Op. Ltr. 90-11 Public Inspection of University Program Reviews
Please note that opinions discussing the deliberative process privilege have been materially affected by the Hawaii Supreme Court's majority opinion in Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (Dec. 21, 2018).

February 26, 1990

MEMORANDUM

TO: The Honorable Albert J. Simone
President, University of Hawaii

ATTN: Paul C. Yuen, Interim Vice President
for Academic Affairs, University of Hawaii at Manoa

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Public Inspection of University Program Reviews

This is in reply to your memorandum dated September 29, 1989, requesting an advisory opinion concerning the public inspection of University of Hawaii program reviews.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, the University of Hawaii at Manoa ("UH") must permit the public to inspect and copy self-study reports and other program review reports prepared in connection with the review and evaluation of academic departments or units at the UH pursuant to Executive Policy E5.202.

BRIEF ANSWER

We believe that portions of the self-study and review team reports are government records which are subject to the deliberative process privilege" and therefore, are government records which, if disclosed, would frustrate a legitimate government function. Haw. Rev. Stat. Þ 92F-13(3) (Supp. 1989). This privilege protects from disclosure certain deliberative, predecisional agency memoranda and advisory opinions in order to

encourage the candid and frank discussion of ideas and recommendations on issues of agency policy, thereby avoiding the frustration of the legitimate government function of agency decision-making.

On the contrary, factual portions of otherwise deliberative memoranda are not protected from disclosure under this privilege. Thus, unless it is impossible to reasonably segregate purely factual material from the UH program review documents, the factual information must be available for public inspection and duplication under the UIPA. Whether segregation is reasonable depends on the portion of the information in the reports that is public and how the public information is dispersed throughout the record.

FACTS

Pursuant to UH Executive Policy E5.202, established programs which award an academic degree or certification and which have been approved by the Board of Regents ("Board") as continuing programs, are subject to a review at least once every five years on a schedule established by each campus.[1]

Among other things, the purpose of the program review policy is "[t]o provide for a periodic examination by faculty and administration of the extent to which established academic programs are meeting their stated objectives and the extent to which these program objectives are still appropriate to the campus, Unit and University." UH Executive Policy E5.202.

The program review process begins with the conduct of a "self-study" and the preparation of a self-study review document. According to UH Executive Policy E5.202, the self-study review document includes at least the following information:

a. A statement of the program objectives. Where appropriate this should be taken from the program proposal on which establishment of the program was based.

b. An assessment of whether or not the program is

[1]A special review of any program may be conducted at any time pursuant to this policy "as deemed necessary by the faculty or administration."

meeting its objectives and a summary of the evidence used to reach this conclusion. Where appropriate, this should include evidence related to continuing need for the program and, in the case of graduate programs, should specifically address the criteria for evaluation of graduate programs provided in Board policy.

c. A discussion of unusual features or trends in the quantitative program profile, if any.

d. An identification of any present or potential problems that the program personnel believe warrant attention and a plan for addressing those problems that falls [sic] within the program's jurisdiction.

Following completion of the self-study review report, members of a "review team" are appointed by the dean of each college, who may be from within or from outside the college or school under review. According to the Executive Policy, the review team is to examine the self-study report, interview faculty and students, and observe the departmental facilities. The review team then reports its findings to the appropriate deans. Among other things, the review team report is to indicate whether the program under review meets the UH's Strategic Plan, compares with those of mainland universities, provides courses that are appropriate to the level at which they are offered, offers courses that are intellectually challenging and comprehensive, and has a thoughtfully-designed program for its students. The review team report is also to comment upon the department's facilities, program achievements, and positive and negative aspects of the program. A complete copy of the guidelines for preparation of the review team report is attached hereto as Exhibit 1.

By July 30 of each year, the Vice President for Academic Affairs at Manoa and campus chancellors report to the President on program reviews completed during the previous year. This report includes a summary list of the reviews completed and attaches a brief report on each program review. This report is then forwarded to the Board.

By letter dated September 13, 1989, a UH student requested to inspect copies of self-study review reports and program reviews relating to 22 departments or units for the 1989-90 academic year. Additionally, by letter dated November 27, 1989, to the Board, the student requested to inspect any and all program review documents related to 11 UH departments or units, along with "any and all intra-agency memoranda between the Board of Regents and the University of Hawaii . . . regarding these above-mentioned [sic] 11 program reviews."

In response to the student's requests, he was provided with a memorandum dated August 9, 1989, which sets forth the procedures for the 1989-90 program reviews, and a copy of the 1986-87 and 1987-88 program review annual reports submitted to the President and the Board. The student was not provided with copies of any self-study report or review team report for any academic year. By memorandum dated September 29, 1989, you requested an advisory opinion pursuant to section 92F-42(2), Hawaii Revised Statutes, concerning public access to intra-agency memoranda and program review documents.

