2), Hawaii Revised Statutes, as it would not be discoverable in a judicial or quasi-judicial action to which the State or county is or may be a party, and also under section 92F-13(2), Hawaii Revised Statutes, as disclosure would frustrate a legitimate government function. However, any factual information within the requested documents that has previously been made available to you[2] is disclosable, insofar as such information is reasonably segregable, as the OIP has determined that factual information that has already been disclosed is not protected under the attorney work privilege. OIP Op. Ltrs. No. 92-14 at 8-9 (Aug. 13, 1992) and 98-3 at 2 (May 11, 1998).

FACTS

On December 29, 2000, you signed an agreement entitled "Department of Business, Economic Development and Tourism DBEDT LAN and Online Systems Use Agreement," a copy of which you provided to OIP. Below your signature, you typed:

> I am signing this agreement against my will and principle so that I will be able to do my job in my new assignment at the Office of Planning. I believe this is not a proper management practice and that a Directive would have served the same purpose. Furthermore, my signature does not imply my consent to the network administrators to remotely access my computer and read my e-mail.

Thereafter, Mr. Gregory P. Barbour of DBEDT requested legal advice from the AG, Commerce and Economic Development Division, in connection with your addendum to the agreement, as quoted above. Subsequently, on March 22, 2001, you sought OIP's assistance.

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

[2] In this case, the only factual material in the document consists of the typed material on the December 29, 2000 material as set forth herein in the section entitled "FACTS".

On April 4, 2001 you wrote Dr. Seiji Naya, and said:

> I am still not convinced that my civil rights were not violated when I was forced to sign the "LAN Agreement" in order to perform my duties at the OP. I would like the Attorney General's formal opinion or the opinion of any other legal authority to ensure that my rights were not violated.

DISCUSSION

I. INTRODUCTION

The UIPA provides that government records are open to public inspection unless access is restricted or closed by law. Haw. Rev. Stat. § 92F-11(a) (1993). There are five general exceptions to disclosure of public records under the UIPA, two of which allow DBEDT to withhold from public disclosure the Legal Opinion. The exceptions are the exception for disclosure of government records that would not be discoverable in a judicial or quasi-judicial action to which the State or county is or may be a party, and the exception for government records that must be kept confidential to avoid the frustration of a legitimate government function. Haw. Rev. Stat. § 92F-13(2) and (3) (1993).

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

The document requested was reviewed *in camera* to determine if it contains attorney work product. Haw. R. Civ. P. 26(b)(3) provides "the court shall protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." This provision is known as the "attorney work product" protection.

The OIP has previously opined that section 92F-13(2), Hawaii Revised Statutes, exempts from disclosure any government records that would be protected by the civil discovery rule, Haw. R. Civ. P. 26. OIP Op. Ltrs. No. 92-14 at 6-9 (Aug. 13, 1992) (DOE report and portions of DAGS claim report are exempt from disclosure as attorney work product prepared in anticipation of litigation); No. 89-10 at 5 (Dec. 12, 1989) (section 92F-13(2), Hawaii Revised Statutes, protects information subject to attorney-client, work product, or other judicially recognized privileges).

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

The Legal Opinion is signed by a Deputy Attorney General and discusses legal strategies behind decisions made or contemplated and makes recommendations, and, as such, consists of attorney work product, as it contains "mental impressions, conclusions and opinions." Haw. R. Civ. P. 26(b)(3).

It would appear that you have not filed a civil action in connection with the matters discussed in the Legal Opinion. Nevertheless, your March 15, 2001 memorandum to Dr. Seiji Naya states:

> In a February 1, 2001 memo (attached), I requested an explanation why I am denied access to the Internet. In your telephone call the next day you told me that you could not give me the Internet access because of the legal problem with my comments on the agreement I signed. I asked you if I was the only person who signed the agreement with comments and concerns, you said yes. I asked for a written explanation why my comments are "illegal". You agreed and told me that you will ask Mr. Tsumoto to write me one. I assumed that you already had the opinion of the AG office. As I indicated in my memo from February 1, 2001, Mr. Greg Barbour had told my supervisor, Mr. Richard Poirier, that he was planning to send my agreement to the AG office for their advice.

(emphasis added).

Your April 4, 2001 memorandum also references a concern with violation of your civil rights. Therefore, the OIP concludes, from the review of the Legal

Opinion, that it was prepared in anticipation of litigation. See OIP Op. Ltr. No. 92-14 (Aug. 13, 1992), OIP Op. Ltr. No. 98-3 (May 11, 1998).

The OIP will not opine on whether a court of law would find that the Legal Opinion would be discoverable in litigation, as discovery access is separate and distinct from access under the UIPA. See OIP Op. Ltr. No. 95-16 (July 18, 1995).[3]

However, although the Legal Opinion appears to consist primarily of attorney work product, the Legal Opinion also incorporates certain facts which may not be exempt from disclosure. The OIP has previously opined that factual information which has already been disclosed is not protected under the attorney work product privilege. OIP Op. Ltrs. No. 92-14 at 8-9 (Aug. 13, 1992) and 98-3 at 10 (May 11, 1998). Therefore, the factual material in the Legal Opinion (which consists of typed material in the December 29, 2000 memorandum as set forth herein in the section entitled "FACTS"), is disclosable, subject to segregation[4] of the portion of the Legal Opinion that will not be disclosed.

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

In OIP Opinion Letter Number 92-14 (Aug. 13, 1992) the OIP applied the UIPA "frustration"[5] exception that protects government records to attorney work product material. In reviewing the legislative history that opinion letter noted that "[i]nformation that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule" is information the disclosure of which would frustrate a legitimate government function. OIP Op. Ltr. No. 92-14 at 9 (Aug. 13, 1992) (emphasis added in opinion letter) (citation omitted).

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[3] Although documents primarily consisting of attorney work product are exempt from disclosure under section 92F-13(2), Hawaii Revised Statutes, the document could be ordered disclosed by a court of law. See OIP Op. Ltr. No. 98-3 (May 11, 1998). On the other hand, the protection of attorney work product may not be extinguished after the close of a case. In Re Murphy, 560 F.2d 326, 334 (8th Cir. 1977).

[4] "Segregate" means to prepare a government record for disclosure by excising any protion of the record that will not be disclosed under chapter 92F, Hawaii Revised Statutes. Haw. Admin. R. § 2-71-2.(Eff. Feb. 26, 1999)

[5] This exception protects government records which, if disclosed, would cause the frustration of a legitimate government function.

The Supreme Court of Hawaii codified the attorney-work product doctrine when the court adopted Rule 26(b)(3) of the Hawaii Rules of Civil Procedure. See OIP Op. Letter 92-14 at 9 (1992). Thus, the OIP concludes that where a document is protected by those judicial rules, it is non-disclosable under the UIPA. As the Legal Opinion contains information protected by judicial rule, DBEDT has discretion to withhold the document from public disclosure under section 92F-13(3), Hawaii Revised Statutes.

CONCLUSION

The OIP concludes that DBEDT has the discretion to withhold the document from public disclosure under section 92F-13(2), Hawaii Revised Statutes, as the Legal Opinion would not be discoverable in a judicial or quasi-judicial action to which the State or county is or may be a party. However, any factual information within those records must be disclosed, insofar as it is reasonably segregable. DBEDT also has discretion to withhold the document pursuant to section 92F-13(2), Hawaii Revised Statutes, as disclosure would frustrate a legitimate government function.

Very truly yours,

Susan R. Kern
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

SRK:jetf

c: Deputy AG, Commerce and Economic Development Division
Mr. Gregory P. Barbour, DBEDT