DEVELOPMENT OF THE DELIBERATIVE PROCESS PRIVILEGE
ENCOMPASSED UNDER THE UIPA'S FRUSTRATION EXCEPTION
August 13, 2015

The state Office of Information Practices (OIP) applauds a recent Circuit Court ruling, which applied the "palpably erroneous" standard of judicial review and deferred to OIP's opinions recognizing that certain government records need not be disclosed due to the "deliberative process privilege" (DPP) that is encompassed under the frustration exception provided in the Uniform Information Practices Act (Modified), chapter 92F, HRS, (UIPA). First Circuit Court Judge Virginia Crandall rejected a motion for summary judgment filed by the Civil Beat Law Center on behalf of Peer News LLC, dba Civil Beat against the City and County of Honolulu and its Department of Budget and Fiscal Services. Civil Beat had argued that, based on the legislative history of the UIPA, the DPP had been intentionally eliminated from the final version of the UIPA that was adopted in 1988. OIP provides this article to explain the development of the DPP in light of legislative history and OIP's opinions interpreting the frustration exception.

LEGISLATIVE HISTORY

There may be various legal or political reasons as to why the Legislature did not include specific provisions in its final compromise of a legislative measure adopted as the UIPA, but they all fall within the shadow of the clear legislative intent to have OIP and the courts develop the common law to consider competing policy interests and address the many different factual and legal issues that would arise as the law was implemented. Recognizing that the UIPA itself could not address all the different issues that would present themselves over the years, the Legislature created OIP in 1988 to implement the law and interpret it in accordance with legislative intent under various factual circumstances and as the common law evolved. OIP was established as the singular agency that shall, among other things, "review and rule on an agency's denial of access to information or records." HRS § 92F-42(1); see House Stand. Com. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Hawaii H. J. 971.

In 2012, the Legislature demonstrated its continued faith in OIP's ability to interpret and administer the UIPA (as well as the Sunshine Law, Part I of chapter 92, HRS) by statutorily establishing the "palpably erroneous" standard of judicial review, which sets a high bar for courts to meet before they can overturn OIP's decisions under either the UIPA or Sunshine Law. HRS §§ 92F-27(b), -43(c). The 2012 amendments also made clear that OIP is not required to defend its opinions in court, as its opinions speak for themselves, but OIP may choose to intervene if desired. In 2013, the Hawaii Supreme Court applied the "palpably erroneous" standard of review and cited with approval several OIP decisions in a landmark case involving the Sunshine Law in which OIP did not intervene. Kanahele v. Maui County Council, 130 Haw. 228, 307 P.3d 1174 (2013).

Civil Beat's motion challenged a line of OIP opinions dating back to 1989 and addressing what is today's HRS section 92F-13(3) frustration exception to disclosure for "[r]ecords which, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." In proposing this and other categorical exceptions to the UIPA's general rule of affirmative disclosure, the Senate Committee on Government Operations stated in 1988 that

> [r]ather than list specific records in the statute, at the risk of being over-or under-inclusive, your Committee prefers to categorize and rely on the developing common

> law. The common law is ideally suited to the task of balancing competing interest [sic] in the grey areas and unanticipated cases, under the guidance of the legislative policy.

Senate Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Hawaii S. J. 1094. The Senate committee report also provided examples of records that need not be disclosed, if disclosure would frustrate a legitimate government function. The examples were similar to those found in the House draft of the proposed legislative measure, which had enumerated twelve examples substantially similar to those found in the model act known as the Uniform Information Practices Code. The Senate committee expressly intended that the frustration exception was not to be limited to the nine examples set forth in its report. By creating the broadly worded frustration exception rather than limiting it to specific examples in the statute, the Senate version of the provision, which was ultimately agreed upon by the House and incorporated into the final version of the UIPA, allowed OIP and the courts to consider competing interests and develop the common law under the guidance of legislative policy to apply the UIPA to unforeseen types of records and in unanticipated situations.

