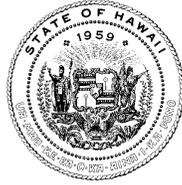


**Op. Ltr. 07-11 Applications for Permits to Enter and Conduct Activities in
the Northwestern Hawaiian Islands Marine Refuge (U RFO-G 07-51)**

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).



LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oiip@hawaii.gov
www.hawaii.gov/oiip

CATHY L. TAKASE
ACTING DIRECTOR

OPINION¹

Requester: Chair, Board of Land and Natural Resources
Agency: Department of Land and Natural Resources
Date: September 25, 2007
Subject: Applications for Permits to Enter and Conduct Activities in the Northwestern Hawaiian Islands Marine Refuge (U RFO-G 07-51)

REQUEST FOR OPINION

Requester seeks guidance under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (“HRS”) (“UIPA”), regarding public disclosure of permit applications (“Applications”)² submitted to the Department of Land and Natural Resources (“DLNR”) by persons seeking to enter and conduct activities in the Northwestern Hawaiian Islands (“NWHI”) Marine Refuge (“Refuge”), located in the NWHI Marine Monument (the “Monument”), and other DLNR records related to its review of the Applications and recommendations to BLNR.³

¹ The Office of Information Practices (“OIP”) previously issued this opinion as Memorandum Opinion 07-7 on April 12, 2007. The memorandum opinion has been modified for the purpose of this re-issuance as a formal opinion by adding the questions presented, brief answers and facts sections.

² OIP understands that there are currently two different forms of the Application, one titled “Northwestern Hawaiian Islands State Marine Refuge, Permit Application Form,” and another titled “Northwestern Hawaiian Islands Marine National Monument, Permit Application.” This opinion is intended to provide general guidance regarding the types of information that may be found in completed Applications of either type as well as other related records.

³ Requester also asks what information “must, by law, be withheld” and, thus, “may not be included in the public review.” The question of whether a statute outside of the UIPA mandates confidentiality of information in the Application is generally beyond OIP’s statutory jurisdiction. If Requester believes that another state or federal law may require confidentiality, OIP strongly recommends that Requester consult with the Department of

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in Requester's letter to the Office of Information Practices ("OIP") dated January 26, 2007; an e-mail from Stephanie Fried, Senior Scientist, Environmental Defense, to OIP dated March 4, 2007; enclosures to Requester's and Ms. Fried's correspondence, which include a blank form of an Application⁴ and instructions to complete the Application; and certain completed Applications accessible through the Board of Land and Natural Resources' ("BLNR") website.⁵

This opinion is intended to provide general guidance on what information in the Applications and related records must be disclosed and what information may be properly withheld in the agency's discretion.⁶

QUESTIONS PRESENTED

1. Whether DLNR must publicly disclose the Applications DLNR submits to BLNR for consideration and approval at meetings open to the public and the Applications not submitted to BLNR.

2. Whether DLNR must publicly disclose its recommendations, including recommendations and comments made by DLNR's staff and outside experts, that are made on the Applications submitted to BLNR for its approval.

BRIEF ANSWERS

1. The Applications must generally be disclosed upon request, but the UIPA allows DLNR to withhold certain limited information contained therein.

the Attorney General. If another law does require the confidentiality of specific information found in the Application, DLNR may withhold that information under the UIPA's exception for records that are protected from disclosure by state or federal law. See Haw. Rev. Stat. § 92F-13(4) (1993). OIP notes that the UIPA is not a "confidentiality statute" that requires an agency to withhold records. Rather, the UIPA allows an agency to withhold those records (or information contained in those records) if an exception to disclosure provided by statute applies. An agency, therefore, has the discretion to publicly disclose records that could otherwise be withheld under the UIPA.

⁴ The form of the Application provided to OIP is titled "Northwestern Hawaiian Islands Marine National Monument, Permit Application."

