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VICTOR J. DELOACH
SECOND CIRCUIT COURT
STATE OF HAWAIIIN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

AKAKU: MAUI COMMUNITY	)	CIVIL NO. 07-1-0280 (1)
TELEVISION, a domestic non-profit	)	
corporation	)	FINDINGS OF FACT, CONCLUSIONS OF
	)	LAW AND ORDER GRANTING IN PART
Plaintiff,	)	AND DENYING IN PART PLAINTIFF'S
	)	MOTION FOR SUMMARY JUDGMENT;
vs.	)	CERTIFICATE OF SERVICE
	)	
MARK BENNETT, Attorney General of the	)	
State of Hawai'i and LAWRENCE	)	
REIFURTH, Director, Department of	)	
Commerce and Consumer Affairs, State of	)	
Hawai'i	)	
	)	
Defendants.	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
GRANTING IN PART AND DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

The Court, having heard Plaintiff AKAKU; MAUI COMMUNITY TELEVISION'S ("Plaintiff") Motion for Summary Judgment, seeking injunctive relief, on Tuesday, September 23, 2008, with Lance D. Collins, present representing the Plaintiff, and Rodney J. Tam, Deputy Attorney General, present representing the Defendants, MARK BENNETT AND LAWRENCE REIFURTH, and having considered the entire record in this case, including all the memoranda, pleadings herein, and having considered the arguments of counsel,

and being fully apprised in the premises, hereby enters the following Findings of Fact, Conclusions of Law, and Order.

Any finding of fact that should more properly be deemed a conclusion of law and any conclusion of law that should more properly be deemed a finding of fact shall be so construed.

FINDINGS OF FACT

1. The Plaintiff is a non-profit corporation that is the current designated Public, Educational and Governmental ("PEG") access organization for the County of Maui. The Department of Commerce and Consumer Affairs is responsible for designating a PEG access entity to produce and broadcast community based television programming for each county in the State of Hawai'i. HRS § 440G-3.

2. Sometime in 2005, Defendant Reifurth (successor to Mark Recktenwald), the Director of the Department of Commerce and Consumer Affairs ("DCCA") contacted the Department of the Attorney General to request an opinion concerning whether designation of PEG access organizations under Hawai'i Revised Statute ("HRS") Chapter 440G is subject to the State Procurement Code ("SPC") in HRS Chapter 103D.

3. In October, 2005, Defendant Bennett issued an opinion letter to Defendant Reifurth which concluded that the DCCA's contracts with PEG access organizations throughout the state were subject to the SPC unless one of the exceptions in HRS section 103D-102(b) applied. The Attorney General's opinion was never published pursuant to the procedures set out in HRS § 28-3.

4. In November, 2005, subsequent to receiving Defendant Bennett's letter

concerning the applicability of the SPC to the PEG access organization contracts, Defendant Reifurth submitted a request to the State Procurement Office for a temporary exemption.

5. Plaintiff was the designated access organization for Maui County for several years prior to 2005. During this time, the DCCA did not subject the PEG access organization selection process to the SPC code.

6. In February of 2006, a public meeting was held by the DCCA to receive comments on whether the DCCA should issue a Request for Proposal ("RFP") or should seek a permanent exemption from the SPC. At this meeting, the DCCA distributed a document titled "Public Comment Meeting-Fact Sheet-Compliance with State Procurement Code: PEG Contracts." The fact sheet stated in part, that:

"The DCCA has been informed by the Attorney General's Office (AG) that it must comply with the State's procurement laws as it related to these contracts."

* * * * *

"The DCCA was informed by the AG that the PEG contracts were subject to the state procurement code HRS 103D in October 2005."

DCCA employees also provided this information orally at the public hearing.

7. The final RFP released on July 30, 2007 contained the following statement:

"While reviewing the PEG access contracts, the DCCA asked the Department of the Attorney General and the [State Procurement Office ("SPO")] whether DCCA's contracts with these PEG Access Organizations are subject to the State's Procurement Code. It was determined that these PEG access contracts are subject to the State Procurement Code unless one of the exemptions in HRS § 103D-102(b) applies."

8. Defendant Reifurth has refused to provide Plaintiff with a copy of Defendant Bennett's letter concerning the applicability of the SPC to the designation of PEG access organizations, claiming such communication is protected by attorney-client privilege.

