

**This March 1, 2019 version of OIP’s Analysis cites to the majority and dissenting opinions originally issued by the Hawaii Supreme Court, which are found below under “Court Opinions” on OIP’s website. For an update of OIP’s Analysis, which was revised on May 20, 2019 and cites to the Hawaii Supreme Court’s published opinions, please go to <https://oip.hawaii.gov/wp-content/uploads/2019/05/OIP-analysis-of-DPP-case-revised-5.20.2019.pdf>.**

## OIP'S ANALYSIS OF THE HAWAII SUPREME COURT'S MAJORITY AND DISSENTING OPINIONS REJECTING THE DELIBERATIVE PROCESS PRIVILEGE AS AN EXCEPTION TO DISCLOSURE UNDER THE UIPA

The state Office of Information Practices (OIP) was created in 1988 to administer Hawaii's open records law, the Uniform Information Practices Act (Modified), Chapter 92F, Hawaii Revised Statutes (UIPA).<sup>1</sup> In 1989, in the ninth opinion since the UIPA went into effect that year, OIP first recognized the "deliberative process privilege" (DPP) as a limited form of one of the UIPA's statutory exceptions, allowing government agencies to not disclose certain predecisional and deliberative internal records that, by their nature, must be confidential in order to avoid frustrating the decision-making functions of government. Under the administrations of six different directors, OIP continued to recognize and limit the DPP. But on December 21, 2018, a three-member majority of the Hawaii Supreme Court (Court), over a vigorous dissent by another Justice and the Chief Justice, reversed a Circuit Court judge's decision, and rejected the deliberative process privilege that had been recognized by OIP for nearly 30 years. Posted on [the Opinions page at oip.hawaii.gov](#) are the [majority opinion](#) by Justice Pollack, with Justices McKenna and Wilson ([Attachment A](#)) and [dissenting opinion](#) by Justice Nakayama joined by Chief Justice Recktenwald ([Attachment B](#)) in [Peer News LLC v. City and County of Honolulu](#), \_\_\_ Haw. \_\_\_ (Dec. 21, 2018) (No. SCAP-16-0000114, 2018 WL 6715464) ([Peer News](#)).

OIP was not a party and was not asked to render an opinion on the underlying facts and issues in the [Peer News](#) case, which bypassed OIP and was filed directly in the Circuit Court after a request for records was denied by the City and County of Honolulu (City). After the Circuit Court ruled in favor of the City, an appeal was made to the Supreme Court. Upon reviewing the majority and dissenting opinions, OIP realized that key facts and arguments do not appear to have been presented to the Court, which might have changed the result. But unless the Legislature acts to change or clarify the law or its intent, OIP will follow the Court's decision, [has already advised agencies](#) that the DPP can no longer be used to justify nondisclosure of requested records and has prepared this in-depth analysis to help the agencies and the public understand what the case means.

This analysis provides background information in **Section I** with a summary of the legislative history regarding internal agency communications (beginning on page 2) and OIP's development of the DPP and its limitations (beginning on page 12). **Section II** (beginning on page 18) then contrasts the majority and dissenting opinions, which vigorously debated whether OIP's recognition of the DPP was palpably erroneous based on the "plain language" of the UIPA and its legislative history. In **Section III** (beginning on page 24), OIP discusses key facts and arguments that were apparently not presented to the Court, and the Judiciary's arguments against legislative proposals during the 2019 session that were

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<sup>1</sup> OIP began operations with a director, a researcher, and two clerical positions on July 1, 1988. OIP was created a year before the rest of the UIPA's provisions went into effect, to prepare for implementation of the new law. Act 262, SLH 1988; see CCR 235 at 5 (explaining that "[t]he Office of Information Practices would begin operations on July 1, 1988. This is essential to ensure implementation of the new law one year later. The remaining portions of the new records law would then become effective July 1, 1989, and at that time the existing records laws (chapter 92, Part V and chapter 92, HRS) would be repealed").

As will be further discussed [infra](#) in Section I.A.2., OIP was created as "the singular reviewing agency" standing between the government agencies and the courts to enforce the UIPA, "with rulemaking and other powers, including rendition of advisory opinions concerning the provisions of the new chapter." House Standing Committee Report No. 342-88 (Feb. 19, 1988) at 2.

based on the same reasons for the DPP. Finally, in **Section IV** (beginning on page 31), OIP discusses the Court's decision to reject the DPP and its guidance on how to proceed going forward.

## **I. BACKGROUND**

Before contrasting the majority and dissenting opinions, the following background information is relevant. In the Peer News case, Peer News, dba Civil Beat (Appellant) challenged a decision by the City and its Department of Budget and Fiscal Services (BFS) (together, Appellees) to withhold certain internal government documents generated during the process of establishing the City's annual operating budget. Neither party sought OIP's opinion on the matter, and instead Appellant directly initiated a lawsuit in the First Circuit Court. Although Appellees filed a third-party complaint against OIP in the case, they stipulated to dismissal of their third-party complaint after OIP answered and argued that it had never been asked to opine regarding the records at issue and was not responsible for Appellees' application of OIP's precedents.

The Circuit Court subsequently ruled in favor of the Appellees' application of the DPP to the records being sought, and the case was appealed to the Hawaii Supreme Court. Given its long-standing line of cases recognizing and interpreting the DPP, and the UIPA's clear instruction that courts must consider OIP's opinions and rulings "as precedent unless found to be palpably erroneous,"<sup>2</sup> OIP let its prior opinions speak for themselves and left it to the Court to ultimately decide the DPP's legal effect.

### **A. Legislative History of the UIPA With Respect to Internal Agency Communications**

#### **1. Governor's Committee Report**

The UIPA was enacted in 1988, following the efforts of an Ad Hoc Committee on Public Records and Privacy Laws convened in 1987 by then Governor John Waihee (Governor's Committee). After a series of public hearings, the Governor's Committee produced a four-volume report containing testimony and recommendations in December 1987, which was considered by the Legislature during the 1988 session. Report of the Governor's Committee on Public Records and Privacy (Dec. 1987) (Governor's Committee Report).

In its Introduction, the Governor's Committee Report began by stating:

Public access to government records . . . the confidential treatment of personal information provided to or maintained by the government . . . access to information about oneself being kept by the government. These are issues which have been the subject of increasing debate over the years. And well such issues should be debated as few go more to the heart of our democracy.

Vol. I Governor's Committee Report at 1 (ellipses in original).

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<sup>2</sup> HRS § 92F-15(b) (2012). For an explanation of this section's 2012 revisions and palpably erroneous standard of review, see Cheryl Kakazu Park and Jennifer Z. Brooks, 2013 Law and Administrative Rules Governing Appeal Procedures of Hawaii's Office of Information Practices, 36 U. Haw. L. Rev. 271 (2014).

