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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. Christopher Salem  
**Agency:** County of Maui Department of the Corporation Counsel  
**Date:** May 18, 2023  
**Subject:** Attorney-Client Privileged Communications (U APPEAL 20-43)

Requester seeks a decision as to whether the County of Maui Department of the Corporation Counsel (CORP CNSL-M) properly denied his request for records under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email to OIP dated February 13, 2020, and attached letter to OIP dated February 12, 2020; Requester's email to OIP dated February 24, 2020, and attachments; Requester's email to OIP dated March 3, 2020, and attachments, including attached letter to OIP dated March 2, 2020; OIP's Notice of Appeal to CORP CNSL-M dated March 11, 2023; CORP CNSL-M's email to OIP dated August 18, 2021, and attachments; Requester's email to OIP dated October 17, 2022, and attached letter to OIP dated September 21, 2022; CORP CNSL-M's email to OIP dated February 14, 2023, and attachments, including attached letter to OIP dated February 14, 2023, and *in camera* records; and Requester's email to OIP dated March 3, 2023, and attachments.

**QUESTIONS PRESENTED**

1. Whether CORP CNSL-M was required to respond to the Notice of Appeal given that Requester declined to pay the fees and costs CORP CNSL-M estimated for providing access to a redacted version of the requested records and instead filed this appeal of the partial denial of access.

2. Whether CORP CNSL-M could withhold records under section 92F-13(4), HRS, because the information therein was protected by the attorney-client privilege as set forth in Rule 503 of the Hawaii Rules of Evidence (HRE), chapter 626, HRS.

3. Whether CORP CNSL-M could withhold records under section 92F-13(2), HRS, because the information therein was protected by the attorney work-product privilege as set forth in Rule 26(b)(4) of the Hawaii Rules of Civil Procedure (HRCP).

4. Whether CORP CNSL-M could redact a specific record because the disclosure of that record would constitute a clearly unwarranted invasion of personal privacy.

### **BRIEF ANSWERS**

1. Yes. The payment of fees is not a prerequisite to filing an appeal. The right to appeal a denial of a record request is independent of a requester paying fees and costs for the part of a record request which is granted.

2. Yes. Most redactions made by CORP CNSL-M were either communications made for the purpose of facilitating the rendition of professional legal services between CORP CNSL-M and the employees of the departments and agencies of the County of Maui that CORP CNSL-M serves, or drafts of documents prepared by CORP CNSL-M for its clients. OIP therefore concludes that except as specified otherwise in this decision, the information withheld was protected under the attorney-client privilege as set forth in Rule 503, HRE, and the redactions were therefore proper under section 92F-13(4), HRS.

3. No. When the attorney work product privilege applies to records, the records may be withheld under section 92F-13(2), HRS, for records pertaining to litigation to which the State or a county is or may be a party, to the extent that such records would not be discoverable. The records in question do not appear to have been prepared in anticipation of potential litigation and appear to have been prepared in the ordinary course of business. Therefore, OIP concludes that the attorney work product doctrine is inapplicable to this case.

4. Yes. The specific line CORP CNSL-M redacted contained medical information and therefore fell within the UIPA's privacy exception, section 92F-13(1), HRS, and CORP CNSL-M properly redacted it on that basis.

### **FACTS**

In a letter dated December 31, 2019, Requester made a record request to CORP CNSL-M for copies of “all communications and emails between the Department of the Corporation Counsel, [Maui County] Council Members, former [Maui County Department of] Public Works Director David Goode, and any/all County officials regarding the drafting of the refenced ‘Upcountry Water Bill’ legislation and currently proposed WAI amendment to Title 18.”<sup>1</sup>

On February 28, 2020, CORP CNSL-M responded to the record request with a Notice to Requester, granting in part and denying in part Requester’s request. CORP CNSL-M withheld “various communications” between deputy corporation counsels and their agency and departmental clients within the County of Maui, citing section 92F-13(4), HRS, and the attorney-client privilege as its justification. CORP CNSL-M also withheld what it described as personal, private information regarding County employees and/or their family members under section 92F-13(1), HRS, stating that disclosing such information would be a clearly unwarranted invasion of personal privacy. Requester declined to prepay \$127.50 of the \$197.50 CORP CNSL-M estimated for fees and costs to proceed with the portion of the record request that was granted. Instead, Requester appealed the partial denial of the record request to OIP. On January 31, 2023, after this appeal was opened, CORP CNSL-M amended its Notice to Requester. The amended Notice to Requester estimated the fees and costs for the request to be \$115.00, and required a prepayment of \$60.00.<sup>2</sup>

