



STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

DAVID Y. IGE
GOVERNOR

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.oiip.hawaii.gov

CHERYL KAKAZU PARK
DIRECTOR

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: Ray Kamikawa, Esq.
Agency: Department of Taxation
Date: May 20, 2019
Subject: Deliberative Material for Revenue Estimates (APPEAL 16-43)

REQUEST FOR OPINION

Requester seeks a decision as to whether the Hawaii Department of Taxation (TAX) properly denied Requester's request under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), for "assumptions, bases, computations, source data, and documents and analysis relied upon" for TAX's revenue estimates in legislative testimony. Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's letter to OIP dated May 26, 2016, and attached materials; TAX's letter to OIP dated June 27, 2016, and attached materials; Requester's emails to OIP dated January 4 and February 22, 2019; and TAX's letter to OIP dated January 31, 2019, and received February 8, 2019.

QUESTION PRESENTED

Whether TAX may withhold from public disclosure under the UIPA the underlying assumptions, source data and documents, and computations it uses to create revenue estimates presented in legislative testimony, either based on a confidentiality statute, as working papers of a legislative committee, or to prevent frustration of its ability to produce objective and independent revenue estimates. See HRS § 92F-13(3), (4), and (5) (2012).

BRIEF ANSWER

No. TAX has not established that a confidentiality statute applies to information in the records at issue, although OIP recognizes that a confidentiality statute could apply to source data and documents used by TAX in creating other revenue estimates. See HRS § 92F-13(4). The records at issue here were created by TAX, not by a legislative committee, and therefore are not working papers of “legislative committees” that may be withheld under section 92F-13(5), HRS. See HRS § 92F-13(5).

TAX asserts that disclosure of the records at issue would frustrate one of its legitimate government functions, namely its “ability to produce objective and independent revenue estimates.” See HRS § 92F-13(3). Under the UIPA, as interpreted by the Hawaii Supreme Court, deliberative and predecisional materials cannot be withheld on the basis that they would frustrate an agency’s decisionmaking function, although such materials may still be withheld under the UIPA’s frustration exception where some other specifically identified government function would be frustrated by disclosure. Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (2018) (Peer News). The government function TAX seeks to protect is its decisionmaking function by another name, so TAX may not withhold the records at issue under the UIPA’s frustration exception to protect its ability to produce objective and independent revenue estimates.

FACTS

In a request made on April 15, 2016, Requester asked TAX for a copy of:

Assumptions, bases, computations, source data and documents, and analysis relied upon in connection with [TAX’s] revenue estimates contained in its testimonies . . . for House Bill 2744, HD1, SD1 (Relating to Housing) and Senate Bill 2833, SD2, HD1 (Relating to the Low-Income Housing Tax Credit), both bills currently pending in the Hawaii State Legislature, Twenty-Eighth Legislative (2016).

TAX responded by denying the request in its entirety, citing section 92F-13(3), HRS, the UIPA’s exception for records whose disclosure would frustrate a legitimate government function. According to TAX’s Notice to Requester,

The tax data analyzed to produce revenue estimates is confidential, predecisional, deliberative work product of [TAX]; further, some of the tax data is protected from disclosure under the confidentiality provisions of Title 14, HRS.

[TAX] provides revenue estimates at the request of certain Legislative committees for their deliberation of specific draft legislation. These

certain Legislative committees request [TAX] to produce revenue estimates for certain measures because the committees do not have access to tax data and other relevant information needed to determine the fiscal impact of draft tax legislation.

Requester appealed the denial to OIP, arguing among other things that since “no taxpayer name or return information was requested or involved, there can be no confidentiality concerns.”

According to TAX, creating revenue estimates sometimes requires extracting tax data from tax returns, but more typically is based on “tax data that [TAX] tabulates for its regular reports or data from other sources.” For the revenue estimates at issue here, TAX used data provided by the Hawaii Housing Finance and Development Corporation (HHFDC), which TAX noted is available to the public. Indeed, OIP found that HHFDC Awards Lists included in the requested records are available online, although the versions in the requested records had handwritten notations added in some cases. See Awards, HHFDC (last visited May 15, 2019), http://dbedt.hawaii.gov/hhfdc/developers/copy_of_copy_of_rhtf_html/. TAX “also reviewed certain filed tax returns to check the validity of some assumptions used to produce the revenue estimates.” However, no tax returns were included in the records provided for OIP’s *in camera* review, and the only information identifiable to a single taxpayer was in the HHFDC Awards Lists that, as TAX acknowledged, are already available to the public.

