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July 9, 2004

Mr. William S. Devick
Administrator, Aquatic Resources Division
Department of Land and Natural Resources
P.O. Box 2867
Honolulu, Hawaii 96803

Re: Disclosure of Intra-office Email Messages

Dear Mr. Devick:

You asked the Office of Information Practices ("OIP") to address issues concerning the disclosure of intra-office email messages relating to an alleged violation of state law.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"), an agency is authorized to withhold access to intra-agency emails concerning an alleged violation of law that discloses the name of alleged violators, that contain confidential business information, and that reflect the give-and-take of agency decisionmaking.

BRIEF ANSWER

In this case, the OIP finds that the identity of the individual alleged to have violated a State law can be withheld, as well as information that would reveal the identity of that individual. The individual was not charged with a

law violation; therefore, the individual has a significant privacy interest in the fact of the investigation. Where a significant privacy interest in law enforcement information is present, and an agency wishes to withhold information, it is generally authorized to do so under the UIPA. Although the emails may contain confidential business information, in this case, the OIP was not provided with enough information to make that determination. Lastly, information that reflects the give-and-take of agency decisionmaking is authorized to be withheld under the deliberative process privilege; but factual information must be disclosed. In this case, however, most of the factual information in the emails can be withheld, because the factual material is intertwined with policy and evaluative decisions.

FACTS

The Division of Aquatic Resources ("DAR") of the Department of Land and Natural Resources ("DLNR") received an inquiry from a member of the public concerning intra-office emails about the activities of an individual ("fisherman") allegedly planning to fish for sharks using an uncommon fishing method.[1] DAR described the fisherman as being "very open in describing his fishing methods" to it. DAR advised the OIP that release of the information could compromise the fisherman's "competitive advantage in this fishery." DAR also expressed concern that disclosure could discourage other fishermen from providing it with information concerning possible violations of law. In addition, DAR advised that it believed disclosure is not required because of the deliberative process privilege.[2]

The emails in question generally concern intra-office discussions concerning the applicability of section 189-2.5, HRS, which makes it "unlawful to engage in longline fishing or to sell or offer for sale, any marine life taken with longline fishing gear within the boundaries of the State's territorial sea." DAR advised the OIP in a memorandum received June 9, 1999, that discussions with the Department of the Attorney General concerning possible criminal proceedings had taken place. In a telephone conversation of September 16, 1999, DAR advised the OIP that it had

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[1] Pursuant to section 187A-2(3), HRS, DLNR shall "[e]stablish, manage, and regulate public fishing areas, artificial reefs, fish aggregating devices, marine life conservation districts, shoreline fishery management areas, refuges, and other areas pursuant to title 12[.]"

[2] DAR also expressed concern that the information could be used against the fisherman by the requester in a legal action. Under the UIPA, unless the contemplated legal action is against the State or any county, the fact that legal action could be brought as a result of records or information being made publicly available, in and of itself, does not form a basis to withhold access to records or other information. See Haw. Rev. Stat. §§ 92F-13(2), (4), 92F-22(4), (5) (1993).

voluntarily disclosed the emails to the requester,[3] without redacting any information, but nevertheless wished to receive an opinion for future guidance as to whether the disclosure was required under the UIPA.[4] In a telephone conversation of June 9, 2004, you advised that the fisherman in question was never charged with an offense, that he is no longer present in the State, and that DAR never resolved the applicability of section 189-2.5, HRS, to the particular fishing method employed by that fisherman.[5]

DISCUSSION

Initially, we discuss the issue of government records created as emails. The UIPA's definition of government records includes information maintained by an agency in electronic form. See Haw. Rev. Stat. § 92F-3 (1993). The OIP routinely advises government agencies that records of email communications should be treated no differently than records maintained in written form.[6] The fact that the emails are government records and that disclosure of the emails is governed by the UIPA is not in dispute.

Under the UIPA, all government records are open to the public unless an exception contained in section 92F-13, HRS, authorizes withholding of the record. Haw. Rev. Stat. § 92F-11(b) (1993). Since emails are maintained by

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[3] The UIPA is not a confidentiality statute. It, generally, does not prohibit disclosure of records and information but rather authorizes government agencies to withhold access to records and information in certain circumstances. Thus, agencies are not required to invoke the exceptions to access and may elect to disclose records that could be withheld under the exceptions. OIP Op. Ltr. No. 03-03 at 5, n. 5 (Apr. 1, 2003). The UIPA also provides penalties for unauthorized disclosure of information explicitly described by specific confidentiality statutes, with actual knowledge that disclosure is prohibited. See Haw. Rev. Stat. § 92F-15(a) (1993). The OIP is unaware of any specific State confidentiality statute that addresses the disclosure of the information contained in the intra-agency emails.

[4] Although the name of the fisherman is contained in the emails and was disclosed by DAR to the UIPA requester, we do not name the fisherman in this Opinion because we do not believe that the fisherman's identity was required to be disclosed under the UIPA. In addition, the emails mention another fisherman by name, and that individual is likewise not named in this Opinion, as we do not believe that disclosure was required under the UIPA.