DISCUSSION

The UIPA, the State's new public records law, provides generally that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). 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 (Supp. 1989). In OIP Opinion Letter No. 89-9 (Nov. 20, 1989), we concluded that the UH was an "agency" within the UIPA definition set forth at section 92F-3, Hawaii Revised Statutes, and thus, subject to the provisions of the new public records law.

Under the UIPA, the public's right to inspect and copy government records is not absolute. Exceptions to the general rule of mandatory agency disclosure are set forth at section 92F-13, Hawaii Revised Statutes. Among other things, this section provides that an agency is not required to disclose:

> (3) Government 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) (Supp. 1989).

In OIP Opinion Letter No. 89-9 (Nov. 20, 1989) and 90-8 (Feb. 12, 1990), we discussed the application of this UIPA exception, and noted that it protects from disclosure, government records which are subject to the "deliberative process privilege." This privilege protects from disclosure communications which would be "injurious to the consultative functions of government." See Kaiser Aluminum & Chemical Corporation v. United States, 157 F. Supp. 939, 946 (1958), quoted in Environmental Protection Agency v. Mink, 410 U.S. 73, 87, 93 S. Ct. 827, 836, 35 L. Ed. 2d 119 (1973). This privilege focuses on documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.C. 1966).

In discussing the purpose of this privilege, the Supreme Court has emphasized the importance of protecting predecisional, deliberative material:

> Manifestly, the ultimate purpose of this long recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decision maker on the subject of the decision prior to the time the decision is made.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29 (1975).

In short, the privilege rests upon the 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); Costal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

There are two fundamental requirements, both of which must be met in order for the deliberative process privilege to be invoked. First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." Jordan v. Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978). Second, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

In determining whether a document is predecisional, an agency does not necessarily have to point specifically to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 868. On this point the Supreme Court has been very clear:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

NLRB v. Sears, Roebuck & Co., 421 U.S. at 151 n.18 (emphasis in original).

Lastly, the deliberative process privilege does not apply to "purely factual material appearing in [government records] in a form that is severable without compromising the private remainder of the documents." Mink 410 U.S. at 91, 93 S. Ct. at 838, 35 L. Ed. 2d at 134. However, factual information within a deliberative document may be protected where it is impossible to reasonably segregate meaningful portions of that factual information from the deliberative information. See Local 3, Int'l Bhd. of Elec. Workers v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1980). Whether segregation is reasonable depends on the portion of the information in the record that is public and how the public information is dispersed throughout the record. See Mead

Data Central, Inc. v. U.S. Dep't. of Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977). It 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." 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).

Turning to the self-study reports and review team reports presented for our review, we believe that significant portions of these government records contain deliberative material. These program review documents highlight program deficiencies and make recommendations to the UH administration for changes in the operation of the departments or units. For example, one review team report recommended that fewer graduate students be admitted to the program under review, that admissions standards should be raised, and that teaching duties among the faculty be redistributed. In addition, one review team report called for the "marginal third" of the faculty to become more involved in the graduate program and in research activities, and that an "outside chair" be recruited to facilitate the recommended changes.

Additionally, in our opinion, the self-study and review team reports are also predecisional in character. UH Executive Policy E5.202 evidences that the program review reports are part of a continuing process by which the UH administration conducts an examination of the extent to which established academic programs are meeting their stated objectives and whether these objectives should be modified, changed, or eliminated. Although these reports are not generated for the purpose of a specific decision, they need not be, as long as they are a part of "a continuing process of examining [its] policies." NLRB, 421 U.S. at 151.

However, an examination of the program review reports submitted for our review also reveals that a significant portion of these government records contain purely factual information. Indeed, pursuant to Executive Policy, the self-study report must provide a "quantitative profile of program activity." Similarly, one review team report concerning one department contained over ten pages of factual information concerning the department including, but not limited to, a description of the degrees offered, program objectives, and a graduate program description.

As discussed above, purely factual information within an otherwise deliberative document is not protected from disclosure under the deliberative process privilege, unless it is "impossible to reasonably segregate" the factual from the deliberative.