TAX’s employees have “specialized job skills and experience” in addition to “access to historical tax data” that TAX asserts make them the only agency within the executive or legislative branch capable of revenue estimation. In creating revenue estimates, TAX “acts from a neutral policy perspective, as if the staff were attached to the Legislature.” TAX presents its revenue estimates of the effect of legislative bills to the Legislature by way of its testimony on those bills.

In its response to this appeal, TAX originally argued that (1) the UIPA exempts “inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product” and TAX staff acts on behalf of the Legislature in creating revenue estimates, and (2) the records sought were predecisional and deliberative and thus fell within the “deliberative process privilege” (DPP)¹ form of the UIPA’s exception for records whose disclosure would frustrate a legitimate government function. See HRS § 92F-13(3) and (5).

The DPP has been adopted in other jurisdictions and allows government agencies to withhold predecisional and deliberative internal records. Since 1989,

¹ For OIP’s detailed analysis of the history of the DPP, including legislative source materials, see <https://oip.hawaii.gov/wp-content/uploads/2019/03/OIP-analysis-of-DPP-case-3.1.2019-final.pdf>.

OIP had recognized the DPP as a valid reason to withhold records under section 92F-13(3), HRS, the UIPA's frustration exception. Subsequent to the filing of this appeal, the Hawaii Supreme Court's Peer News decision invalidated the use of the DPP under the UIPA to withhold certain internal records on the basis that decisionmaking was not a government function that fell within the frustration exception.

OIP informed TAX of the Peer News decision and allowed time for TAX to supplement its position based on the Court's decision. In its supplemental response, TAX argued that the government function that would be frustrated by disclosure of the records at issue is TAX's "ability to produce objective and independent revenue estimates," which the Legislature relies on to balance the State's budget.

DISCUSSION

Under the UIPA, all government records are open to the public unless an exception to disclosure in section 92F-13, HRS, applies. HRS § 92F-11 (2012). As discussed above, TAX raised several possible exceptions to disclosure, which OIP will address in turn.

I. TAX Has Not Established That a Confidentiality Statute Applies

In its Notice to Requester, TAX stated generally that "some of the tax data is protected from disclosure under the confidentiality provisions of Title 14, HRS." TAX did not mention this argument in its responses to this appeal, and did not at any point provide a citation to a specific statute or identify specific information covered by a confidentiality statute. Thus, TAX may not have intended to seriously pursue this argument; nonetheless, since it was raised in TAX's Notice to Requester OIP will address it before moving on to TAX's other grounds for withholding the requested records.

An agency bears the burden to establish that an exception to disclosure applies under the UIPA. E.g. OIP Op. Ltr. No. F17-02 at 8, citing HRS § 92F-15(c) (2012) and § 2-73-15(c) (2012), HAR. To meet this burden, an agency arguing that section 92F-13(4), HRS, allows it to withhold records based on a confidentiality statute must typically cite the specific confidentiality statute relied upon and explain its applicability to specific records or information withheld. A general citation to Title 14 is inadequate to meet this burden. OIP further notes that in this case the records that include names of specific projects qualifying for a tax credit, the HHFDC Awards Lists, are public information according to TAX and are

available online. OIP therefore concludes that the records at issue² do not fall under a confidentiality statute and thus may not be withheld under section 92F-13(4), HRS.

II. TAX Work Product Does Not Fall Under Section 92F-13(5), HRS

The UIPA does not require disclosure of “[i]nchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product[.]” HRS § 92F-13(5). TAX argues that although it is not part of the legislative branch, “only [TAX’s] Tax Research and Planning staff is able to undertake the specialized function of developing revenue estimates. . .,” and TAX “acts from a neutral policy perspective, as if the staff were attached to the Legislature.” It appears that TAX made this argument primarily to support its original argument that the records at issue fall under the now-defunct DPP form of the UIPA’s frustration exception (see discussion of Peer News, supra); however, OIP will examine whether TAX has established that the records may be withheld under section 92F-13(5), HRS.

