

BENJAMIN J. CAYETANO
GOVERNOR OF HAWAII



MOYA DAVENPORT GRAY
DIRECTOR

MARGERY S. BRONSTER
ATTORNEY GENERAL

PH. (808) 586-1400
FAX. (808) 586-1412

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
OFFICE OF INFORMATION PRACTICES
426 QUEEN STREET, ROOM 201
HONOLULU, HI 96813-2904

October 6, 1995

Honorable James Takushi
Director of Human Resources Development
830 Punchbowl Street
Honolulu, Hawaii 96813

Dear Mr. Takushi:

Re: State of Hawaii Management Study Reports Compiled by
SMS Research & Marketing Services, Inc.

This is in reply to a letter from the former Director of Human Resources Development, to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), agency management opinion survey reports ("SMS Survey") prepared by SMS Research & Marketing Services, Inc. ("SMS"), under contract with the State Department of Human Resources Development ("DHRD"), formerly known as the Department of Personnel Services, ("DPS") must be made available for public inspection and copying.

BRIEF ANSWER

Except as provided in section 92F-13, Hawaii Revised Statutes, "each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (1993). Only two of the exceptions in section 92F-13, Hawaii Revised Statutes, would permit the State of Hawaii to withhold access to the SMS Survey: (1) the UIPA's "clearly unwarranted invasion of personal privacy" exception and (2) the "frustration of legitimate government function" exception.

OIP Op. Ltr. No. 95-24

Honorable James Takushi
October 6, 1995
Page 2

Under section 92F-14(b)(8), Hawaii Revised Statutes, individuals have a significant privacy interest in information comprising a "personal recommendation or evaluation." Thus, an agency should not disclose such information unless the public interest in disclosure outweighs the individual's significant privacy interest. It is the OIP's opinion that, assuming information in the SMS Survey constitutes a personal recommendation or evaluation, under the UIPA's public interest balancing test, the public interest in disclosure outweighs the significant privacy interest, as disclosure of the SMS Survey would shed significant light upon the workings of government, upon government operations, and working conditions.

In previous opinion letters, the OIP opined that agencies may withhold records protected by the common law deliberative process privilege under the frustration of legitimate government function exception. See e.g., OIP Op. Ltr. No. 90-11 (Feb. 26, 1990); OIP Op. Ltr. No. 90-21 (June. 20, 1990); and OIP Op. Ltr. No. 91-16 (Sept. 19, 1991). For the reasons discussed herein, the OIP declines to extend the "frustration of legitimate government function" exception to aggregate statistical reports and survey data.

Based upon an examination of relevant authorities, in our view, the aggregate statistical data and summaries thereof, are largely factual compilations. Because disclosure of the aggregate data is not likely to link survey responses with any individual respondent, it is unlikely that disclosure of the aggregate data would impair the quality of agency decision-making by stifling the candid and frank exchange of ideas and opinions.

In contrast, based upon a survey of state and federal court decisions, we believe that the "verbatim" comments and opinions set forth in various survey reports prepared by SMS may be withheld by the Office of the Governor, because this information is both predecisional and deliberative, and because the verbatim comments may be linked to individual survey respondents. As such, disclosure of the verbatim comments would likely chill the free and candid exchange of ideas and opinions, and result in injury to the quality of agency decisionmaking.

FACTS

The facts giving rise to this opinion letter are now several years old, and involve a previous State administration. As such, it is now difficult for the OIP to confirm the accuracy of the facts set forth below. Nevertheless, the facts giving rise to

OIP Op. Ltr. No. 95-24

Honorable James Takushi
October 6, 1995
Page 3

this opinion are set forth below, and are believed to be reasonably accurate.

Pursuant to a consultant services contract dated May 7, 1991 between the DPS and SMS and amendments thereto, the State contracted with SMS to conduct a management survey of its executive branch agencies to identify and monitor employee satisfaction and productivity, and management effectiveness. The State paid SMS \$178,000 for its services under the contract.

Under its contract with the DPS, SMS actually conducted several separate management surveys, which were performed in five "modules." Multiple reports were prepared by SMS after receiving the results of each survey module.

I. MODULE ONE

Module One of SMS's survey involved separate, in-person hour long interviews with approximately 65 agency employees. Those interviewed by SMS represented a cross section of agency administrators from the branch chief to director levels from all executive branch departments. During the interviews, agency senior managers were asked to give their views on the following topics: leadership, strategy and programs, authority and decisionmaking, recruitment and retention, operating efficiency, working relationships, communication, career development and training, job satisfaction, and compensation/benefits. According to its contract with the DPS, the purpose of the Module One survey was:

[T]o determine major strengths and areas for improvements [sic] across a broad range of topics such as communication, operating efficiency, working relationships between groups, authority and responsibility, decision making, career development, ideas for change, and the like.