A review of decisions under the public records laws of other states supports our conclusion that, under the UIPA, in order to avoid the frustration of a legitimate government function, portions of the program review reports are protected by the "deliberative process privilege." In Athens Observer, Inc. v. Anderson, 245 Ga. 63, 263 S.E.2d 128 (1980), the Supreme Court of Georgia was asked to decide whether a report prepared by university consultants which evaluated mathematical science programs at the University of Georgia must be disclosed under the Georgia Open Records Act. The trial court in Anderson concluded that the review report "must be protected in order to assure candid assessments by evaluators." Anderson, 263 S.E.2d at 131. Although the Georgia Supreme Court reversed the trial court's decision, it did so on the basis of balancing "the interest of the public in favor of inspection against the interest of the public in favor of non-inspection." Id. at 130. Importantly, unlike the UIPA's privacy exception, the application of the "frustration of legitimate government function" exception does not depend upon a balancing test. See Haw. Rev. Stat. §§ 92F-13(3), and 92F-14(a) (Supp. 1989).

Similarly, in Wilson v. Freedom of Information Commission, 435 A.2d 353 (1980), a member of the University of Connecticut's student government sought access to reports compiled by the university's "program review committee." The committee's function was to review the operations of the various departments of the university and to make recommendations to the Vice President for Academic Affairs for improving the efficiency of the departments, including recommendations for changing existing administrative structures and programs. Relying upon case law interpreting Exemption 5 of FOIA in construing an exemption to the Connecticut records law which protected from disclosure "preliminary drafts or notes," the court concluded that the program review committee's reports were protected from disclosure. Specifically, recognizing that disclosure of predecisional deliberative material would be "injurious to the consultative functions of government," the court found that disclosure of the reports would "inhibit the PRC's candid

advisory input . . . and cause needless panic in the university community because of the recommendations for wide scale revisions of departmental structures contained in them." Wilson, 435 A.2d at 361-362.

Lastly, in Hafermehl v. University of Washington, 29 Wash. App. 366, 628 P.2d 846 (1981), the court held that letters from faculty members to the Dean, which expressed opinions and evaluations of an associate professor who was being considered for promotion, were protected from disclosure under Washington's Public Disclosure Act. The court, relying upon an exception for records that are "preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed and policies formulated," held that the letters were protected from disclosure by the deliberative process privilege. We are not unmindful that there is significant public interest in the operation and administration of the UH. Such issues as faculty recruiting and retention and student tuition increases have attracted widespread public attention. Thus, the public interest in disclosure of UH program review reports may indeed be weighty. However, as discussed above, application of the exception for "frustration of government function" set forth by section 92F-13(3), Hawaii Revised Statutes, does not depend upon a balancing of the public interest in disclosure against the government interest in confidentiality.

Accordingly, we conclude that deliberative, predecisional material that is contained within the UH's self-study and review team reports need not be made available for public inspection and copying under the UIPA. On the contrary, purely factual information which is contained in these review documents does not fall within the protection of the deliberative process privilege and must be disclosed, unless it is impossible to reasonably segregate the deliberative information from the factual information. It would be neither practicable or feasible for this office to make such a determination as to the 33 review reports under consideration here. However, should the UH need guidance in applying the principles set forth in this opinion to any particular reports, the Office of Information Practices will be in a position to be of assistance at that time.

The principles set forth above apply with equal force to the annual report that is submitted to the Board by the President. That is to say, predecisional, deliberative material need not be

disclosed, while purely factual information must be available for inspection and copying. In reviewing the 1987-88 annual report, we observe that only one paragraph of each program summary approaches characterization as deliberative, that being the fourth paragraph, which in the most general of terms, describes "recommendations" regarding that unit. Regardless, we have been informed that the UH administration has no objection to the public inspection and duplication of this annual report.

Finally, the conclusions reached above make it unnecessary to consider whether the self-study and review team reports, or portions thereof, are government records which are protected from disclosure under section 92F-13(1), Hawaii Revised Statutes, which protects from disclosure "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy."

CONCLUSION

Based upon previous OIP opinion letters, case law under FOIA, and similar provisions of the public records laws of other states, we conclude that portions of the UH self-study and review team reports are protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, which protects from disclosure government records which, if disclosed, "would frustrate a legitimate government function." Among other records, government records which are protected by the "deliberative process privilege" need not be disclosed under this UIPA exception. The review reports are "deliberative" in that they express opinions or recommendations on agency policy and are "predecisional" insofar as they are part of the UH's continuing process of examining its academic policies. However, purely factual material contained in the program review reports must be available for public inspection and copying under the UIPA, unless it is impossible to reasonably segregate the deliberative information from the factual information. Disclosure of the deliberative portions of the review documents would be injurious to the quality of UH decision-making by discouraging the frank exchange of ideas and opinions on issues of agency policy, thereby frustrating a legitimate government function.

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HRJ:sc
Attachments
c: Dr. Diane Deluca
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APPROVED:

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