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## MEMORANDUM DECISION

**Requester:** Richard Spacer
**Agency:** Office of the Mayor of Kauai
**Date:** May 22, 2019
**Subject:** Attorney-Client Privilege and Reasonable Search (U APPEAL 16-12)

Requester seeks a decision as to whether the County of Kauai (County) Office of the Mayor (MAYOR-K) properly denied his request under Part II of the UIPA for records pertaining to the proposed $70,000 county fencing project at Lepeuli, Kauai (Project).

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's emails to OIP dated November 9, 2015, February 24, 2017, November 26, 2018, February 5, 12, and 28, 2019, April 5, 11, 15, and 25, 2019; MAYOR-K's Notice to Requester (NTR) dated October 28, 2015, and Amended NTR dated February 1, 2019, with a copy of the documents disclosed to Requester; OIP's Notice of Appeal with enclosures dated November 13, 2015; letters to MAYOR-K from OIP dated December 10, 2015, November 26, 2018, February 28, 2019, and March 21, 2019; a letter from MAYOR-K to OIP dated December 17, 2015, with enclosures consisting of records withheld from Requester for OIP's *in camera* review; letters from MAYOR-K to OIP dated December 21, 2018, February 1, 2019, and April 25, 2019; and emails from OIP to MAYOR-K dated January 2, 2019, and April 29, 2019.

## Decision

Emails and summaries/tables between MAYOR-K (including the Mayor and his policy team) and the Kauai County Attorney and a Deputy County Attorney (hereinafter collectively referred to as CORP CNSL-K), relating to CORP CNSL-K's rendering of legal services for the Project, were not required to be disclosed because the records contain information protected by the attorney-client privilege.

Requester also sought access to other documents referenced in the records disclosed by MAYOR-K to Requester or by another County agency, which MAYOR-K did not disclose on the basis that it did not maintain them. OIP concludes that MAYOR-K conducted a reasonable search for those records in its office and could not locate them. OIP therefore finds that MAYOR-K's response that it does not maintain those records was proper.

## Statement of Reasons for Decision

Requester sought to obtain records from MAYOR-K relating to the Project. In its NTR dated October 28, 2015, MAYOR-K responded that the request would be granted as to certain parts. MAYOR-K also denied access to certain emails, meeting minutes and notes under section 92F-13(3), HRS, on the basis that the records

> are exempted from disclosure under HRS section 92F-13(3), in that these materials were created antecedent to the policy decision to place the subject fence at Lepeuli and contain recommendations or express opinions on legal policy matters.

The UIPA's exception to disclosure at section 92F-13(3), HRS, allows agencies to withhold records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function. MAYOR-K essentially asserted that the deliberative process privilege (DPP)[1] applied, and that the records thus fell under the UIPA's exception to disclosure for information which, if disclosed, would frustrate a legitimate government function. HRS § 92F-13(3).

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[1] The DPP has been adopted in other jurisdictions and allows government agencies to withhold predecisional and deliberative internal records. Since 1989, OIP had recognized the DPP as a valid reason to withhold records under section 92F-13(3), HRS, the UIPA's frustration exception. For OIP's detailed analysis of the history of the DPP, including legislative source materials, see https://oip.hawaii.gov/wp-content/uploads/2019/05/OIP-analysis-of-DPP-case-revised-5.20.2019.pdf.

## I. MAYOR-K Revised Its Position and Disclosed Most of the Requested Records Based on a Recent Hawaii Supreme Court Decision

In response to OIP's Notice of Appeal, on December 17, 2015, MAYOR-K provided a copy of the withheld records for OIP's *in camera* review and provided additional information regarding its position that the records were protected under the UIPA's frustration exception based on the DPP.

Subsequent to the filing of this appeal, the Hawaii Supreme Court, in Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (Dec. 21, 2018) (Peer News), invalidated the use of the DPP under the UIPA to withhold certain internal records on the basis that "decision-making" was not a government function that fell within the frustration exception. OIP subsequently notified MAYOR-K that based on Peer News, OIP would no longer recognize the DPP under the UIPA's frustration exception, and offered MAYOR-K the opportunity to supplement its position in light of that decision. In its response of February 1, 2019, MAYOR-K abandoned its argument that certain records were exempt from disclosure because of the DPP and disclosed most of the records at issue for this appeal to Requester, thus narrowing the issues on appeal.

At the same time, MAYOR-K reiterated its other argument that records reflecting discussion between CORP CNSL-K and MAYOR-K relating to CORP CNSL-K's rendering of legal services for the Project were protected from disclosure under section 92F-13(3), HRS, as records containing attorney-client privileged information.

## II. Attorney-Client Privilege

In response to this appeal, MAYOR-K asserted that

> all of the subject documents reflect discussions that Mayor and his policy team had with their Deputy County Attorney, Ian K. Jung. As you will be able to see Mr. Jung's name and or communications are contained on any and all documents herein and therefore are further protected from disclosure under the attorney client privilege as stated in Hawai`i Rules of Evidence, Rule 503.

Three UIPA exceptions to disclosure recognize the attorney-client privilege,[2] but only one was invoked by the CORP CNSL-K, the frustration exception at section 92F-13(3), HRS.

Hawaii's attorney-client privilege is codified in chapter 626, HRS, Rule 503, Hawaii Rules of Evidence (HRE), and 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) (describing how an attorney-client communication becomes privileged).

OIP has previously discussed the applicability of the attorney-client privilege under the UIPA:

> 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 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. F14-01, citing OIP Op. Ltr. No. 91-23 at 8-9 (citations omitted).

