December 31, 2002

The Honorable Gilbert S. Coloma-Agaran
Chair, Board of Land and Natural Resources
Department of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii 96813

Re: Attorney Client Privilege

Dear Mr. Coloma-Agaran:

This is in response to a letter from then Chair Michael Wilson dated May 11, 1998, to the Office of Information Practices ("OIP") on the above-referenced matter.

ISSUE PRESENTED

Whether a November 15, 1991, letter from the Maui County Office of the Prosecuting Attorney ("Maui Prosecutor") to William Paty, former Chairman of the Department of Land and Natural Resources ("DLNR") is protected by the attorney-client privilege.

BRIEF ANSWER

No. The Maui Prosecutor has no authority under the Maui County Charter to act as an attorney representing the DLNR, thus, no attorney-client privilege can attach to information shared between them. To be protected from public disclosure under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), a government

record has to fall into one of the exceptions to disclosure at section 92F-13, Hawaii Revised Statutes.

FACTS

Then Maui County Deputy Prosecuting Attorney Kurt W. Spohn wrote a letter to the Chair of the DLNR dated November 15, 2001. This letter was in response to a question presented to the Maui Prosecutor by the DLNR regarding possible violations of the law by a non-government entity.

In telephone conversations of October 19, 2001, and November 26, 2002, the OIP was advised by Gary Moniz, Administrator, DLNR Conservation and Resources Enforcement Division, that there is ongoing litigation in the Third Circuit regarding matters discussed in the Maui Prosecutor's letter. The OIP does not know whether this litigation is civil or criminal in nature.

Deputy Attorney General Kurt Spohn advised the OIP, in a telephone conversation of December 6, 2002, that the Maui Prosecutor's Office was the attorney for the State of Hawaii in criminal matters. As such, it acted in an impartial and unbiased manner. Witnesses were always told that the Maui Prosecutor was not that person's attorney. The same holds true for government agencies bringing cases to the Maui Prosecutor. Mr. Spohn indicated it is his belief that the attorney-client privilege would not attach to his letter to the DLNR at issue here, but that another exception to disclosure may apply.

DISCUSSION

I. UIPA

The UIPA governs access to all Hawaii State and county records. A "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993). The letter at issue, maintained by the DLNR, is a government record subject to the UIPA.

Government records are presumed to be available to the public for inspection and copying unless an exception to disclosure applies. Haw. Rev. Stat. § 92F-11(a) (1993). There are five exceptions to this general rule requiring disclosure:

§92F-13 Government records; exceptions to general rule. This part shall not require disclosure of:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

(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;

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

(4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and

(5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

Haw. Rev. Stat. § 92F-13 (1993).

II. ATTORNEY-CLIENT PRIVILEGE

Hawaii's attorney-client privilege is found in the Hawaii Rules of Evidence, chapter 626, Hawaii Revised Statutes:

Rule 503 Lawyer-client privilege.

(a) Definitions. As used in this rule:

(1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services.

> (2) A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.
>
> (3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
>
> (4) A "representative of the lawyer" is one directed by the lawyer to assist in the rendition of professional legal services.
>
> (5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure would be in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
>
> **(b) General rule of privilege.** 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 (1) between the client or the client's representative and the lawyer or the lawyer's representative, or (2) between the lawyer and the lawyer's representative, or (3) by the client or the client's representative or the lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.
>
> **(c) Who may claim the privilege.** The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication shall claim the privilege on behalf of the client unless expressly released by the client.

Rule 503, Hawaii Rules of Evidence, Chapter 626, Hawaii Revised Statutes ("Rule 503").

The OIP has previously opined on the attorney-client privilege in the OIP Opinion Letter Number 91-23:

> 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. See generally, Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 1-4 (2d ed. 1989). The privilege is applicable to communications from the attorney to the client, as well as communications to the attorney from the client. Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956); Costal States Gas. Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980).
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> This privilege is also unquestionably applicable to the relationship between government attorneys and government agencies and administrative personnel. Green v. IRS, 556 F. Supp. 79 (N.D. Ind. 1982); see also Rule 503(a)(1), Hawaii Rules of Evidence (client includes "public officer" or "other organization or entity, either public or private"). The protection of communications made in confidence between an attorney and a governmental client serves an important public policy purpose. As stated by an Ohio court:
>
>> In disclosing these records, attorneys and their governmental clients may feel compelled to revert to unrecorded oral communications in order to protect their communications from possible public disclosure. The government unit would become less efficient due to the increased chance of miscommunication. Public policy favors an institution being able to freely seek legal advice and for advice to be given in a document form without concerns over a breach of the privilege by public disclosure.
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> Woodman v. City of Lakewood, 541 N.E.2d 1084, 1087 (Ohio 1988) (emphasis added).
>
> . . .
>
> Under Rule 503, a client . . . has a privilege to refuse to disclose confidential communications made for the purpose of