Agreement for Consultant Services, dated May 7, 1990, between the State of Hawaii Department of Personnel Services and SMS Research & Marketing Services, Inc.

As a result of these 65 in-person interviews, SMS prepared an "Interview Report/Executive Summary," which contained SMS's analysis and evaluation of the comments made by those interviewed, as well as the verbatim comments of some of the individuals who were interviewed. This report, however, did not

Honorable James Takushi
October 6, 1995
Page 4

identify any of the managers interviewed, nor did it identify any individual making a written comment. The Interview Report/Executive Summary for Module One was provided directly to former Governor John Waihee. The Governor shared this report with his cabinet members at a cabinet meeting, and then the copies were returned to the Governor.

B. MODULE TWO

SMS's Module Two research consisted of in-person interviews with approximately 144 employees and managers of the Department of Human Services ("DHS"). As a result of these interviews, SMS prepared an "Interview Report/Executive Summary," which categorized the interview findings by the following topics: leadership, operating efficiency, pay and benefits, job security and satisfaction, training and development, working conditions, communications, and teamwork.

According to SMS's Module Two Interview Report/Executive Summary, the purpose of the interviews was to "identify potential issues that could be addressed in a department-wide Employee Opinion Survey." The interview report prepared by SMS as a result of the Module Two interviews contained verbatim comments by the interview subjects, as well as an analysis and commentary by SMS regarding the interview responses. As with the Module One report, the Module Two report did not identify any of the managers or employees that were interviewed. This report was shared by SMS only with the Governor.

C. MODULE THREE

Like Module Two, this module consisted of in-person interviews with approximately 22 employees and managers of the Department of Business, Economic Development and Tourism ("DBED"), for the purpose of identifying topics that could be addressed in a department-wide employee opinion survey as part of Module Four.

Also, as with Module Two, SMS prepared an "Interview Report/Executive Summary" which highlighted the interview findings according to the following topics: leadership, operating efficiency, pay, job security, training, working conditions, communications, and teamwork. The report also contained verbatim comments of some of the interview subjects, as well as commentary and analysis by SMS about the significance and meaning of the interview results. The verbatim comments were

Honorable James Takushi
October 6, 1995
Page 5

reported anonymously. As with Module Two, this Report was shared by SMS only with the Governor.

D. MODULE FOUR

Based upon information derived from Modules Two and Three, SMS designed two survey questionnaires requesting standardized answers to questions on such topics as working conditions, pay, training, job satisfaction, employee benefits, operating efficiency, management, leadership, and supervision. In addition to questions calling for standardized responses, the survey requested written comments of the respondents.

The Module Four questionnaire was distributed to all employees of the DHS and the DBED. The survey questionnaire that was given to all DBED employees contained 92 separate questions, with subparts, and the questionnaire that was given to all DHS employees contained 95 separate questions, also with subparts. Questionnaires were returned to SMS by 1,454 DHS employees and 185 DBED employees, for a response rate of 72% and 82% respectively.

As a result of the data gathered from the employee opinion survey questionnaires, SMS prepared six separate reports for both the DHS and DBED, which were provided to the directors of the DHS and DBED, for a total of twelve reports. SMS prepared an "Executive Summary" report summarizing the results of the opinion survey, as well as a report entitled "Report Highlights," that described, by percentages, the number of respondents responding favorably or unfavorably on each of the survey questions. SMS also compiled a "Normative Report" which compared the survey results against a sample of the largest U.S. industrial corporations (Fortune 500) and service sector corporations.

In addition, SMS prepared a "Demographic Report" in which survey results were categorized by the sex, race, and years of service of the survey respondents. The fifth report prepared by SMS, an "Overall Results" report, categorized survey results by the job level (e.g. clerical, supervisory, administrative, top manager) of survey respondents, and by type of employee (e.g. civil service, exempt, probationary, emergency hire).

Finally, SMS prepared a "Verbatim Comments" report highlighting special matters to be brought to the administration's attention as contained in the written comments by the survey respondents. The verbatim comments of those responding to the survey were re-typed, set forth anonymously in

Honorable James Takushi
October 6, 1995
Page 6

the report, and were categorized by such topic headings as: management, pay, communications, working conditions, operating efficiency, training, supervision, organizational image, job satisfaction, and organizational change. Many of the verbatim comments contained in this report made very candid observations or expressed frank opinions about departmental management generally. Other verbatim comments contained references to the job titles of certain employees, such as the director or deputy director, and still other comments referenced particular individuals by name. The Verbatim Comments report for the DHS contained approximately 764 separate verbatim comments, which were organized by the offices within the department to which the comments related (e.g. Hawaii Housing Authority, Health Care Administration) as well as organized by island. The Verbatim Comments report for DBED contained 93 separate comments.