9. Plaintiff appealed Defendant Reifurth's denial of its request to the Office of

Information Practices ("OIP").¹ The OIP found that the Attorney General had issued an "opinion" letter governed by HRS § 28-3, but nevertheless concluded that Reifurth's denial should be upheld, reasoning that the attorney-client privilege attached to the communication and that the privilege had not been waived when the DCCA publicly disclosed Defendant Bennett's ultimate legal conclusion.²

10. The Uniform Information Practices Act ("UIPA"), directs agencies to disclose "[g]overnment records which, pursuant to federal law or a statute of this State, are expressly authorized to be disclosed to the person requesting access..." HRS § 92F-12(b)(2).

11. Attorney General opinions are "government records" for the purposes of the UIPA. Under Hawai'i State Law, HRS § 28-3, the Attorney General is required to file a copy of each opinion addressing questions of law submitted by the head of any department "with the lieutenant governor, the public archives, the supreme court library, and the legislative reference bureau within three days of the date it is issued."

12. Under HRS § 28-4, the Attorney General is directed to "give advice and counsel to the heads of departments... in all matters connected with their public duties..." but is not expressly required to disclose a copy of every communication containing advice and counsel.

13. Pursuant to HRS § 28-3, the Attorney General's duty to disclose legal opinions in response to questions of law posed by any head of department is not discretionary. If the head of any department poses a question of law, the Attorney General's response must be filed in

¹ The OIP was established under the Uniform Information Practices Act, HRS § 92F-41. Among OIP's other responsibilities, it has the duty to "upon request, review and rule on an agency denial of access to information or records," HRS § 92F-42(1), and can "[u]pon request ... provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under [UIPA]." HRS § 92F-42(3).

² Under the UIPA, the circuit courts review an action to compel disclosure *de novo*. HRS § 92F-15(b).

accordance with HRS § 28-3 absent other considerations set out in HRS §§ 92F-13 and 14.³

14. It has been the position of the Attorney General for the past forty years, that HRS § 28-3 requires the public disclosure of opinions: (1) that are requested by the public officers set forth in the statute, and (2) that are of such significant statewide importance that they guide the actions of governmental entities. Haw. Op. Atty. Gen., OIP Ltr. OP. NO. 91-23, 1991 WL 474720 (1991).

15. Defendant Bennett argues that this two pronged "significant statewide importance" test serves as a guideline for determining whether to disclose the letter and that the statute confers unfettered discretion upon the Attorney General to determine whether his written opinions on questions of law are "advice and counsel" letters (HRS § 28-4) not subject to disclosure or "opinion" letters (HRS § 28-3) required to be filed to ensure public availability.

16. The Attorney General's construction of his statutory duties is generally accorded great weight. Waikiki Resort Hotel v. City and County of Honolulu, 63 Haw. 222, 242-243 (1981). However, "no deference is required when the agency's interpretation conflicts with or contradicts the manifest purpose of the [statute] it seeks to implement." Colony Surf, Ltd. v. Director of Dept. of Planning and Permitting, 116 Haw. 510, 514 (2007) citing City and County of Honolulu v. Hsiung, 109 Haw. 159, 172 (2005); In re Water Use Permit Applications, 94 Haw. 97, 145 (2000).

17. Before the statutory provision governing Attorney General opinions was amended to require disclosure in 1961, the statute read as follows: "Gives Opinions. He shall when required, give his opinions upon questions of law submitted to him by the governor, the

³ HRS § 28-3 provides that the "attorney general shall file a copy of each opinion... within three days of the date it is issued." (emphasis added). Generally, the legislature uses the word "shall" to indicate its intention to make the provision

legislature, or the head of any department.”

18. In 1961, the Hawai'i Legislature amended the statute governing Attorney General opinions to require the Attorney General to file a copy of each opinion for public review because the Legislature recognized that such opinions “guid[e] the activities of government agencies” and yet were “inaccessible to the public.”⁴

19. The Legislature's intent is clear. The manifest purpose of enacting the current version of HRS § 28-3 is to foster transparency in government by requiring disclosure of Attorney General opinions that guide the actions of government agencies in significant ways.

20. It is uncontroverted that Defendant Reifurth, the head of the DCCA, posed a question of law to the Attorney General, Defendant Bennett.