⁵ <http://www.state.hi.us/dlnr/chair/meetings/index.htm>, last accessed April 5, 2007. The completed Applications accessible through BLNR's website include both forms of the Application.

⁶ OIP understands that BLNR currently publishes the Applications to be considered as well as DLNR's recommendations on those Applications on its website as attachments to its meeting agenda. OIP emphasizes that such affirmative disclosure does not violate the UIPA.

First, under the UIPA's privacy exception, DLNR may withhold personal information that sheds no light on BLNR's consideration of the Applications, such as the following:

- (1) Personal contact information, including home addresses, home telephone numbers and personal e-mail addresses; and
- (2) Social security numbers.

For Applications that DLNR does not submit to BLNR for approval, DLNR may also generally withhold the following additional personal information:

- (1) Medical history information about an applicant or others covered by the permit, including, for example, medical condition, diagnosis and treatment;
- (2) Personal financial information that may be included to demonstrate an applicant's financial ability to conduct the proposed project and to pay for emergency assistance, if needed; and
- (3) Personal details relating to proposed cultural activities, including, for example, information about an applicant's genealogy, religious beliefs or family issues.

However, once BLNR gives public notice that it will be considering an Application at a public meeting by including it on its agenda, DLNR must then disclose certain medical, financial, or cultural information to the extent that it is relevant to BLNR's consideration of the Application and, thus, will likely be discussed at the public meeting. At that time, the heightened public interest in the information outweighs the individuals' privacy interest and such information must be disclosed.

Second, Application information that DLNR determines to be confidential commercial or financial information ("CBI") or proprietary information may be withheld under the UIPA's "frustration of a legitimate government function" exception. Based upon OIP's review of certain completed Applications accessible through BLNR's website, however, it does not appear that the Applications generally contain information that is CBI or proprietary in nature.

2. The recommendations and comments DLNR receives from staff and outside experts as well as its recommendations to BLNR are predecisional and deliberative in nature and, therefore, may be withheld from disclosure under the "frustration" exception. If BLNR: (1) publicly discloses those recommendations or comments by publishing them on its website or specifically referencing them during its discussion of the Applications, or (2) expressly incorporates them into its final decision, BLNR will have "waived" any protection from disclosure with respect to those specific records, and DLNR must disclose those records upon request.

FACTS

In 2005, DLNR adopted administrative rules establishing the NWHI Refuge, which includes reefs, shoals and all state waters extending three miles seaward of the NWHI coastlines, and generally prohibiting entry without a permit. Haw. Admin. R. § 13-60.5-2, -60.5-4 (2005). A permit may be sought from BLNR to enter into the Refuge to conduct activities permitted by rule. Haw. Admin. R. § 13-60.5-5, -60.5-6 (2005). BLNR must review an Application to assess the appropriateness of the proposed activity described in the Application and must approve an Application at a public hearing during which the public may comment on the Application. Haw. Admin. R. § 13-60.5-6. Approval is discretionary and only a limited number of permits are granted each year. See id.

In 2006, Presidential Proclamation 8031 established the Monument, which includes the state-controlled waters of the NWHI Refuge. 71 Fed. Reg. 36443 (June 26, 2006). The State and several federal agencies (the “Co-Trustees”) work cooperatively to manage the Monument’s land and waters.⁷ A person seeking to enter and conduct activities in the Monument must submit a “joint” Application to the Co-Trustees for issuance of a permit.⁸ A joint Application must also receive BLNR’s approval after a public hearing for activities that will occur in the NWHI Refuge, including ingress and egress.⁹

Before BLNR’s review of an Application, DLNR’s staff reviews the Application and solicits comments from outside experts. DLNR then provides written comments and recommendations to BLNR, which may include the comments and recommendations made by DLNR staff and outside consultants. At

⁷ See Northwestern Hawaiian Islands Marine National Monument, 71 Fed. Reg. 51134 (August 29, 2006) (to be codified at 50 C.F.R. pt. 404); Memorandum of Agreement entered among Co-Trustees, signed May 19, 2006 (accessed 9/24/07) at: http://hawaiiireef.noaa.gov/PDFs/MOA_NWHI_Mgmnt.pdf.