E. MODULE FIVE

Under an amendment to the contract between SMS and the DPS, SMS conducted an in-depth senior management opinion survey of approximately 950 agency senior managers at the branch chief level and above who were employed by the 21 State executive branch agencies.

The Module Five survey consisted of a 16-page questionnaire that contained 73 questions, with subparts. Fifteen pages of the questionnaire requested standardized responses to questions on a variety of topics including the performance of the Governor and the respondent's departmental management, job satisfaction, operating efficiency, working environment, productivity, relationships with immediate supervisor, pay and benefits, employee recruitment and retention, communications, planning, and barriers to effective performance.

Page sixteen of the questionnaire was a comments section, requesting each respondent to provide written answers to the following questions:

1. What actions do you think would be most helpful in removing barriers to your department's effectiveness?
2. If there are other matters you would like brought to the attention of the Governor, please write your comments below.

The questionnaire also asked the respondents to identify their position by department, job level, location, length of

Honorable James Takushi
October 6, 1995
Page 7

service, and by type of employee, such as civil service or exempt. However, the introduction to the Module Five questionnaire states, "[y]our opinions are strictly confidential and anonymous," and "[n]o one in state government will see a completed questionnaire and no attempt will be made to identify individual responses." The introduction to page 16 of the Module Five questionnaire, the comments section, stated that the respondent's comments would be typed and "reported anonymously."

The form cover memorandum dated September 5, 1990 instructed the respondent to mail the completed questionnaire directly back to the company that developed the survey in consultation with SMS. With regard to the survey, the memorandum stated that "[i]t will be completely anonymous . . . [n]o one in State government will see the completed questionnaires, nor will there be any way to identify you as an individual." It also stated, "[p]lease respond frankly and honestly to the questionnaire."

As in Module Four, as a result of the Module Five senior management survey, SMS prepared several reports. First SMS prepared a Module Five "Executive Summary," which contained a statistical analysis of the survey responses, as well as selected anonymous verbatim comments of a few of the survey respondents. As with SMS's Module Four survey, SMS prepared a "Normative Report," a "Demographic Report," and an "Overall Report." The Normative Report compared the survey responses to those of Fortune 500 corporations and service sector corporations. The Overall Report for each of the 21 executive branch departments provided the overall survey results, and further categorized responses by job level (e.g. director, division head, branch chief) and by type of service (e.g. civil service, exempt). The Overall Report also compared groups of government agencies with respect to the responses received for each survey question and made direct comparisons between departments.

SMS's Module Five Overall Demographic Report categorized the survey responses by sex, race, location, and by years of service. Lastly, SMS prepared a Module Five "Verbatim Comments" report containing 364 candid, frank, and anonymous verbatim comments organized by such topic headings as productivity, leadership, communications, recruitment and retention, management relations, authority and decisionmaking, management development, satisfaction, performance measurement, and rewards.

Finally, as a result of the Module Five questionnaires, SMS prepared a statistical report for each department which summarized all survey responses from employees of that agency,

Honorable James Takushi
October 6, 1995
Page 8

and a booklet reporting in an anonymous fashion the verbatim comments to the two written comments questions contained on page 16 of the questionnaire. Each department director received copies of these reports for their respective departments only.

By letter dated January 28, 1991, Mr. James Dooley, a Staff Writer for The Honolulu Advertiser requested copies of all reports prepared by SMS pursuant to its contract with the DPS to conduct the agency management surveys specified therein. In response to this request, by facsimile letter dated February 1, 1991, your predecessor requested an advisory opinion from the OIP concerning public access to the SMS reports, pursuant to section 92F-42(2), Hawaii Revised Statutes. The OIP also received opinion requests concerning the SMS management survey reports from Mr. Sam Slom, President of Small Business Hawaii, and former Senator Russell Blair, dated March 7, 1991 and May 31, 1991, respectively.

DISCUSSION

I. INTRODUCTION

The issue presented is one of first impression under the UIPA, as the OIP has not yet opined whether agency opinion surveys, whether conducted by the agency or through consultants, must be made available for public inspection and copying under the UIPA.

The UIPA provides that all government records shall be made available for public inspection and duplication, unless access to those records is closed or restricted by law. Specifically, an agency's general disclosure responsibilities under the UIPA are set forth at section 92F-11, Hawaii Revised Statutes, which provides in pertinent part:

§92F-11 Affirmative agency disclosure responsibilities. (a) All government records are open to public inspection unless access is restricted or closed by law.

(b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours. . . .

Haw. Rev. Stat. § 92F-11(a), (b) (1993) (emphasis added).

Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993); see also Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 376 n.10 (1993). Thus, under the UIPA's definition of "government record," an agency's possession of the records is determinative, and "ownership" of the record is generally irrelevant.¹ Because the Office of the Governor is in possession of the written reports prepared by SMS under its contract with the DPS, these reports constitute "information maintained by an agency . . . in some physical form" and, therefore, constitute "government records" subject to the UIPA.

Unless the SMS Survey reports or information therein are protected by one of the exceptions set forth at section 92F-13, Hawaii Revised Statutes, the reports must be made available for public inspection and copying in accordance with section 92F-11(b), Hawaii Revised Statutes.

Additionally, unless information in a government record is protected by one of the exceptions set forth at section 92F-13, Hawaii Revised Statutes, an agency cannot deny access to the information by promising those contributing the information that it will remain confidential, as court decisions in states with open records laws similar to the UIPA have held that such promises are void as against public policy. See OIP Op. Ltr. No. 90-39 at 10 (Dec. 31, 1990); OIP Op. Ltr. No. 93-22 at 7-8 (Nov. 4, 1993); OIP Op. Ltr. No. 95-7 at 6 (Mar. 28, 1995), and cases cited therein. However, given the nature and contents of the reports prepared by SMS, two of the UIPA's statutory exceptions to public access merit examination, and we do so separately below.

II. WOULD DISCLOSURE OF THE SMS DOCUMENTS CONSTITUTE A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY?

In enacting the UIPA, the Legislature stated that "[t]he policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of

¹The State's contract with SMS, however, provided that except for copyright materials, "all other materials . . . prepared by CONSULTANT under this Agreement shall remain the property of the STATE." Agreement for Consultant Services dated May 7, 1990, ¶ 3.

Honorable James Takushi
October 6, 1995
Page 10

the Constitution of the State of Hawaii." Haw. Rev. Stat. § 92F-2 (1993). In recognition of this constitutional right to privacy, an agency is not required by the UIPA to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (1993).

However, under the UIPA, the "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (1993). Under this balancing test, "if a privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, Haw S.J. 689, 690 (1988). Indeed, the legislative history of the UIPA's privacy exception indicates this exception only applies if an individual's privacy interest in a government record is "significant." See id. ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure").

A. Do the SMS's Reports Implicate a Significant Privacy Interest?

The OIP must first determine whether an individual has a significant privacy interest in information in the reports generated by SMS. The Legislature has provided in the UIPA examples of records in which an individual possesses a significant privacy interest. Haw. Rev. Stat. § 92F-14(b) (Supp. 1992 & Act 242, Session Laws of Hawaii 1995). Section 92F-14(b), Hawaii Revised Statutes, provides in pertinent part:

(b) The following are examples of information in which the individual has a significant privacy interest:

. . . .

(8) Information comprising a personal recommendation or evaluation.

Haw. Rev. Stat. § 92F-14(b)(8) (1993).

Neither the UIPA's legislative history nor the Uniform

Honorable James Takushi
October 6, 1995
Page 11

Information Practices Code², upon which the UIPA was modeled, provide any guidance in applying the terms "personal recommendation or evaluation." These terms could encompass not only job performance evaluations and letters for recommendation for employment or academic purposes, but may also include surveys in which opinions are expressed concerning agency managers, supervisors, and policy makers. The statistical reports and verbatim comment reports prepared by SMS do contain anonymously reported comments and evaluations on such issues as departmental management, operating efficiency, communication, and leadership.

For purposes of this analysis, the OIP shall assume that reports prepared by SMS do contain information comprising a personal recommendation or evaluation and, therefore, the managers, supervisors, and policy makers have a "significant privacy interest" in the SMS Survey reports.

B. Does the Public Interest In Disclosure Outweigh The Significant Privacy Interest?

In previous opinion letters, the OIP has stated that, as with the federal Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA"), the core purpose of the UIPA is to promote governmental accountability³ through the disclosure of information that sheds light upon an agency's performance of its statutory duties and upon the actions and conduct of government officials. See OIP Op. Ltr. No. 89-4 (Nov. 9, 1989); OIP Op. Ltr. No. 89-16 (Dec. 27, 1989); OIP Op. Ltr. No. 90-7 (Feb. 9, 1990); OIP Op. Ltr. No. 90-9 (Feb. 26, 1990) and OIP Op. Ltr. No. 90-17 (April 24, 1990).

In assessing the "public interest in disclosure" under the FOIA, the U.S. Supreme Court has stated:

²Section 92F-14(b)(8), Hawaii Revised Statutes, is identical to section 3-102(b)(9) of the Uniform Information Practices Code, adopted by the National Conference of Commissioners on Uniform State Laws.

³Section 92F-2, Hawaii Revised Statutes, provides that "opening up the government process to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest," and that it is the policy of this State "that the formation and conduct of public policy--the discussions, deliberations, decisions, and actions of government agencies--shall be conducted as openly as possible."

