December 12, 1989

MEMORANDUM

TO: The Honorable Warren Price, III
Attorney General

ATTN: Laurence K. Lau,
Supervising Deputy Attorney General
Litigation Division

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Access to Aloha Stadium Litigation Settlement Agreements

This is in reply to a letter dated November 27, 1989, from George F. Hilty, Deputy Attorney General, requesting an advisory opinion concerning the public's right to inspect settlement agreements entered into between the State and various defendants in litigation concerning construction defects affecting Aloha Stadium.

ISSUE PRESENTED

Whether under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, the public may inspect and copy a settlement agreement between the State and a defendant in a civil action where the State has outstanding claims that have not been resolved against similarly situated defedants.

BRIEF ANSWER

In a civil action where the State has asserted claims against several similarly situated defendants and has compromised its claims with fewer than all such defendants, we conclude that disclosure of a settlement agreement between the State and the settling defendants would give a manifestly unfair advantage in continuing settlement negotiations to those defendants with whom

the State has not yet settled. Accordingly, disclosure of the terms and conditions upon which the State has settled would likely result in "the frustration of a legitimate government function" under the UIPA, thus permitting the State to withhold disclosure of the settlement agreements.

However, upon final resolution of the State's claims against those similarly situated defendants who have not settled, the terms and conditions of all settlement agreements entered into by the State must be available for public inspection under the UIPA, except those portions, if any, which would constitute a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes.

FACTS

As a result of alleged defects in materials used in the construction of Aloha Stadium, the State commenced two separate civil actions against various design professionals, contractors, steel manufacturers and others seeking an award of damages sufficient to remedy and repair the construction defects. One of these actions involves claims focusing primarily upon "weathering steel" used in the construction of the stadium. The primary defendants named by the State in this lawsuit were Nippon Steel Corporation, Bethlehem Steel Corporation, U.S. Steel Corporation and Kaiser Steel Corporation. This case, however, also involves other design professionals and material suppliers.

In September 1989, the State settled its claims against Bethlehem Steel Corporation ("Bethlehem") and Nippon Steel Corporation ("Nippon") and entered into written settlement agreements dated September 8, 1989, and September 15, 1989, respectively.

Each of the settlement agreements contains a provision whereby the State agreed to "refrain from initiating the broadcast, publication or dissemination of any or all of the terms of the agreement[s] through any of the news media." However, under the settlement agreements, the State is permitted to disclose the contents thereof "if compelled to do so by law, government regulations or judicial requirements." Additionally, the agreements provide that the State may disclose the contents thereof, if required under the UIPA.

The State has not yet settled its claims against the two remaining steel manufacturer defendants, although settlement offers are currently outstanding. The Department of the Attorney General has received a request by a member of the news media for information concerning the terms of the settlement agreements and requests an opinion concerning whether it must make the settlement agreements available for public inspection and copying under the UIPA.

DISCUSSION

In enacting the UIPA, the Legislature concluded that "[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public interest." Haw. Rev. Stat. Þ 92F-2 (Supp. 1989). Further, the Legislature declared that:

> [I]t is the policy of th is State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible.

Haw. Rev. Stat. § 92F-2 (Supp. 1989) (emphasis added).

In implementing this policy, the Legislature declared that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). Thus, whether a settlement agreement to which the State is a party is available for public inspection depends on whether "access is closed or restricted by law."[1] Id.

Among other things, the UIPA does not require an agency to disclose:

> (1) Government records which, if disclosed,

[1]Like the Freedom of Information Act, 5 U.S.C. § 552, part II of the UIPA is structured so that "virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's . . . exceptions." N.L.R.B. v. Sears Roebuck & Co., 421 U.S. 132, 136, 95 S. Ct. 1504, 1509, 44 L. Ed. 2d 29 (1975).

> would constitute a clearly unwarranted invasion of personal privacy;
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> (2) 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, to the extent that such records would not be discoverable;
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> (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function; . . . .

Haw. Rev. Stat. § 92F-13(1), (2), (3) (Supp. 1989).

Our review of the pertinent settlement agreements reveals that they contain no information which, if disclosed, would implicate a significant privacy interest. While the corporate defendants may prefer that details relating to each settlement remain forever confidential, only "individuals"[2] have cognizable privacy interests under the UIPA. Although each settlement agreement contains the names of legal counsel for each defendant, this information is routinely available from court records and, there is no significant privacy interest in this information.