OIP is required to interpret the UIPA’s provisions to promote its underlying purposes. HRS § 92F-2 (2102). The purposes most relevant here are “the public interest in disclosure” and “governmental accountability through a general policy of access to government records.” See id. To promote those underlying purposes, OIP must interpret the UIPA’s exceptions to disclosure narrowly. OIP Op. Ltr. No. 90-3 at 7.

The plain language of section 92F-13(5), HRS, clearly makes it applicable to working papers of “legislative committees,” not executive branch agencies such as TAX. OIP further notes that even assuming for the sake of argument that this exception could apply to the work of executive branch employees who are effectively acting as temporary legislative committee staff, TAX has not established here that its Tax Research and Planning staff is effectively acting as legislative staff in all but name during the legislative session. OIP accepts that TAX has specialized knowledge and skills that it uses to provide neutral revenue analysis in its testimony to the Legislature, but does not find that this is unique to TAX. Other executive branch agencies also testify based on their specialized knowledge and skills in particular areas, and in many cases also seek to provide a neutral analysis of the effects of legislative proposals. TAX has not asserted that its staff is

² TAX asserted that in some cases the source data and documents it relies upon to produce revenue estimates include data extracted from tax returns. While the source data and documents at issue here did not include information subject to a confidentiality statute, OIP does not conclude in this opinion that such source data and documents must be disclosed in all cases. When responding to future requests, to the extent the responsive records include information actually protected by a confidentiality statute, TAX may withhold that information.

temporarily housed in legislative offices during the legislative session, or that it produces these revenue analyses under the direction of legislative committees such that the employees involved are acting effectively as legislative staffers. To the contrary, TAX stated that it presents the revenue estimates to the relevant committees in its testimony on measures up for hearing. Based on the plain language of the statute as well as the circumstances in which the revenue estimates are created and presented to the Legislature, OIP concludes that the records at issue here are not working papers of “legislative committees” that may be withheld under section 92F-13(5), HRS.

III. Disclosure of Assumptions and Methodology Would Not Frustrate a Legitimate Government Function

A. TAX’s Argument

TAX argued in its original response to the appeal that public disclosure of how TAX reaches revenue estimates would frustrate “the ability of [TAX] to provide unbiased revenue estimates to the Legislature.” In TAX’s view, making its assumptions and methods for a revenue estimate public “would result in skewed analyses, as the interested parties would challenge only the assumptions they found less favorable to their position.” TAX further asserted that its revenue estimates “often require assumptions about facts for which data are limited or subject to a great deal of uncertainty, such as when behavioral responses of taxpayers must be taken into account,” and that disclosure would allow “proponents and opponents of [a] measure . . . to undermine the revenue estimate analyses” by TAX staff.³

In its supplemental response after the Peer News decision was issued, TAX argued that the government function that would be frustrated by disclosure was its “ability to produce objective and independent revenue estimates.”

TAX has set out a rationale for how disclosure of the assumptions and methodology used in reaching revenue estimates for legislative measures could ultimately impair the effectiveness of its revenue forecasts in allowing the Legislature to make decisions based on neutral analysis, by allowing proponents or opponents of a bill to contest the assumptions and methodology by which the estimates were reached instead of arguing as to why a legislative measure was or

³ TAX also argued that for these same reasons, revenue-estimating assumptions and methods are not publicly disclosed by the Office of Tax Analysis in the Treasury Department of the United States of America. However, the fact that the DPP is recognized as a basis for withholding records under the federal Freedom of Information Act, whereas the Peer News court held that it is not recognized under the UIPA, makes federal agency practices regarding deliberative materials an unreliable guide for State and county agencies. See 5 U.S.C.S. § 552 (LexisNexis, Lexis Advance through PL 116-17, approved 5/10/19).

was not worthwhile in view of its anticipated effect on revenue or proposing changes to a measure to address a prospective loss of revenue. However, the impairment TAX has described is essentially a frustration of both TAX's and arguably the Legislature's ability to reach sound decisions. TAX's argument is that under the Peer News standard "certain deliberative records may still qualify" for the UIPA's frustration exception, so long as the agency "define[s] the government function that would be frustrated by a record's disclosure with a degree of specificity" and "demonstrate[s] a connection between disclosure of the specific record and the likely frustration of a legitimate government function." See Peer News at 143 Haw. 472, 487.

