November 25, 1991

Ms. Linda C. Tseu
Executive Director
Hawaii Civil Rights Commission
830 Punchbowl Street
Honolulu, Hawaii 96813

Re:Intra-Agency Memoranda Cited or Identified at a Public Meeting

This is in reply to your letter requesting an advisory opinion from the Office of Information Practices ("OIP") concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Hawaii Civil Rights Commission ("Commission") must disclose certain government records discussed or identified at an October 10, 1990 public meeting of the Commission.

BRIEF ANSWER

For compelling public policy reasons, and using Exemption 5 of the federal Freedom of Information Act for guidance, we have previously opined that the UIPA's frustration of legitimate government function exception, section 92F-13(3), Hawaii Revised Statutes, permits agencies to withhold access to intra-agency and inter-agency memoranda that contain the recommendations and opinions of agency subordinates, and certain "drafts," which are subject to the common law "deliberative process privilege."

While we conclude that certain records discussed by the Commission at its October 10, 1990 meeting fall within the

protections of the deliberative process privilege, we also conclude that, in this case, any privilege attaching to these records was waived through substantial discussion of their contents at a meeting open to the public. While a determination of whether a party has, by their conduct, waived the protections of a privilege is a question of fact that must be decided on a case-by-case basis based upon the totality of circumstances, we find that such a waiver occurred in this case.

Further, while the UIPA does not expressly address whether government records that would otherwise be subject to the deliberative process privilege should be publicly available when discussed at a meeting open to the public, we note that the legislatures of several states have specifically addressed this question as part of state open meeting or open records laws. Given this fact, and because this is an issue of statewide importance, during the next legislative session the OIP will be proposing legislation concerning the treatment of intra-agency and inter-agency memoranda when discussed at an open meeting.

Finally, agencies are not required by the UIPA to disclose government records that are protected from disclosure by State or federal law. Haw. Rev. Stat. . 92F-13(4) (Supp. 1990). While section 368-4, Hawaii Revised Statutes, appears to require the Commission to keep all its records confidential, in examining this statute as a whole, and in construing it to avoid an unreasonable result, we conclude that it prohibits the Commission from disclosing complaint records, and Commission records associated therewith, such as records compiled as part of an investigation, or during its attempts to mediate or conciliate a complaint.

Accordingly, it is our opinion that the government records discussed at the Commission's October 10, 1990 meeting are not protected from disclosure by section 368-4, Hawaii Revised Statutes, with the exception of the attachments to the Deputy Director's memorandum dated October 10, 1990, which contain a listing of complaints. With the exception of these attachments, we find that the government records discussed at the Commission's October 10, 1990 meeting must be made available for public inspection and copying "upon request by any person." Haw. Rev. Stat. . 92F-11(a) and (b) (Supp. 1990).

FACTS

The Hawaii Civil Rights Commission ("Commission"), created by the Legislature under an Act approved June 7, 1988, ch. 219,

1988 Haw. Sess. Laws 386, was originally granted jurisdiction, among other things, "to receive, investigate, and conciliate complaints alleging any unlawful discriminatory practice under existing state laws" and to conduct proceedings on such complaints where conciliation is inappropriate or unsuccessful.

In 1989, the Legislature clarified that the Commission's jurisdiction extends to receiving, investigating, conciliating, and adjudicating complaints alleging unlawful discriminatory practices under chapters 489, 515, and part I of chapter 378, Hawaii Revised Statutes. See Act approved June 27, 1989, ch. 386, 1989 Haw. Sess. Laws 1102.

On October 10, 1990, the Commission held a meeting which was open to the public pursuant to the open meeting provisions of part I of chapter 92, Hawaii Revised Statutes. At this meeting, the Commission discussed or referred to several documents, including an October 10, 1990 memorandum from the Commission's Deputy Director addressed to the Commission and Commission staff (hereinafter "Memorandum"). This Memorandum included "updated statistics concerning the status of investigations on complaints" filed under chapters 378 and 515, Hawaii Revised Statutes, and contained recommendations on how the Commission could reduce an apparent backlog of existing complaints under these chapters. Apparently, attached to the Memorandum were two documents listing the complaints pending under part I of chapter 378, Hawaii Revised Statutes, including the names of the complainants and respondents.

In addition to discussing the Deputy Director's Memorandum at the Commission's October 10, 1990 public meeting, the Commission also discussed three draft legislative proposals and a draft fiscal year 1991-1993 budget. After discussion of two of the legislative proposals, the Commission voted to approve the same. With respect to the third legislative proposal, the Commission voted to approve two of the sections of the proposed bill, and disapproved the remaining sections. No action was taken by the Commission concerning the draft budget. None of the documents discussed at the Commission's meeting were publicly distributed. A copy of the minutes of the Commission's October 10, 1990 meeting is attached as Exhibit "A."

