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GOVERNOR

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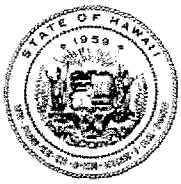
LIEUTENANT GOVERNOR



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April 12, 2000

The Honorable Les Ihara, Jr., Senator
Senate Majority Leader
Twentieth Legislature, State of Hawaii
State Capitol, Room 214
Honolulu, Hawaii 96813

Re: Request for Advisory Letter

Dear Senator Ihara:

You have asked the Office of Information Practices ("OIP") for a general advisory letter regarding the public disclosure requirements for legislative materials under Hawaii's public records law, entitled the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). However, as you have not asked the OIP to review specific records, our advice is, of necessity, general in nature.

ISSUE PRESENTED

Specifically you have asked if a private citizen were to request access to or copy all of your materials relating to the policy development of an issue, what are you, as an elected official, obligated to disclose? You are concerned about the following records:

1. Internal correspondence between yourself and your staff summarizing the legal and practical aspects of the issues and areas for further research;
2. Correspondence between yourself and other elected officials discussing information gathered and alternatives available to address the issue;
3. Correspondence, containing draft language for introduction, soliciting recipients' input and comments and responses;

4. Correspondence between yourself and other elected officials relating to strategy to address the issue, including emails; and
5. Personal notes from a majority caucus on the issue.

BRIEF ANSWER

Yes, a government agency has the discretion to withhold from public disclosure information that it maintains as part of its decision-making function pursuant to the deliberative process privilege under section 92F-13(3) Hawaii Revised Statutes, so long as the information is not mandated to be disclosed under section 92F-12, Hawaii Revised Statutes.

To qualify for this privilege, the deliberative material must have been created antecedent to the adoption of an agency policy and must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal policy matters." OIP Op. Ltr. No. 90-21 at 5 (June 20, 1990). If the documents bearing the predecisional and deliberative material include factual material, the factual material must be made public if it is reasonably segregable. If the final product bearing the decision specifically incorporates any of the predecisional and deliberative material within it, or whether there have been other disclosures of the deliberative material, the privilege itself may have been waived.

DISCUSSION

I. THE GENERAL RULES OF DISCLOSURE

The UIPA is a comprehensive legislative framework which clarifies the public's right to inspect government records, while protecting the individual's constitutional right to privacy. Haw. Rev. Stat. § 92F-2 (1993). OIP Op. Ltr. No. 90-22 at 3 (June 21, 1990). Under the UIPA, a government record "means information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993). OIP Op. Ltr. No. 90-21 (June 20, 1990).

An agency is defined in section 92F-3, Hawaii Revised Statutes, as "any unit of government in this State, any county, or any combination of counties...."

In Opinion Letter No. 93-17, the OIP concluded that the term "agency" included the State Legislature as a unit of government in this State within the meaning of the UIPA. OIP Op. Ltr. No. 93-17 at 7 (Oct. 8, 1993).

The UIPA applies to information possessed or controlled in any way by an agency even if it does not have physical custody of the same, provided that it remains administrative control over the information. OIP Op. Ltr. No. 91-5 at 7 (April 15, 1991) ("Control" has different meanings depending on its context but in its ordinary sense, it refers "to the power or authority to manage, direct or oversee," or "to exercise restraining or directing influence over," and also relates to "authority over what is not in one's physical possession." Id.).[1]

Under the UIPA, government records must be made available for public inspection and copying, unless an exception to disclosure in section 92F-13, Hawaii Revised Statutes, applies. Haw. Rev. Stat. § 92F-11(b) (1993). It is the agency's burden to demonstrate that an exception to disclosure exists. Haw. Rev. Stat. § 92F-15(c) (1993); see also OIP Op. Ltrs. No. 91-15 at 8 (Sept. 10, 1991); 94-11 at 5 n. 1 (June 24, 1994); 94-18 at 10 (Sept. 20, 1994); 95-5 at 3 n. 1 (March 9, 1995); 95-21 at 8 n. 1 (Aug. 28, 1995), 98-4 at 2 (June 17, 1998).

