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December 23, 1992

The Honorable Alan S. Hayashi
Executive Director
Convention Center Authority
Davis Pacific Center
841 Bishop Street, Room 2222
Honolulu, Hawaii 96813

Dear Mr. Hayashi:

Re: Convention Center Authority's Report to the Legislature

This is in response to your letter dated November 27, 1992 requesting the Office of Information Practices ("OIP") to provide you with an advisory opinion regarding the above-referenced matter.

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Convention Center Authority ("CCA") must make its "Final Report to the 1993 Legislature" ("Report") available for public inspection and copying.

II. Whether, under the UIPA, the CCA must make its drafts and working papers used in the preparation of the Report available for public inspection and copying.

BRIEF ANSWER

The Report, in draft form, is "predecisional" and "deliberative," and is, therefore, covered by the common law deliberative process privilege. In previous opinion letters, we have extended the UIPA's "frustration of a legitimate government function" exception to records covered by this privilege. Thus, we find that the Report, in draft form, would similarly fall within the UIPA exception for "[g]overnment records that, by

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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. 1991). For the same reasons, the previous drafts and working papers used to prepare the Report are also protected by this UIPA exception.

However, as described herein, the disclosure of the Report, when finalized for transmission to the Legislature, would not result in the frustration of deliberations within the CCA or the Legislature. Therefore, we find that, under these circumstances, the Report does not fall within the scope of the UIPA's "frustration of a legitimate government function" exception. Consequently, the CCA must make the Report, in final form, available for public inspection and copying.

FACTS

Chapter 206X, Hawaii Revised Statutes, sets forth the duties and functions of the Convention Center Authority ("CCA"), which is attached to the Department of Business, Economic Development, and Tourism for administrative purposes. Section 206X-5, Hawaii Revised Statutes, as amended by Act 159, 1992 Hawaii Session Laws, provides:

(a) The [convention center] authority shall conduct a survey of potentially appropriate sites both in Waikiki; and other areas in the State and a study of criteria for development within a convention center district and report to the legislature not less than twenty days prior to the convening of the regular session of 1993 with an update of its recommendations of appropriate sites and criteria for development to be approved by the legislature.

Act 159, § 6, 1992 Haw. Sess. Laws 290, 292.

In compliance with this statutory duty, the CCA's staff is drafting a "Final Report to the 1993 Legislature" ("Report") setting forth "an update of its recommendations of appropriate [convention center] sites and criteria for development." When approved and finalized by the CCA, the Report will be transmitted to the State Legislature by the deadline set forth in section 206X-5, Hawaii Revised Statutes.

The CCA will be holding a public meeting in December at which time the CCA expects to approve the Report. After the

meeting, the CCA's staff will finalize the Report and send it to the Legislature. The CCA anticipates that after it posts its notice and agenda for its December meeting, it will receive requests from the public for the disclosure of its Report. The CCA would prefer not to disclose the Report until after the Legislature receives it, at which time the Legislature is likely to make the Report available to the public as it typically does with reports submitted pursuant to legislation. Consequently, the CCA requests the OIP for an advisory opinion regarding whether the Report, or its drafts and working papers in preparing the Report, constitute government records that must be made available for public inspection and copying under the UIPA.

DISCUSSION

I. THE REPORT TO THE LEGISLATURE

As the UIPA's general rule, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1991). The UIPA further provides that "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(b) (Supp. 1991) (emphasis added).

Section 92F-13, Hawaii Revised Statutes, sets forth the exceptions to the UIPA's general rule of required public access to government records. As for the facts present in this case, we must particularly examine whether the exception for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function" would apply. Haw. Rev. Stat. § 92F-13(3) (Supp. 1991).

