

Summaries of Recent OIP Opinion Letters

☛ Disclosure of Intra-office E-mail Messages

The Aquatic Resources Division of the Department of Land and Natural Resources (“ARD”) asked whether it was required to disclose intra-agency e-mails concerning an alleged violation of law.



More specifically, the e-mails in question contained the name of the alleged violator (who was never charged with any wrongdoing) and described an unusual and, possibly, proprietary fishing method. The

e-mails also reflected the discussion between agency employees, i.e., the give-and-take exchanges, regarding whether the statute regulating long-line fishing applied to the alleged violator’s fishing method.

The OIP found that the alleged violator had a significant privacy interest in the fact that he was the subject of a criminal investigation which, under the circumstances, outweighed the public interest in that fact. Accordingly, the OIP advised ARD that the name of the alleged violator and other information that could reasonably identify the person could be withheld under the Uniform Information Practices Act (Modified), chapter 92F, HRS (“UIPA”).

The OIP also opined that the deliberative process privilege, recognized under the “frustration” exception to the UIPA, authorized ARD to withhold almost all of the e-mails. [OIP Op. Ltr. No. 04-12, July 9, 2004]

Note: See this month’s OpenPoint, on the right, for a detailed explanation of the deliberative process privilege.

☛ Disclosure of Forecasts Prepared by Staff



An opinion was requested as to whether forecast sections of tax credit data tables (the “Staff Forecasts”), prepared by staff of the Tax Research and Planning Office for use by the Council on Revenues (the

“Council”) in deliberating and preparing the forecast of state general fund tax revenues, must be open to public inspection under the UIPA.

See OIP Opinions, p. 2

OpenPoint

OpenPoint, a new tutorial feature of Openline, focuses on UIPA and Sunshine Law concepts that frequently arise.

The Deliberative Process Privilege

Section 92F-13(3), HRS, of the UIPA permits the withholding of records that, by their nature, must be confidential in order for the government to avoid the **frustration** of a legitimate government function. The OIP has recognized that the disclosure of certain **intra-agency and inter-agency memoranda or correspondence** would “frustrate” agency decision-making because, if agencies were forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of government decisions would consequently suffer.



The OIP thus extended the “frustration” exception to allow agencies to withhold government records protected by the executive or “**deliberative process privilege.**” The deliberative process privilege shields from disclosure **recommendations, draft documents, proposals, suggestions, and other subjective documents** that comprise part of the process by which the government formulates decisions and policies.

To invoke this privilege, the document sought to be withheld must meet two requirements: First, the document must be “predecisional,” i.e., received by the decision-maker prior to the time the agency decision or policy is made. Second, the document must be “deliberative,” i.e., a recommendation or opinion on agency matters that is a direct part of the decision-making process. The privilege thus protects the back-and-forth discussions that lead up to the agency’s decision, not the final policy of the agency.

A protected document may lose its privileged status, however, if an agency later adopts or incorporates it into the agency’s final decision or policy. 🗑️

OIP Opinions (from p. 1)

The Constitution charges the Council with being the final decision-making agency with respect to the preparation of revenue estimates to be used to administer the State.

The OIP found that the Staff Forecasts, by their very nature, reflect the preliminary judgments and opinions of the staff, not the policy or determination of the Council.

Because the Staff Forecasts consist of predecisional, deliberative intra-agency communications and the Council did not adopt or incorporate them into the Council's forecast, the OIP found that the Staff Forecasts met the two requirements necessary to invoke the "deliberative process privilege," and therefore could be withheld from disclosure under the "frustration" exception to the UIPA set forth at § 92F-13(3), HRS. [OIP Op. Ltr. No. 04-15, August 30, 2004].

Note: See the OpenPoint, on page one, for a detailed explanation of the deliberative process privilege.

Disclosure of Personal Information on Petitions and Nominating Papers

The Hawaii County Clerk requested an opinion from the OIP regarding whether the public has a right to inspect and copy initiative and charter amendment petitions and candidate nominating papers, all of which require those signing the petitions and nominating papers to include personal information such as name, date of birth, social security number, and home address.



Because the personal information is collected by the petitioners and not by a government agency, the Hawaii County Clerk also asked whether it was proper to require the collection of social security numbers.

The OIP opined that the signatories have a significant privacy interest in their personal information. In balancing that privacy interest against the public interest in disclosure, the OIP concluded that a signatory's town of residence and zip code must be disclosed as the information is similar to publicly available voter roll information regarding a voter's district or precinct.

The OIP further determined that a signatory's social security number, date of birth and street address, including the house or apartment number, may be withheld under

the UIPA's privacy exception.

With respect to the collection of social security numbers, the OIP advised that the UIPA does not address the issue but that courts from other jurisdictions have found the requirement that a petition signatory include his or her social security number to be a violation of the federal Privacy Act.

The OIP recommended that the County Clerk consult with the Corporation Counsel as to whether the County should continue requiring the collection of social security numbers with petition signatures. [OIP Op. Ltr. No. 04-11, June 30, 2004].

Disclosure of List of Voters

The General County Register, which contains, among other things, the name and address of each voter, is not public under the UIPA, unless requested for certain "government or election purposes[.]"

Under the UIPA, an agency may withhold records from public access that are protected from disclosure by another statute.



Because sections 11-14 and 11-97, HRS, expressly restrict access to the General County Register "for government or election purposes only[.]" the County Clerk is entitled to deny access to the General County Register by a member of the public who is not seeking the record "for government or election purposes[.]"

Note: this Opinion supercedes OIP Opinion Letter Number 90-22. [OIP Op. Ltr. No. 04-08, April 2, 2004].

Opinion Letters on the Internet 

All 280 OIP opinion letters, both full text and summaries, are available on the OIP's web site: www.hawaii.gov/oip.

Openline is a monthly publication of the Office of Information Practices, State of Hawaii.

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