In addition to the presumption that all government records are open to the public, at section 92F-11(b), Hawaii Revised Statutes, the Legislature set forth a list of government records that must be disclosed "'[a]ny provision to the contrary notwithstanding.' The Legislature stated that '[a]s to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable ... [t]his list merely addresses some particular cases by

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[1] See also OIP Op. Ltr. No. 92-25 (Dec. 22, 1992) (because the State Auditor retains the legal right [under a contract] to require the CPA firm to produce the working papers, the Auditor maintains the paper notwithstanding the lack of physical custody of the records.) But cf. OIP Op. Ltr. No. 93-17 (Oct. 8, 1993) in which the OIP opined that the paper trail concerning expenditure of legislative allowances are not government records. In that opinion, the OIP said "[n]onethless, the term "government record" cannot be extended so far as to encompass records that are possessed solely by agency employees and that relate to how they expend their personal income, any more than it can be extended to include records relating to how agency employees disburse their public salary, or income derived from other sources." Id. at 3 (Oct. 8, 1993).

unambiguously requiring disclosure.'" S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988). See OIP Op. Ltr. No. 93-10 (Sept. 2, 1993).

II. EXCEPTIONS TO DISCLOSURE REQUIREMENTS

In section 92F-13, Hawaii Revised Statutes, the UIPA provides five exceptions to the general rule of disclosure. These exceptions include the relevant exceptions for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function," pursuant to section 92F-13(3) Hawaii Revised Statutes, and for "the personal files of members of the legislature," pursuant to section 92F-13(5) Hawaii Revised Statutes. All of the records raised in your letter could possibly fall within the "frustration" exception depending upon the contents of each record. However, the OIP has not issued opinions that define what is a personal file of legislators. Therefore, as this letter is only an advisory letter, discussion will be limited to the "frustration" exception to disclosure.

A. Frustration Of Legitimate Government Function

1. Deliberative Process Privilege

It is well recognized that the candid and free exchange of ideas and opinions within and among agencies is essential to agency decision-making.[2] Moreover, both the legislative history and case law of the federal Freedom of Information Act 5

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[2] In Opinion Letter 90-8 the OIP stated that "an exception for disclosure prevents frustration of agency decision-making" because:

> [I]t serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

U.S.C. § 552 (1994) ("FOIA")[3] recognizes that this candid and free exchange of ideas is less likely to occur when all memoranda for this purpose are subject to public disclosure. OIP Op. Ltr. 90-8 at 5 (Feb. 12, 1990).

Therefore, in recognizing the decision-making function of government agencies, the OIP has opined that disclosure of documents that are *both* predecisional and deliberative would frustrate agency decision-making functions, such as the resolution of issues and the formulation of policies. Id. To be predecisional, the OIP has opined that the "communication must be predecisional, i.e., 'antecedent to the adoption of an agency policy.'" OIP Op. Ltr. No. 90-21 at 5 (June 20, 1990) (citing Jordan v. Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978)). To be deliberative, the communication must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal policy matters." Id., (citing Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975)).

The OIP has also noted that federal courts, recognizing the practicalities of agency operations, "have construed the scope of the deliberative process privilege expansively, and have included communications generated from outside of an agency within the scope of this privilege." OIP Op. Ltr. No. 90-21 at 6 (June 20, 1990). Thus, OIP has concluded that, notwithstanding the fact that a government record may have been created outside of the agency, documents may come within the deliberative process privilege if they have been "solicited by the agency and are "deliberative" and "predecisional" in character. If the information in the document meets these tests, then the agency has the discretion to withhold it from public disclosure. Id. at 7-8 (June 20, 1990) (citing CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987)).

2. Limitations - Postdecisional Documents

As the "frustration" exception in section 92F-13(3), Hawaii Revised Statutes, protects the function of decision-making, rather than a particular type of record,

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OIP Op. Ltr. No. 90-8 at 5 (Feb. 12, 1990) (citing Coastal States Gas Corp. v. Dep't. of Energy, 617 F.2d 854, 866, (D.C. Cir. 1980) (describing the deliberative process privilege under the FOIA exemption, 5 U.S.C. Þ 552(b)(5)).

[3] In some instances, the OIP looks to cases interpreting FOIA for guidance.