The debate over these issues arose from various statutes<sup>3</sup> that created a broad public right of access to records while controlling access to specific records and also protecting the privacy of individuals about whom information is kept and may be corrected. Vol. I Governor's Committee Report at 1 (citing the now-repealed HRS § 92-50, the public records law, and HRS Chapter 92E, the personal records law, and specific statutes cited in Appendix D to Vol. I of the Governor's Committee Report). As the Governor's Committee Report further noted:

Hawaii's current law has operated to keep most records which involve an individual confidential. It has, however, not done so through a balancing test which weighs competing interests but rather by the unintended interplay between statutes (Chapters 92 and 92E) written at different times for different purposes and without regard for each other. The results leave everyone involved (the public, the media, and government officials) uncertain as to the effect of the law in any particular instance and unlikely to agree on the interpretations made in specific cases. Repeated efforts to address this subject at the Legislature have produced little agreement or progress in resolving this dispute.

Id. at 2.

In its chapter on "Current Issues and Problems," the Governor's Committee Report had a separate section on "Internal Government Processes" and stated:

One of the areas of greatest tension in any review of public records law involves the internal processes of government and the records that accompany such processes. On 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.

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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<sup>3</sup> Prior to the adoption of the UIPA, HRS Chapter 92 was the "Public Agency Meetings and Records" law while HRS Chapter 92E was "Fair Information Practice" law governing the confidentiality of personal records. ([Attachment U](#).) The Governor's Committee separately discussed the impact of the right to privacy provision of the Hawaii State Constitution, which had been ratified by the 1978 Constitutional Convention and was the impetus for the adoption of Chapter 92E, the personal records law. Because of the conflicts in implementing the right of access under the public records law against the constitutional right to privacy and confidentiality provisions of the personal records law, the Governor's Committee surmised that this "might be regarded as a source of many of the current problems." Vol. I Governor's Committee Report at 4. Ultimately, both public records and personal records laws were repealed and replaced by the UIPA, which addresses government records in Part II and personal records in Part III of Chapter 92F, HRS.

The Governor's Committee reviewed other related state statutes as well as the federal Freedom of Information Act and Privacy Act of 1974, the Uniform Information Practices Code (Model Act), the Uniform Criminal-History Records Act, and Uniform Health-Care Information Act. Vol. I Report at 21-42. As will be discussed infra, the Model Act became the basis for the House Draft in 1988 that resulted in adoption of the UIPA.

This dilemma, to be both a public institution open enough to be monitored and an institution which is capable of efficient and effective action, will exist regardless of what decisions are made on government records. There is no question, however, that decisions about records can have a substantial impact on the functioning of government.

The first issue concerns the availability of internal correspondence and memoranda 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, 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 116) 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.

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.

Vol. I Governor's Committee Report at 101-02 (emphasis in original) ([Attachment U](#)); see also Majority at 21 (citing Vol. I Governor's Committee Report at 101).

The Honolulu Managing Director's testimony had stated "[t]he current laws prevent public disclosure of various government records, including, but not limited to, . . . inter- and intra-agency correspondence or memoranda . . . . The City is of the opinion that these records must continue to be confidential." Vol. II Governor's Committee Report at 126 ([Attachment L](#)). Included with the testimony of the Honolulu Managing Director were Exhibits A-D, which can be found in Vol. III of the Governor's Committee Report at pages 368 to 614. Exhibit A was the Managing Director's Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of All City Agencies (MD's Rules) ([Attachment M](#)), which had been approved by the Mayor on October 23, 1978. Vol III Governor's Committee Report at 369-77. Section 3-1 of the MD's Rules, entitled "Confidential Records Defined," states in relevant part:

c. The following records are specifically exempted from public access and shall be deemed confidential:

1. Records specifically exempted from public access by federal, state or local law, such as: . . .

B. Records which do not relate to a matter in violation of law and the confidentiality of which are deemed by the City Attorney to be necessary for the protection of the character or reputation of any person (HRS § 92-51);

. . . .

6. Records related solely to the internal personnel, rules and procedures of an agency;

7. Interagency or intraagency memorandums or letters which would not be available by law to a party other than one in litigation with the agency;
8. Investigatory files of any agency involved in administrative adjudication, if the granting of access to the information would interfere with the administrative proceeding, or deprive a person of an impartial adjudication, or identify a confidential source, or disclose confidential information, or if the granting of access would constitute an invasion of personal privacy; and
9. Any record which falls within a common law privilege of confidentiality.

Id. at 375-75.

Exhibit B of the Managing Director's testimony was a December 30, 1983 memorandum to Managing Director Andrew I. T. Chang from Deputy Corporation Counsel Kathleen A. Callaghan,<sup>4</sup> which explained that the MD's Rules had been promulgated to be complementary to HRS § 92-51, the State's public records law. Id. at 379-80 ([Attachment N](#)). In response to the question of whether the City's departments and agencies may also utilize the MD's Rules to determine whether to disclose personal records pursuant to the State's personal records law, the memorandum answered

that Chapter 92E, HRS, governs determinations regarding access to 'personal records' even if said personal record is also a public record or a confidential record within the meaning of Section 92-50, HRS, or Chapter 5, Article 16, ROH, and the MD's Rules Governing Public and Confidential Records, adopted pursuant thereto. Of course, if the public record or confidential record is not a personal record within the meaning of Chapter 92E, HRS, then the MD's Rules Governing Public and Confidential Records would be applicable.

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For example, Rule 3-1(c) of the MD's Rules specifically exempts from public access and deems confidential those records which, if made accessible, would impair . . . interagency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency. If said records do not contain information which would designate them as a "personal record," then Chapter 92E, HRS, would not apply and then the standards set forth in the MD's Rule would apply.

Vol. III Governor's Committee Report at 378-79, 383 ([Attachment N](#)).

Exhibit C was a listing of the various memoranda, opinions, studies by the Department of the Corporation Counsel and reports regarding public and confidential records. Id. at 389-91. Exhibit D consisted of copies of memoranda by the Department of the Corporation Counsel. Id. at 389-614. Included in Exhibit D was an October 12, 1983 memorandum to the Director and Building Superintendent from a Deputy Corporation Counsel advising that building permit plans, prior to issuance of the building permit, would not fall within the definition of public records subject to disclosure pursuant to Section 92-50, HRS, notwithstanding two Circuit Court decisions that "touched upon" this

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<sup>4</sup> Callaghan was subsequently appointed to be OIP's first Director in 1988 and served until 1995.

issue. Vol. III Governor's Committee Report 475-77 ([Attachment O](#)). This memo distinguished the Circuit Court's decision in Pauoa-Pacific Heights Community Group v. Building Department, City and County of Honolulu, Civil No. 59632 (Hawaii 1st Cir. 1980), as not involving a request for inspection of the building permit application and plans and that the court's ruling did not classify such documents as public records or even mention § 92-50, HRS, which was then the State's public records statute. *Id.* at n. 1 and 2; see [Attachment J](#) for the Pauoa-Pacific Heights case.

