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

OPINION

Requester: Mr. Orion Enocencio
Agency: Planning Department, County of Hawaii
Date: April 24, 2017
Subject: E-Mail Messages Protected by Attorney-Client Privilege (U APPEAL 15-10)

REQUEST FOR OPINION

Requester seeks a decision as to whether, under Part III of the UIPA, the Planning Department, County of Hawaii (County) (PLAN-H), properly denied his request, in part, for access to e-mail messages regarding whether Requester, as a tour operator, can bring guests to enter the Kaohe Homesteads property for viewing the lava flow (Messages).

Unless otherwise indicated, this decision is based solely upon the facts presented in (1) Requester's e-mail correspondence to OIP dated October 2, 2014, which included Requester's record request to PLAN-H, dated September 30, 2014, and PLAN-H's responses, also dated September 30, 2014, and (2) copies of the eight Messages that PLAN-H did not disclose to Requester but provided, in an-email transmittal, dated August 27, 2015, to OIP for its *in camera* review for purposes of this appeal.[1]

[1] OIP sent to PLAN-H the Notice of Appeal, which gave PLAN-H the opportunity to provide a response to the Appeal and requested PLAN-H to provide copies of

QUESTION PRESENTED

Whether the UIPA allows PLAN-H to withhold from Requester access to the Messages that constitute Requester's personal records.

BRIEF ANSWER

Yes, in part. All eight Messages constitute the Requester's personal records because they identify him by name and are about him. The five Messages that PLAN-H received or sent to its assigned Deputy Corporation Counsel (Attorney-Client Messages) constitute confidential and privileged attorney-client communications under Rule 503, Hawaii Rules of Evidence, chapter 626, HRS (HRE Rule 503), and thus may be withheld from Requester under the exemption in Part III of the UIPA for personal records "authorized to be so withheld by constitutional or statutory privilege." HRS § 92F-22(5) (2012).

However, PLAN-H is required to disclose to Requester the three Messages that were exchanged between PLAN-H Director and employees (Intra-agency Messages). There is no applicable exemption under Part III of the UIPA that would allow these three Intra-agency Messages to be withheld from the subject individual.

FACTS

Requester asked PLAN-H for access to "all emails regarding the situation with providing myself and my guests access to the Kaohe [Homestaeds[sic]." In response to Requester's record request, PLAN-H disclosed its Director's e-mail message, which was dated September 26, 2014 and addressed to PLAN-H staff members, regarding the subject matter "Access to Ka'ohe Homesteads Restricted to Residents and residential use/purposes" and setting forth PLAN-H's "official response to be provided to any inquiries regarding Kaohe Homesteads subdivision" (Homesteads Decision).

After PLAN-H disclosed the Homesteads Decision, Requester asserted to PLAN-H that "there are other emails that are still missing" and were not disclosed upon his request. PLAN-H responded that "[p]er Deputy Corporation Counsel Bill Brilhante, the emails between [PLAN-H] Director Kanuha and Bill Brilhante are privileged attorney client information; therefore, we will not release them." Requester then appealed to OIP regarding PLAN-H's denial of access to the Messages other than the Homesteads Decision that had been disclosed.

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the Messages for OIP's *in camera* review. PLAN-H provided the copies of the Messages to OIP, but no response.

From OIP's *in camera* review of the Messages, OIP finds that they fall into two general categories:

(1) Five Attorney-Client Messages that identified Requester by name, three of which were exchanged between PLAN-H and Mr. Brilhante, and two of which were sent by PLAN-H Director to other County employees and also to Mr. Brilhante as a secondary recipient on the "cc" address line. More specifically, of these two "cc" Attorney-Client Messages, one was sent by PLAN-H Director and addressed to the Director of the Civil Defense Agency, County of Hawaii (CIV DEF-H), as the primary recipient, and to the following three County employees as "cc" recipients: (a) Mr. Brilhante, (b) then Deputy Corporation Counsel Craig Masuda, who was assigned to advise CIV DEF-H at that time, and (c) the Mayor's Assistant at that time. The second "cc" Attorney-Client Message was sent by PLAN-H Director and addressed to PLAN-H Director's Secretary as the primary recipient, with Mr. Brilhante and a PLAN-H employee as "cc" recipients; and

(2) Three Intra-agency Messages identifying Requester by name that were exchanged between PLAN-H Director and PLAN-H employees.

DISCUSSION

OIP finds that all eight Messages identify Requester by name, either by naming him or referring to him in response to a previous message naming him in the same e-mail thread. Consequently, OIP concludes that all the Messages constitute the Requester's "personal records" because they are about Requester.[2] See HRS § 92F-3 (2012) (defining the term "personal record" as "any item, collection, or grouping of information about an individual that is maintained by an agency").

Part III of the UIPA governs an individual's right of access to personal records and provides that "[u]pon the request of an individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a copy made within ten working days following the date of receipt of the request by the agency unless the personal record requested is exempted under section 92F-22." HRS § 92F-23 (2012) (emphasis added). Section 92F-22, HRS, sets forth five exemptions, one of which is for personal records that are "authorized to be so withheld by constitutional or statutory privilege." HRS § 92F-22(5) (2012) (emphasis added).

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[2] The Homesteads Decision, which was disclosed to Requester, was not a personal record because it did not name Requester and was not about him.

