

**Op. Ltr. 93-19 Disclosure of Enforcement Plan**

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).

OIP. Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

October 21, 1993

The Honorable Rex D. Johnson  
Director of Transportation  
State of Hawaii  
869 Punchbowl Street  
Honolulu, Hawaii 96813

Attention: Mr. Alex Kaonohi  
Motor Vehicle Safety Office

Dear Mr. Johnson:

Re: Disclosure of State Enforcement Plan

This is in response to your memorandum dated September 27, 1993 concerning whether the Department of Transportation's ("DOT") State Enforcement Plan ("SEP") may be released by the DOT upon request by a member of the public. In accordance with established department protocol, your memorandum was forwarded to the Office of Information Practices ("OIP") for a reply.

**ISSUE PRESENTED**

Whether the Department of Transportation must make the State Enforcement Plan available for public inspection and copying upon request, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

**BRIEF ANSWER**

For the reasons set forth below, we conclude that under the UIPA, the SEP must be made available for public inspection and copying upon request, after all information that would reveal the exact compensation of identifiable employees covered by or included in chapters 76, 77, 297, or bargaining unit (8) has been segregated or removed from the SEP.

OIP Op. Ltr. No. 93-19

The Honorable Rex D. Johnson  
October 21, 1993  
Page 2

### FACTS

According to your September 27, 1993 memorandum, the SEP is part of a federal grant agreement between the Federal Highway Administration and the DOT under the federal Motor Carrier Safety Assistance Program ("MCSAP"). The SEP describes how the DOT will spend federal grant monies each federal fiscal year to enforce motor carrier safety and hazardous material safety regulations in the State. A member of the public has made a request to the DOT to inspect and copy the SEPs for federal fiscal years 1993 and 1994. The DOT provided the OIP with a copy of the federal fiscal year 1994 SEP for review in connection with this opinion.

### DISCUSSION

#### I. INTRODUCTION

Under the UIPA, unless at least one of the five exceptions set forth in section 92F-13, Hawaii Revised Statutes, authorizes an agency to withhold access to government records, they must be made available for inspection and copying upon request by any person. See Haw. Rev. Stat. ~~§ 192F~~ (Supp. 1992). In addition to this general rule of disclosure, the UIPA sets forth categories of government records, or information contained therein, that an agency must make available for public inspection and copying "[a]ny provision to the contrary notwithstanding." Haw. Rev. Stat. ~~§ 22~~(Supp. 1992).<sup>1</sup>

Initially, we find that only the statutory exceptions to required agency disclosure set forth in sections 92F-13(1) ("clearly unwarranted invasion of personal privacy") and (3) ("frustration of a legitimate government function"), Hawaii Revised Statutes, arguably apply to the facts presented.

#### II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Section 3.e.1. on page III-3 of the SEP provided for our review contains salary information that can be used to determine the exact salaries of particular DOT employees. Specifically, section 3.e.1., titled "Personnel Costs," contains five columns: (1) the job title of the employee(s) involved with the Motor

---

<sup>1</sup>As to the categories of records listed in section 92F-12, Hawaii Revised Statutes, "the [UIPA's] exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable." 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).

The Honorable Rex D. Johnson  
October 21, 1993  
Page 3

Carrier Safety Assistance Program ("MCSAP"); (2) the number of persons with that job title; (3) the dollar amount of salary/benefits that corresponds to the percentage of time that the employee(s) devotes to the MCSAP; (4) the percentage of time that the employee(s) devotes to the MCSAP; and (5) the total of the number of persons (column 2) multiplied by the salary (column 3). Where there is only one employee with a particular job title, one can determine the exact annual salary of that employee by dividing the salary amount in column 3 by the percentage in column 4. From that point, it would seem to be a simple matter to discover the identity of the single employee who occupies the job position. Where there is more than one employee with a particular job title, one can determine the exact salary only if those employees receive the same amount of salary.

Section 92F-13(1), Hawaii Revised Statutes, provides an exception to required agency disclosure for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Further, under section 92F-12(a)(14), Hawaii Revised Statutes, the "compensation (but only the salary range for employees covered by or included in chapters 76, 77, 297, or bargaining unit (8))" of agency employees must be made available for public inspection and copying, "any provision to the contrary notwithstanding." Haw. Rev. Stat. ~~§ 92F~~ (14) (Supp. 1992) (emphasis added).

In our opinion, information that would disclose the exact salaries of identifiable agency employees "covered by or included in chapters 76, 77, 297, or bargaining unit (8)" would constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes. See OIP Op. Ltr. No. 91-15 (Sept. 10, 1991) (disclosure of exact salaries of certain law school employees would constitute a clearly unwarranted invasion of personal privacy). Accordingly, that information must be segregated from the SEP, before the SEP is made available for public inspection and copying. However, we note that the "Total Personnel Costs" listed in section 3.e.1 on page III-3 of the SEP, identifying the aggregate amount devoted to salaries, should be disclosed, if one would not be able to discern the exact salaries based on that figure. In addition, in accordance with section 92F-12(a)(14), Hawaii Revised Statutes, the DOT must disclose the salary information pertaining to any of the positions listed that are not "covered by or included in chapters 76, 77, 297, or bargaining unit (8)."