Immediately following Exhibit D was separate testimony in the form of an October 14, 1987 memorandum from the State Director of Finance, Yukio Takemoto. Attached to his testimony was "A Review of Public and Private Records Within the Department of Budget and Finance" (Review) ([Attachment P](#)) providing examples of what a State agency considered to be "staff work" that was "privileged information" as follows:

Budget, Planning and Management Division

All records in the Budget, Planning and Management Division are public records except those that contain personal information which may invade the privacy of an individual pursuant to Sections 92-50 and 92E, HRS, and except for "staff work" which may be considered "privileged information." These documents include working documents, correspondence, internal references and other staff work for the Office of the Governor.

Vol. III Governor's Committee Report at 616.

The Senate President also provided testimony to the Governor's Committee as to documents that he considered to be "confidential internal working papers of the Senate" that were and should continue to be protected from public disclosure. In testimony dated August 14, 1987, then Senate President Richard S. H. Wong<sup>5</sup> stated:

I know I speak for all members of the Senate in expressing full support of the laws ensuring public access to public records. However, I have concerns regarding whether or not certain working papers and documents generated during the legislative process are to be classified as "public records."

Specifically, it has been contended by some that the term "public records" include the following:

- (1) Committee reports which are being circulated for signatures and which have not yet been filed with the Clerk of the Senate; and
- (2) Senate budget worksheets which are prepared by the Senate Ways and Means Committee staff for use by the Senate conferees on the budget and which contain the Senate position on various disputed budget items.

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<sup>5</sup> Wong was still the Senate President during the 1988 Legislature, which passed the UIPA. His testimony apparently led to the adoption of the legislative exception found in HRS § 92F-13(5) (2012).

The latter item was the subject of a court action in which the circuit court held that the worksheets were not public records. An appeal to the Hawaii Supreme Court was dismissed on the basis of mootness and the question was not decided by the Court on the merits.

It has been and continues to be my position that such documents are confidential internal working papers of the Senate and are not public records.

Vol. II Governor's Committee Report at 198-99 ([Attachment H](#)).<sup>6</sup>

Ultimately, the Governor's Committee made no conclusions as whether to exempt inter- or intra-agency communications from disclosure as it viewed its role as not "to provide the final answers, but instead to provide the factual foundation and policy discussion that must underlie sound decision making." I Governor's Committee Report at 5. The Governor's Committee Report did, however, extensively discuss and attach the Uniform Information Practices Code drafted by the National Conference of Commissioners on Uniform State Laws (1980) (Model Act).<sup>7</sup> I Governor's Committee Report at 30-42 and Appendix E.

## 2. 1988 Legislature

During the 1988 legislative session, the House Committee on Judiciary considered the Governor's Committee Report and recommended revisions to a public records proposal that was passed by the House of Representatives as House Bill 2002, House Draft 1 (House Draft). While it contained many deviations, the House's 46-page proposal substantially followed the organization and content of the Model Act. As is still provided in the current law, the House Draft stated, "All government records are open to public inspection unless access is restricted or closed by law." House Draft at 5; HRS § 92F-11(a) (2012) ([Attachment R](#)). The House Draft did not contain the present exceptions to disclosure, but did contain in section -13 twelve exemptions to disclosure based on those found in the Model Act, and included the following relevant items:

- (1) Records or information compiled for law enforcement purposes . . .
- (2) Inter-agency or intra-agency advisory, consultative, or deliberative material other than factual information if:
  - (A) Communicated for the purpose of decision-making; and
  - (B) Disclosure would substantially inhibit the flow of communications within an agency or impair an agency's decision-making processes[.]

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<sup>6</sup> The Circuit Court decision referenced by Senate President Wong was Abercrombie v. The Senate, S.P. No. 6126 (1<sup>st</sup> Cir. Ct. 1983), which held that legislative budget worksheets were not public records, was not attached to his testimony, nor was it referenced by the majority in the Hawaii Supreme Court's Peer News decision. OIP obtained copies of the existing case file after making a record request to the Judiciary and has attached them as [Attachment G](#).

<sup>7</sup> The Model Act had been approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws at its Annual Conference held on Kauai, Hawaii, from July 26 – August 1, 1980.



House Draft at 9-11 (omitting restrictions on nondisclosure of law enforcement records, as well as other exemptions.)

The House Judiciary Committee’s report that accompanied the House Draft noted that there were “agency records for which disclosure ‘is not required’” and described section -13 as being “the first of two parts for the ‘closed’ records list.”<sup>8</sup> House Standing Committee Report No. 342-88, February 19, 1988, at 2. (HSCR 342-88) ([Attachment R](#)). The House Judiciary Committee’s report went on to recognize OIP as

the singular reviewing agency established in this bill by Part IV of Section 1. This Office stands between the agency and the circuit courts to enforce the provisions of this Act, among other duties described in Part IV.

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Part IV of Section I creates the Office of Information Practices with powers to review and rule on agency decision on access to records. The Office shall be within the Office of the Governor, with rulemaking and other powers, including rendition of advisory opinions concerning the provisions of the new chapter.

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Finally, it is the intent of your Committee that the commentary to the Model Uniform Information Practices Code (“Model Act”) guide the interpretation of similar provisions found in the Uniform Act created by this bill where appropriate.

Id. at 3-4, 9.

With respect to exemptions for “certain law enforcement information and inter- and intra-agency communications which are deliberative and predecisional in nature” found in Section 2-103(a)(1) and (2) of the Model Act, the commentary recognized that “[t]hese government functions need to be insulated from immediate, though not ultimate, public scrutiny.” Vol. I Governor’s Committee Report at Appendix E, Model Act at 16. The commentary further explained:

Although exemptions of this kind are typical in state public record or freedom of information statutes, . . . it is difficult to state with precision how much confidentiality is crucial to effective law enforcement and agency decision-making. The exemptions, therefore, must be read against the background of case law developed at the federal and state level. Agency attempts to abuse these exemptions should be amenable to judicial control. It should not be forgotten, however, that numerous other mechanisms exist to insure the accountability of public officials in law enforcement activity and general decision-making: criminal sanctions, civil sanctions, exclusionary rules, judicial review of agency action, legislative oversight and ultimately the

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<sup>8</sup> The second part of the “closed” records list is in the personal records section of the bill, which established a balancing test to determine whether the public interest in disclosure outweighs the individual privacy interest and provided examples in which the individual has a significant privacy interest. HSCR 342-88 at 3; House Bill at 15-17.

electoral process. Subsections (a)(1) and (a)(2) supplement the established structure of checks and balances; they do not supplant it.

Id. (statutory citations omitted).