B. The Peer News Decision

1. Recognition that Deliberative Material May Sometimes Be Withheld

In the Peer News majority opinion,⁴ the Court recognized in a lengthy footnote that certain types of deliberative material may be withheld from disclosure under certain conditions:

This is not to say that certain types of deliberative communications will not qualify for withholding when the government can identify a concrete connection between disclosure and frustration of a particular legitimate government function. For instance, if disclosed prior to a final agency decision, many pre-decisional draft documents may impair specific agency or administrative processes in addition to inhibiting agency personnel from expressing candid opinions. However, an agency must clearly describe what will be frustrated by disclosure and provide more specificity about the impeded process than simply "decision making." See infra Section III.D.

Additionally, writings that are truly preliminary in nature, such as personal notes and rough drafts of memorandum that have not been finalized for circulation within or among agencies, may not qualify as government records for purposes of an agency's disclosure obligations. See OIP Op. Ltr. No. 04-17 (Oct. 27, 2004) ("[W]e find, in line with the number of other state and federal courts that have similarly construed other open records laws, that the determination of whether or not a record is a 'government record' under the UIPA or a personal record of an official depends on the totality of circumstances surrounding its

⁴ As will be discussed infra, a dissenting opinion by two members of the Hawaii Supreme Court accompanied the three-member majority opinion.

creation, maintenance and use. . . . [C]ourts have distinguished personal papers. . . from public records where they ‘are generally created solely for the individual’s convenience or to refresh the writer’s memory, are maintained in a way indicating a private purpose, are not circulated or intended for distribution within agency channels, are not under agency control, and may be discarded at the writer’s sole discretion.’” (internal citations omitted) (quoting Yacobellis v. Bellingham, 780 P.2d 272, 275 (Wash. App. 1989)); Shevin v. Byron, Harless, Schaffer, Reid & Assoc., Inc., 379 So.2d 633, 640 (Fla. 1980) (“To be contrasted with ‘public records’ are materials prepared as drafts or notes, which constitute mere precursors of governmental ‘records’ and are not, in themselves, intended as final evidence of the knowledge to be recorded [unless] they supply the final evidence of knowledge obtained in connection with the transaction of official business.”); cf. Conn. Gen. Stat. § 1-210(e(1) (2018) (“[D]isclosure shall be required of: . . . [i]nteragency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency.”).

It is also noted that, when there is a true concern that disclosure of deliberative communications may expose specific individuals to negative consequences, the individuals’ identities may potentially qualify for withholding pursuant to HRS § 92F-13(1) if their privacy interests outweigh the public’s interest in disclosure.

Peer News at 480, n. 15.⁵

⁵ In OIP Opinion Letter Number 04-17, which was referenced above by the majority, OIP concluded that individual employees’ personal calendars and telephone message slips were personal records and not “government records” maintained by an agency. As the Court suggested, a set of handwritten notes or perhaps a draft document stored only a computer’s local drive, similar to personal paper calendars or a calendar on a computer’s local drive accessed only by that computer’s user, might not be considered a government record because it is not “maintained” by a government agency.

Since the time OIP Opinion Letter Number 04-17 was issued, however, agencies have increasingly turned to file servers, including cloud servers, to store their work product including both finished documents and unfinished or draft documents. OIP notes that this technological shift makes it more likely that most draft documents created by agency staff would indeed be considered “government records” for the purpose of the UIPA, because

If read in isolation, this footnote would support TAX's argument that under the Peer News standard an agency may still withhold deliberative documents to protect the integrity of its decisionmaking process as long as it explains in specific detail and without using the term DPP how the disclosure of deliberative and predecisional material would deter its staff from expressing candid opinions or otherwise impair its ability to reach sound decisions. However, it is important to read the footnote in the context of the full opinion, and particularly in the context of the majority opinion's rejection of the approach proposed by the dissenting opinion, to fully understand the Peer News decision's approach to deliberative and predecisional material.