⁸ See 71 Fed. Reg. 51134 (Permits are issued only for activities in any of six categories of permissible purposes and that are compatible with conservation and management of the Monument’s resources); Northwestern Hawaiian Islands Marine National Monument Joint Permit Application Instructions, January 2007 (accessed 9/24/07) at http://hawaiiireef.noaa.gov/resource/permits/MONUMENT_Instructions.doc. The “joint” Application contains sections requiring applicant information, project information, logistics (including funding sources and vessel information), and additional information for land based operation. The applicant is instructed to attach various records, including the applicant’s cv/resume/biography, documentation of funding, insurance, inspections, required permits, and a statement of information applicant wishes to be kept confidential. The full Application may be viewed at: http://hawaiiireef.noaa.gov/resource/permits/MONUMENT_Application.doc.

⁹ <http://www.hawaii.gov/dlnr/dar/nwhi/NWHIPermitGuidelinesRevised.pdf>.

the time OIP issued Memorandum Opinion 07-7, BLNR published on its website the Applications recommended by DLNR for its approval as well as DLNR's submitted comments and recommendations.

DISCUSSION

Under the UIPA, records maintained by a government agency are public unless an exception to disclosure allows the agency to withhold the record. Haw. Rev. Stat. § 92F-11 (1993). Where an agency seeks to withhold a record (or information contained in a record), the agency must establish that one or more of the UIPA's exceptions apply. See Haw. Rev. Stat. §§ 92F-13, -15(c) (1993); see also OIP Op. Ltr. No. 05-16 at 7.

With respect to the Applications and related records, the exceptions that would likely apply are those that allow an agency to withhold information: (1) which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, and (2) where disclosure would frustrate a legitimate government function.¹⁰ See Haw. Rev. Stat. § 92F-13(1), (3).

A. Information That May Be Withheld Under the “Privacy Exception”

An agency may withhold information from public disclosure where an individual's significant privacy interest outweighs the public interest in disclosure. Haw. Rev. Stat. § 92F-14(a) (Supp. 2006); Haw. Rev. Stat. § 92F-13(1). In balancing the competing interests, the public interest to be considered is that which sheds light on how the agency is performing its statutory duties. OIP Op. Ltr. No. 04-07 at 7. However, if the privacy interest is not “significant” and there is a scintilla of public interest in disclosure, the information cannot be withheld under the privacy exception. H. Conf. Com. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988).

OIP has previously opined that individuals have a significant privacy interest in permit or license applications prior to grant, or after denial, of those applications. OIP Op. Ltr. No. 91-1, *aff'd* in part, *overruled* in part by OIP Op. Ltr. No. 91-11 (when agency has not yet issued a license or denies a license, the individual's significant privacy interest in their application information outweighs the public interest in disclosure since disclosure with respect to these applicants would shed

¹⁰ The UIPA also allows an agency to withhold records that are confidential under state or federal law as well as where disclosure would cause the agency to lose or be denied federal funding. Haw. Rev. Stat. §§ 92F-13(4), -4 (1993). In this case, Requester has not cited any statute that would require DLNR to withhold information contained in the Applications or related records, nor has Requester alleged that disclosure of the information would jeopardize its federal funding.

little if any light upon the conduct of the agency in the granting of licenses or permits). However, those opinions are not directly applicable here because of the nature of the permits or licenses involved.