Following its October 10, 1990 public meeting, an attorney present at the meeting requested to inspect and copy the above documents, and others which were also discussed by the

Commission. In response to this request, the Commission disclosed the minutes of its previous meeting, a copy of a computer system proposal, and a draft Operational Expenditure Plan for fiscal year 1990-91. However, with respect to the legislative proposals, the Deputy Director's Memorandum, and its draft 1991-93 budget, the Commission notified the requester that it was seeking an advisory opinion from the OIP concerning its obligation to make the same available for public inspection under the UIPA.

In its request to OIP for an advisory opinion, the Commission asserts that the above documents are "confidential and deliberative" in nature, and in the Commission's estimation, are protected from disclosure by section 92F-13(3), Hawaii Revised Statutes, which allows agencies to withhold from public inspection and copying, "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." In addition, the Commission states that the attachments to the Deputy Director's Memorandum considered at its public meeting contain the names of complainants under chapter 378, Hawaii Revised Statutes, which the Commission alleges are protected from disclosure by State law. Lastly, although the Commission initially alleged that the contents of the Deputy Director's Memorandum were protected by the attorney-client privilege, after discussions with OIP personnel, the Commission has withdrawn this assertion.

DISCUSSION

I. INTRODUCTION

Under the UIPA, "[a]ll government records are available for public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1990). Thus, except as provided by section 92F-13, Hawaii Revised Statutes, all government records must be made available for inspection and copying upon request by any person. See Haw. Rev. Stat. § 92F-11(b) (Supp. 1990).

We now turn to a consideration of whether the Commission's draft legislative proposals, draft budget, and the Memorandum prepared by the Commission's Deputy Director, are protected from disclosure by section 92F-13(3), Hawaii Revised Statutes, the UIPA's exception for government records that must remain confidential "to avoid the frustration of a legitimate government function."

II. FRUSTRATION OF LEGITIMATE GOVERNMENT FUNCTION EXCEPTION

Using Exemption 5 of the federal Freedom of Information Act, 5 U.S.C. . 552(b)(5) ("FOIA") for guidance, we have previously opined that under section 92F-13(3), Hawaii Revised Statutes, agencies may withhold access to certain inter-agency and intra-agency memoranda, "drafts," staff recommendations, and notes subject to the common law "deliberative process privilege" to avoid the frustration of the legitimate government function of decisionmaking. See OIP Op. Ltr. Nos. 90-8 (Feb. 12, 1990), 90-11 (Feb. 26, 1990), 90-21 (June 20, 1990), and 91-16 (Sept. 19, 1991).

As explained in previous OIP opinion letters, three policies underlie the existence of this common law privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against the premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from the disclosure of reasons and rationales that were not in fact ultimately the grounds for agency action. See, e.g., Russell v. Department of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. Department of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978).

This privilege does not apply to purely factual information in an otherwise deliberative and predecisional document. Environmental Protection Agency v. Mink, 410 U.S. 73, 91 (1973). Further, even if a document is clearly protected by this privilege, it loses its protected status if an agency chooses to expressly adopt it or incorporate it by reference as part of an agency decision or policy, see NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161 (1974), or if a document is formally or informally adopted as the agency's effective law or policy, see American Society of Pension Actuaries v. IRS, 746 F. Supp. 188 (D.D.C. 1990); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

With respect to the two legislative proposals that were reviewed and approved by the Commission at its October 10, 1990 public meeting, it is our opinion that as of their approval, they ceased to be "predecisional" documents. Therefore, we conclude that the deliberative process privilege of section 92F-13(3), Hawaii Revised Statutes, does not protect these records from disclosure to the public.

With respect to the draft legislation and the draft budget that were not approved by the Commission, we believe that these records are within the scope of the deliberative process privilege. See OIP Op. Ltr No. 91-16 at 4-7 (Sept. 19, 1991). We have also examined the contents of the Deputy Director's Memorandum and find that it sets forth opinions, recommendations, and evaluations on questions of Commission policy. As such, we believe that the contents of this memorandum are covered by the deliberative process privilege, which was intended to permit agencies to refuse to disclose documents reflecting advisory opinions, recommendations, and deliberations comprising the process by which governmental decisions and policies are formulated. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1974).

Importantly, however, like other privileges, the deliberative process privilege may be waived by an agency through conduct that is inconsistent with a claim of privilege. Thus, we turn to an examination of whether the discussion of these documents at a public meeting has resulted in the waiver of the deliberative process privilege protections of section 92F-12(3), Hawaii Revised Statutes.