It is possible that a settlement agreement to which the State is a party may contain information in which an individual has a significant privacy interest.[3] Section 92F-14(b), Hawaii Revised Statutes, sets forth examples of information in which an individual has a significant privacy interest. Even then, however, such information would have to be disclosed "if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1989). Regardless, the settlement agreements under consideration contain

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[2]An "individual" is, for purposes of the UIPA, "a natural person." See Haw. Rev. Stat. § 92F-2 (Supp. 1989).

[3]See, e.g., Guy Gannett Pub. v. University of Maine, 555 A.2d 470 (Me. 1989) in which the court concluded that portions of a settlement agreement between the University and a former basketball coach were protected from disclosure under that state's Freedom of Access Act. In Gannett, the court concluded that one sentence of the agreement which contained medical information concerning the coach (a public employee) should be deleted before public inspection. However, the court ordered that the remainder of the settlement agreement be available for public inspection.

no information the disclosure of which would constitute "a clearly unwarranted invasion of personal privacy."

Finally, our conclusion in this regard is buttressed by the decision in Painting Industry of Hawaii Market Recovery Fund v. Alm, 69 Haw. ____, 746 P.2d 79 (Dec. 3, 1987). In Alm, the Hawaii Supreme Court concluded that a settlement agreement between the Department of Commerce and Consumer Affairs and a corporate public works contractor regarding license law violations must be disclosed to the public under chapter 92E, Hawaii Revised Statutes.[4] Specifically, in Alm, the court concluded that disclosure of the name of a contractor's responsible managing employee, as contained in the agreement, would not implicate a significant privacy interest.

With respect to the exception created by section 92F-13(2), Hawaii Revised Statutes, government records under this exception are protected only "to the extent that such records would not be discoverable." This section protects from disclosure those documents which would be protected under Rule 26 of the Hawaii Rules of Civil Procedure. Thus, this section preserves protection for documents involving the attorney-client, work product or other judicially recognized privileges.

In C.B. Dutton v. Guste, 395 So. 2d 683 (La. 1983), the plaintiff, pursuant to the state's public records law, sought to compel the Louisiana Attorney General's Office to produce a settlement agreement between the State of Louisiana and various architects and engineers which compromised claims relating to the design and construction of the Louisiana Superdome. In Guste, the Louisiana Attorney General's Office alleged that the settlement agreements were exempt from disclosure under an exception which protected records which reveal "the mental impressions, conclusions, opinions, theories of an attorney or an expert, obtained or prepared in anticipation of litigation." Guste, 395 So. 2d at 685. The court quickly rejected this position, observing that while the agreements remained executory, they were not prepared in anticipation of litigation. Specifically, the court reasoned that "we consider that the documents were prepared in an attempt to conclude the litigation between the parties settlement." Id. at 685 (emphasis added).

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[4]This chapter was repealed as part of the enactment of the UIPA. See Act effective July 1, 1988, ch. 262, Haw. Sess. Laws 473 (1988). Therefore, our analysis must proceed under the provisions of the UIPA.

Accordingly, the court ordered that the settlement documents be made available for public inspection.

With respect to the attorney-client privilege, in Norwood v. F.A.A., 580 F. Supp. 994 (W.D. Tenn. 1983), the U.S. District Court for the Western District of Tennessee held, in an action arising under the federal Freedom of Information Act, that settlement agreements between the FAA and striking air traffic controllers were not protected under Exemption (b)(5)'s protection for material subject to the attorney-client privilege. The court reasoned that the FAA failed to establish that the material in the documents "was communicated to or by an attorney as part of a professional relationship in order to provide the [FAA] with advice on the legal ramifications of its actions." Norwood, 580 F. Supp. at 1002. Further, the court concluded that the privilege does not permit the withholding of documents merely because they are the product of an attorney-client relationship, the agency must also prove that the information is confidential. Id.

In turning to the settlement agreements presented for our review, it appears that these agreements contemplated the disclosure of their contents to third parties not only when "compelled to do so by law" but to inform branches of State government of their terms and "to respond to inquiries of the news media." Further, we do not believe that the information was communicated to or by an attorney for either party in order to provide their clients with legal advice, rather the information is merely contractual in nature. Lastly, our research has found no instance where a court has protected the terms of a settlement agreement under the attorney-client privilege. Accordingly, we conclude that the settlement agreements presented here are not protected under section 92F-13(2), Hawaii Revised Statutes.

With respect to the exception created by section 92F-13(3), Hawaii Revised Statutes, for records that "must be confidential in order to avoid the frustration of a government function," Senate Standing Committee Report No. 2580, dated March 31, 1988, helps clarify the types of records which might merit the shelter of this exception. Among other records mentioned in the report which need not be disclosed if "frustration of a legitimate government function" would result is:

> Information, which if disclosed, would . . . give a manifestly unfair

> advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining.