[5] See discussion at I regarding agency disclosure of the individual's name and identifying information. The emails also mention another fisherman in connection with the fishing method; the discussion at I is applicable to both fishermen mentioned in the emails.

[6] The OIP notes that the State of Hawaii, Department of Accounting and General Services posts a General Records Schedule at http://www.hawaii.gov/dags/divisions/divisions/Archives/genrecsched2002.pdf, accessed July 8, 2004. Section 11.7 of the General Records Schedule states that "[s]ender's and recipient's versions of electronic mail (e-mail) messages that meet the definition of government records as defined by Section 92F-3, Hawaii Revised Statutes, shall be evaluated for information content. . . . Records transmitted through e-mail systems will have the same retention period as the same records in other formats."

DAR, they are subject to the UIPA and required to be disclosed to the public, unless an exception to access applies.

DAR articulated three bases to withhold access to the intra-office emails, all arising under section 92F-13(3), HRS, which authorizes agencies to withhold access to "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function" ("frustration exception").[7] As DLNR is responsible for management and administration of the aquatic life and aquatic resources of the State,[8] DAR law enforcement activity pertaining to violators of chapter 189 is a legitimate government function under chapter 189, HRS.

The three bases articulated by DAR to withhold access under the frustration exception are: (1) records or information compiled for law enforcement purposes; (2) confidential business information; and (3) the deliberative process privilege. We also address disclosure pursuant to the UIPA's privacy exception, at section 92F-13(1), HRS, as the emails contain the name and other identifying information of individuals alleged to have violated a State law. Under the UIPA, such information carries a significant privacy interest. Haw. Rev. Stat. § 92F-14(b)(2) (Supp. 2003).

I. PRIVACY INTEREST IN RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES

Under the UIPA, law enforcement agencies are not entitled to categorical protection for all records or information compiled for law enforcement purposes. OIP Op. Ltr. No. 95-21 at 9, n.2 (Aug. 28, 1995).[9]

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[7] The UIPA's legislative history lists, as examples of records that may be withheld due to the frustration exception, "[r]ecords or information compiled for law enforcement purposes" and "[t]rade secrets or confidential commercial and financial information." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S. J. 1095 (1988). And, we have long interpreted the frustration exception to authorize agencies to withhold access to material based on the deliberative process privilege recognized by federal case law. See OIP Op. Ltr. No. 90-8 (Feb. 12, 1990).

[8] Haw. Rev. Stat. § 187A-2 (Supp. 2003).

[9] The provisions of Exemption 7 of the federal Freedom of Information Act, 5 U.S.C. § 552(b) (2004) ("FOIA") and the case law developed there under are consulted to assist agencies in making a determination as to whether law enforcement records can be withheld. OIP Op. Ltr. No. 95-21 at 8 (Aug. 28, 1995); see also Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988). Exemption 7 of FOIA protects records compiled for law enforcement purposes and contains six categories of records that may be withheld. Briefly summarized, those six categories involve (1) interference with pending or prospective law enforcement proceeding when it can be established that disclosure would disrupt, impede or otherwise harm the enforcement proceeding; (2) protection of an individual's right to a fair trial; (3) unwarranted invasion of personal privacy; (4) disclosure of identity and information furnished by a confidential source; (5) techniques and procedures

We have previously determined that the identity of persons named in a law enforcement investigation, but not charged with a violation of law, is not required to be disclosed under the UIPA. OIP Op. Ltr. No. 99-9 (Dec. 3, 1999). That opinion letter was based on the UIPA's "privacy exception" at section 92F-13(1), HRS, and on section 92F-14(b)(2), HRS, which provides that an individual has a significant privacy interest in "[i]nformation identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation."

In making a disclosure determination under the privacy exception, an individual's privacy interest is balanced against the public's interest in disclosure. Haw. Rev. Stat. § 92F-14(a) (Supp. 2002). The public's interest is in information which sheds light upon the workings of government. OIP Op. Ltr. No. 03-04 at 6 (Apr. 8, 2003). The OIP has previously stated that, "where it does not appear that disclosure is necessary to continue the investigation" and "absent compelling evidence in the facts presented indicating that a government agency is engaged in illegal activity," the public interest in disclosure does not outweigh the privacy interest of the subject of the investigation. OIP Op. Ltr. No. 92-19 at 6 (Oct. 7, 1992).

We find that the emails reveal no evidence of any wrongdoing by the DAR. Given that an individual has a significant privacy interest in the fact that he is mentioned in law enforcement records, the balance here tips in favor of nondisclosure. We thus conclude that the identity of the fishermen listed in the emails was not required to be disclosed under the UIPA.

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for law enforcement investigations and (6) danger to the life or safety of an individual. OIP Op. Ltr. No. 95-21 at 10-15 (Aug. 28, 1995). Additionally an agency is authorized to withhold access to investigatory records to avoid "tipping off" the subject of an investigation. Id. at 10.