The voluntary disclosure of a document protected by the deliberative process privilege of FOIA's Exemption 5 may result in the waiver of the document's protected status. See e.g., Department of the Air Force v. Rose, 425 U.S. 352, 357 n.4 (1976); Mobil Oil Corp. v. U.S. Environmental Protection Agency, 879 F.2d 698 (9th Cir. 1989); Cooper v. Department of the Navy, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979); Shell Oil Company v. Department of the Treasury, 772 F. Supp. 202 (D.C. Del. 1991).

A determination of whether an agency has, through its conduct, waived the protection of the deliberative process privilege is a question of fact, and must be based on a case-by-case examination of the totality of circumstances surrounding the alleged waiver. Id.

Based upon our examination of the minutes of the October 10, 1990 meeting of the Commission, and upon the totality of circumstances, it is our opinion that the Commission, through substantial discussion of the contents of the records subject to the deliberative process privilege, waived the protection of this government privilege.

Additionally, while the UIPA does not expressly address the question of whether intra-agency memoranda, drafts, notes, and other records commonly subject to the deliberative process privilege should be publicly available when discussed or cited at a meeting open to the public, the legislatures of several states have expressly examined and addressed the treatment of these records as part of open meeting or open records laws. See, e.g., Kan. Rev. Stat. Ann. . 45-221(a)(20) (Supp. 1990), Minn. Stat. Ann. . 471.705(2) (1985), and Rev. Stat. Neb. . 84-1412(6) (1990).

The question of whether government records protected by the deliberative process privilege should lose that protection by virtue of their discussion or identification at a public meeting is one of statewide importance. Pursuant to its authority under section 92F-42(7), Hawaii Revised Statutes, during the next legislative session the OIP intends to submit proposed legislation that, if adopted, would expressly require agencies to disclose intra-agency memoranda and other government records protected by the deliberative process privilege, when identified and substantively discussed at a meeting open to the public under chapter 92, Hawaii Revised Statutes.

Additionally, because the Legislature has declared that "[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest," see Haw. Rev. Stat. . 92F-2 (Supp. 1990), until this issue is clarified by the Legislature, it is our strong recommendation that whenever possible, agencies voluntarily disclose intra-agency or inter-agency memoranda which are identified and substantively discussed at meetings open to the public under chapter 92, Hawaii Revised Statutes, when the only UIPA exception applicable to such memoranda is the deliberative process privilege of section 92F-13(3), Hawaii Revised Statutes.

Although in this case, we have concluded that the Commission waived the deliberative process privilege attaching to the documents that are the subject of this opinion, we must now turn to an examination of whether any other UIPA exception protects these government records from disclosure.

III. EFFECT OF SECTION 368-4, HAWAII REVISED STATUTES

In its request to the OIP for an opinion, the Commission notes that the Memorandum prepared by the Commission's Deputy Director dated October 10, 1990 may contain information that the

Commission is prohibited from disclosing by section 368-4, Hawaii Revised Statutes. Specifically, we are informed that a listing of pending complaints was contained in attachments to the Memorandum, including references to the names of complainants and respondents.

The UIPA does not require an agency to disclose government records "which, pursuant to a state or federal law . . . are protected from disclosure." Haw. Rev. Stat. § 92F-13(4) (Supp. 1990). Therefore, we find it necessary to consider the effect, if any, of section 368-4, Hawaii Revised Statutes, upon the public disclosure of the Deputy Director's Memorandum to the Commission and its staff. This statute provides:

> **§368-4 Records; confidentiality; reporting requirements.** All records of the commission shall be kept confidential and shall not be disclosed to anyone except as may be required by order of a court with jurisdiction in a case arising from a complaint filed with the commission or as otherwise provided by law. The commission shall maintain complete records of all complaints filed with the commission and shall compile annual statistical data on the number of complaints filed and the status or disposition of those complaints by types of complaints. The commission shall provide to the governor and the legislature a report of that statistical data on an annual basis, not less than thirty days prior to the convening of the legislative session.

Haw. Rev. Stat. § 368-4 (Supp. 1990) (emphasis added).

The first sentence of section 368-4, Hawaii Revised Statutes, was added by the Legislature during the 15th Legislative Session. See Act approved June 27, 1989, ch. 386, sec. 7, 1989 Haw. Sess. Laws 1102. As amended, this statute literally provides that "all records" of the Commission are confidential, unless otherwise provided by law. Read literally, not one single record maintained by the Commission may be disclosed outside the Commission by any Commission officer or employee, except by court order or "as otherwise provided by law."

It is a fundamental rule of statutory construction that "departure from the literal construction of a statute is justified when such construction would produce an absurd or

unreasonable result and would clearly be inconsistent with the purposes and the policies of the act in question." 2A N. Singer, Sutherland Statutory Construction § 45.12 (4th ed. rev. 1984); see also State v. Torres, 66 Haw. 281, 286, 660 P.2d 522 (1983).