21. The subject matter of the letter at issue is clearly of “significant importance” to members of the public throughout the state. PEG access organizations facilitate the production of programs addressing local issues of importance and train local citizens to produce their own programs. PEG access organizations provide a forum for citizen produced television programs. Under HRS §§ 440G-3, G-8.2(f) a PEG access organization oversees the operation, production, and broadcasting of television programs for three or more channels. The selection of a television production and broadcasting service for every county in the State of Hawai'i is undoubtedly an issue of statewide public significance.

mandatory and not discretionary. *State v. Shannon*, 118 Haw. 15, 25 (2008).

⁴ “The purpose of this bill is to amend the existing section 30-3 of the Revised Laws of Hawaii 1955, relating to opinions of the attorney general to provide for the filing of a copy of each such opinion with the lieutenant governor, the public archives, the supreme court library and the legislative reference bureau within three days after issue. It is further provided that the legislative reference bureau furnish each member of the legislature with a list of the most recent opinions filed with said bureau at least four times each year.”

“Your Committee has been informed that at the present time there is no place where a person can examine opinions of the attorney general very readily. That attorney general's opinions do furnish a basis for guiding the activities

22. Furthermore, changes in the PEG access designation process have generated significant governmental action and public interest. The DCCA has sponsored several public hearings in which public response to changes in the procedure and policy of designating PEG access organizations was voiced. The Hawai'i legislature has recently addressed the issue of PEG access organization procurement and has convened a task force to consider and evaluate designation alternatives.

23. The opinion provided by Defendant Bennett guided the actions of a government agency and Defendant Reifurth specifically cited Bennett's opinion as the basis for his decision to subject the PEG access designation to the SPC after a long history of using other methods to designate providers.

24. The legislative purpose of HRS § 28-3 would be frustrated if department heads could make changes in policy and procedures affecting the statewide marketplace of ideas without having to acknowledge the basis for the changes.

25. The letter issued by Defendant Bennett in response to Defendant Reifurth's legal inquiry satisfies the Attorney General's own criteria for determining whether a specific opinion should be disclosed pursuant to HRS § 28-3 and as such the Defendants must provide a copy of the letter for public review unless disclosure is precluded by the exceptions set out in the UIPA HRS §§ 92F-13, 92F-14.

26. Under the UIPA, disclosure of government records will not be required if such records "by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." HRS § 92F-13(3). In the interest of furthering proper

of government agencies and therefore should be readily accessible to the public." H.R. Stand. Comm. Rep. No. 809, 1st Leg., 1961 Reg. Sess., Haw. H.J. 988 (1961)

functioning of the government, the circuit court may examine the government record at issue, *in camera*, to assist in determining whether it, or any part of it, may be withheld. HRS § 92F-15(b).

27. The Attorney General provides advice and counsel to assist heads of departments “in every way requisite to enable them to perform their duties faithfully”. HRS § 28-4. Requiring complete disclosure of all communications and advice could have a chilling effect on the attorney-client relationship and potentially jeopardize a resource statutorily available to government officials to aid in the execution of their public duties. Despite this concern, a government agency is prohibited from entering into a confidentiality agreement that has the effect of circumventing the UIPA. A confidentiality agreement in contravention of the UIPA is void. Haw. Op. Atty. Gen. OIP Ltr. OP. NO. 90-2, 1990 WL 482350 (1990); Haw. Op. Atty. Gen. OIP Ltr. OP. NO. 90-39, 1990 WL 482387 (1990).

28. The UIPA does not require disclosure of “[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure.” HRS § 92F-13(4). Under the Hawai‘i Rules of Evidence (“HRE”), the attorney-client privilege can be invoked to prevent disclosure of qualifying communications between government attorneys and government agencies. HRE 503(a)(1) (“a ‘client’ is a... public officer... who is rendered professional legal services by a lawyer, or who consults a lawyer with the view to obtaining professional legal services.”)

29. Under the Hawai‘i Rules of Evidence (“HRE”), Rule 511, “[a] person upon whom these rules confer a privilege against disclosure waives the privilege if, while holder of the privilege, the person or the person’s predecessor voluntarily discloses or consents to disclosure of any *significant part of the privileged matter*.” (emphasis added). Commentary to HRE, Rule

511 further provides that "[a]ny intentional disclosure by the holder of the privilege defeats [the purpose of HRE 503] and eliminates the necessity for the privilege in that instance."