The OIP is informed that the DOT has concerns about whether the names appearing on pages I-3 and I-4 may be disclosed. See Memorandum from Wayne Matsuura, Deputy Attorney General, to Kathleen Callaghan, OIP Director (Oct. 11, 1993). Page I-3 of

The Honorable Rex D. Johnson  
October 21, 1993  
Page 4

the SEP contains the names, job titles, business addresses, and business telephone numbers of the DOT employees who are the contact persons for the MCSAP. Page I-4 contains the names of the motor carrier safety employees who have been assigned to the MCSAP, and the island of employment for those employees located on neighbor islands.

Section 92F-12(a), Hawaii Revised Statutes, provides in pertinent part:

**92F-12 Disclosure required.** (a) Any provision to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

. . . .

- (14) The name, compensation (but only the salary range for employees covered by or included in chapters 76, 77, 297, or bargaining unit (8)), job title, business address, business telephone number, job description, education and training background, previous work experience, dates of first and last employment, position number, type of appointment, service computation date, occupational group or class code, bargaining unit code, employing agency name and code, department, division, branch, office section, unit, and island of employment, of present or former officers or employees of the agency; provided that this provision shall not require the creation of a roster of employees; and provided further that this provision shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency; . . .

Haw. Rev. Stat.  92F-12(a)(14) (Supp. 1992) (emphases added).

The Honorable Rex D. Johnson  
October 21, 1993  
Page 5

Thus, pages I-3 and I-4 of the SEP contain information relating to agency employees that must be made available for public inspection and copying upon request, under section 92F-12(a)(14), Hawaii Revised Statutes. Specifically, the DOT must disclose all of the information on pages I-3 and I-4, including the employees' names, job titles, business addresses, business telephone numbers, and islands of employment.

### III. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

The OIP is informed that the copy of the SEP provided for our review is the "final, submitted version" for federal FY 1994, even though it is stamped "DRAFT." Letter from Wayne A. Matsuura, Deputy Attorney General, to Rex D. Johnson, Director of Transportation (Oct. 5, 1993). However, we note that Mr. Joseph R. Mason requested a copy of the DOT's "proposed new [SEP] that is supposed to be completed and submitted by September 30, 1993," as well as a copy of last year's SEP. Letter from Joseph R. Mason to Larry Hao, Motor Vehicle Safety Administrator (Sept. 21, 1993). Thus, Mr. Mason had requested the SEP in draft form. Accordingly, we will examine the issue of disclosure of a draft SEP.

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 in 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) (1988) ("FOIA"). See, e.g., OIP Op. Ltr. No. 90-8 (Feb. 12, 1990); OIP Op. Ltr. No. 91-16 (Sept. 19, 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).

To be subject to the deliberative process privilege, an intra- or inter- agency memorandum must be both "predecisional" and "deliberative." To be "predecisional," the government records must be "received by the decisionmaker on the subject of the decision prior to the time the decision is made." Id. 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 also OIP Op. Ltr. No. 90-8 (Feb. 12, 1990); and OIP Op. Ltr. No. 92-5 (June 16, 1992).

In our previous advisory opinions, we described the policies underlying the "deliberative process privilege." Specifically, we found that the disclosure of predecisional and deliberative

The Honorable Rex D. Johnson  
October 21, 1993  
Page 6

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 at 5 (Feb. 12, 1990). Further, the "candid and free exchange of ideas and opinions within and among agencies is essential to agency decision-making and is less likely to occur when all memoranda for this purpose are subject to public disclosure." Id.

Significantly, "[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); and OIP Op. Ltr. No. 91-16 (Sept. 19, 1991) (draft of master plan prepared by a consultant); cf. OIP Op. Ltr. No. 92-27 (Dec. 30, 1992) (proposed minutes not protected by "deliberative process privilege"). We believe that the SEP, in draft form, is "predecisional" and deliberative." Consequently, we find that the SEP, 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 DOT's deliberative processes during the preparation of the SEP.

However, in our opinion, the SEP in final form is not protected by the UIPA's exception for records which, if disclosed, would result in the "frustration of a legitimate government function." Haw. Rev. Stat. § 92F-13(3) (Supp. 1992). Further, we note that the DOT itself does not object to the disclosure of the final SEP, other than to raise concerns about the disclosure of employees' names, which we have addressed earlier in this letter. See Memorandum from Wayne Matsuura, Deputy Attorney General, to Kathleen Callaghan, OIP Director (Oct. 11, 1993).

Although our review is limited to the SEP for federal fiscal year 1994, the same analysis would apply to the SEPs for other years, assuming they contain similar information.

#### CONCLUSION

In conclusion, we believe that under the UIPA, the SEP in final form must be made available for public inspection and copying upon request, after all information that would reveal the exact compensation of identifiable employees covered by or included in chapters 76, 77, 297, or bargaining unit (8) has been segregated from the SEP.

The Honorable Rex D. Johnson  
October 21, 1993  
Page 7

Very truly yours,

Mimi K. Horiuchi  
Staff Attorney

APPROVED:

Kathleen A. Callaghan  
Director

c: Wayne A. Matsuura, Deputy Attorney General  
Mr. Joseph R. Mason