Under the County of Kauai Charter (Charter), CORP CNSL-K is the chief legal advisor and legal representative of the County of Kauai and all its departments, officials, and employees in matters relating to official duties. Charter § 8.04 (2018). MAYOR-K and its staff are therefore clients of CORP CNSL-K attorneys. MAYOR-K asserted that the records or parts of records being withheld reflect discussions or summaries of discussions between the Mayor and his policy team with CORP CNSL-K.

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[2] See OIP Op. Ltr. No. F14-01 at 6, citing OIP Op. Ltr. No. 91-23 at 8-9 (explaining that the exceptions in section 92F-13(2), (3), and (4), HRS, protect attorney-client privileged information from disclosure).

Based on its *in camera* review, OIP finds that each of the following documents, as they were described by MAYOR-K, is a communication between a client and attorney or a summary of such a communication:

1. 12/10/13 email Ian Jung to Beth Tokioka
2. 1/8/14 email Beth Tokioka to Ian Jung
3. 1/8/14 email Beth Tokioka to Ian Jung
4. 6/3/14 Summary of a project presentation
5. 7/30/14 Table Listing Items for Discussion/Decision with estimated completion date of 7/30/14
6. 9/15/14 Table Listing Items for Discussion/Decision with estimated completion date of 9/15/14
7. 12/10/19 email Ian Jung to Beth Tokioka
8. 3/3/15 email Ian Jung to Cathy Simao
9. 3/3/15 email Ian Jung to Beth Tokioka
10. 3/4/15 email from Beth Tokioka to Policy Team
11. 4/9/15 email from Beth Tokioka to Policy Team

As such, these records are presumptively protected by the attorney-client privilege. OIP is not aware of any conduct or circumstances indicating that these emails were voluntarily disclosed to any non-clients, so there was no waiver of the privilege. OIP Op. Ltr. No. F17-03 at 5 (citations omitted). OIP therefore concludes that these emails constitute confidential and privileged attorney-client communications under HRE Rule 50, and they were properly withheld by MAYOR-K under section 92F-13(3), HRS.

The Memorandum from Paula Morikami to OIP of December 17, 2017, was addressed to OIP and not to CORP CNSL-K. OIP thus concludes that this memorandum is not a confidential and privileged attorney-client communication between MAYOR-K and CORP CNSL-K and cannot be withheld from disclosure under section 92F-13(3), HRS, so an unredacted copy must be disclosed to Requester.

## III. Reasonable Search

After reviewing the records disclosed pursuant to Peer News, Requester believed that MAYOR-K maintained additional responsive records that it had not disclosed. These records were referred to in the disclosed records or by another County agency. Specifically, Requester sought a 2011 letter from Ms. Hanwright to the County, a document from Waioli Corporation requesting fencing at Lepeuli, Kauai, and notes of a meeting on September 20, 2012, involving the County, the Department of Land and Natural Resources, and others (hereinafter collectively referred to as undisclosed records).

In a letter to OIP dated April 24, 2019, MAYOR-K explained that it had not been able to locate the undisclosed records. Requester disagreed with MAYOR-K's explanation regarding the inability to locate the undisclosed records. This appeal therefore also addresses whether MAYOR-K conducted a reasonable search for the undisclosed records.

The UIPA provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." HRS § 92F-11(a). A government record is defined as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." HRS § 92F-3 (2012). So long as an agency maintains a government record in the form requested by a requester, the agency must generally provide a copy of that record in the format requested unless doing so might significantly risk damage, loss, or destruction of the original record. OIP Op. Ltr. No. 97-8 at 4, citing OIP Op. Ltr. No. 90-35 at 13. However, an agency's disclosure obligation applies only to those records it actually maintains; it is not required to provide records that it does not maintain, including records that do not exist. See HRS §§ 92F-3 (definition of government record limited to records agency maintains) and 92F-11 (agency not required to create compilation or summary in response to UIPA request).

Normally, when an agency's response to a record request states that no responsive records exist and that response is appealed, OIP assesses whether the agency's search for a responsive record was reasonable. OIP Op. Ltr. No. 97-8 at 4. A reasonable search is one "reasonably calculated to uncover all relevant documents," and an agency must make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Id. at 5 (citations omitted).

In response to Requester's request for the undisclosed documents, MAYOR-K explained that

1. There was an election in 2018 and there is a new Mayor. There is no one in the current staff who has institutional knowledge dating back to 2011. Current staff searched the file cabinets and electronic records and also contacted former employees who had worked in MAYOR-K's office during the prior administration.
2. CORP CNSL-K has staff with institutional knowledge dating back to 2011, who confirmed that if they had such records, it would be stored electronically or in a discrete set of paper files. CORP CNSL-K conducted a search of its electronic records and paper records and did not locate any responsive records.
3. The County Department of Public Works checked its file cabinets, paper files, email and electronic storage and no responsive records were found.

4. The Department of Planning searched its email archives and paper and electronic files. No unresponsive records were found.[3]

Based on the information provided by MAYOR-K, OIP finds that MAYOR-K conducted a reasonable search for responsive records in the locations where any responsive records in its own office were most likely to have been found, and could not locate the undisclosed records. OIP therefore concludes that MAYOR-K properly responded that it does not maintain the undisclosed records, and that it has satisfied its obligations under the UIPA with regard to the undisclosed records.

## 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) (2012). 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), (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 decision 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 rule does not allow for extensions of time to file a reconsideration with OIP.

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[3] OIP notes that neither the UIPA nor OIP's administrative rules at chapter 2-71, HAR, require an agency, here MAYOR-K, to contact other agencies and ask them to search their records in response to a record request. An agency is only required to search its own records in response to a UIPA record request.

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

**OFFICE OF INFORMATION PRACTICES**

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APPROVED:

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