In previous advisory opinions, the OIP has extended the UIPA's "frustration of a legitimate government function" exception to certain intra-agency and inter-agency memoranda or correspondence that are covered by the common law "deliberative process privilege." For guidance on applying this privilege, we have previously referred to case law applying Exemption 5 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(5) ("FOIA"). See, e.g., OIP Op. Ltr. No. 90-8 (Feb. 12, 1990); OIP Op. Ltr. No. 91-15 (Sept. 10, 1991). FOIA's Exemption 5 has been interpreted to encompass the deliberative process privilege. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

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To be subject to the deliberative process privilege, an inter-agency memorandum must be both "predecisional" and "deliberative." To be "deliberative," the government record must "reflect the give and take of the consultative process" within or among agencies. Schell v. United States Dep't of Health & Human Services, 843 F.2d 933, 940 (6th Cir. 1988); see OIP Op. Ltr. No. 90-8 (Feb. 12, 1991). To be "predecisional," a government record must be "received by the decisionmaker on the subject of the decision prior to the time the decision is made." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1984). However, even if a document is originally predecisional, it ceases to be predecisional if an agency chooses to expressly adopt it or incorporate it by reference as part of an agency decision or policy. See id.

In our previous advisory opinions, we described the policies underlying the "deliberative process privilege." Specifically, we found that the disclosure of predecisional and deliberative records "would frustrate agency decision-making functions, such as the resolution of issues and the formulation of policies." See OIP Op. Ltr. No. 90-8 (Feb. 12, 1990); OIP Op. Ltr. No. 92-5 (June 16, 1992). Further, the "candid and free exchange of ideas and opinions within and among the agencies is essential to agency decisionmaking and is less likely to occur when all memoranda for this purpose are subject to public disclosure." See id.

We believe that the Report, in draft form, is "predecisional" and "deliberative." As we discussed in previous advisory opinion letters, "[d]raft documents, by their very nature, are typically predecisional and deliberative. They 'reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation either by their authors or by superiors.'" Exxon Corp v. Dep't of Energy, 585 F. Supp. 690, 698 (D.D.C. 1983) (citation omitted); see also OIP Op. Ltr. No. 90-8 (Feb. 12, 1990) (drafts of agency correspondence); OIP Op. Ltr. No. 91-16 (Sept. 19, 1991) (draft of master plan prepared by a consultant). Consequently, we find that the Report, in draft form, is not required to be disclosed under section 92F-13(3), Hawaii Revised Statutes, in order to avoid the frustration of the CCA's deliberative processes during the preparation of the Report.

However, by taking actions that are inconsistent with a claim of the deliberative process privilege, the CCA will be deemed to have waived the privilege and the Report's protection from required disclosure under the UIPA's "frustration of a legitimate government function" exception. See OIP Op. Ltr. No. 91-22 (Nov. 25, 1991). For example, the CCA may waive the

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deliberative process privilege by disclosing the contents of the Report, in draft form, at its public meeting or by permitting inspection and copying of the Report by persons outside of the agency with whom the agency lacks a formal relationship. See OIP Op. Ltr. No. 91-22 (Nov. 25, 1991) (waiver by substantial discussion of the contents of privileged records at a public meeting); see also Shell Oil Company v. Internal Revenue Service, 772 F. Supp. 202 (D. Del. 1991) (waiver by oral disclosure of privileged document); Washington Post Co. v. United States Dep't of the Air Force, 617 F. Supp. 602 (D.D.C. 1985) (waiver by publication of a summary of a privileged report).

Furthermore, once the CCA approves and finalizes the Report for transmission to the Legislature, and treats the Report as its official recommendations to the Legislature, we believe that the Report ceases to be "predecisional." See OIP Op. Ltr. No. 91-22 at 5 (Nov. 25, 1991) (draft legislative proposals cease to be "predecisional" documents when approved at a commission public meeting); see generally, J. O'Reilly, Federal Information Disclosure § 15.10 (1990) ("if an agency adopts a particular recommended position and refers to the document marked 'draft' as its rationale, that document is no longer predecisional but is explanatory of the final decision, and thus it is no longer exempt").

When the Report ceases to be "predecisional," we find that its disclosure would not frustrate the CCA's deliberative processes because the Report represents the end product of the CCA's deliberations. Consequently, we find that the Report, when finalized, would no longer fall within the "frustration of a legitimate government function" exception. Hence, in the absence of an applicable exception to disclosure, the UIPA requires that the Report, in final form, be made available for public inspection and copying. Haw. Rev. Stat. § 92F-11(b) (Supp. 1991).