The Senate Committee on Government Operations then considered the House Draft and made extensive revisions. The Senate's version of the legislation was pared down to seven pages as House Bill No. 2002, House Draft 1, Senate Draft 1 (Senate Draft) ([Attachment S](#)). The Senate Committee on Government Operations' report accompanying the Senate Draft noted that the House had effectively "wiped the slate clean and adopted a new law" while the Senate's proposal was "a less drastic alternative, premised on the belief that most of the current law is salvageable." Senate Standing Committee Report No. 2580, March 31, 1988 at 1 (SSCR 2580) ([Attachment S](#)). In particular, the Senate Draft removed the twelve exemptions of section -13 found in the House Draft and instead added a new section 92-53 to the then existing law "to create four categorical exceptions to the general rule." SSCR 2580 at 3. One category of records not required to be disclosed were "[r]ecords which, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Senate Draft at 3. The Senate Committee report explained the rationale for this change as follows:

Rather 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. To assist the Judiciary in understanding the legislative intent, the following examples are provided.

SSCR 2580 at 3.

As "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function," the Senate Committee report summarized nine of the twelve exemptions found in the House Draft. SSCR 2580 at 4-5. Not included in the Senate's list of examples was the House's proposed exemptions for (1) materials relating to inter- and intra-agency communications; (2) nondiscoverable litigation materials; and (3) individually identifiable records.<sup>9</sup> The Senate Draft did not create OIP and instead directed the Attorney General to draft model rules to implement the law.

It should be noted that both the House and Senate received extensive testimony on the proposed legislation that became the UIPA. While there was testimony critical of the exemption for inter- and intra-agency deliberative material<sup>10</sup> and opposing the creation of OIP as an "information

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<sup>9</sup> The deletion of the last two exemptions was explained in n. 19 of the majority's opinion, as will be discussed infra in Section II.A.2 regarding the legislative intent (beginning herein at page 21). As will be discussed in Section II infra, the majority and dissenting opinions expressed different reasons for the exclusion of the inter- and intra-agency exemption.

<sup>10</sup> See testimony to the Senate Government Operations Committee on March 16, 1988 from Common Cause/Hawaii (stating that the House Draft's exception for inter and intra-agency records "would result in closing off access to records which are currently open to the public. Again, this would be a major NET loss of public information"); Honolulu Advertiser and KHON-TV (asserting on page 4 that the House draft "would deny (continued on next page)

czar,”<sup>11</sup> there was also testimony in support of an exemption for internal documents<sup>12</sup> and the creation of OIP as the one place for uniform implementation and administration of the UIPA and interpretation of the law and possible new remedies.<sup>13</sup>

Ultimately, the House and Senate compromised on their proposals and adopted House Bill 2002, House Draft 1, Senate Draft 1, Conference Draft 1 (Final Bill) ([Attachment T](#)), which was enacted as Act 262, Session Laws of Hawaii 1988 and is known today as the UIPA.<sup>14</sup> The Final Bill, consisting of 26

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access to inter and intra agency memorandum, which records are currently public and critical to the public’s right to know and understand how its’ [sic] government operates” and objecting on page 5 to the bill portions denying “access to documents which would ‘substantially inhibit the flow of communications within an agency or impair an agency’s decision-making process’; . . . and related provisions which appear to deny access to documents which are now public records under existing law and which are critical to the public’s right to know”); and Ian Lind (suggesting on page 2 that the Senate committee “[d]elete references to intra- and inter-agency records, or at least narrow the exemption as much as possible” and claiming on page 3 that the House Draft’s exception for inter-agency or intra-agency advisory, consultative, or deliberative material other than factual information “would result in closing off access to records which are currently open to the public. Although access to such records is resisted in practice, the only Hawaii legal case resulted in the disclosure of this type of internal agency correspondence”).

<sup>11</sup> See testimony to the House Judiciary Committee on February 11, 1988 from Honolulu Star-Bulletin (urging the committee to “tread cautiously” in creating OIP as “a kind of ‘Freedom of Information Czar’” within “a new centralized ‘ministry of information’” and advocating instead “a statewide policy of responsiveness to requests for information within each department and agency of government”); testimony to the Senate Government Operations Committee on March 16, 1988 from Honolulu Star-Bulletin (opposing a centralized “information czar” and advocating for a statewide policy of responsiveness).

<sup>12</sup> See testimony to the House Judiciary Committee on February 10, 1988 from Ian Lind (stating that language in the original House Bill 2002 creating an exception if “[d]isclosure would substantially inhibit the flow of communication within an agency or impair an agency’s decision-making processes” was “vague and potentially very broad” and should be instead combined with the exception for material prepared in anticipation of litigation “into a section comparable to exemption 5 of the federal Freedom of Information Act,” 5 USCS § 552, which excluded from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”). Although Mr. Lind apparently changed his view in later testimony (see n. 10 [supra](#)), there was other testimony supporting an exemption for internal documents, which was not cited in either the majority or dissenting opinion but is discussed in section III [infra](#), beginning at page 24.

<sup>13</sup> See testimony to the Senate Government Operations Committee on March 16, 1988 from the Department of Commerce and Consumer Affairs (supporting the creation of OIP to ensure “the uniform implementation of the law throughout the departments” rather than the then current practice of relying upon 18 information “czars” from each department, the University of Hawaii, and the Superintendent of Education); Superintendent of Education (stating that “[a]n Office of Information Practices is an appropriate vehicle for assuring implementation of the Uniform Information Practices Act and initiating new remedies as needed”); and Department of Health (urging the Legislature to clearly indicate whether OIP would be the agency deciding when a “compelling public interest” has developed).

<sup>14</sup> Much of what was removed from the House Draft related to the collection, maintenance, and disclosure of personal records and research records; the time limits and procedures for agencies to respond to (continued on next page)

pages, established OIP and adopted five categories of exceptions to the general rule requiring disclosure of government records, which remain in effect today as HRS § 92F-13. The Conference Committee Report accompanying the Final Bill explained:

5. Exceptions to Access. The bill will provide in Section -13 a clear structure for viewing the exceptions to the general rule of access. The five categories of exceptions relate to personal privacy, frustration of government practice, matters in litigation, records subject to other laws and an exemption relating to the Legislature. The category relating to personal privacy is essentially the same in both the House Draft and the Senate Draft. The second category, concerning frustration of legitimate government functions, was clarified by examples on pages 4 and 5 of the Senate Standing Committee Report No. 2580. The last three are self-explanatory.

The records which will not be required to be disclosed under Section -13 [now HRS § 92F-13] are records which are currently unavailable. It is not the intent of the legislature that this section be used to close currently available records, even though these records might fit within one of the categories in this section.

Conference Committee Report No. 235 at 3 (April 22, 1988) (CCR 235) ([Attachment T](#)) (emphasis added).

With a minor change from “chapter” to “part” in 1993, HRS § 92F-13(3) continues to provide, “This part shall not require disclosure of: . . . (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function[.]”

Additionally, the final bill created OIP “as the agency which will coordinate and ensure implementation of the new records law.” CCR 235 at 5. Among other things, OIP was empowered to “review and rule on an agency denial of access to information or records, or an agency’s granting of access;” “[u]pon request by an agency, shall provide and make public advisory guidelines, opinions, or other information concerning that agency’s functions and responsibilities;” and “[u]pon request by any person, may provide advisory opinions or other information regarding that person’s rights and functions and responsibilities of agencies under this chapter[.]” Final Bill at § -42(1) to (3). OIP’s powers and duties have changed little since its inception in 1988, except that a proviso has been added to HRS § 92F-42(1), which requires OIP’s director to “upon request, review and rule on an agency denial of access to information or records, or an agency’s granting of access; provided that any review by the office of information practices shall not be a contested case under chapter 91 and shall be optional and without prejudice to rights of judicial enforcement available under this chapter[.]”