S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988) (emphasis added).

The settlement agreements between the State, Nippon and Bethlehem are contracts. See Dowsett v. Cashman, 2 Haw. App. 77, 625 P.2d 1064 (1981). Thus, if disclosure of these agreements would give "a manifestly unfair advantage" to any of the remaining defendants, with whom settlement proposals are outstanding, the agreements need not be disclosed pending the final resolution of the lawsuit.

Our research indicates that the courts, in construing state public or open records laws, have consistently ordered that a settlement agreement to which an agency was a party be made available for inspection.[5] Significantly however, these cases involved circumstances where the states' claims had been fully and finally resolved. In the instant matter, the State has claims still pending against two primary steel-producing defendants, as well as others. Further, settlement proposals among these parties are outstanding. Disclosure of the amounts accepted by the State in satisfaction of its claims relating to the construction of Aloha Stadium could significantly adversely affect its settlement posture by revealing the State's evaluation of the strengths or weaknesses of its civil claims and the amount it would reasonably accept to settle similar claims. Additionally, the terms upon which the State settled with Nippon and Bethlehem were not identical. Disclosure of these provisions

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[5]See Daily Gazette Co. v. Withrow, 350 S.E.2d 738 (W. Va. 1986); Registrar Division of Freedom Newspapers, Inc. v. County of Orange, 205 Cal. Rptr. 92 (Cal. Ct. App. 1984) (settlement documents in tort claim by county jail inmate alleging sheriff's negligence); Dutton v. Guste, 395 So. 2d 683 (La. 1981) (settlement documents in action by state against architects and engineers concerning construction of public stadium); In re Geneva Printing Co. v. Village of Lyons, 7 Med. L. Rep. 1220 (N.Y. Sup. Ct. March 25, 1981) (settlement agreement in disciplinary proceeding by municipality against public employee); Anchorage School District v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989) (settlement agreement between school district and contractor involving fireproofing of school building); Society of Professional Journalists v. Briggs, 675 F. Supp. 1308 (D. Utah 1987) (settlement documents in claim against county for official misconduct); Guy Gannett Publishing Co. v. University of Maine, 555 A.2d 470 (Me. 1989) (settlement agreement between University and former basketball coach).

may give the remaining defendants a distinct advantage in the settlement process.

Under these circumstances, we are constrained to conclude that disclosure of the information contained in the settlement agreements would give a manifestly unfair advantage to the remaining defendants in the settlement negotiation process, thereby resulting in the "frustration of a legitimate government function" under section 92F-13(3), Hawaii Revised Statutes.

However, upon the final resolution of this lawsuit involving "weathering steel" used in the construction of the stadium, these settlement agreements must be made available for public inspection and copying under the UIPA. The civil claims asserted by the State ultimately belong to the people. There is a significant public interest in whether the State has prosecuted these claims in a diligent manner. Should any settlement proceeds be insufficient to remedy or repair the defects present in the stadium, the shortfall will ultimately be paid by State taxpayers. These considerations demand, in light of the policy of openness and disclosure fostered by the UIPA, that such documents ultimately be subject to public scrutiny. More importantly, following the conclusion of this lawsuit, no exception to the UIPA will authorize the nondisclosure of these settlement agreements. This result is not changed by the confidentiality provisions of the agree ments, which must yield to the provisions of the UIPA.[6]

CONCLUSION

Disclosure of the settlement agreements between the State, Nippon and Bethlehem would not "constitute a clearly unwarranted invasion of personal privacy" under the UIPA. Further, we believe that the settlement agreements are not protected under section 92F-13(2), Hawaii Revised Statutes, as neither the work-product or attorney-client privileges apply to these records. However, we conclude that disclosure of the agreements would give

[6]Such confidentiality provisions have been declared void to the extent they conflict with state Freedom of Information Acts. See, e.g., Daily Gazette Co., Inc. v. Withrow, 350 S.E. 2d 738 (W. Va. 1986); Anchorage School District v. Anchorage Daily News, 779 P.2d 1191 (Alaska 1989). See also Washington Post Co. v. United States Department of Health & Human Services, 690 F.2d 252, 263 (D.C. Cir. 1982) ("to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate").

a "manifestly unfair advantage" to the remaining defendants in ongoing settlement discussions with the State and thereby result in the "frustration of a legitimate government function" under the UIPA. Disclosure of the terms and conditions of the agreements would reveal the State's evaluation of the strengths or weaknesses of its claims and the amounts that the State would likely accept to compromise its claims.

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HRJ:sc
cc: George F. Hilty
Deputy Attorney General

APPROVED:

Kathleen A. Callaghan
Director