Specifically, because those permit or license applications required the individual to submit information of a more personal nature to show that he or she met minimum qualification requirements, or “fitness,” to obtain the license or permit, OIP found those individuals’ privacy interests in that information significant and that they outweighed the minimal public interest in disclosure. See e.g., OIP Op. Ltr. No. 07-01 (application for gun permit). Moreover, in the case of vocational licenses, that significant privacy interest is specifically recognized by statute. See Haw. Rev. Stat. § 92F-14(b)(7) (Supp. 2006) (recognizing an individual’s significant privacy interest in information compiled as part of an inquiry into individual’s fitness to be granted a vocational license).

Unlike those permit and license applications, the application being made here is to enter and conduct activities on protected government lands. Given the nature of the permit, the Application itself does not seek much of the type of personal information opined on in OIP’s previous opinions. Rather, it generally focuses more upon the activity to be performed on the protected government lands. The Application does seek to qualify the parties to perform the activities proposed, commonly the academic researcher’s professional qualification, and to ensure their financial ability to carry out those activities, including the ability to finance their possible rescue. However, OIP believes that this information is generally less personal in nature and that the denial of a use type permit, especially where a limited number of permits may be approved annually, does not carry a negative stigma that attached to the other permit and license denials on which OIP opined.¹¹ Moreover, because the applicants knowingly submit their Application for consideration at a public meeting, i.e., a public permit process,¹² OIP believes that those individuals have a reduced expectation of privacy in that Application.

¹¹ In the case of license applicants, for whom the licensing process is primarily meant to determine their fitness to hold a license, OIP has previously concluded that “disclosure of information about unsuccessful applicants reveals little about those applicants whom the DCCA has licensed, whereas this disclosure may embarrass or harm the unsuccessful applicants.” OIP Op. Ltr. No. 91-1 at 8. For that reason, OIP has allowed withholding not just resume information, but even the names of unsuccessful applicants, to prevent such embarrassment. Id. By contrast, DLNR’s or BLNR’s rejection of an Application does not necessarily reflect upon the applicant’s qualifications or otherwise stigmatize the applicant because DLNR’s and BLNR’s decisions are not primarily intended to determine an applicant’s fitness to conduct research or cultural activities. Rather, those decisions will likely take many factors into account, particularly the number of applicants seeking to operate in the Monument during the relevant timeframe.

¹² The administrative rules relating to the Refuge and the guidelines published by DLNR for submitting Applications clearly reflect that the process to obtain a permit is intended to be a public process. Haw. Admin R. § 13-60.5-6 (2005); Application, Appendix

Accordingly, in OIP's opinion, an individual generally does not have a significant privacy interest in the fact that he or she applied for a permit and in most of the information contained in the Application. OIP therefore believes that DLNR must disclose the identities of applicants and their project teams, as well as the following: (1) information about the applicant's proposed project included in the Application, such as locations identified, the project's activities, purpose and scope, and logistics; and (2) information showing the applicant's and applicant's team's qualifications to perform the proposed project, such as their curriculum vitae or resumes.¹³

OIP does believe, however, that certain limited information contained in the Applications about the applicant or others named in the Application may be withheld under the privacy exception. First, in OIP's opinion, an applicant has a significant privacy interest in certain personal information that the public has little interest in scrutinizing unless and until BLNR includes the Application on a meeting agenda, reflecting its intent to consider the Application. This information would include the following:

- (1) Medical history information about an applicant or others covered by the permit, including, for example, medical condition, diagnosis and treatment;
- (2) Personal financial information that may be included to demonstrate an applicant's financial ability to conduct the proposed project and to pay for emergency assistance, if needed; and
- (3) Personal details relating to proposed cultural activities, including, for example, information about an applicant's genealogy, religious beliefs or family issues.

A: Criteria and Guidelines for Submitting Permit Applications. Specifically, both the rules and guidelines specify that there will be a "public comment period during the Board hearing" and explain that BLNR is the authority that issues the permits. Under the Sunshine Law, BLNR, as a government board, is required to consider the Applications in a meeting open to the public unless an exception applies. Haw. Rev. Stat. § 92-3 (1993).