A literal construction of section 368-4 would, in our opinion, lead to unreasonable results. For example, if this statute was mechanically applied, records which the Legislature directed in section 92F-12, Hawaii Revised Statutes, shall be available for inspection during regular business hours, such as orders made in the adjudications of cases, rules of procedure, government purchasing information, and information concerning Commission contract hires, consultants, and personnel, would be confidential. We do not believe that the Legislature intended the 1989 amendments to section 368-4, Hawaii Revised Statutes, to have this effect. Unfortunately, the legislative history of the 1989 amendments to section 386-4, Hawaii Revised Statutes, sheds no light whatsoever concerning the intended operation of the confidentiality provisions of this statute. See S. Conf. Comm. Rep. No. 181, 15th Leg., 1989 Reg. Sess., Haw. S.J. 850 (1989); H. Conf. Comm. Rep. No. 172, 15th Leg., 1989 Reg. Sess., Haw. H.J. 845 (1989).

It is another commonly accepted principle of statutory construction that in determining the meaning of a statute, the statute's entire context should be examined:

> A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.

2A N. Singer Sutherland Statutory Construction § 46.05 at 92 (4th ed. rev. 1984); see also Pacific Ins. Co., Ltd. v. Oregon Mutual Ins. Co., 53 Haw. 208, 490 P.2d 899 (1971) ("[s]tatutory language must be read in the context of the entire statute and construed in a manner consistent with the purposes of the statute").

The Legislature has also declared that where the words of a statute are ambiguous, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous

words, phrases, and sentences may be compared, in order to ascertain their true meaning." Haw. Rev. Stat. . 1-15 (1985).

In examining the context in which the phrase "[a]ll records of the commission shall be kept confidential" appears within section 368-4, Hawaii Revised Statutes, one discovers that this statute also refers to "the records" that the Commission is commanded to maintain:

> The commission shall maintain complete records of all complaints filed with the commission and shall compile annual statistical data on the number of complaints filed and the status or disposition of those complaints by types of complaints. The commission shall provide to the governor and the legislature a report of that statistical data on an annual basis, not less than thirty days prior to the convening of the legislative session.

Haw. Rev. Stat. . 368-4 (Supp. 1990) (emphasis added).

Based upon an examination of section 368-4, Hawaii Revised Statutes, as a whole, and construing this statute to reach a harmonious result, it is our opinion that the "records" that "shall be kept confidential" are those records referred to by section 368-4, Hawaii Revised Statutes, namely the records of complaints on file with the Commission. Accordingly, we conclude that section 368-4, Hawaii Revised Statutes, prohibits the Commission from disclosing complaints on file with the Commission, and associated records, such as records related to the investigation or conciliation of those complaints except as required by court order or as otherwise provided by law.[1]

Given the above construction of section 368-4, Hawaii Revised Statutes, we conclude that it does not apply to the actual contents of the Deputy Director's Memorandum. However, any information contained in the attachments to the Memorandum that contain specific information concerning complaints filed with the Commission should be segregated from the attachments

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[1]We believe that our conclusion is buttressed by the fact that federal law prohibits the Equal Employment Opportunities Commission, a federal agency with duties similar to the Commission, from disclosing similar records. See 42 U.S.C. . 2000e-5(b) (1991).

before the Memorandum is made available for public inspection and copying. As to this latter information, in our opinion, it is protected from disclosure under sections 92F-13(4) and 368-4, Hawaii Revised Statutes.

CONCLUSION

Although agencies are not required by the UIPA to disclose government records protected by the common law deliberative process privilege, such as intra-agency memoranda, drafts, and notes, and although we find that a few of the government records discussed by the Commission at its October 10, 1990 meeting fall within this privilege, we conclude that the Commission waived the protection of this privilege by substantively discussing their contents at a meeting open to the public under chapter 92, Hawaii Revised Statutes.

Additionally, while section 368-4, Hawaii Revised Statutes, provides that all records of the Commission shall be kept confidential, in examining the statutory context of this phrase, it is our opinion that this statute prohibits the Commission from disclosing records of complaints, or records associated with such complaints, except as required by court order or as otherwise provided by law. As such, it is our opinion that section 368-4, Hawaii Revised Statutes, does not apply to the records discussed at the Commission's October 10, 1990 meeting, except for the attachments to the Deputy Director's Memorandum, which contain a listing of pending complaints.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
Attachment
cc: John L. Knorek, Esquire
Kitty K. Knight, Esquire
Torkildson, Katz, Jossem, Fonseca, Jaffe & Moore