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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 sections 92F-27.5 and 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

**OPINION**

**Requester:** Zachary Bliss  
**Agency:** Department of Finance, County of Hawaii  
**Date:** March 7, 2024  
**Subject:** Emails Containing Attorney-Client Privileged Information  
(U APPEAL 21-6)

**REQUEST FOR OPINION**

Requester seeks a decision on whether the Hawaii County Department of Finance (FIN-H) properly withheld emails pertaining to his prior record request for video footage under part III of the UIPA (Part III).

Unless otherwise indicated, this decision is based solely upon the facts presented in an email from Requester to OIP dated August 17, 2020, with attachments; an email from the Hawaii County Office of the Corporation Counsel (CORP CNSL-H) on behalf of FIN-H to OIP dated September 3, 2020, with attachment and records provided for *in camera* review; and an email from OIP to FIN-H dated September 10, 2020, with attached email thread.

**QUESTION PRESENTED**

Whether the UIPA authorized FIN-H to deny access to emails because they contain attorney-client privileged communications.

## BRIEF ANSWER

Yes. The UIPA allows agencies to withhold records that contain attorney-client privileged communications, whether they are government records subject to part II of the UIPA (Part II) or personal records subject to Part III. HRS §§ 92F-13(2), (3), (4), -22(5) (2012). OIP finds that the only portions of the responsive emails that do not contain attorney-client privileged communications are the tops of four email threads which simply express gratitude. OIP therefore concludes that FIN-H was authorized to withhold the emails, with the exception of the expressions of gratitude and non-substantive header information, which must be disclosed if Requester seeks copies of that limited portion of the records.

## FACTS

Requester made a UIPA request to FIN-H in 2019 for a copy of “security camera video footage from County of Hawaii Vehicle Registration and Licensing Division, Waimea Center, 65-1158 Mamalahoa Hwy, Ste 1-A, Kamuela, Hawaii 96743, from June 24, 2019, from 9:00 to 12 pm” (Video Footage). FIN-H’s response stated that “[d]ue to unforeseen circumstances the tape is no longer available.” Requester appealed FIN-H’s response, and OIP issued U MEMO 21-01 which found that: (1) FIN-H’s response to the record request complied with the notice provisions in section 2-71-14(c)(1), HAR; (2) FIN-H did maintain the Video Footage at one time and attempted to make a copy of it in response to the record request, but found the video had been overwritten and no longer existed; and (3) FIN-H’s actions in attempting to copy the video were in good faith and did not violate the UIPA, although quicker action might have prevented the unintentional destruction of the record.

Requester thereafter made a record request to FIN-H dated July 19, 2020, for a copy of “all County of Hawaii email communications, with all parties, regarding my records request dated July 8, 2019 for video footage.” FIN-H sent Requester a Notice to Requester (NTR) dated August 14, 2020, along with approximately 15 responsive emails, some with attachments and emails threads. The NTR explained that FIN-H denied access to thirteen emails (Emails) under section 92F-13, HRS,<sup>1</sup> because the Emails consisted of attorney-client privileged communications. Requester appealed the partial denial of access to the Emails.

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<sup>1</sup> Section 2-71-14(b), HAR, states that when the agency denies access to all or part of a requested record, the agency’s notice to the requester shall state: (1) the specific record or parts of the record that will not be disclosed; and (2) the specific legal authorities under which the request for access is denied under section 92F-13, HRS, or other laws. The NTR did not list the specific sections under which it was denying access, and for that reason OIP concludes that the NTR did not satisfy the requirements of section 2-71-14(b), HAR.

## DISCUSSION

FIN-H's response to this appeal invoked the UIPA's Part II exceptions set out in section 92F-13(3) and (4), HRS, and the Part III exemption set out in section 92F-22(5), HRS. Part II requires generally that agencies must make government records<sup>2</sup> available to the public for inspection and copying, subject to the exceptions to disclosure in section 92F-13, HRS. HRS § 92F-11 (2012 and Supp. 2022). Section 92F-13, HRS, contains the five exceptions to the UIPA's general disclosure requirement. The exceptions invoked by FIN-H allow agencies to withhold government records that (1) by their nature must be confidential for the government to avoid the frustration of a legitimate government function; and (2) are protected from disclosure pursuant to state or federal law including an order of any state or federal court. HRS § 92F-13(3), (4).

Part III sets forth the exclusive provisions governing an individual's right to access the individual's personal record.<sup>3</sup> Agencies are required to disclose personal records upon request, unless an exemption to disclosure at section 92F-22, HRS, applies. HRS § 92F-23 (2012). FIN-H invoked section 92F-22(5), HRS, which allows agencies to withhold a personal record that is required to be withheld from the individual to whom it pertains by statute or is authorized to be withheld by constitutional or statutory privilege.