2. Majority Opinion Compared to Dissenting Opinion

The majority opinion strictly construed the UIPA's statutory policy that "the formation . . . of public policy,' including 'discussions' and 'deliberations,' 'shall be conducted as openly as possible,'" and concluded that "[c]ommunications between decision-makers and their subordinates regarding adopting available courses of action prior to the making of a decision is the very definition of deliberations in common usage, case law, and the OIP's own precedents." Peer News at 480, n. 14. Based on that, the majority opinion concluded that the DPP would render much of the UIPA's policy "a dead letter" because it would protect from public scrutiny the very deliberations comprising part of a process by which government decision and policies are formulated. Id. The majority opinion concluded that "because the deliberative process privilege attempts to uniformly shield records from disclosure without a determination that disclosure would frustrate a legitimate government function, it is inconsistent with the plain language of HRS § 92F-13(3)." Id. at 481.

By contrast, the dissenting opinion emphasized the limitations placed in the UIPA's statutory purpose: "as possible" and "unless access is restricted or closed by law." It concluded that "the inclusion of such qualifying language in the

unlike handwritten notes in a desk drawer or a document stored on a computer's local drive, a file on an agency's fileservers is readily accessible to other agency personnel even in the absence of its author and thus is "maintained" by the agency as a whole, rather than by an individual staffer in a way indicating a private purpose. Of course, UIPA exceptions could still apply to such records.

Information stored on an agency's fileservers may be distinguished from information stored on an employee's personal cloud-based calendar or other account and accessed on a government computer to coordinate business scheduling or for personal reasons while on break. The mere access to a person's personal calendar or other information from a government computer does not turn the personal information into a government record maintained by the agency, absent other facts showing that a government agency actually "maintained" those records.

UIPA supports that the Legislature may have intended for certain ‘discussions, deliberations, decisions, and action[s] of government agencies,’ HRS § 92F-2, to remain confidential” and that “the recognition of a privilege that limits the disclosure of certain types of internal memoranda and communications relating to an agency’s deliberative process in the course of decision-making and policy formation is consistent with such legislative intent.” Peer News at 492. While agreeing that “the UIPA favors ensuring the transparency of and public access to our government’s decisionmaking and policy-development processes,” the dissenting opinion found that the “the plain language of several provisions in the UIPA indicates that the Legislature did not intend for such transparency and accessibility to be absolute” and viewed the DPP, as properly applied, to exempt some but not all government deliberations. Id.

Thus, the dissenting opinion would not have completely abandoned the DPP, and instead proposed an approach that “would require the government to more fully describe in the first instance why a specific document qualifies for the privilege, and require the court to balance that interest with a party’s statutory interest in disclosure.” Peer News at 500. After an agency established a preliminary showing of why disclosure would be harmful to its interests, the dissent proposed that the government’s interest in confidentiality for its deliberative process be balanced with the requesters’ interest in disclosure of the materials. Id. Thus, rather than mechanically considering whether a document is predecisional and deliberative to qualify under the DPP, the dissent proposed “weigh[ing] the government’s interest in confidentiality with a party’s interest in disclosure on a case-by-case basis.” Id.

When reading statements in the majority opinion that seem to support the idea that an agency may still withhold deliberative documents to protect the integrity of its decisionmaking process as long as it explains its concerns in detail, it is important to recognize that the majority opinion explicitly **rejected** the dissent’s proposal to weigh an agency’s interest in confidentiality against the public interest in disclosure for predecisional and deliberative documents, stating that “the dissent would thus usurp the role of the legislature by reading a complex exception into the statute that has no basis in its text or legislative history.” Peer News at 488. While recognizing that “[t]he dissent’s approach may well represent sound policy, and we express no opinion as to its advisability as matter of public administration,” the majority nevertheless asserted that “[t]he determination as to whether and to what extent deliberative documents should be shielded from disclosure must be made by the legislature and not by judicial fiat.” Id. at 489.