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record requests; and the repeal of numerous then existing laws, including HRS Chapter 92, Part V (the public records law) and HRS Chapter 92E (the personal records law). While the House Draft was extensively revised and reorganized, the Final Bill reflected the House Bill’s structure and much of its UIPA content, which had been originally based on the Model Act. See CCR 235 at 2 (stating that the Final Bill “provides for the use of the basic framework envisioned by the uniform law and will separate [sic] out all provisions dealing with the access of individuals to their own records and place them in Part III. Provisions of the current Chapter 92E, Hawaii Revised Statutes (HRS) will be substituted for similar provisions in the uniform law.”)

In 2012, the Legislature amended the UIPA to provide in relevant part in HRS § 92F-15(b) that “[o]pinions and rulings of the office of information practices shall be admissible and shall be considered as precedent unless found to be palpably erroneous[.]”<sup>15</sup>

### **B. The Deliberative Process Privilege (DPP)**

The frustration exception in HRS § 92F-13(3) is the statutory basis for the DPP, which was examined by Hawaii Supreme Court in its majority and dissenting decisions in Peer News. In the Circuit Court and ultimately on appeal to the Hawaii Supreme Court, Appellees defended BFS’s withholding of its internal budget documents on the basis of the DPP, which OIP had first recognized in OIP Opinion Letter No. 89-9. OIP’s opinion, written only five months after the provisions of the UIPA went into effect on July 1, 1989, interpreted the law’s exception for frustration of a legitimate government function as being not applicable to the names of faculty members serving on the law school’s Admissions Committee. OIP looked to the examples of frustration that were listed in the SSCR 2580<sup>16</sup> and found that records containing the names of faculty members serving on the Admissions Committee did not appear to fall within the enumerated examples. OIP Op. Ltr. No. 89-9 at 9. OIP understood, however, that the list of examples was not exhaustive<sup>17</sup> and that the UIPA’s legislative history had suggested that “case law under the Freedom of Information Act should be consulted for additional guidance” in interpreting the UIPA. Id. at 9, n 4, citing SSCR 2580. Citing the federal Freedom of Information Act, 5 U.S.C. § 552(b)(5) (FOIA), which expressly provides that an agency need not disclose “inter-agency or intra-agency memorandums or letter which would not be available by law to a party other than an agency in litigation with the agency,” OIP stated that “[a]nother example of government records which if disclosed may result in the frustration of a legitimate government function are inter-agency and intra-agency memoranda or correspondence.” Id. at 9.

Upon examining the well-established case law interpreting FOIA’s exemption 5 for inter- and intra-agency materials, OIP noted that “the key question in Exemption 5 cases became whether disclosure of materials would expose an agency’s decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.” Id. at 10, quoting Dudman Communications v. Dept. of Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987). OIP concluded, however, that the disclosure of faculty members’ identities “will not discourage candid discussion within the confines of the committee meetings, inhibit intra-committee debate or result in the premature disclosure of the recommended outcome of the deliberative process,” and thus would not result in frustration of a legitimate government function. Consequently, the DPP did not protect from disclosure the faculty members’ identities.

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<sup>15</sup> For a more extensive discussion of the 2012 statutory changes, see Cheryl Kakazu Park and Jennifer Z. Brooks, 2013 Law and Administrative Rules Governing Appeal Procedures of Hawaii’s Office of Information Practices, 36 U. Haw. L. Rev. 271 (2014).

<sup>16</sup> See Section I.A.2 and n. 9 for the discussion of the examples.

<sup>17</sup> Both the majority and dissenting opinions agree that the list of examples in SSCR 2580 was not exhaustive. See Majority at 33 (stating, “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 the text of the Senate Standing Committee report provides guidance as to the provision’s operation”); Dissent at 17 (stating “the Senate did not suggest that this list was exhaustive or exclusive”).

In 1990, OIP once again discussed the DPP in [Opinion Letter No. 90-3](#) and concluded that the privilege did not protect from disclosure the recommendation section of an agency's Revenue Audit Reports of airport concessioners' operations. Even though the materials had been predecisional and deliberative in nature, they had been expressly adopted by the agency in its final decision. OIP Op. Ltr. No. 90-3 at 12. In that opinion, OIP also noted that the DPP "does not extend to purely factual matters, or factual portions of otherwise deliberative memoranda." *Id.* Once again, OIP concluded that the DPP did not protect the recommendation section from disclosure to the public.

A month later, in [OIP Opinion Letter No. 90-8](#), OIP further explained reasons for the DPP:

As is well-recognized in the FOIA legislative history and case law, the candid and free exchange of ideas and opinions within and among agencies is essential to agency decision-making and is less likely to occur when all memoranda for this purpose are subject to public disclosure. See generally FOIA Case List 397. Specifically, an exception for disclosure prevents frustration of agency decision-making because:

[I]t serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States Gas Corp. v. Dep't. of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (describing the deliberative process privilege under the FOIA exemption, 5 U.S.C. § 552(b)(5)); see generally J. O' Reilly, Vol. II Federal Information Disclosure § 15.02 (1989).

OIP Op. Ltr. No. 90-8 at 5.

In Opinion Letter No. 90-8, OIP went on to state that the UIPA exception for frustration "protects the legitimate government function of decision-making, rather than a particular type of record." OIP Op. Ltr. No. 90-8 at 5 (emphasis in original). To be protected, the record must be predecisional and deliberative. *Id.* at 4-5. When decision-making has ended, or the record is expressly adopted or incorporated by reference into the agency's final decision, then the record's protected status may be lost. *Id.* at 5-6, 12. Moreover, OIP recognized that purely factual materials do not ordinarily implicate the decision-making process and is protected under the DPP only in limited circumstances. *Id.* at 6. When reasonably segregable, deliberative material may be redacted while factual matter must be disclosed. *Id.*

Based on FOIA case law, however, OIP also recognized that the DPP protects from disclosure drafts of government records that, in their final form, are public. *Id.* at 8. Even where the contents are purely factual, the DPP protects drafts because disclosure would reveal the many editorial judgments made by an agency, which "would stifle the creative thinking and candid exchange of ideas" and result in the danger of "chilling." *Id.* at 7-8, quoting Dudman Communications Corp. v. Dep't of Air Force, 815 F.2d 1565, 1569 (D.C. Cir. 1987). Thus, OIP concluded in Opinion Letter No. 90-8 that drafts of

correspondence to an alleged violating party about a zoning violation and its enforcement are protected under the DPP. Id. at 8. OIP reasoned:

Even if purely factual, a draft of correspondence exposes the tentative substance, wording, and format proposed by the employee who prepared it, as well as the editorial judgments of the Planning Director who accepted parts of it, while possibly revising or rejecting others. Whether a draft of correspondence contains deliberative material or not, disclosure in either case will "chill" the free exchange during the editing process since the Department will be judged by the tentative contents and the editorial judgments revealed in the draft. Consequently, the UIPA does not require the disclosure of a draft of correspondence since disclosure would frustrate agency decision-making in the editing process."