> facilitating the rendition of profession legal services to the client. In our opinion, communications within the scope of this rule of evidence are protected from disclosure pursuant to state law within the meaning of section 92F-13(4), Hawaii Revised Statutes. Similarly, the legislative history of section 92F-13(3), Hawaii Revised Statutes, indicates that among other things, agencies may withhold from public inspection and duplication, "[i]nformation that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).
>
> In addition, in some cases, communications . . . will be protected from public disclosure under section 92F-13(2), Hawaii Revised Statutes, which permits agencies to withhold "[g]overnment records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State. . . is or may be a party, to the extent that such records would not be discoverable." This is because under Rule 26(b)(1), Hawaii Rules of Civil Procedure, discovery is permitted of "any matter not privileged."

OIP Op. Ltr. No. 91-23 at 8-9 (Nov. 25, 1991).

The Maui County Charter vests the Maui Prosecutor with the following powers, duties, and functions:

> Section 8-3.3. Powers, Duties and Functions. The prosecuting attorney shall:
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> . . .
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> b. Attend all courts in the county and conduct, on behalf of the people, all prosecutions therein for offenses against the laws of the State and the ordinances and rules of the county.
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> c. Appear in every criminal case where there is a change of venue from the courts in the county and prosecute the same in any jurisdiction to which the same is changed or removed.
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> d. Institute proceedings, or direct the chief of police to do so, before a judge of a court of competent jurisdiction for the arrest of persons charged with or reasonably suspected of public offenses when the prosecuting attorney has information that any such offenses have been committed, and for that purpose take

> charge of criminal cases before a judge of a court of competent jurisdiction, either in person or by a deputy or by such other prosecuting officer as the prosecuting attorney shall designate.
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> e. Draw all indictments and attend before the grand jury whenever cases are presented to it for its consideration. Nothing herein contained shall prevent the conduct of proceedings by private counsel before a judge or courts of record under the direction of the prosecuting attorney.
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> f. Prosecute administrative violations of the liquor laws before the board of liquor adjudication.
>
> g. Perform such other duties and functions as shall be assigned by the mayor.

Rev. Charter of the County of Maui art. VIII, § 8-3.3 (rev. ed. 1999).

Given the foregoing, the OIP is of the opinion that the Maui Prosecutor is clearly a "person authorized . . . to practice law in any state or nation" under Rule 503's definition of "attorney." The DLNR however, is not a "client" of the Maui Prosecutor under Rule 503. The DLNR is not the Maui Prosecutor's client because its consultation with the Maui Prosecutor was not pertaining to representation of the DLNR. Thus the OIP opines that, with regard to the letter at issue, the DLNR is not "a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services." Further, the Maui Prosecutor is not authorized by the Maui County Charter to transact business for the DLNR, nor is it the DLNR's legal agent. Thus, the OIP is of the opinion that the Maui Prosecutor was not the DLNR's attorney at the time Mr. Spohn's letter was written. Because the Maui Prosecutor was not the DLNR's attorney, communications between these two government agencies cannot be protected by the attorney-client privilege.

III. OTHER EXCEPTIONS TO DISCLOSURE

The letter at issue may be protected from disclosure under another one of the UIPA's exceptions in section 92F-13, Hawaii Revised Statutes. While the OIP is not rendering an opinion on this issue, it is possible that the Maui Prosecutor's letter would not be discoverable in a judicial or quasi-judicial action to which the State or county is or may be a party. If so, then the DLNR may be able to withhold it from public disclosure under section 92F-13(2), Hawaii Revised Statutes. In addition, if disclosure of the Maui Prosecutor's letter would cause the frustration of a legitimate government

function, it may be withheld from disclosure under section 92F-13(3), Hawaii Revised Statutes. If the Maui Prosecutor's letter is protected from disclosure by a State or federal law or court order, is may be withheld from disclosure under section 92F-13(4), Hawaii Revised Statutes.

CONCLUSION

The Maui Prosecutor is not the attorney representing the DLNR. As such, information exchanged between these two agencies is not protected by the attorney-client privilege. The Maui Prosecutor's letter may be protected from public disclosure under one of the other exceptions at section 92F-13, Hawaii Revised Statutes.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

CMD: ankd

cc: Mr. Gary D. Moniz, Administrator
Conservation and Resources Enforcement Division

Mr. Ray Enos, Deputy Attorney General

Mr. Kurt W. Spohn, Deputy Attorney General