3. Guidance in Majority Opinion

The majority opinion provided guidance as to the application of the frustration exception and used as a starting point the examples found in the UIPA’s legislative history. See Senate Standing Committee Report No. 2580,

March 31, 1988 (SSCR 2580).⁶ The majority stated, “Although it is not necessary that a record fall within or be analogous to one of the enumerated categories for it to be shielded from disclosure under HRS § 92F-13(3), the list and text of the Senate Standing Committee report provides guidance as to the provision’s operation.” Peer News at 486. The Court noted that “each of the legislature’s provided examples implicates a specific legitimate government function, including the enforcement of laws, the procurement of property, the fair administration of exams, and the maintenance of secure record-keeping systems. Id. (emphasis in opinion). The majority rejected, however, “decision-making” as a legitimate government function because it “is such a broad and ill- defined category that it threatens to encompass nearly all government actions, which almost inevitably involve decisions of some sort,” and even illegitimate actions. Id. at 486-487. Because the agency has the burden of proof to establish justification for nondisclosure, “an agency must define the government function that would be frustrated by a record’s disclosure with a degree of specificity sufficient for a reviewing court to evaluate the legitimacy of the contemplated function.” Id. at 486.

The majority further noted that even the expressly enumerated categories of records in SSCR 2580 are not automatically exempt from disclosure. Thus, in addition to establishing the legitimacy of the contemplated function, the frustration exception requires “an individualized determination that disclosure of the particular record or portion thereof would frustrate a legitimate government function.”⁷ Id. at 487 (noting also in footnote 26 that “redaction and disclosure of the remainder of the record is appropriate when the portion of a document that qualifies for withholding under one of HRS § 92F-13’s exceptions is reasonably separable from the record as a whole”). The opinion continued:

That a record is of a certain type—whether that type is deliberative, pre-decisional, or even a type included in or analogous to the examples set forth in the Senate Standing Committee Report—is not alone sufficient to shield the record from disclosure under the provision. While such a designation may be instructive, an agency must nonetheless demonstrate a connection between disclosure of the specific record and the likely frustration of a legitimate government function, including by clearly describing the particular frustration and providing concrete information indicating that the identified outcome is the likely result of disclosure. See OIP Op. Ltr. No. 03-16 at 8 (Aug. 14, 2003) (stating that withholding disclosure of a coaching contract

⁶ For a link to legislative documents, see n. 1.

⁷ OIP has followed this same approach in past opinions. E.g. OIP Op. Ltr. No. F17-01 at 6-7, citing Peer News LLC v. City and County of Honolulu, 138 Haw. 53, 75, 376 P. 3d 1, 23 (2016) (citing with approval OIP Op. Ltr. No. 98-02 at 10).

under HRS § 92F-13(3) was not justified because the university “has provided us with no specific examples of or any concrete information as to how disclosure of the contract will frustrate the Athletic Department’s ability to function”).

In sum, to justify withholding a record under HRS § 92F-13(3), an agency must articulate a real connection between disclosure of the particular record it is seeking to withhold and the likely frustration of a specific legitimate government function. The explanation must provide sufficient detail such that OIP or a reviewing court is capable of evaluating the legitimacy of the government function and the likelihood that the function will be frustrated in an identifiable way if the record is disclosed. *See id.* at 8, 16 (stating that “[w]e would be remiss in our statutory duties if we simply accepted UH’s statement that disclosure [of the Head Coach’s compensation package] will frustrate a legitimate government function without any factual basis to support UH’s assertion” that disclosure “could have the impact of frustrating the Athletic Director’s ability to maintain a cohesive coaching team and a successful athletic program”). In the absence of such a showing, withholding disclosure under the provision is not warranted.

Id.

C. Decisionmaking as a Government Function Under the Frustration Exception

Given this guidance from the Court, OIP must conclude that decisionmaking fundamentally is not a government function that may be frustrated under section 92F-13(3), HRS, even if the nature of the frustration is explained in detail and even if the function is described by a term other than decisionmaking. In isolation, the Court’s statement that “if disclosed prior to a final agency decision, many pre-decisional draft documents may impair specific agency or administrative processes in addition to inhibiting agency personnel from expressing candid opinions” could be read to suggest that deliberative material can be withheld so long as agency explains how its disclosure would inhibit agency personnel from expressing candid opinions. *See Peer News* at 480, n. 15. In the context of the opinion as a whole and in particular the majority’s rejection of the dissenting approach, though, it is clear that the Court was not recognizing inhibition of agency personnel from expressing candid opinions as a legitimate basis for frustration by itself, but instead was noting that disclosure of pre-decisional documents might frustrate a specific government function other than decisionmaking, particularly one enumerated in SSCR 2580, and could potentially be withheld (with a sufficient explanation) to avoid frustration of that other government function.