¹³ See generally Haw. Rev. Stat. § 92F-14(b)(5) (Supp. 2006) (recognizing an individual's significant privacy interest in "[i]nformation relating to an individual's non-governmental employment history **except as necessary to demonstrate compliance with requirement for a particular government position**" (emphasis added)). Similarly, OIP believes that an applicant would generally not have a significant privacy interest in curriculum vitae or resume information that demonstrates the individual's qualification, or his project team's qualifications, for issuance of a particular government permit.

However, once BLNR gives notice of its intent to consider the Application by including the Application on its agenda, the public interest in disclosure of the personal information that is relevant to BLNR's grant of the permit is heightened. Disclosure of that information will allow the public to scrutinize the actions of the agency and its officials. OIP Op. Ltr. No. 04-07 at 7.

OIP believes that, at this point in the process, the individual's privacy interest in the personal information relevant to BLNR's consideration of the Application is outweighed by the heightened public interest in disclosure of that information. Where DLNR receives a request for access to an Application that has been included on BLNR's meeting agenda, even if that Application was subsequently rejected by BLNR, DLNR must disclose personal information in the three categories of information listed above if the information would be or was relevant to BLNR's consideration of the Application.

For other personal information not relevant to BLNR's consideration of the Application, DLNR must, on a case-by-case basis, determine whether the Applicant continues to have a significant privacy interest in that information that outweighs the public interest in disclosure as described herein to determine whether the specific information may be withheld.

Second, OIP finds that the Applications may contain limited personal information in which an individual holds a significant privacy interest and there is no public interest in disclosure. This type of information contained in the Applications include the following and other personal information that is not likely to be relevant to BLNR's consideration of the Application:

- (1) Personal contact information, including home addresses, home telephone numbers, and personal e-mail addresses;¹⁴ and
- (2) Social security numbers.

See OIP Op. Ltr. No. 89-16 at 7; OIP Op. Ltr. No. 91-12. For personal information such as above in which there is no public interest in disclosure, DLNR can withhold that information.

¹⁴ An individual has no privacy interest in business contact information. However, where the information is a direct telephone number or e-mail address (as opposed to a switchboard number or general mailbox), the information may be withheld under the frustration exception if it helps the agency to perform its functions more efficiently (i.e., it can contact applicants quickly and directly) and applicants would be less likely to provide direct contact information if it were made public. See Haw. Rev. Stat. § 92F-13(3).

B. Information That May Be Withheld Under the “Frustration Exception”

1. Proprietary Information and Confidential Business Information

The “frustration” exception allows an agency to withhold information which if disclosed would frustrate the agency’s ability to perform its legitimate duties. Haw. Rev. Stat. § 92F-13(3). The UIPA’s legislative history gives examples of “records which need not be disclosed if disclosure would frustrate a legitimate government function,” including “[p]roprietary information” and “trade secrets or confidential commercial and financial information.” S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

According to the UIPA’s legislative history, “proprietary information” consists of “research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it.” *Id.* OIP has previously opined that this term “applies to information which already has the protection of an exclusive legal ownership mechanism, such as copyright or trademark, before becoming a government record.” OIP Op. Ltr. No. 90-2 at 9.

To constitute CBI that may be protected under the “frustration” exception, the information must actually be confidential (i.e., information not typically disclosed to the public) and commercial or financial in nature. In addition, the agency must demonstrate that the public disclosure of the information would either (1) make it more difficult to obtain such information in the future, or (2) cause substantial competitive harm. *See e.g.*, OIP Op. Ltr. No. 05-13.