Id.

OIP concluded in Opinion Letter No. 90-8 that the DPP did not require disclosure of drafts of correspondence, which reveal tentative views and editorial judgements that are predecisional and deliberative. Employee notes about an alleged zoning violation are also protected from disclosure under the DPP when they "give opinions, suggestions, and thoughts on agency matters." Id. at 9. "Like other types of inter-agency and intra-agency memoranda, an employee's notes may contain factual information in support of predecisional and deliberative material." Id. If this factual information is "inextricably intertwined" with the reasoning and conclusions that form the basis of the author's recommendations and advice, then factual notes are also exempt from disclosure under the DPP because they can reveal "personal judgments and initial conclusions about an investigation" that are "just as predecisional and deliberative as notes providing overt ideas, opinions, and recommendations." Id. at 9-10. Even when employee notes are not predecisional and deliberative and reveal nothing about the "give and take" in the decision-making process within or among government agencies, disclosure may frustrate an agency's investigative and enforcement function. Id. at 10.

As the Judiciary's administrative functions are also subject to the UIPA, OIP has held that the DPP applies to such functions. HRS § 92F-3 (2012) (UIPA definition of "agency"). In [OIP Opinion Letter No. 03-20](#), OIP concluded that the records of the Oversight Committee for the First Circuit Family Court, as a whole, were predecisional and protected from disclosure by the DPP. Also, in [OIP Opinion Letter No. 91-24](#), OIP concluded that the Judiciary's interview panelists' notes are not required to be disclosed because it would frustrate the decision-making function that occurs during the employee selection process.

OIP has further concluded that the DPP applies to the Legislature. In [OIP Opinion Letter No. 00-01](#), OIP was asked by then Senate Majority Leader Les Ihara, Jr. for an advisory opinion as to the following question:

[I]f a private citizen were to request access to or copy all of your materials relating to the policy development of an issue, what are you, as an elected official, obligated to disclose? You are concerned about the following records:

1. Internal correspondence between yourself and your staff summarizing the legal and practical aspects of the issues and areas for further research;

2. Correspondence between yourself and other elected officials discussing information gathered and alternatives available to address the issue;
3. Correspondence, containing draft language for introduction, soliciting recipients' input and comments and responses;
4. Correspondence between yourself and other elected officials relating to strategy to address the issue, including emails; and
5. Personal notes from a majority caucus on the issue.

Id. at 1.

Without addressing the legislative exception from disclosure found at HRS § 92F-13(5),<sup>18</sup> OIP concluded that “[a]ll of the records raised in your letter could possibly fall within the ‘frustration’ exception depending upon the contents of each record” under the DPP and HRS § 92F-13(3). Id. at 4. OIP noted that “the ‘frustration’ exception in § 92F-13(3), Hawaii Revised Statutes, protects the function of decision-making, rather than a particular type of record.” Id. at 5 (emphasis in original). Thus, when the decision-making process has ended, post-decisional documents are not protected as “the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted.” Id. at 5-6, quoting U.S. Department of Justice, Freedom of Information Act Guide and Privacy Act Overview, 183-84 (September 1966 ed.).

OIP also discussed in OIP Opinion Letter No. 00-01 limitations on the DPP with respect to the reasonable segregation of deliberative material from factual information, and the waiver of the DPP if protected records are expressly adopted or incorporated by reference into an agency's final decision. Significant limitations on the DPP have been discussed in many other OIP opinions<sup>19</sup> as follows:

[OIP Opinion No. 90-11](#) (requiring disclosure of purely factual portions of self-study reports and program reviews prepared in connection with the evaluation of UH academic department after the portions protected by the DPP are segregated)

[OIP Opinion Letter No. 90-21](#) (requiring disclosure of a financial and compliance audit report, except for portions containing opinions, recommendations, and evaluations on policy matters that were protected by the DPP)

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<sup>18</sup> The UIPA recognizes a specific exemption from disclosure for certain legislative documents as follows:

- (5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

HRS § 92F-13(5) (2012). Note that this legislative exemption appears to apply only to legislative committees and the personal files of members of the Legislature and is silent as to the legislative files of individual legislators.

<sup>19</sup> OIP has issued no fewer than 28 formal opinions discussing the deliberative process.



[OIP Opinion Letter No. 91-3](#) (concluding that Honolulu Police Department Standards for police code of conduct do not fall within the DPP as they embody the agency’s final decision on issues of personnel policy and contain no advice, opinions, or recommendations from agency subordinates to agency decisionmakers on issues of agency law or policy)

[OIP Opinion Letter No. 91-22](#) (finding that the DPP may be waived and that those portions of draft documents that were substantially discussed at a public meeting must be made available to the public)

[OIP Opinion Letter No. 92-15](#) (concluding that a newsletter circulated within a department does not constitute a predecisional intra-agency memoranda, it did not reflect a “give-and-take” exchange of ideas, and its disclosure would not frustrate a legitimate government function)

[OIP Opinion Letter No. 92-26](#) (concluding that drafts and working papers for a report about convention center sites can be withheld under the DPP, but that the final report must be disclosed)

[OIP Opinion Letter No. 94-8](#) (finding no frustration by disclosure of the “metropolitan police assistant chief” exam score worksheets, after the candidate’s name has been deleted to protect privacy, because the score worksheets are not predecisional; rather, the score sheets are decisional because, when totaled and adjusted, they determine the final rankings of all candidates)

[OIP Opinion Letter No. 95-12](#) (requiring disclosure of the names and qualifications of unpaid consultants who assist the agency in reviewing job applications for civil service positions because they would not disclose any predecisional or deliberative communications between the unpaid consultants and the agency)

[OIP Opinion Letter No. 19-02](#) (concluding that the DPP did not protect from disclosure an agency’s notes and minutes for a meeting with legislators relating to ongoing rule amendments because they were shared outside the agency and were not a direct part of the agency’s internal decision-making process)

Notably, while OIP’s early decisions in [OIP Opinion Letter No. 90-11](#) at 8 and [OIP Opinion Letter No. 90-21](#) at 10 did not depend on a balancing test, OIP later evidenced its inclination to balance competing interests to avoid having the DPP “swallow” the UIPA’s disclosure requirements. In [OIP Opinion Letter No. 95-24](#), OIP required disclosure of aggregate data compiled in responses to standardized job satisfaction survey questions while allowing other portions of the survey to be withheld under the DPP with respect to respondents’ verbatim comments that could identify the individual responders and stifle the frank exchange of opinions and ideas and thereby injure the quality of the decision-making process. OIP extensively examined federal and other states’ opinions and concluded as follows:

The OIP agrees with the [United States] Supreme Court and the federal circuit courts that the **deliberative process privilege must be narrowly construed consistent with the need for efficient government operations, so as to confine the privilege within in [sic] its proper scope. Narrow construction of this privilege would also prevent the privilege from “swallowing” an open records or freedom of information**

**law, and permit disclosure of information that is of legitimate public interest** concerning “the formation and conduct of public policy—the [discussions,] deliberations, decisions, and actions of government agencies.” Haw. Rev. Stat. § 92F-2 (1993).