Honorable James Takushi
October 6, 1995
Page 12

In our leading case on the FOIA, we declared that the Act was designed to create a broad right of access to "official information." EPA v. Mink, 410 U.S. 73, 80 (1973). In his dissent in that case, Justice Douglas characterized the philosophy of the statute by quoting this comment by Henry Steele Commager:

"The generation that made the nation thought secrecy in government one of the instruments of Old World Tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know *what their government is up to.*" Id. at 105 (quoting The New York Times Review of Books, Oct. 5, 1972, p. 7) (emphasis added).

This basic policy of "full agency disclosure unless information is exempted under clearly delineated statutory language," [citation omitted.] indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light upon an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose however, is not furthered by the disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct.

United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772-73 (1988) (emphasis in original).

Unlike the disclosure of information about private citizens that reveals little about the actions of government agencies, the OIP concludes that the disclosure of the SMS Survey reports would shed significant light upon how government agency managers and employees perceive high level department administrators on such

Honorable James Takushi
October 6, 1995
Page 13

issues as operating efficiency, productivity, management, and leadership. In short, the disclosure of the SMS Survey reports would reveal how these top level agency administrators are perceived to be performing their responsibilities, the workings of government, government operations and working conditions.

Accordingly, even though agency administrators may have a significant privacy interest in the contents of the SMS Survey reports, such a privacy interest is outweighed by the public interest in disclosure. Therefore, the OIP concludes that the disclosure of the SMS Survey reports would not "constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (1993). We now turn to an examination whether the UIPA's frustration of legitimate government function exception applies to the SMS Survey reports.

III. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION: DELIBERATIVE PROCESS PRIVILEGE

Under the UIPA, agencies need not disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (1993). In previous OIP opinion letters, based upon Exemption 5 of FOIA and for compelling policy reasons, the OIP reasoned that the UIPA's frustration exception applies to certain intra-agency and inter-agency memoranda protected by the common law "deliberative process privilege." See e.g., OIP Op. Ltr. No. 90-11 (Feb. 26, 1990); OIP Op. Ltr. No. 90-21 (June. 20, 1990); and OIP Op. Ltr. No. 91-16 (Sept. 19, 1991).

The deliberative process privilege rests upon a belief that "were agencies forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." See Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deliberative process privilege, however, must be construed as narrowly as is consistent with efficient government operations. Wolfe v. HHS, 839 F.2d 773 (D.C. Cir. 1988). "Disclosure not secrecy, is the dominant objective" of FOIA's statutory scheme." Department of Air Force v. Rose, 525 U.S. 352, 361 (1976). The privilege, however, does not apply to factual information within deliberative government records "in a form that is severable without compromising the private remainder

Honorable James Takushi
October 6, 1995
Page 14

of the documents." Environmental Protection Agency v. Mink, 410 U.S. 73, 91 (1973).

Documents that are commonly encompassed by the deliberative process privilege include "advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated," NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975), or documents that, if released, would "stifle honest and frank communication within an agency," Coastal States Gas Corp., 617 F.2d at 866. Agency self-evaluations have also been traditionally afforded protection under the deliberative process privilege. See Ashley v. Department of Labor, 589 F. Supp. 901 (D.D.C. 1983); Athens Observer, Inc. v. Anderson, 263 S.E.2d 128 (Ga. 1980) (agency evaluation "must be protected in order to assure candid assessments by evaluators"); Wilson v. Freedom of Information Commission, 435 A.2d 353 (Conn. 1980) (disclosure of university program review committee report "would be injurious to the consultative functions of government"); Hafermehl v. University of Washington, 628 P.2d 846 (Wash. App. 1981).

Further, because agencies commonly have a special need for opinions and recommendations of temporary consultants, documents that have been generated outside of an agency but produced under agency initiative have been found to be protected by the deliberative process privilege. As emphasized in a decision of the U.S. Court of Appeals for the District of Columbia, this privilege extends to the communications of agency outsiders or consultants, so long as such communications express opinions, evaluations, or recommendations on opinions or policy matters:

Ryan (and Formaldehyde), then, stand for the proposition that Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of the agency's deliberative process. As such, they remain intra-agency documents.

Dow Jones & Company, Inc. v. Department of Justice, 917 F.2d 571, 575 (D.C. Cir. 1990) (emphasis added); see also OIP Op. Ltr. No. 90-21 (June 20, 1990) (deliberative process privilege applies to documents prepared by agency consultant who has a formal relationship with the agency).

Only a few courts and authorities have examined whether the deliberative process privilege applies to the findings, analysis

Honorable James Takushi
October 6, 1995
Page 15

and recommendations resulting from agency opinion surveys or opinion research. An examination of these decisions provide useful guidance in resolving the issue presented under the UIPA.