30. "[I]t has been widely held that voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege as to all other such communications on the same subject." Weil v. Investment/Indicators, Research and Management, Inc. 647 F.2d 18, 24 (9th Cir. 1981) citing, United States v. Cote, 456 F.2d 142, 144-45 (8th Cir. 1972); Handgards, Inc. v. Johnson & Johnson, 413 F.Supp. 926, 929 (N.D.Cal.1976); Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1161, 1191 (D.S.C. 1974); Haymes v. Smith, 73 F.R.D. 572, 576-77 (W.D.N.Y.1976); ITT Corp. v. United Telephone of Florida, 60 F.R.D. 177, 185-86 (M.D.Fla. 1973).

31. "A sophisticated, well-counseled party who intentionally discloses an important part of an otherwise privileged communication acts in a manner that is thoroughly inconsistent with preserving the confidentiality of that communication." See Electro Scientific Indus. v. Gen. Scanning, Inc., 175 F.R.D. 539, 543 (N.D. Cal, 1997) wherein it was held that where a party issues a "news release" disclosing that counsel advised him that the opposing party's patents were invalid, waiver was effectuated because the party voluntarily disclosed an important and substantive part of what would have been a confidential attorney-client communication.

32. Defendant Reifurth disclosed to the public both the *purpose* for which he contacted the Attorney General-- he wanted a legal opinion about the applicability of the SPC to PEG access organization designation-- and also disclosed *the essence of the legal opinion* provided by the Attorney General-- the SPC applied to the designation. The disclosure of the legal opinion of the Attorney General amounted to a disclosure of a significant or important part

of the attorney-client communication.

33. Defendant Reifurth has put two important statutory provisions in competition by using the attorney-client privilege as both a sword and a shield. Defendant Reifurth and DCCA staff cited the Defendant Bennett's opinion letter to justify changes in designation practices to the public on numerous occasions. The Defendants then invoked the attorney-client privilege as a shield to prevent disclosure of Defendant Bennett's opinion required under HRS § 28-3 by recasting the communication as "advice and counsel" (HRE 503) provided to department heads to aid in the performance of their duties.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits or declarations, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

2. There is no genuine issue of material fact relative to whether Defendant Reifurth, the head of the DCCA, posed a question of law to Defendant Attorney General Bennett regarding a matter of significance to the public and whether Defendant Bennett, in response, issued an Attorney General opinion letter.

3. In this instance, if the Attorney General could avoid publication of his response to a question of law by denominating the opinion as an "advise and counsel" letter, the mandatory disclosure provisions of HRS § 28-3 would be rendered meaningless.

4. The opinion rendered by Defendant Bennett was followed by Defendant Reifurth

and resulted in changing the actions of a governmental agency on a statewide basis.

5. Defendant Reifurth and the DCCA disclosed a significant part of the Attorney General Opinion thereby waiving the attorney-client privilege on communications on the same subject matter.

6. Plaintiff is entitled to judgment as a matter of law that the Defendants should disclose Defendant Bennett's Opinion letter regarding the applicability of the SPC to PEG designations unless there is material in the opinion which would tend to frustrate a governmental function.

7. The Court concludes that it is appropriate to review the opinion letter *in camera* before ordering any disclosure of the document to ensure the release of information which is specifically required by HRS § 28-3 and not protected by the attorney-client privilege. This is designed to avoid the frustration of a legitimate government function.

ORDER

Based on the record and the Findings of Fact and the Conclusions of Law, the Court Grants Plaintiff AKAKU; MAUI COMMUNITY TELEVISION's Motion for Summary Judgment, in part, against Defendants MARK BENNETT and LAWRENCE REIFURTH. Defendants must submit the opinion letter for *in camera* review by November 15, 2008. The Court reserves the right to redact portions of the opinion letter which are either protected by the attorney-client privilege or should be kept confidential to avoid the frustration of a legitimate government function. After its *in camera* review and redaction, if any, the opinion letter will be issued in a subsequent order.

The Motion is Denied in so far as it requests this Court to order Defendant Bennett to file a copy of the opinion with the lieutenant governor, the public archives, the supreme court library and the legislative reference bureau pursuant to the requirements of HRS § 28-3.

SEP 29 2008

DATED: Wailuku, Maui, Hawai'i, _____.

Tarh E. August
JUDGE OF THE ABOVE ENTITLED COURT



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was duly served upon the following parties at their last known address by U.S. MAIL, postage pre-paid or by court jacket on SEP 29 2008.

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DATED: Wailuku, Maui, Hawai'i, SEP 29 2008.



LAW CLERK OF THE ABOVE-ENTITLED COURT