The OIP is persuaded that, as in the Army Times case, aggregate opinion survey results, while predecisional, are primarily factual and do not qualify for protection by the common law deliberative process privilege. The OIP also believes the decisions in the Vaughn and Moser cases, and in Texas Open Records Decision Nos. 209 and 464 **appropriately balance the often competing policies underlying freedom of information laws, and those that underlie the deliberative process privilege.** Disclosure of aggregate, or statistical, opinion survey data is not likely to impair the agency’s ability to obtain frank and candid opinions from the survey participants.

Accordingly, it is the OIP’s opinion that the disclosure of aggregate data compiled from the responses of the survey respondents to objective standardized survey questions, and summaries thereof, are largely factual in nature and would not significantly impair or harm the consultative functions of government by depriving it of candid responses to future surveys. Therefore, the **OIP finds that aggregate data in the survey reports prepared by SMS are not protected by the deliberative process privilege** recognized under section 92F-13(3), Hawaii Revised Statutes, and must be disclosed upon request.

**In contrast, the OIP finds that disclosure of the verbatim comments of those who responded to the surveys, including verbatim comments reproduced in report summaries, may be withheld** by the Office of the Governor under the deliberative process privilege recognized by section 92F-13(3), Hawaii Revised Statutes. In our view, **release of those responses could identify the individuals making the evaluations and recommendations, and disclosure of such responses could stifle the frank exchange of ideas and opinions, and cause injury to the quality of the decision-making process.**

In brief, it is the opinion of the OIP that the Office of the Governor should make the SMS Survey reports available for public inspection and copying, after it segregate[s], or deletes, the verbatim comments of survey respondents.

OIP Opinion Letter No. 95-24 at 21-22. As this opinion demonstrates, **OIP has narrowly construed the DPP to be consistent with the need for efficient government operations while preventing the privilege from swallowing the UIPA’s requirement to form and implement public policy as openly as possible, and concluded in that case that the DPP only protected those portions of deliberative material that could stifle the frank exchange of ideas and opinions and injure the quality of the decision-making process.**

Thus, with significant limitations and while often concluding that all or portions of requested records were not protected from disclosure, OIP has recognized the DPP in these and many other cases since 1989. Because OIP was not a party in Peer News and was not asked for a decision before the case was taken directly to the courts, it did not see the “narrative budget memo” that was withheld by the

City, so it cannot determine if the requested document would have met OIP's requirements to be protected from disclosure under the DPP.

**Based on the Appellees' arguments, however, the Court construed the DPP much more rigidly than OIP has refined it over time and the Court characterized the DPP as being automatically applied once records were found to be predecisional and deliberative, without consideration of any limitations or balancing of interests that even the Appellant had argued as an alternative position.<sup>20</sup> Consequently, although the dissenting opinion would have salvaged the DPP by explicitly adopting a balancing test, the majority opinion in Peer News rejected altogether the use of the DPP and of "decision-making" as a function that may be considered under the frustration exception to disclosure of HRS § 92F-13(3).**

## **II. A COMPARISON OF THE HAWAII SUPREME COURT'S MAJORITY AND DISSENTING OPINIONS**

Both the majority and dissenting opinions construed OIP's opinions and agreed that the DPP (as had been described by Appellees) creates an overly broad exception to the UIPA's general rule requiring public access to government records, and their rationales will be discussed later. The majority and dissenting opinions, however, disagreed on whether OIP's recognition of that privilege under HRS § 92F-13(3) was palpably erroneous and not supported by the language or legislative history of the UIPA. After examining the UIPA's language and legislative history, the majority opinion concluded that OIP had palpably erred in adopting the DPP, while the dissenting opinion disagreed with this "extreme" position rejecting any DPP and concluded that OIP had not been palpably erroneous in recognizing the DPP.<sup>21</sup> Majority at 2-3, 31-32; Dissent at 3-5, 26, 32. The dissenting opinion went on to suggest a "middle ground approach that would require more detailed justification by the agency asserting the privilege and require a court to balance the government's interest in confidentiality with the public's interest in disclosure," citing City of Colorado Springs v. White, 961 P.2d 1042 (Colo. 1998) (en banc). Dissent at 4-5. While recognizing that "the dissent's approach may well represent sound policy," the majority opinion rejected the middle ground approach and stated 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" as "no such exception exists in the UIPA." Majority at 39-40.

This section of the analysis will contrast the majority and dissenting opinions views on the first issue addressed by the Court: Was OIP's recognition of the DPP palpably erroneous under the plain language of the UIPA and the legislative intent?

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<sup>20</sup> As an alternative argument, the Appellant had cited OIP Opinion Letter N. 95-24 and argued that "OIP also has indicated support for the deliberative process privilege as a 'qualified privilege' that requires balancing against the public interest in disclosure" and "the need to balance the public interest in disclosure falls squarely within the Legislature's intent." Appellant's Opening Brief at 26 ([Attachment C](#)); Appellant's Reply Brief at 10.

<sup>21</sup> Like the dissent, the First Circuit Court in this case had determined that OIP was not palpably erroneous in recognizing the DPP. Peer News v. City, Civ. No. 15-1-0891-05 VLC, Order Granting Defendant City and County of Honolulu and Department of Budget and Fiscal Services Motion for Partial Summary Judgment on Count I of the Complaint Filed October 19, 2015 (January 13, 2016).

**A. Was OIP’s Recognition of the DPP Palpably Erroneous?**

Both the majority and dissenting opinions agreed that OIP’s interpretation of the UIPA is subject to the “palpably erroneous”<sup>22</sup> standard of review by the courts under HRS § 92F-15(b) (2012 and Supp. 2017). Majority at 12-13; Dissent at 6. Both opinions also recognized that “[t]he legislature has provided that OIP’s interpretations of the UIPA in an action to compel disclosure should generally be considered precedential.” Majority at 29; Dissent at 6.

After looking at the “plain language” of the statute and its legislative history, the majority concluded that OIP’s recognition of the DPP was palpably erroneous. Moreover, the majority opinion held that the DPP could not be supported under either the frustration exception at HRS § 92F-13(3) or the state or federal law exemption under HRS § 92F-13(4).<sup>23</sup> Majority at 30-32, n. 24

In contrast, apparently without “a definite and firm conviction that a mistake has been made,”<sup>24</sup> the dissent concluded that it was not palpably erroneous for OIP to have adopted a DPP.