The Civil Beat Law Center has argued that the omission of an example for intra- or inter-agency materials from the Senate committee report was evidence of legislative intent to not adopt the DPP. Yet, the Legislature expressly adopted a provision unambiguously requiring agencies to disclose the "final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases," but did not extend this disclosure requirement to non-final intra- or interagency deliberations. HRS § 92F-12(2) (emphasis added). If the Legislature had actually intended to eliminate the DPP, it could have easily made all agency opinions, final or non-final, subject to the mandatory disclosure requirement of the UIPA.

Instead, it is clear that the Legislature was aware of what the Governor's Committee on Public Records and Privacy (Governor's Committee) had called the government's "dilemma, to be both a public institution open enough to be monitored and an institution which is capable of efficient and effective action." I Report of the Governor's Committee on Public Records and Privacy 101 (December 1987) (Report). The Governor's Committee, which was created in 1987 by Governor John Waihee to review Hawaii's existing open records and privacy laws and to suggest alternatives, created the Report that became the basis for the reforms adopted in 1988. The Report recognized that

> [o]n one hand, government is a public institution and therefore must be accountable to the public. This requires access if any real effort is to be made to monitor the actions of government officials.
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> On the other hand, the public also has a right to expect public institutions to perform efficiently and effectively. And in order to do so, public institutions like all institutions have certain needs – to freely communicate internally, to be able to confidentially formulate strategy and then take actions in a competitive environment, and to obtain and receive best possible professional advice.
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> The first issue concerns the availability of internal correspondence and memoranda (emphasis in original) and raises all of the problems that were just discussed. These materials are not currently viewed as public records by government

> officials under Chapter 92, HRS, (emphasis added) though there are records which the courts have opened up on an individual basis. This view was espoused by Honolulu Managing Director Jeremy Harris (II at 16) and undoubtedly reflects the views of most agencies. The ability to share views internally and to have those views be candidly expressed is critical. If, however, this material is likely to be made public, its character is likely to change dramatically. If officials are worried more about how others will later read their work than they are about making the tough recommendation or taking the strong stand, the internal communication could become so wishy-washy as to be of little value.
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> On the other hand, as one of the Committee members pointed out, these internal communications demonstrate the decision-making process of the government and thus are important to those wishing to monitor the actions of government.

Id.

OIP'S RECOGNITION OF THE DPP

OIP adopted a framework for resolving the dilemma of balancing the need for government accountability with the need for government to act efficiently and effectively by recognizing the DPP under the frustration exception, but construing it narrowly when determining whether internal government communications must be disclosed. OIP Op. Ltr. No. 89-9. In 1989, the DPP was already well established in the common law by courts interpreting the federal Freedom of Information Act, 5 U.S.C. 552 (FOIA), who, like the Governor's Committee, understood that the frank exchange of ideas and opinions within and between government agencies would cease and the quality of administrative decisions would suffer if agencies were forced to "operate in a fishbowl." OIP Op. Ltr. No. 89-9 at 10. While recognizing the DPP, OIP ultimately concluded in its first DPP opinion in 1989 that the privilege did not apply to protect from disclosure the names of members of the law school's Admissions Committee.

> In a second opinion decided in 1990, OIP enumerated three policy purposes behind the DPP:
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> (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies or decisions before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

OIP Op. Ltr. No. 90-3 at 11-12. OIP further recognized that for the DPP to apply, information to be withheld must be both predecisional and deliberative, and that the privilege may be lost when a final decision chooses to expressly adopt or incorporate the information by reference. Id. Ultimately, OIP concluded that the DPP was not applicable to an auditor's recommendations that were expressly adopted by a department in its final decisions and to a letter from the department reporting the audit findings and actions taken by the department.

While reiterating the purposes and requirements of the DPP, a third OIP opinion in 1990 provided further clarification that the DPP protects the legitimate government function of decision-making and is no longer available to protect records describing the final decision or policy once the decision-making process has ended. OIP Op. Ltr. No. 90-8 at 5. Additionally, this opinion clarified that

where an intra- or inter-agency memorandum included purely factual matter as well as deliberative material, then the agency must disclose those factual portions that are reasonably segregable and are not inextricably intertwined with deliberative processes. Id., at 6-12. Furthermore, as the DPP is permissive rather than mandatory, an agency could voluntarily waive the DPP and disclose its internal records. Id., at 6-7.