A. Federal Authorities Regarding Agency Opinion Surveys/Management Evaluations

In Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975), the U.S. Civil Service Commission unsuccessfully sought to protect, under FOIA's Exemption 5, personnel management reports and studies prepared by the Bureau of Personnel Management, dealing with the compliance of federal agencies with policies set down by statute. The reports covered a wide range of topics: labor management relations, position classification, merit promotion programs, incentive awards, the employee suggestion program, training, and recruitment.

The district court held that material in the reports which contained an analysis of how the agencies' personnel policies were being carried out was not exempt under FOIA's Exemption 5. On the other hand, the district court held that those portions of the reports consisting of advice and recommendations to the agencies on how to improve their personnel programs, and those portions that contained references to individual employees, were exempt from disclosure. This portion of the district court's ruling was not appealed and, therefore, was not an issue reviewed by the appellate court.

The government asserted that the evaluative portions of the 2,448 reports that set forth the government's findings and evaluations, organized by topic, were an integral part of the agency's ongoing, pre-decisional deliberative process because they played a consultative role by which that agency evaluates and changes its personnel policies. The court rejected this argument, noting in dicta that it would "result in a huge mass of material being forever screened from public view," reasoning:

We cannot accept this. If we consider this entire continuous process of management appraisal, beginning with the Commission's staff inquiries through final recommendations to the subject agency and its final action thereon, as a deliberative process, then surely we would be interpreting Exemption 5 to protect too much [footnote omitted.] The phrase 'management process' or 'personnel improvement process' would swallow up a

substantial part of the administrative process, and virtually foreclose all public knowledge regarding the implementation of the management improvement process, the only final action which would be subject to public disclosure would be the action taken by the surveyed agency in the implementation of the recommendations of the Commission.

. . . .

. . . If we construed Exemption 5 as broadly as the Government seeks to do here, we would go a long way toward undercutting the entire Freedom of Information Act. There is a huge quantity of amorphous management improvement activity in every agency which would be protected by an equivalent rationale, if we held the evaluations reports of the Commission and the mass of facts behind them in this case were so protected.

Vaughn, 523 F.2d 1145.⁴

The court held that government failed to meet its burden of establishing that the reports, including portions setting forth the evaluations of the agency evaluating teams, were protected by FOIA's Exemption 5.

In contrast, in Times Journal Co. v. Dep't of the Air Force, 793 F. Supp. 1 (D.D.C. 1991), the U.S. District Court for the District of Columbia held that records pertaining to computer assisted personnel surveys, including analyses, briefing papers, and summaries, conducted by an Air Force consultant, were protected by the deliberative process privilege recognized under

⁴The court also noted that characterizing the mass of material that the Government sought to protect as "deliberative process" "would result in a huge mass of material being forever screened from public view because the administrative bureaucracy had never reached a 'final' decision on the management matters involved," and that "[t]he public has an interest in decisions deferred, avoided, or simply not taken for whatever reason, equal to its interest in decision made, which from their very nature may more easily come to public attention than those never made." Id. at 1146.

Honorable James Takushi
October 6, 1995
Page 17

FOIA's Exemption 5.

The plaintiff made a FOIA request seeking access to records related to the Air Force's Computer Assisted Telephone Interview ("CATI") surveys and related documents. The purpose of these surveys was to gather data on the opinions and perceptions of Air Force personnel regarding pay, working conditions, and other topics. The plaintiff later clarified that it was seeking access to the results of the CATI surveys, and not information that would identify individual survey respondents.

The Air Force denied the FOIA request, on the basis that the survey results would be used by behavioral analysts to make briefings and recommendations to the Air Force's director of personnel on how to fashion personnel policies, and that disclosure of the survey results would inhibit future survey participants from either candidly expressing themselves or participating at all in the surveys.

The plaintiff contended that it sought factual information in the form of aggregate survey results reflecting the opinions and attitudes of randomly selected members of the Air Force, and that the disclosure of the material would not expose the agency's decisionmaking process because the survey participants were not acting as policy advisers, but merely survey participants. It also asserted that since it was not seeking individual responses to survey questions but only aggregate survey results, individuals would not be inhibited from participating in future surveys. Over these arguments, the court found that the survey results were protected under Exemption 5.

However, the U.S. Court of Appeals for the District of Columbia reversed the opinion of the District Court and remanded the case. See The Army Times Publishing Co. v. Dep't of the Air Force, 998 F.2d 1067 (D.C. Cir. 1993)⁵. In reversing the district court's decision, the court concluded that while the agency's disclosure of portions of the survey results did not waive its right to withhold the non-disclosed portions of the survey results, there was an inadequate showing that the withheld material was in some way qualitatively different from the

⁵In a telephone conversation on June 2, 1995 with Martin Wald, the attorney for the appellant Times Publishing, the OIP was informed that the caption of this case was changed to reflect a change in ownership of the Times Journal.