From OIP’s review of completed Applications, it does not appear that Applications likely contain proprietary information or CBI. However, in the event that an applicant identifies information as being proprietary or CBI,¹⁵ DLNR must review the applicant’s basis for claiming so and determine the applicability of the exception to the identified information under the standards articulated by OIP. *See id.*

Although it may be helpful to have an applicant identify the information believed to be proprietary or CBI, DLNR must make the determination that the information does, in fact, fall within the frustration exception. *See* Haw. Rev. Stat. § 92F-15(c) (agency bears the burden of establishing that the information falls

¹⁵ OIP notes that the “Joint Permit Application Instructions” includes a paragraph titled “Confidential Information.” That paragraph requests that applicants identify any information that the applicant considers “proprietary business information,” which the instructions state includes “trade secrets, commercial and financial information.”

within one of the exceptions to disclosure). Again, DLNR may seek guidance from OIP on information contained in a specific Application.

2. DLNR Staff Recommendations and Expert Comments

The “frustration” exception also allows an agency to withhold certain intra-agency and inter-agency memoranda consisting of “recommendations, draft documents, proposals, suggestions, and other subjective documents that comprise part of the process by which the government formulates decisions and policies.” OIP Op. Ltr. No. 04-15 at 4 (citations omitted).

OIP has characterized such memoranda as falling within the “deliberative process privilege.” As OIP has previously noted:

“This privilege, which protects the deliberative and decisionmaking processes of the executive branch, rests most fundamentally on 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.” Dudman Communications Corp. v. Dep’t of Air Force, 815 F.2d 1565, 1567 (D.C. Cir 1987) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). The privilege protects the quality of agency decision-making, specifically, by encouraging subordinates to provide uninhibited opinions and recommendations to decisionmakers without fear of public ridicule or criticism; by protecting against premature disclosure of proposed policies or decisions before they are finally formulated or adopted; and by protecting against any confusion of the issues and misleading of the public that might be caused by dissemination of documents suggesting reasons and rationales that are not in fact the ultimate reasons for an agency’s action. OIP Op. Ltr. No. 90-8 at 5 (citing Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

Id. In order to invoke the deliberative process privilege, an agency must show that the document is “predecisional,” i.e., received by the decision-maker prior to the time the agency decision or policy is made, and “deliberative,” i.e., a recommendation or opinion on agency matters that is a direct part of the decision-making process. Id. at 4-5 (citations omitted).

Here, DLNR solicits and receives comments and recommendations from staff as well as from outside experts prior to and for use in making its recommendation to BLNR. Some of those comments and recommendations are included in its final recommendation to BLNR. In OIP’s opinion, the comments and recommendations that DLNR receives from staff and other experts as well as DLNR’s recommendations and findings to BLNR are deliberative and predecisional.

Accordingly, DLNR may withhold those records from public disclosure.¹⁶ Haw. Rev. Stat. § 92F-13(3). However, if BLNR specifically discusses the findings, comments or recommendations (or any parts thereof) in its consideration of the Application or otherwise expressly incorporates any of those records into its decision, BLNR would be deemed to have “waived” the privilege and the records (or those portions thereof) must then be disclosed. See OIP Op. Ltr. No. 92-26.

C. Timing of Disclosure

The administrative rules promulgated to implement the UIPA provide specific time limits in which an agency must respond to a record request.¹⁷ See Haw. Admin. R. §§ 2-71-13(b), -15 (1999). In the future, DLNR must allow access to Applications consistent with the time limits provided by rule and, generally, cannot deny access to an Application or specific information until BLNR includes the Application on an agenda unless the information or record falls within one of the exceptions to disclosure as discussed above.

OFFICE OF INFORMATION PRACTICES

Lorna L. Aratani
Staff Attorney

Cathy L. Takase
Acting Director

¹⁶ OIP again notes that the UIPA does not require DLNR to withhold the records, and this opinion is not intended to suggest that DLNR should discontinue its apparent practice of publicly disclosing its findings and recommendations to BLNR as well as the experts’ comments.

¹⁷ An agency’s obligation to provide public access to records under both the UIPA and OIP’s administrative rules, however, applies only to those records that the agency maintains at the time of the request. Haw. Rev. Stat. § 92F-3 (1993); Haw. Admin. R. § 2-71-14(c) (1999).