## DISCUSSION

### **I. Payment of Fees is Not a Prerequisite to Filing an OIP Appeal**

As a preliminary matter, OIP discusses the position taken by CORP CNSL-M in its letters dated August 18, 2021 and February 14, 2023. CORP CNSL-M argued that because Requester refused to pay the fees and costs CORP CNSL-M estimated for providing access to a redacted version of the requested records, CORP CNSL-M should not have to respond to Requester’s appeal of its denial of access to the redacted or withheld information, and the appeal should therefore be dismissed.

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<sup>1</sup> Neither party to this appeal informed OIP what the acronym “WAI” stands for.

<sup>2</sup> Requester did not allege in his appeal that the fee estimate was inappropriate. Thus, should he seek copies of the requested records with redactions as authorized by OIP’s opinion herein, he should contact CORP CNSL-HON to arrange for prepayment.

A requester is not required to accept an agency's proposed partial denial of a request, including paying any fees required and receiving redacted documents, as a prerequisite to filing an appeal. When an agency denies a requester access to a government record, the requester has the right to appeal the denial to OIP. HRS § 92F-15.5 (2012). The right to appeal is contingent upon the requester's record request being denied, partially denied, or not responded to at all, and not upon whether the requester chooses to pursue a redacted version of the requested records while awaiting a final decision on appeal. HAR § 2-73-11. Regardless of whether Requester paid the fees for the parts of his record request that were granted or preferred to await the outcome of his appeal before deciding whether to pursue the request, Requester still had the right to appeal the denial of the other records that were requested. Id.

Under section 2-71-16(b), HAR, for the purpose of processing a record request an agency may presume a requester has abandoned the request if the requester does not respond to a notice to requester within twenty business days. However, a person has up to a year to appeal an agency's denial of access to OIP. HAR § 2-73-12. Even when a requester has abandoned a request and the agency can justifiably stop processing it, the requester still has the right to appeal the portion of the request to which the agency denied access. In any case, here Requester filed this appeal within one business day of receiving the Notice to Requester, well before the abandonment period, and OIP sent the Notice of Appeal to CORP CNSL-M seven business days later. Thus, OIP finds that CORP CNSL-M was aware of Requester's decision to appeal well before the twenty business day period had run and had no basis to assume the request had been abandoned.

When an agency receives a notice of appeal of its denial of a record request, the agency is required to respond with a written statement to OIP that includes the information set forth in the notice of appeal and appeal procedures. HAR § 2-73-14. CORP CNSL-M did eventually respond to this appeal in a letter dated February 14, 2023, after OIP explained in its letters to CORP CNSL-M dated November 17, 2022 and January 25, 2023 that the right to appeal a denial of a record request is independent of a requester paying fees and costs for the part of a record request which is granted.

## **II. Under Section 92F-13(4), HRS, Agencies May Withhold Records Protected by the Attorney-Client Privilege**

The UIPA generally provides that government records are public unless an exception to disclosure applies. HRS § 92F-11 (2012). The exceptions under which an agency is permitted to withhold records responsive to a request are found in section 92F-13, HRS. In CORP CNSL-M's response to this appeal, CORP CNSL-M

raised the exceptions for privacy and for information protected from disclosure by other laws, which are found in sections 92F-13(1)<sup>3</sup> and (4), HRS.

CORP CNSL-M provided OIP with 641 pages of records for *in camera* review. In its letter dated February 14, 2023, CORP CNSL-M argued that all but one of the withheld records contained attorney-client privileged information that could be redacted based on section 92F-13(4), HRS, and Rule 503, HRE. CORP CNSL-M also argued that these records could be withheld under the attorney work-product privilege per Rule 26 of the Hawaii Rules of Civil Procedure, which is discussed in section IV.<sup>4</sup>

The attorney-client privilege claimed by CORP CNSL-M may be invoked under three UIPA exceptions to disclosure, of which CORP CNSL-M claimed the exception found in section 92F-13(4), HRS, applies.<sup>5</sup> Section 92F-13(4), HRS, permits an agency to withhold records that are protected from disclosure “pursuant to state or federal law.” Pursuant to chapter 626, HRS, in Rule 503, HRE, the attorney-client privilege 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 specific applicability of the attorney-client privilege, as recognized under the UIPA, to communications between government attorneys and agencies:

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<sup>3</sup> The discussion of section 92F 13(1), HRS, is found in section V, infra.

