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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

OPINION

Requester: Rick Gaffney
Agency: Department of Land and Natural Resources, Division of Boating and Ocean Recreation
Date: November 27, 2018
Subject: Records of Meeting with Legislators (APPEAL 16-3)

REQUEST FOR OPINION

Requester seeks a decision as to whether the Division of Boating and Ocean Recreation of the Department of Land and Natural Resources (DOBOR) properly denied his request for records under Part II of the UIPA. Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email to OIP dated July 27, 2015, and attached materials; DOBOR's emails to OIP dated August 19 and 20, 2015; Requester's emails to OIP dated September 11 and 16, 2015; and a letter from the Civil Beat Law Center to OIP dated February 24, 2016.

QUESTIONS PRESENTED

1. Whether the agenda and handouts for a meeting between DOBOR and legislators were responsive to Requester's request for notes for or minutes of that meeting.
2. Whether the agenda and handouts were properly withheld under the UIPA's exception at section 92F-13(3), HRS, for records whose disclosure would frustrate a legitimate government function.

BRIEF ANSWERS

1. Yes. The agenda and handouts for a meeting between DOBOR and legislators were responsive to Requester's request seeking notes for or minutes of that meeting.

2. No. The deliberative process privilege¹ claimed by DOBOR under the UIPA's exception for records whose disclosure would frustrate a legitimate government function did not apply to the agenda or the meeting handouts, as they were shared outside the agency and thus were not a direct part of the agency's internal decision-making process. OIP Op. Ltrs. No. 92-26 at 5 and 04-15; see HRS § 92F-13(3) (2012) (agency may withhold records whose disclosure would frustrate a legitimate government function); see also HRS § 92F-19(a)(6) (2012) (agency may share otherwise nonpublic records with a legislative body or committee). DOBOR did not state any other basis for withholding the records or provide them for OIP's *in camera* review as required by section 92F-42(5), HRS, and section 2-73-15(d), HAR. Thus, OIP concludes that no UIPA exception applies to the agenda or the meeting handouts. The agenda and meeting handouts should be provided to Requester without redaction based on his request for notes for or minutes from the meeting.

FACTS

Requester emailed DOBOR on July 24, 2015, to ask for "a copy of your notes for the meeting held on 7/21 with legislators, as well as any minutes from that meeting." According to Requester, DOBOR was working on amendments to its rules at that time and the meeting was relevant to that work. DOBOR responded in an email that same day that the requested records were "internal working documents and we will not release at this time." Requester then appealed the denial of access to OIP.

In responding to the appeal, DOBOR added as further justification, "It was frustration of a government function. We did not take minutes of the meeting nor any notes." OIP requested clarification as to whether DOBOR had any records responsive to the request as indicated by its initial denial, and DOBOR explained in response that it took no notes or minutes at the meeting but did have an agenda and handouts prepared for the meeting, which were the "internal working documents" referred to in its denial.

¹ For a detailed discussion of the background of the deliberative process privilege, see OIP Opinion Letter Number F19-01 beginning at page 8.

OIP's Notice of Appeal had required DOBOR to provide a copy of the records for OIP's *in camera* review.² In an email dated August 29, 2015, OIP reminded DOBOR that it had not yet provided those records and warned that without reviewing the records, it was "unlikely that OIP would be able to find that [DOBOR] met its burden to establish justification for withholding records under the UIPA." DOBOR nonetheless did not provide the records for OIP's *in camera* review.

DISCUSSION

I. What Records Were Responsive to the Request

The first question OIP must resolve is whether the records DOBOR did have, an agenda and handouts prepared for the meeting, were responsive to Requester's request for "your notes for . . . as well as any minutes from" the meeting. Consistent with the UIPA's requirement to interpret its provisions in favor of openness, OIP must interpret the scope of what records are responsive to a request reasonably broadly to avoid disadvantaging requesters based on their imperfect knowledge of what records an agency may have. See HRS § 92F-2 (2012) (UIPA must be applied and construed to promote public interest in disclosure.) It is the agency, not the requester, that has the most complete knowledge about the type and number of records the agency maintains relating to a given subject. While a requester must provide a reasonable description of the records he or she is requesting, the requester is not required to specify which particular records are responsive. OIP Op. Ltr. No. 93-7 at 8.

Because the description of the records sought might not correspond clearly to the records an agency has, or might encompass a larger number of records than a requester likely anticipated, OIP's administrative rules setting out the process for responding to record requests allow an agency to seek clarification of the request when needed. HAR § 2-71-14(c)(2) (1998). Here, the number of potentially responsive records was small, so DOBOR could reasonably understand the request as being intended to apply relatively broadly to the few records of the relevant meeting it had. DOBOR did not seek clarification as to whether Requester wanted the records of the meeting that it did maintain, namely the agenda and the handouts prepared for the meeting.³ However, DOBOR apparently did initially understand the request as encompassing the meeting agenda and handouts that it had and denied access to

² "OIP may require any party to submit to OIP the original or a copy of one or more documents necessary for its ruling, including government records or minutes at issue in an appeal." HAR § 2-73-15(c) (2012). See also HRS § 92F-42(5) (OIP may examine records of an agency when conducting inquiries regarding compliance with the UIPA).

³ After receiving DOBOR's response to this appeal, Requester confirmed to OIP that he did indeed want the agenda and the handouts.

them on the basis that they were “internal working documents.” Only after this appeal was filed did DOBOR assert that the meeting agenda and handouts were not responsive to the request.

