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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST, INC.,

Plaintiff,

vs.

DEPARTMENT OF PUBLIC SAFETY,

Defendant.

CIVIL NO. 1CCV-22-735
(Other Civil Action)

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

HEARING MOTION
JUDGE: Honorable John M. Tonaki
TRIAL DATE: NONE
HEARING DATE: January 19, 2023
HEARING TIME: 10:00 a.m.

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this public records case, Defendant Department of Public Safety (PSD or Department) has not met its burden to prove a justification for withholding reports concerning its response to the COVID-19 pandemic (AMP Reports). Plaintiff Civil Beat Law Center for the Public Interest (Law Center) respectfully requests that the Court deny the Department's motion for summary judgment, grant the Law Center's cross-motion for summary judgment, and order disclosure of all information requested.

With respect to the attorney work product doctrine, the Department's opposition addresses only one issue raised by the Law Center—PSD's waiver by disclosure to its adversary. But as explained in the cross-motion, PSD cannot meet the basic threshold requirements for the attorney work product doctrine.

- The AMP prepared the reports because of the *Chatman* settlement, not because of the threat of future litigation. Dkt. 37 at 19.[1]
- The AMP prepared the reports independently, not as PSD's representative. *Id.* at 20.

Other than conclusory assertions that the AMP Reports were prepared in anticipation of litigation, the Department has offered no facts or law that address these issues.[2] Dkt. 37 at 7-9.

And, even if the threshold requirements are met, the doctrine simply does not apply when a party shares the information with its adversary.[3] The whole point of the attorney work product doctrine is to keep particular information out of an adversary's hands. *Id.* at 18-21. PSD's only response is that its adversary cannot disclose the AMP Reports per a confidentiality agreement. Dkt. 39 at 5. That confidentiality agreement, however, is "unenforceable as against public policy" because it contradicts the Department's obligations under the UIPA. Dkt. 37 at 14-15; *SHOPO v. Soc'y of Prof'l Journalists – Univ. of Haw. Chapter* [*SHOPO v. SPJ*], 83 Hawai`i 378, 404-06, 927 P.3d 386, 412-14 (1996). But even if the confidentiality agreement were not void and thus

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[1] Pinpoint citations refer to the page of the PDF.

[2] In its motion, PSD heavily relied on one case—a D.C. district court case. Dkt. 33 at 9-11. As the Law Center pointed out, however, the attorney work product holding in that case only concerned correspondence between attorneys and draft notices and thus had no relevance to this case. Dkt. 37 at 22-23. PSD did not cite that case at all in its reply.

[3] There is no dispute that the *Chatman* plaintiffs' and their counsel were "adversaries" of the Department—not only for the *Chatman* litigation, but the anticipated and now filed damages lawsuit. *E.g.*, Dkt. 37 at 10-11. PSD's argument that such acknowledgment proves that AMP prepared the reports "in anticipation of litigation"—Dkt. 39 at 5—only illustrates that the Department fails to understand the evidence required to justify that prong of the work product doctrine. *See* Dkt. 37 at 19 (describing the law and necessary evidence to meet the "prepared in anticipation of litigation" threshold).

irrelevant to this proceeding, PSD disclosed these documents to—regardless of whether anyone else had access—the one group that defeats the attorney work product doctrine.

With respect to the deliberative process privilege, OIP Opinion 19-05 extensively addressed the *Peer News* footnote that is the sole basis for PSD's argument, and OIP rejected that argument. Dkt. 37 at 24-25. That opinion is binding on the Court unless found to be palpably erroneous. HRS § 92F-15(b) ("Opinions and rulings of the office of information practices shall be admissible and shall be considered as precedent unless found to be palpably erroneous"). PSD makes no effort to address that binding precedent or show that it is palpably erroneous. Dkt. 39 at 6. The Department's deliberative process privilege claim is frivolous. Dkt. 37 at 23-26.

As it concerns waiver by failure to identify its purported justifications for nondisclosure as required by HAR 2-71-14(b)(2), PSD does not dispute that it failed to provide *timely* notice. Instead, the Department argues that it eventually disclosed, citing cases under HRCP 8(c) that affirmative defenses may be raised on summary judgment absent prejudice. Dkt. 39 at 3. None of those cases concerned required notification by administrative rule. In any event, delays in access to the AMP Reports—occasioned here by PSD's deficient and constantly changing justifications—prejudiced the Law Center's rights under the UIPA. Effectively, PSD asks this Court to endorse its refusal to provide notice of its justifications within the timeframe required by law. The Department's position does not support the spirit and purpose of the UIPA to provide the public "accurate, relevant, *timely*, and complete government records." HRS § 92F-2 (emphasis added). Agencies cannot be permitted to simply refuse access—without explanation—and interminably delay access through confusion, rather than a valid justification for nondisclosure.

Lastly, PSD does not address the fact that it expressly denied any reliance on the attorney work product doctrine in its Answer—a judicial admission under HRCP 8(b).[4]

[4] The Law Center never argued that PSD waived reliance on the deliberative process privilege by failing to assert that claim in its Answer. Dkt. 37 at 18 (stating only that PSD waived the deliberative process privilege claim "by failing to assert it in the notice to requester").

The issue here is not that the Department simply failed to identify the work product doctrine as an affirmative defense; PSD stated outright in its Answer that it denied that the work product doctrine was a justification for nondisclosure.[5] *E.g.*, *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 528-29 (2d Cir. 1985) (court cannot consider party's affidavits that contradict its judicial admissions in pleadings), *cited with approval in Int'l Bhd. of Elec. Workers v. Hawaiian Tel. Co.*, 68 Haw. 316, 320 n.2, 713 P.2d 943, 949 n.2 (1986). PSD cannot assert claims that it expressly denied in its Answer.

The Law Center respectfully requests that the Court deny the Department's motion for summary judgment, grant the Law Center's cross-motion for summary judgment, and order disclosure of all information requested.

DATED: Honolulu, Hawai`i, January 13, 2023

/s/ Robert Brian Black
ROBERT BRIAN BLACK
Attorney for Plaintiff
Civil Beat Law Center for the Public Interest, Inc.

[5] To simplify the analysis, the Law Center withdraws its separate argument that PSD waived by failing to plead the work product doctrine as an affirmative defense under HRCP 8(c). *See* Dkt. 37 at 17-18.