In 1991, OIP recognized that the purpose of the DPP was to protect the quality of decisionmaking by government agencies, and not by non-governmental entities, such as the American Bar Association (ABA) and the Association of American Law Schools (AALS). OIP Op. Ltr. No. 91-15. Thus, OIP concluded that a joint site evaluation report prepared by the ABA and AALS was not protected as an intra- or inter-agency memorandum under the DPP, except for those portions that evaluated the self-study report by the William S. Richardson School of Law and revealed self-study authors' opinions, recommendations, or evaluations. Additionally, OIP concluded that no statutory exceptions applied to the letters documenting the ABA and AALS's official actions, which must be disclosed.

In 2000, OIP opined that the frustration exception, specifically the DPP, may apply to legislators' policy making records, such as internal correspondence between a senator and his staff; correspondence between elected officials; correspondence containing draft legislation and soliciting comments; e-mails regarding strategy to address an issue; and personal notes from a majority caucus on an issue. OIP Op. Ltr. No. 00-01. This opinion to a state senator clearly set forth the DPP and its various limitations. Notably, this and other OIP opinions presumably made the Legislature aware of the DPP—particularly as it applies to legislators—and yet, the UIPA has not been changed to eliminate the use of this privilege.

Over the years, OIP has carefully and narrowly applied the DPP to determine whether or not various items are protected from disclosure as records that must be confidential in order for the government to avoid the frustration of the legitimate government function in decision-making. See, e.g., OIP Op. Ltr. 91-15 at 11 (recognizing that OIP is "constrained to construe the UIPA's 'frustration of legitimate government function' exception narrowly, and extend its application only upon a clear showing that the disclosure of a particular government record would frustrate or impair a legitimate government function.") The DPP does not automatically protect all intra- or inter-agency records, and the agency asserting it must bear the burden of proving that its requirements have been met. HRS 92F-15(c)(stating that "[t]he agency has the burden of proof to establish justification for nondisclosure"); see, e.g., OIP Op. Ltr. No. 04-15 at 4 (stating that the agency seeking to invoke the DPP must show that the document sought to be protected is both predecisional and deliberative). While OIP determined that the DPP did not protect certain records from disclosure in first four cases discussed above, the opposite result was reached when the agencies met their burden to prove that the DPP applied to the following records:

- Draft correspondence and employee notes containing factual information inextricably intertwined with deliberative processes, but not the final decision (OIP Op. Ltr. No. 90-8)
- Panelists' notes taken during job interviews (OIP Op. Ltr. No. 91-24)
- A draft plan describing how a department will spend federal grant monies, but not the final plan (OIP Op. Ltr. No. 93-19)
- A staff report containing preliminary forecasts of tax credits projected to be claimed in upcoming fiscal years (OIP Op. Ltr. No. 04-15)

- Recommendations and comments received by a department from staff and outside experts, as well as the department's recommendations to its board, provided that the board does not waive the privilege by publicly disclosing the information or expressly incorporating the information into its final decision (OIP Op. Ltr. No. 07-11)
- Inter-agency summaries and memos seeking and receiving comments about a remnant parcel of City-owned land (OIP U Memo Op. No. 15-8)

While the discussion above does not cover all DPP opinions rendered by OIP, it provides an overall perspective of how the DPP has evolved under the common law interpretation of the UIPA's broadly worded exception from disclosure for records that would frustrate a legitimate government function.

CIVIL BEAT LITIGATION

OIP was not involved in and was not asked to opine on Civil Beat's underlying record request to the City that had reportedly sought the disclosure of memos sent to the Mayor by agency heads to justify their budget requests for fiscal year 2016. Thus, while OIP offers no opinion on the applicability of the DPP to the facts of Civil Beat's case, OIP believes that its opinions since 1990 recognizing the DPP as a form of "frustration" under the exception at section 92F-13(3), HRS, stand on solid legal ground and it was not necessary for OIP to defend its DPP opinions before the Circuit Court.

OIP appreciates the confidence that the Legislature and Courts have placed in its opinions and OIP will continue to fairly and reasonably interpret and administer Hawaii's open records and open meetings laws for the public's benefit.