The request was for “notes for” and “minutes from” the meeting. In its response to this appeal, DOBOR appears to have misread the request as seeking only notes or minutes taken during the meeting; however, on its face the request was broader than that, as it sought “notes **for**” the meeting, which presumably would include notes or materials prepared in advance for use during the meeting (emphasis added). In the absence of any information from DOBOR as to the content of the handouts, OIP must conclude that they contained information prepared for reference during the meeting, and thus under a reasonably broad interpretation of the request, were “notes for the meeting.” Similarly, the agenda, while prepared in advance, effectively served as the minutes from the meeting, as it was apparently the only document that set out the topics being discussed at the meeting. OIP therefore finds that the agenda and handouts were responsive to the request for “notes for” and “minutes from” the meeting.

II. Deliberative Process Privilege

The second question presented to OIP is whether DOBOR properly withheld the agenda and handouts. DOBOR’s justification for withholding the records was the UIPA’s exception allowing an agency to withhold information whose disclosure would frustrate a legitimate government function, section 92F-13(3), HRS. Based on DOBOR’s minimal explanation of why it believed the frustration exception applied to these records as “internal working documents,” OIP understands DOBOR to be arguing that the records fell within the deliberative process privilege⁴ form of the frustration exception. *See, e.g.*, OIP Op. Ltrs. No. 90-03 at 11-12 and 90-08 at 3-4. As OIP wrote in its Opinion Letter Number 04-15,

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

⁴ The Civil Beat Law Center argued in this appeal that OIP should reconsider its prior opinions finding the deliberative process privilege to be a form of the frustration exception. In light of OIP’s decision herein finding the deliberative process privilege inapplicable, OIP declines to reconsider the existence of the deliberative process privilege in this opinion.

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)).

OIP Op. Ltr. No. 04-15 at 4. 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. In other words, the decision-making process that the deliberative process privilege is intended to protect occurs within an agency prior to the time when an agency reaches a decision on a proposed policy.

Even assuming these records were actually predecisional and reflected recommendations or opinions on agency matters,⁵ OIP must still consider whether the records can be considered “deliberative” after DOBOR’s disclosure of them to the legislators⁶ it met with. Records disclosed to someone outside the relevant agency do not automatically lose their deliberative character; in appropriate situations as discussed herein, they may still fall within the deliberative process privilege. For instance, OIP has recognized that disclosure to a person with a formal relationship with an agency, such as an agency consultant, may be functionally an internal disclosure. OIP Op. Ltr. No. 90-21 at 6-8; see also OIP Op. Ltr. No. 92-26 at 5 (disclosure to a person with whom the agency has no formal relationship waives deliberative process privilege). OIP has similarly found that communications with another agency or outside consultants may fall within the deliberative process privilege where the record is ‘solicited by the agency’ and is ‘predecisional’ and ‘deliberative’ in character.” OIP Op. Ltr. No. 91-16 at 6-7 (citations omitted); see also OIP Op. Ltr. No. 90-21 (agency communication with outside consultant it has formal relationship with may fall within deliberative process privilege). More

⁵ DOBOR has not actually met its burden to establish that the records reflected recommendations or opinions on agency matters, as it did not provide the records for OIP’s *in camera* review. Even if DOBOR had not also failed to establish that the records were a direct part of its decision-making process as discussed herein, OIP would still be constrained to find the deliberative process privilege inapplicable due to DOBOR’s failure to meet its burden to establish that the records reflected recommendations or opinions. See HRS § 92F-15(c) (2012) (agency has burden of proof to justify nondisclosure) and HAR § 2-73-15(c) (OIP may require a party to submit records for *in camera* review).

⁶ OIP notes that section 92F-19(a)(6), HRS, allows an agency to share otherwise nonpublic records with a legislative body or committee without waiving its ability to withhold those records from the general public. HRS § 92F-19(a)(6) (2012). In this case, DOBOR has neither argued nor presented any evidence that its meeting with legislators was actually a hearing of a legislative committee or the full House or Senate; rather, it apparently was a meeting with individual legislators. OIP thus concludes that section 92F-19(a)(6), HRS, is inapplicable here.

specifically, OIP has found inter-agency communications to be “deliberative” where the lead agency is seeking the assistance of a subordinate agency as part of its internal give and take prior to making its decision. OIP Op. Ltr. No. 04-15 (OIP found the Department of Taxation’s and Department of Budget and Finance’s staff forecasts to be predecisional and deliberative work product used to prepare the state general fund tax revenues’ forecast because they were provided to the Council on Revenues pursuant to statutory charge that such departments provide staff assistance and support to the Council); see also OIP Op. Ltr. No. 91-16 at 6-7 (communications with another agency or outside consultants may fall within the deliberative process privilege where the record is ‘solicited by the agency’).

Other than its conclusory statement that the records were “internal working documents,” DOBOR has not asserted or presented any evidence in this case that the legislators present at the meeting were DOBOR consultants, that DOBOR was seeking the assistance of the legislators as part of its internal give and take, or that the legislators were in some other way functionally acting as a direct part of DOBOR’s decision-making process. OIP therefore concludes that DOBOR’s disclosure of the records to the legislators it met with was an external disclosure such that the records could not be considered “deliberative.” OIP further concludes that the records do not fall within the deliberative process privilege, and DOBOR therefore could not withhold them under the UIPA’s frustration exception. DOBOR has not argued or presented any basis to conclude that another UIPA exception applies. Thus, DOBOR must disclose the agenda and handouts from its meeting with legislators to Requester.

RIGHT TO BRING SUIT

Requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney’s fees and costs. HRS §§ 92F-15(d), (f) (2012).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court’s review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS

§ 92F-3(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

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APPROVED:

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