<sup>4</sup> CORP CNSL-M argued that the remaining record was a single line of personal information redacted under the clearly unwarranted invasion of personal privacy interest exception found in section 92F-13(1), HRS, and this is discussed in section V.

<sup>5</sup> While sections 92F-13(2) and (3), HRS, were not argued by CORP CNSL-M, OIP previously found that these exceptions also allow agencies to withhold records protected by the attorney-client privilege. OIP Op. Ltr. No. F14-01. Section 92F-13(2), HRS, permits an agency to withhold 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.” Section 92F-13(3), HRS, permits an agency to withhold records “that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.”

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 Maui County Charter (Charter), CORP CNSL-M serves as the chief legal advisor and legal representative of Maui County and all its departments, officials, and employees in matters relating to official duties. Charter § 8-2.3 (2019). CORP CNSL-M asserted that the records withheld are communications between CORP CNSL-M and "various other employees of departments and agencies of Maui County."

Based on *in camera* review of the redacted records, with few exceptions, OIP finds that the redacted portions of the records were either communications made for the purpose of facilitating the rendition of professional legal services between CORP CNSL-M and the employees of the departments and agencies of the County of Maui that CORP CNSL-M serves, or drafts of documents prepared by CORP CNSL-M for its clients. The exceptions are as follows:

1. On page 13, CORP CNSL-M redacted an email response to a request for a copy of a draft ordinance. The draft ordinance itself (on pages 14-15) and the request for a copy of it were left unredacted, and the redacted line appears to be a simple message of transmittal. Therefore, OIP finds that the sentence redacted on page 13 was not a communication made for the purpose of professional legal services.

2. On page 59, CORP CNSL-M redacted a line in an email, but the redacted line also appears unredacted in subsequent emails in which the email in question was copied, such as on page 61, and the redacted line appears to relate purely to when an attorney might be available to meet. Therefore, OIP finds that the line redacted on page 59 was not a communication made for the purpose of professional legal services.

3. On page 123, only the word “Notice” is redacted in the standard notice that the email is privileged and confidential; in other emails that contained this notice, the same word was not redacted. OIP finds that the word “Notice” was not a communication made for the purpose of professional legal services.

4. On page 135, CORP CNSL-M redacted the header information of an email, such as the sender, the recipients, the subject line, and the date it was sent, which was disclosed in several other instances. The email address of the sender, for example, also appears unredacted on the same page. OIP finds that the header information was not a communication made for the purpose of professional legal services. OIP also finds that the header information is not subject to other exceptions, such as the privacy exception, and the header information appears unredacted elsewhere, including on the same page, so any exception concerning this information was waived.

OIP is not aware of any conduct or circumstances indicating that these emails and documents were voluntarily disclosed to any non-clients, so there was no waiver of the attorney-client privilege. Other than in the listed exceptions, OIP concludes that the redactions were for confidential and privileged attorney-client communications protected under Rule 503, HRE, and were therefore proper under section 92F-13(4), HRS. For the listed exceptions, OIP concludes that the information was not eligible to be withheld under section 92F-13(4), HRS, and because no other UIPA exception applies, the information must be disclosed.<sup>6</sup>

### **III. The Attorney Work Product Privilege is Inapplicable to This Case**

CORP CNSL-M also asserted that the redacted records may be withheld under the attorney work product privilege. Rule 26(b)(4), HRCPP, provides that “the court shall protect against the disclosure of the 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” doctrine. Section 92F-13(2), HRS, provides that agencies may withhold 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.” OIP has previously opined that section 92F-13(2), HRS, exempts from disclosure any government records that would be protected by a civil discovery privilege. OIP Op. Ltr. No. 01-05 at 3. OIP has interpreted the language “to which the State or any county is or may be a party” to mean that there is no

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<sup>6</sup> Fees and costs may be assessed for a request to receive the non-redacted portion of the responsive records. In deciding whether to pursue this request, Requester should consider that most of the non-redacted portion of his request would be email header information referencing who the email was to and from and emails discussing scheduling and when CORP CNSL-M and its clients could meet to discuss their work.

legal mandate that the State or county already be a party in a suit for an assertion of the attorney work product privilege to be upheld as a reason for nondisclosure under the UIPA. OIP Op. Ltr. No. 01-05 at 4 and OIP Op. Ltr. No. 98-03 at 8.