It would appear that, based on the facts before the OIP, the category for impairment of a pending of prospective law enforcement proceeding may have, at one time, authorized the withholding of access to the emails. To withhold on that basis, it would have been necessary for the DAR to establish that disclosure would, in some discernable fashion, impede the pending, ongoing or reasonably likely enforcement proceeding. See OIP Op. Ltr. No. 99-8 at 5 (Nov. 29, 1999). Here, as an enforcement proceeding is not pending or prospective, we conclude that the emails cannot be withheld on that basis.

As stated above, you indicated concern that disclosure "could discourage other fisherman from confiding in us and therefore lead to frustration of a legitimate government function, which is to manage fisheries[.]" As we conclude that disclosure was not required due to the fisherman's significant privacy interest in the fact that he is mentioned in law enforcement records, we need not address the "frustration exception" in connection with disclosure of the identities of fisherman confiding in DLNR.

II. CONFIDENTIAL BUSINESS INFORMATION ("CBI")

To determine whether information in government records is CBI and, therefore, may be withheld under the UIPA's frustration exception, the OIP has previously directed agencies to consider whether public disclosure is likely to cause substantial harm to the competitive position of the submitter of the records. OIP Op. Ltr. No. 02-07 (Aug. 27, 2002). In OIP Opinion Letter Number 02-07, the OIP stated:

> [a]lthough conclusory and generalized allegations of competitive harm are insufficient to prove the likelihood of substantial competitive harm, neither must there be proof of actual competitive harm. Substantial competitive harm is present when (1) the submitter faces actual competition, and (2) there is a likelihood of substantial competitive harm.

Id. at 9. Here, the fisherman voluntarily provided information to DAR, and DAR believes that release of the information could cause the fisherman to be at a competitive disadvantage if it were to be publicly disclosed. DAR's conclusory statement, by itself, is insufficient to establish that the information contained in the emails is CBI. Were we to be provided more specific information establishing the uniqueness of the fishing method and disclosure of the information in the email would likely cause the fisherman substantial competitive harm, it may be possible to conclude that the information submitted would be authorized to be withheld as CBI. However, we need not decide in this instance, because we believe that the information is authorized to be withheld under the deliberative process privilege, discussed below.

III. DELIBERATIVE PROCESS PRIVILEGE

Under the UIPA, agencies may withhold access to documents that are both predecisional and deliberative when disclosure would frustrate a legitimate government function. OIP Op. Ltr. No. 00-01 at 5 (Apr. 12, 2000). This authority to withhold access, termed the "deliberative process privilege," is authorized so that agencies can candidly and freely exchange ideas and opinions. Id. at 3-4. The United States Court of Appeals for the Second Circuit recently explained the purpose of the privilege:

> [t]he rationale behind this privilege is "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions,' by

> protecting open and frank discussion among those who make them within the Government." The [deliberative process] privilege has a number of purposes: it 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.

Tigue v. United States DOJ, 312 F.3d 70, 76 (2nd Cir. 2002) (citations omitted). Before a document can be withheld on the basis of the deliberative process privilege, it must be determined to contain a communication that is both predecisional, i.e., "antecedent to the adoption of an agency policy," and deliberative, i.e., the communication 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. 00-01 at 5 (Apr. 12, 2000). The emails provided to the OIP for review discuss the applicability of section 189-2.5, HRS, to the fishing method of a particular individual. Our review of the emails shows they contain a discussion of different ways of interpreting that law, with the writers posing different factual scenarios to make a determination as to how the law would apply to those different scenarios. The emails do not indicate that a final decision has been made. As you advised the OIP that a final decision was not made as to what DAR believes to be a conclusive interpretation of section 189-2.5, HRS, the OIP considers the emails to still be deliberative in nature and concludes that DAR is authorized to withhold access to the deliberative material contained in the emails on the basis of the deliberative process privilege.

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). The OIP has held that an agency must disclose those portions that are public and reasonably segregable. Id. 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. Material is not reasonably segregable if it would be either "nonsensical" or "too illuminative of the agency's deliberative process." OIP Op. Ltr. No. 00-01 at 7 (Apr. 12, 2000) (citations omitted). The OIP's review of the emails reveals that they consist of very little factual material. What factual material is present, is for the most part,

intertwined with evaluative and policy discussions. The OIP therefore concludes that disclosure of the emails reviewed by it is not required under the UIPA, with the exception of the portions identified below.

CONCLUSION

Based on our review of the emails you provided, we conclude that the first five sentences of the email dated November 9, 1998, 2:00 P.M. (the first email), with the information identifying the fisherman redacted, and the entirety of the email dated February 8, 1999, 3:59 p.m. (the last email) are required to be disclosed under the UIPA. Those portions contain no material protected by either section 92F-13(1), HRS, or the deliberative process privilege, or by any other exception to access contained in section 92F, HRS. The remainder of the information in the emails is authorized to be withheld under sections 92F-13(1) and (3), HRS. The name of the fisherman and information identifying the fisherman may be withheld since it implicates the significant privacy interest of an individual in information identifiable as part of a criminal law violation. Absent reliable evidence of government impropriety, such information is authorized to be withheld under the UIPA. The material reflecting the agency's deliberative process may also be withheld.

Sincerely,

Susan R. Kern
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

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