"when the decision-making process has ended on a particular issue or policy, any record describing the final decision or policy is not protected by the deliberative process privilege." OIP Op. Ltr. No. 90-8 at 5 (Feb. 12, 1990) (citations omitted). The FOIA case law recognizes postdecisional documents which generally

> embody statements of policy and final opinions that have the force of law . . . that implement an established policy of an agency . . . or that explain actions that an agency has already taken.... Exemption 5 does not apply to post decisional documents, as "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted."

U.S. Department of Justice, Freedom of Information Act Guide & Privacy Act Overview, 183-84 (September 1996 ed.).

3. Limitations - Factual Material

Purely factual material is often not protected under the deliberative process privilege because it does not ordinarily implicate the decision-making process. OIP Op. Ltr. No. 90-8 at 6 (Feb. 12, 1990).[4] In a prior opinion letter the OIP noted that the federal courts have only protected factual information from disclosure under two circumstances: where a document employs specific facts out of a larger group of facts and this very act is deliberative in nature, and where the information is so inextricably connected to deliberative material that its disclosure will expose or cause harm to the agency's deliberations. OIP Op. Ltr. No. 89-9 (Nov. 20, 1989).

When the records contain purely factual matter as well as deliberative material, the OIP has held that an agency must disclose those portions that are public and reasonably segregable. What is reasonably segregable depends on the portion of information in the record that is public and how the public information is dispersed throughout the record. Id. at 6 (Nov. 20, 1989).

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[4] See OIP Op. Ltr. No. 89-9 (Nov. 20, 1989) (agency decision-making would not be frustrated by the disclosure of the names of members serving on a student admissions committee since the names were purely factual information and disclosure would not inhibit discussion or deliberation in any way).

In Opinion Letter No. 89-9, we said that "[i]t is possible that segregation would not be reasonable", for example, if "stripping them [the records] down to their bare-bone facts would render them either nonsensical or perhaps too illuminative of the agency's deliberative process." Id., at 6, (citing Local 3, IBEW v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988) (because the intra-agency memoranda were so short, segregation would not have been reasonable)).

4. Limitations - Waiver

If an agency's final decision expressly adopts or incorporates any record protected by the privilege by reference, its protected status may be lost. OIP Op. Ltr. No. 90-8 at 5 (Feb. 12, 1990) (citations omitted). See also OIP Op. Ltr. No. 90-3 (Jan. 18, 1990) (auditor's recommendations in an intra-agency report were expressly adopted in an agency's final decision and, therefore, were not protected from disclosure by the "deliberative process privilege").

As mentioned at the outset of this letter, OIP is not applying these principles to specific records. However, because information that is both predecisional and deliberative could be contained in the types records you ask about, it is possible that the correspondence between yourself and your staff, other elected officials, and others could be excepted from disclosure under the deliberative process privilege. Should these documents meet the tests laid out in our opinion letters and summarized here, they would be records protected under the "frustration" exception of section 92F-13(3), Hawaii Revised Statutes. In evaluating each record, you should carefully review, however, whether the information meets the requirements set out in the opinion letters mentioned herein, as well as determining whether the privilege has been limited.

CONCLUSION

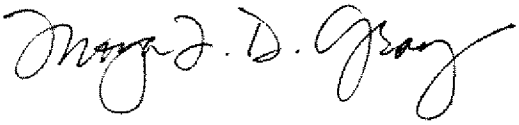
In summary, a government agency has the discretion to withhold from public disclosure information that it maintains as part of its decision-making function pursuant to the deliberative process privilege under section 92F-13(3) Hawaii Revised Statutes, so long as the information is not mandated to be disclosed under section 92F-12, Hawaii Revised Statutes.

To qualify for this privilege, the deliberative material must have been created antecedent to the adoption of an agency policy and must be "a direct part of

the deliberative process in that it makes recommendations or expresses opinions on legal policy matters." See OIP Op. Ltr. No. 90-21 at 5 (June 20, 1990). If the documents bearing the predecisional and deliberative material include factual material, the factual material must be made public if it is reasonably segregable. If the final product bearing the decision specifically incorporates any of the predecisional and deliberative material within it, or if there have been other disclosures of the deliberative material, the privilege itself may have been waived.

Should you have further questions, please feel free to contact me at your convenience.

Sincerely yours,



Moya T. D. Gray
Director

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