PLAN-H asserts that the Messages are protected from disclosure by the attorney-client privilege set forth in HRE Rule 503(b), which states, "[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. HRE Rule 503(b). While OIP has previously determined that the attorney-client privilege is recognized under exceptions protecting government records from public disclosure under Part II of the UIPA, OIP has not yet specifically determined that the privilege also applies to personal records under Part III. See OIP Op. Ltr. Nos. 91-23 and F14-01 (citing Save Sunset Beach Coalition v. City and County of Honolulu, 102 Haw. 465, 484-85, 78 P.3d 1, 21-22 (2003), and discussing the attorney-client privilege as recognized by Part II exceptions in HRS § 92F-13(2), (3) and (4)).[3]

Nevertheless, OIP has previously opined that "by using the phrase 'statutory privilege' in section 92F-22(5), Hawaii Revised Statutes, the Legislature intended to include those 'privileges' provided by the Hawaii Rules of Evidence," which are set forth in chapter 626, HRS. OIP Op. Ltr. No. 92-14 (concluding that the attorney work-product doctrine was a "statutory privilege" as this term is used in section 92F-22(5)). Because the attorney-client privilege is set forth in HRE Rule 503, under Article V, entitled "Privileges," OIP now concludes that the attorney-client privilege constitutes a statutory privilege for purposes of applying the exemption in section 92F-22(5), HRS, to personal records.

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[3] The importance of the attorney-client privilege was also recognized by the court in a Sunshine Law case involving Part I of chapter 92, HRS. In holding that a county council's executive session minutes need not be disclosed under the UIPA, the Hawaii Intermediate Court of Appeals stated:

> 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 Hui Malama Aina 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 Wash. App. 718, 724, 559 P.2d 18, 22 (1978)).

For the attorney-client privilege to apply, the communications must be between the client and its attorney. According to the County Charter, County of Hawaii (Charter), the Corporation Counsel is "the chief legal advisor and legal representative of all county agencies, the council and all officers and employees in matters related to their official powers and duties." Charter § 6-5.3 (2016). Here, OIP finds that the Deputies Corporation Counsel, Messrs. Brilhante and Masuda, were the attorneys (collectively County Attorneys) providing legal counsel and representation in accordance with the Charter to County agencies and employees, namely (1) PLAN-H and its director and employees, (2) CIV DEF-H and its director, and (3) the Mayor's Assistant (collectively County Clients).

OIP further finds that all five Attorney-Client Messages directly concerned one specific legal matter and thus constituted communications between the County Clients and County Attorneys "for the purpose of facilitating the rendition of professional legal services to the client[s]." HRE Rule 503(b). The fact that the County Attorneys were the "cc" secondary recipients and not the primary recipients of two of the five Attorney-Client Messages is of no consequence in this case, as the senders and recipients in both Messages were limited to County Clients and County Attorneys.[4]

Moreover, OIP finds that the County Clients as well as County Attorneys had kept confidential the Attorney-Client Messages on this specific legal matter. OIP is not aware of any conduct or circumstances indicating that these Messages were voluntarily disclosed to any non-clients, so there was no waiver of the privilege. See OIP Op. Ltr. No. F14-01 (discussing when the attorney-client privilege may be waived); OIP Op. Ltr. No. 89-10 (concluding that the attorney-client privilege does not apply to a settlement agreement anticipated to be disclosed to other persons).

Consequently, OIP concludes that the Attorney-Client Messages constitute confidential and privileged attorney-client communications under HRE Rule 503. Therefore, the five Attorney-Client Messages are not required to be disclosed to Requester under the UIPA exemption in section 92F-22(5), HRS. See OIP Op. Ltr. Nos. F14-01 at 6 and 91-23 at 8-9 (stating that privileged attorney-client communications are protected from disclosure under the UIPA because "[t]he attorney-client privilege was developed to promote full and complete freedom of consultation between clients and their legal advisor without fear of compelled disclosure, except with the client's consent" and "[t]he protection of communications made in confidence between an attorney and a government client serves an important public policy purpose").

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[4] OIP does not mean to imply that the attorney-client privilege automatically applies whenever an agency lists its attorney as a "cc" recipient on the agency's correspondence.

PLAN-H may have sought to assert the attorney-client privilege for the Intra-agency Messages because they are in the same e-mail "threads" that include the Attorney-Client Messages. Upon *in camera* review, however, OIP finds that the three Intra-agency Messages were neither exchanged with the County Attorneys nor do they reveal any attorney-client communications. Thus, OIP believes that the Intra-agency Messages do not constitute attorney-client communications that would be covered by the attorney-client privilege. OIP also believes that the Intra-agency Messages can readily be segregated from the Attorney-Client Messages without disclosing any privileged communications between the County Attorneys and County Clients. Therefore, OIP concludes that PLAN-H is required to disclose the three Intra-agency Messages to Requester because no exemption would allow PLAN-H to withhold them under the personal records provisions of Part III of the UIPA.

RIGHT TO BRING SUIT

Requester is entitled to seek assistance directly from the courts after Requester has exhausted the administrative remedies set forth in section 92F-23, HRS. HRS §§ 92F-27(a), 92F-42(1) (2012). An action against the agency denying access must be brought within two years of the denial of access (or where applicable, receipt of a final OIP ruling). HRS § 92F-27(f).

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).

If the court finds that the agency knowingly or intentionally violated a provision under Part III, the personal records section of the UIPA, the agency will be liable for: (1) actual damages (but in no case less than $1,000); and (2) costs in bringing the action and reasonable attorney's fees. HRS § 92F-27(d). The court may also assess attorney's fees and costs against the agency when a requester substantially prevails, or it may assess fees and costs against Requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e).

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 rule does not allow for extensions of time to file a reconsideration with OIP.

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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