Based on OIP's *in camera* review, OIP finds that the redacted records contain drafts of documents produced by CORP CNSL-M for its clients, discussions regarding these documents, and recommendations about how to revise these drafts. OIP further finds that the documents produced by CORP CNSL-M are drafts of bills, and do not appear to have been prepared in anticipation of potential litigation. From their context, the documents appear to have been prepared in the ordinary course of business. Therefore, OIP concludes that the attorney work product privilege doctrine is inapplicable to this case, and the exception found in section 92F-13(2), HRS, does not apply on that basis, although as explained in section III, *infra*, the requested records may be withheld as attorney-client communications under section 92F-13(4), HRS.

#### **IV. Agencies May Withhold Records or Information Under Section 92F-13(1), HRS, To Avoid a Clearly Unwarranted Invasion of Personal Privacy**

Section 92F-13(1), HRS, permits an agency to withhold records that, if disclosed, “would constitute a clearly unwarranted invasion of personal privacy.” Section 92F-14(a), HRS, clarifies that disclosure of a record shall not constitute a clearly unwarranted invasion of personal privacy “if the public interest in disclosure outweighs the privacy interests of the individual.” Based on OIP's *in camera* review of the record redacted under section 92F-13(1), HRS, OIP finds that at page 243 CORP CNSL-M redacted a line containing information relating to an individual's medical status. Section 92F-14(b)(1), HRS, provides that “[i]nformation relating to medical . . . history, diagnosis, treatment, or evaluation” holds a significant privacy interest. OIP does not find any particular public interest in disclosure of the particular line redacted, as the specific information redacted would not shed any light upon an agency's performance or the conduct of government officials. HRS § 92F-14(a), HRS (2012). Therefore, OIP concludes that the line fell within the UIPA's privacy exception, section 92F-13(1), HRS, and CORP CNSL-M properly redacted it.

#### **V. Requester Was Acting on His Own Behalf and Did Not Seek Records on Behalf of the Mayor**

Requester argued that he believed he had a right to access the requested records because he was a staff member of the Office of the Mayor of the County of Maui (Mayor) at the time of the request and he asserted that he was seeking these records to complete a report for the Mayor.

Section 92F-19(a), HRS, sets forth limits on the ability of government agencies to disclose nonpublic records to other government agencies without implicitly waiving their ability to withhold those records from the general public. The arguably relevant portions of section 92F-19(a) allow, but do not require, an agency to share its records with another agency:

**§92F-19 Limitations on disclosure of government records to other agencies.** (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

- (1) Necessary for the performance of the requesting agency's duties and functions and is also:
  - (A) Compatible with the purpose for which the information was collected or obtained; or
  - (B) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided; [or]

...

- (11) Otherwise subject to disclosure under this chapter.

HRS § 92F-19(a) (2012).

CORP CNSL-M argued that, while Requester was an employee of the Mayor at the time he submitted his record request, Requester appears to have made his record request in his personal capacity and not as an employee of the Mayor. CORP CNSL-M stated, and the evidence shows, that the record request was sent from Requester's personal email address and had his private home address at the top of the document, and that all correspondence between Requester and CORP CNSL-M was sent to or from Requester's personal email address. CORP CNSL-M also stated that when Maui County agencies, including the Mayor, require information from CORP CNSL-M such requests for information are made utilizing a request for legal services form, which is approved by a supervisor prior to being submitted to CORP CNSL-M, and no such form was submitted with the record request.<sup>7</sup> OIP agrees with CORP CNSL-M that the evidence presented to OIP does not support a finding that Requester was acting on behalf of the Mayor and CORP CNSL-M reasonably

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<sup>7</sup> Additionally, CORP CNSL-M argued that the attorney-client privilege and the attorney work-product privilege would still protect the information from disclosure even if Requester had made the request in his official capacity as an employee of the Mayor.

treated his request as one from a member of the public rather than a request for inter-agency sharing of records under section 92F-19(a), HRS.

Even if Requester had made his request on behalf of the Mayor, CORP CNSL-M would not have been required to share the requested records under section 92F-19(a), HRS. Whether Requester made his record request in his personal capacity or as an employee of the Mayor and whether or not section 92F-19(a), HRS, would have **allowed** CORP CNSL-M to share the records with the Mayor, this section clearly did not **require** CORP CNSL-M to do so. Therefore, OIP concludes that CORP CNSL-M was not required by section 92F-19(a) to provide Requester with access to the requested 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.

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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