Honorable James Takushi
October 6, 1995
Page 18

material that had been disclosed⁶. The Court also noted that "FOIA operates on the premise that government will function best if its warts as well as its wonders are available for public review." Army Times, 998 F.2d at 1072. Upon remand, the District Court ordered the Air Force to disclose all of the withheld opinion survey results, including aggregate survey responses concerning leadership, morale, readiness, training, ability to do the job, confidence in command, and unit cohesion. Upon remand, the District Court found the aggregate survey results to be factual, and not "opinions," stating that the aggregate results "provide the raw data upon which decisions can be made; they are not themselves part of the decisional process." The Army Times Publishing Co. v. Dep't of the Air Force, No. 90-1383, slip op. at 7 (D.C.D.C. Feb. 28, 1995).

**B. State Authorities Regarding Agency Opinion
Surveys/Management Evaluations**

At least two state courts and two attorney general opinions have examined whether agency opinion surveys and reports regarding agency management must be available for public inspection and copying under open records laws.

In Moser v. Kanekoa, 744 P.2d 364 (Wash. App. 1987), the Court of Appeals of Washington found that a final report summarizing the results of interviews and questionnaires used to evaluate management problems experienced by a county jail, including a memorandum summarizing the results of the survey research, were not protected under an exemption in the Washington Public Disclosure Act, similar to Exemption 5 of FOIA, which was also designed to promote free and uninhibited deliberations on

⁶The court stated "the failure of the Air Force to offer some distinguishing feature of the withheld information strongly suggests that at least some of the information contained in the withheld surveys is similar to that already released, and also non-exempt. We therefore reverse the district court's decision and remand to enter a finding of segregability. In order to succeed on remand, the Air Force must demonstrate that, unlike the released poll results, the withheld poll results would actually inhibit candor in the decision making process if made available to the public." Army Times, 998 F.2d at 1071-72 (emphasis added).

Honorable James Takushi
October 6, 1995
Page 19

the part of those involved in making policy.⁷ The court rejected an argument that all opinions ultimately considered by the decision maker are exempt, and instead concluded that the opinions expressed were the "raw material" from which, the city manager could understand why police officers had lost confidence in the police chief:

Here, as in *Columbian Publishing Co.*, those offering the opinions the Sheriff seeks to exempt from disclosure were not involved in the decision-making process. Their "opinions" were not the kind contemplated by the deliberative process exemption. The interview summaries must be disclosed.

Moser, 744 P.2d at 366 (emphasis added).

Similarly, in *Yacobellis v. City of Bellingham*, 780 P.2d 272 (Wash. App. 1989), the court found that questionnaires received in response to a "Municipal Golf Manager Survey" conducted by the City of Bellingham of governmental agencies operating 27 public golf courses were not protected by the Washington Public Disclosure Act's exemption for the deliberative process privilege, finding that the questionnaires did not contain opinions or policy recommendations.

The Texas Attorney General, in Open Records Decision No. 209 (Nov. 28, 1978), considered whether, under the Texas Open Records Act, the results of an opinion survey of school district employees must be made available for public inspection and copying. The survey was conducted among 2,799 employees, including teachers and administrators, and consisted of 34 questions. The first 32 questions asked the employee to indicate whether the employee agreed, disagreed, or had no opinion with regard to the statement in each question reflecting job attitudes. One question called for the completion of a phrase with written narrative comments.

The Texas Attorney General's opinion examined whether the survey results would be protected under an exemption in the Texas Open Records Act nearly identical to FOIA's Exemption 5 for

⁷This exemption protected "preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended." Wash. Rev. Code § 17.301(1)(i).

Honorable James Takushi
October 6, 1995
Page 20

intra-agency and inter-agency memoranda protected by the deliberative process privilege. The Texas Attorney General concluded as follows:

It is our decision that the verbatim comments solicited in question 34 are more in the nature of opinion, advice and recommendation than they are factual information and, therefore, fall within the exception of the Texas Open Records Act permitting their nondisclosure, although we believe that the summaries of the comments should be released. Further, it is our decision that those portions of the report from the consultant which make recommendations are excepted from disclosure under the same exemption. [citations omitted.]

However, with regard to the questions on the survey calling for an objective response (#1-33) we believe that the final compilation is factual and information in character must be disclosed. The results of the survey indicate the percentage of the [school district] employees who agree or disagree with given propositions. We think that this is the type of information in which the public has legitimate interest.

Tex. Open Records Decision No. 209 (Nov. 28, 1978) (emphases added).