OIP finds that the government function TAX asserts would be frustrated by disclosure—its “ability to produce objective and independent revenue estimates”—is decisionmaking by another name. It is not OIP’s intent to understate the importance of TAX’s role in creating neutral revenue estimates for legislative measures, and OIP notes that the Court acknowledged that an approach allowing some confidentiality for an agency’s deliberative process “may well represent sound policy.” However, as stated above, the Peer News majority explicitly rejected such an approach as proposed by the Peer News dissent, and in light of the Peer News decision, OIP cannot conclude that records may be withheld on the basis that their disclosure would frustrate an agency’s ability to produce sound decisions. The anticipated public scrutiny and questioning of TAX’s methodology and analysis in creating revenue estimates, which TAX points to in support of its frustration argument, is exactly the sort of public scrutiny of the process by which government decisions and policies are formulated that the Court found to be at the core of the UIPA’s public purpose. See Peer News at 479-480.

OIP concludes that under the UIPA as interpreted in Peer News, deliberative and predecisional materials cannot be withheld on the basis that they would frustrate an agency’s decisionmaking function, but may still be withheld under the UIPA’s frustration exception where the agency establishes that some other specific government function would be frustrated by disclosure.⁸

⁸ OIP notes that other forms of frustration of a legitimate government function previously recognized by OIP, and in some cases other UIPA exceptions, may be applied to deliberative and predecisional documents in appropriate circumstances. For instance, SSCR 2580 lists records compiled for law enforcement purposes as an example of records whose disclosure would frustrate a legitimate government function. Applying this example, OIP has long recognized that in most cases, disclosure of the contents of the investigation file in a prospective criminal or civil law enforcement proceeding could reasonably be expected to interfere with that proceeding, and thus most of the contents of an ongoing investigative file can be withheld while the investigation is still pending to prevent frustration of the agency’s criminal or civil investigative function. See, e.g., OIP Op. Ltr. No. 91-9 at 4-8 (discussing similar protection in federal law, frustration exception’s protection of open civil or criminal investigation, and limitations on that protection). An open investigation file will often include predecisional and deliberative material such as investigator notes, internal correspondence about how to proceed in the investigation, draft reports, or similar deliberative materials, which could still be withheld under the frustration exception to avoid interference with the investigation.

SSCR 2580 also lists as an example of where the frustration exception would apply “[i]nformation which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency[.]” In OIP Opinion Letter Number 94-18, citing this legislative example, OIP concluded that an agency could withhold its internal scoring of design / build

Where the agency argues that some other government function would be frustrated by disclosure, the agency must provide an individualized and sufficiently detailed analysis demonstrating the legitimacy of the government function and the likelihood that the function will be frustrated in an identifiable way if the record is disclosed.

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.

proposals prior to the actual execution of a contract. While a government procurement is ongoing, similar deliberative and predecisional material regarding it could be still be withheld as necessary to avoid frustrating a legitimate government function by raising the cost of government procurements or giving a manifestly unfair advantage to one prospective contractor.

Where government attorneys are involved, OIP has recognized the attorney work product privilege and the attorney client privilege as falling within the UIPA's frustration exception, as well as section 92F-13(2) and, in the case of the attorney client privilege, section 92-13(4), HRS. E.g. OIP Op. Ltrs. No. F14-01 and 01-05. These privileges would in many instances apply to deliberative material involving or created by a government attorney. Additionally, an agency may still withhold information discussed in deliberative materials where the information is itself protected, such as information that would fall within the UIPA's privacy exception, section 92F-13(1), HRS, or that falls within a confidentiality statute and thus may be withheld under section 92F-13(4), HRS.

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

Jennifer Z. Brooks
Staff Attorney

APPROVED:

Cheryl Kakazu Park
Director