FIN-H thus argued that it was authorized to withhold the Emails under both Part II and III because they contain attorney-client privileged communications. Under Rule 503 of the Hawaii Rules of Evidence (HRE), chapter 626, HRS (Rule 503), the general 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

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<sup>2</sup> “Government record” is defined as “information maintained by an agency in written, auditory, visual, electronic, or other physical form.” HRS § 92F-3 (definition of “[g]overnment record”) (2012).

<sup>3</sup> “Personal record” is defined as:

any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

HRS § 92F-3 (definition of “[p]ersonal record”).

between the client and the client's attorney or their respective representatives. Rule 503(b), HRE, chapter 626, HRS (2016).

The Hawaii Supreme Court has stated that:

To come within the attorney-client privilege, the communication must be a "confidential communication made for the purpose of facilitating the rendition of professional legal services" between appropriate parties as stated in HRE Rule 503(b). Accordingly, a communication occurring in the following manner is privileged:

(1) where legal advice of any kind is sought (2) from a professional legal adviser in his [or her] capacity as such, (3) the communication relating to that purpose, (4) made in confidence (5) by the client, (6) are at his [or her] instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection [sic] be waived.

Save Sunset Beach Coalition v. City & County of Honolulu, 102 Haw. 465, 484-5, 78 P.3d 1, 20-21 (2003), citing Sapp v. Wong, 62 Haw. 34, 38, 609 P.2d 137, 140 (1980) (quoting 8 Wigmore, Evidence, § 2292 (McNaughton rev. 1961)).

OIP previously discussed how government records covered by the attorney-client privilege are treated 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 at 5-6, citing OIP Op. Ltr. No. 91-23 at 8-9 (citations omitted).

OIP previously concluded that Part II's subsections 92F-13(2),<sup>4</sup> (3), and (4), HRS, allow agencies to withhold records subject to the attorney-client privilege. OIP Op. Ltr. No. F22-03 at 9-10 n. 7, citing OIP Op. Ltr. No. F14-01 at 6. However, the Emails are at least in part Requester's personal records, and OIP has not previously addressed the applicability of the Part III exemptions to attorney-client privileged records. Part III's subsection 92F-22(5), HRS, allows agencies to withhold personal records required to be withheld from the individual to whom they pertain by statute or authorized to be withheld by constitutional or statutory privilege. The attorney-client privilege as codified at Rule 503, HRE, is clearly both a state law and a statutory privilege authorizing communications falling within the privilege to be withheld. OIP therefore concludes that the Part III exemption set out in section 92F-22(5), HRS, allows agencies to withhold attorney-client privileged communications that are contained in personal records.

The Emails include portions that fall under both Parts II and III of the UIPA. However, OIP further concludes that it is unnecessary for OIP to determine what portion of the Emails is Requester's personal record subject to Part III and what portion is subject to Part II for the purpose of Requester's UIPA access rights, since the result is the same whether the Emails are analyzed under Part II or Part III.

OIP finds based on its *in camera* review of the Emails that they all relate to FIN-H's requests to CORP CNSL-H for legal advice, and as such OIP concludes they contain attorney-client privileged communications with the limited exception of non-substantive header information and pleasantries as follows:

July 11, 2019: top of page 1 which only expresses thanks  
August 5, 2019: top of page 1 which only expresses thanks  
August 8, 2019: (7:55 a.m.)<sup>5</sup> top of page 1 which only expresses thanks  
August 15, 2019: (3:35 p.m.) top of page 1 which only expresses thanks.<sup>6</sup>

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<sup>4</sup> Section 92F-13(2), HRS, provides an exception to disclosure for "[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[.]" This exception was not invoked by FIN-H.

<sup>5</sup> There were two responsive emails dated August 8, 2019, that were withheld under the attorney-client privilege. The other was sent at 3:56 p.m. There were also two responsive emails dated August 15, 2019, that were withheld under the attorney-client privilege. The other was sent at 11:36 a.m.

<sup>6</sup> The *in camera* records included an email dated July 24, 2019. The July 24 email contained an attachment that was not provided for *in camera* review, but OIP finds based on the context that it may be withheld as part of the attorney-client privileged communication.

OIP was provided with no evidence that FIN-H waived the attorney-client privilege for the Emails. OIP therefore concludes that, except as described above, the information contained in the Emails may be withheld under subsections 92F-13(3) and (4), or 92F-22(5), HRS, as applicable, both in their original forms and where they appear as part of an email thread, and including attachments. Under either Part II or Part III, OIP concludes that the portions of the Emails that contain attorney-client privileged communications may be withheld.

If Requester seeks access to the portions of the records described above that are not attorney-client privileged communications, and is willing to pay applicable fees and costs for processing heavily redacted copies of the Emails, he should contact FIN-H within twenty business days of the date of this decision.

### **RIGHT TO BRING SUIT**

Requester is entitled to seek assistance directly from the courts. 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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