In Texas Open Records Decision No. 464 (June 3, 1987), the Texas Attorney General found that a statistical compilation, which set forth the results of answers of faculty members to standardized questions evaluating university administrators, was not protected by the deliberative process privilege, but found that narrative statements expressed by the faculty members could be withheld. In finding the statistical compilation not within the scope of the deliberative process privilege, the Texas Attorney General reasoned that the disclosure of the statistical information would not impair the university's deliberative process because the responses were anonymous. In contrast, the narrative statements of faculty members were found protected:

The narrative responses to questions 50

OIP Op. Ltr. No. 95-24

and 51 present a different question. Because release of these responses could identify the individuals making the evaluations and recommendations, these responses may be withheld under section 3(a)(11). Although the narrative responses are anonymous, releasing them could reveal the identity of the evaluators. For example, some of the evaluations are handwritten and some criticize attitudes which may apply only to some faculty members. Because the release of these evaluations could impair the university's ability to obtain the same degree of openness on evaluations in the future, they may be withheld.

Tex. Open Records Decision No. 464 (June 3, 1987) (emphases added).

C. Application of Federal and State Authorities to Governor's Management Reports

The OIP agrees with the Supreme Court and the federal circuit courts that the deliberative process privilege must be narrowly construed consistent with the need for efficient government operations, so as to confine the privilege within in its proper scope. Narrow construction of this privilege would also prevent the privilege from "swallowing" an open records or freedom of information law, and permit disclosure of information that is of legitimate public interest concerning "the formation and conduct of public policy--the decision, deliberations, decisions, and actions of government agencies." Haw. Rev. Stat. § 92F-2 (1993).

The OIP is persuaded that, as in the Army Times case, aggregate opinion survey results, while predecisional, are primarily factual and do not qualify for protection by the common law deliberative process privilege. The OIP also believes the decisions in the Vaughn and Moser cases, and in Texas Open Records Decision Nos. 209 and 464 appropriately balance the often competing policies underlying freedom of information laws, and those that underlie the deliberative process privilege. Disclosure of aggregate, or statistical, opinion survey data is not likely to impair the agency's ability to obtain frank and candid opinions from the survey participants.

Accordingly, it is the OIP's opinion that the disclosure of

aggregate data compiled from the responses of the survey respondents to objective standardized survey questions, and summaries thereof, are largely factual in nature and would not significantly impair or harm the consultative functions of government by depriving it of candid responses to future surveys. Therefore, the OIP finds that aggregate data in the survey reports prepared by SMS are not protected by the deliberative process privilege recognized under section 92F-13(3), Hawaii Revised Statutes, and must be disclosed upon request.

In contrast, the OIP finds that disclosure of the verbatim comments of those who responded to the surveys, including verbatim comments reproduced in report summaries, may be withheld by the Office of the Governor under the deliberative process privilege recognized by section 92F-13(3), Hawaii Revised Statutes. In our view, release of these responses could identify the individuals making the evaluations and recommendations, and disclosure of such responses could stifle the frank exchange of ideas and opinions, and cause injury to the quality of the decision-making process.

In brief, it is the opinion of the OIP that the Office of the Governor should make the SMS Survey reports available for public inspection and copying, after it segregates, or deletes, the verbatim comments of survey respondents.

CONCLUSION

We conclude that although the SMS Survey reports do reflect upon the leadership and management styles of those holding positions of directors, deputy directors, and divisional supervisors, their disclosure would not constitute a clearly unwarranted invasion of personal privacy under the UIPA. It is the OIP's opinion that disclosure of the SMS Survey reports would shed significant light upon how agency administrators had been perceived to be performing their responsibilities, and that the public interest in disclosure of the SMS Survey reports outweighs the significant privacy interest that agency administrators have in the same.

However, based upon our examination of the SMS Survey it is the opinion of the OIP that the verbatim comments of survey respondents are protected from required agency disclosure by the common law deliberative process privilege, and that they may be withheld to avoid the frustration of the legitimate government function of decisionmaking under section 92F-13(3), Hawaii Revised Statutes.

Honorable James Takushi
October 6, 1995
Page 23

Construing the deliberative process privilege narrowly, the OIP believes that disclosure of the aggregate survey results and summaries thereof will not result in the frustration of a legitimate government function. The OIP finds that the aggregate survey results are largely a factual compilation, and disclosure of these factual compilations would not likely chill the candid exchange of ideas and opinions, and result in injury to the quality of an agency's decisionmaking process.

Very truly yours,



Hugh R. Jones
Staff Attorney

APPROVED:



Moya T. Davenport Gray
Director

HRJ:sc

c: Honorable Benjamin J. Cayetano
Governor of Hawaii
Honorable Russell Blair
James Dooley