An argument can be made that, even after the CCA finalizes the Report to be sent to the Legislature, the Report continues to be "predecisional" and "deliberative" since it contains the CCA's updated recommendations to the Legislature and is specifically being sent to the Legislature for approval. Act 159, § 6, 1992 Haw. Sess. Laws 290, 292; see Nat'l Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1121 (9th Cir. 1988) ("[r]ecommendations on how to best deal with a particular issue are themselves the essence of the deliberative process"). Indeed, under FOIA, predecisional materials protected by the deliberative process privilege include records containing "views submitted by one agency to a second agency that has final

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decisional authority." Bureau of Nat'l Affairs v. United States Dep't of Justice, 742 F.2d 1484 (D.C. Cir. 1984).

However, we note that under the Rules of both the Senate and House of Representatives of the State, deliberations by legislative committees must occur at meetings open to the public. See Rule 20, Rules of the Senate, State of Hawaii, 16th Leg. (1991-1992); Rule 11.5, Rules of the House of Representatives, State of Hawaii, 16th Leg. (1991-1992) ("[m]eetings, including decision-making sessions, of standing committees shall be public"). Furthermore, it is anticipated that the Legislature will make the Report available for public inspection and copying upon receipt as it routinely and customarily does with the reports that it receives pursuant to legislation.

In view of the Legislature's long-standing practice of conducting its deliberations in public view and disclosing reports that are submitted pursuant to legislation, we find no reason to believe that the disclosure of the Report, in its final form, would impede or "chill" the "candid and free exchange of ideas and opinions" within the Legislature. Since the "ultimate objective" of the deliberative process privilege is "to safeguard the deliberative process of agencies, not the paperwork generated in the course of that process," we do not believe that the disclosure of the Report, in final form to be sent to the Legislature, would fall within the scope of the UIPA's "frustration of a legitimate government function" exception. Nat'l Wildlife Fed'n v. Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988).

Because we find that the Report is publicly disclosable in its final form, we note that the CCA cannot fulfill its disclosure obligations under the UIPA by referring requests for inspection and copying of the Report to the Legislature. So long as the CCA maintains a copy of the Report that it sends to the Legislature, it must make this government record available for public inspection and copying, and may charge appropriate fees for copying.¹ See Haw. Rev. Stat. § 92F-3 ("government record" means "information maintained by an agency in . . . physical form"); see also United States Dep't of Justice v. Tax Analysts, 492 U.S. 136 (1989) (an agency must provide copies of an agency record upon request even if the requested document is available from another source).

¹The UIPA does not govern the fees that may be charged by agencies for copies of government records.

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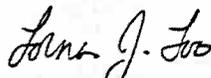
II. PREVIOUS DRAFTS AND WORKING PAPERS

Like the Report before it is finalized for transmission to the Legislature, we believe that the previous drafts and working papers used in preparing the Report would reveal the CCA's deliberative processes in preparing the Report. See OIP Op. Ltr. No. 90-8 (Feb. 12, 1990) (drafts of agency correspondence); OIP Op. Ltr. No. 91-16 (Sept. 19, 1991) (draft of master plan prepared by a consultant). Consequently, we believe that the CCA is not required to disclose its previous drafts of the Report, or its working papers, because they constitute "[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) (Supp. 1991).

CONCLUSION

Because the Report, in draft form, is "predecisional" and "deliberative," it is protected by the common law deliberative process privilege that we have found to be encompassed under section 92F-13(3), Hawaii Revised Statutes. Consequently, the Report, in draft form, as well as the previous drafts and working papers used in its preparation, are not required to be disclosed under section 92F-13(3), Hawaii Revised Statutes, in order to avoid the frustration of the CCA's deliberative processes during the preparation of the Report. However, once the Report is finalized for transmission to the Legislature, we find that the "frustration of a legitimate government function" exception will not apply, and the Report must be made available for public inspection and copying under the UIPA.

Very truly yours,


Lorna J. Loo
Staff Attorney

APPROVED:


Kathleen A. Callaghan
Director

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