**1. “Plain language” of the UIPA**

Both the majority and dissenting opinions looked to the UIPA’s policy encapsulated in HRS § 92F-2, which states:

In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy—the discussions,

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<sup>22</sup> The UIPA’s legislative history expressly states that the “palpably erroneous” standard of review is a strong standard of review that would accord a presumption of validity and require the courts’ deference to OIP’s factual and legal determinations concerning the administration and interpretation of the UIPA and Sunshine Law, unless such determinations are “palpably erroneous” and result in a definite and firm conviction that a mistake has been made. See, e.g., Right to Know Committee v. City Council, 117 Haw. 1, 175 P.3d 111 (2007); Aio v. Hamada, 66 Haw. 401, 664 P.2d 727 (1983).

Park and Brooks, 2013 Law and Administrative Rules Governing Appeal Procedures of Hawaii’s Office of Information Practices, 36 U. Haw. L. Rev. 271, 291 (2014), citing H. Conf. Rep. No. 105-12, 26th Leg., 2012 Reg. Sess., Haw. H. J. 823, 824-25 (2010) (written remarks of Representative Gilbert Keith-Agaran) (emphasis added). Nearly identical comments, with minor non-substantive changes, were included in the Senate Journal by Senator Clayton Hee. See 2012 Haw. Sen. J. 663-64 (comments of Senator Clayton Hee on S.B. 2858, S.D. 1, H.D.2., C.D. 1). See also Kanahele v. Maui County Council, 130 Haw. 228, 245-46, 307 P.3d 1174, 1191-92 (2013) (applying in a Sunshine Law case the palpably erroneous standard of review found in HRS § 92-12(d) (2012), which was enacted in 2012 by Act 176, the same legislation that established the palpably erroneous standard in the UIPA).

<sup>23</sup> HRS § 92F-13(4) states that disclosure is not required of “[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure.” This provision was not a basis for OIP’s adoption of the DPP.

<sup>24</sup> See n. 22, supra.

deliberations, decisions, and action of government agencies—shall be conducted as openly as possible.

The policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii.

This chapter shall be applied and construed to promote its underlying purposes and policies, which are to:

- (1) Promote the public interest in disclosure;
- (2) Provide for accurate, relevant, timely, and complete government records;
- (3) Enhance government accountability through a general policy of access to government records;
- (4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and
- (5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy.

Majority at 16 (underlined portion emphasized in majority opinion); Dissent at 9 (bolded portion emphasized in dissenting opinion).

Both opinions also recognized that the UIPA expressly states in HRS § 92F-11(a) that “[a]ll government records are open to public inspection **unless access is restricted or closed by law.**” Dissent at 9 (emphasis added); see Majority at 5, n 2 (quoting, without discussion, this provision as an agency’s affirmative disclosure obligation).

While both opinions looked to this “plain language” of the UIPA, they disagreed on how to interpret it. See Majority at 19; Dissent at 9.

The majority opinion strictly construed the UIPA’s policy to require “‘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.” Majority at 15-17, n. 14. Accepting Appellees’ interpretation of the DPP as protecting all pre-decisional, deliberative records without a determination that disclosure would frustrate a legitimate government function, 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. Majority at 14–19. The majority opinion went on to state, “As this court has long held, ‘no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute.’” Majority at 17. 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).” Majority at 18-19.

The dissenting opinion emphasized the statutory language in bold above: “as possible” and “unless access is restricted or closed by law.” The dissenting opinion stated that “the inclusion of such qualifying language in the UIPA supports that the Legislature may have intended for certain ‘discussion, 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.” Dissent at 9-10. 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. Dissent at 9-10.

The dissenting opinion, moreover, recognized that the Legislature delegated authority to interpret the UIPA to OIP under HRS § 92F-42, and thus disagreed that OIP’s adoption of a DPP is palpably erroneous. Dissent at 3-4, 6, 8, 26, 32.

## **2. Legislative intent**

Besides disagreeing on the meaning of the “plain language” of the statute, both opinions disagreed as to whether the Legislature intended to omit the DPP as an exception to the general policy of disclosure. While both opinions looked to the legislative history summarized earlier, they came out with completely opposite conclusions.

The majority opinion began its analysis of the legislative history with a discussion of the Governor’s Committee Report that led to the adoption of the UIPA. Majority at 19. The majority recognized that the Governor’s Committee had cited the testimony of Honolulu’s Managing Director to state that internal agency correspondence and memoranda “are not currently viewed as public records by government officials under chapter 92, HRS, though there are records which the courts have opened up on an individual basis.” Majority at 21, citing Vol. I Governor’s Committee Report at 101. The majority opinion, however, concluded that “this view was inaccurate” after reviewing the applicable statutes and caselaw that existed prior to the enactment of the UIPA and determined that “deliberative, pre-decisional agency records were open to public inspection under the plain language of HRS Chapter 92.”<sup>25</sup> Majority at 21-22.

In support of its view that deliberative, pre-decisional agency records were open to public inspection prior to enactment of the UIPA, the majority opinion stated “[i]t is therefore unsurprising that both available court decisions on the subject resulted in an order that the government agency disclose the deliberative materials sought,” citing the following Circuit Court orders: Pauoa-Pacific Heights Cmty. Grp. v. Bldg. Dep’t, 79 HLR 790543, 790556 (Jan. 9, 1980) (Pauoa-Pacific Heights) and Honolulu

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<sup>25</sup>

For the pre-UIPA laws, see n. 3, supra, and [Attachment V](#).

Advertiser, Inc. v. Yuen, 79 HLR 790117, 790120, 790128 (Oct. 10, 1979) (Honolulu Advertiser).<sup>26</sup>  
Majority at 22.

The dissenting opinion disagreed with the majority's "plain language" interpretation of HRS Chapter 92 or that the Managing Director's testimony was inaccurate. Dissent at 22, n. 3. The dissent noted that "it is possible that certain internal agency memoranda and communications, including those generated during an agency's decision-making and policy development processes, did not constitute 'public records' within the meaning of HRS § 92-50, and therefore, were not available to the public prior to the enactment of the UIPA." Id. Even after taking into account testimony that had contradicted the Managing Director's testimony, the dissent stated, "it appears that the record remains ambiguous as to whether inter- or intra-agency deliberative communications generated during an agency's decision-making process were publicly available prior to the UIPA's enactment." Id.

The majority opinion examined the legislative process before the frustration exception in HRS §92F-13(3) was ultimately adopted. The majority recounted the House Draft's incorporation of twelve exceptions to disclosure, specifically including an exemption for deliberative agency records. Majority at 23. It noted that the Senate heard testimony from a number of parties critical of this exemption. Id. at 25. The Senate Draft removed the twelve exemptions and instead added four more general exemptions, and in the accompanying committee report SSCR 2580 cited nine of the twelve exemptions as examples of records for which disclosure would frustrate a legitimate government function. Id. at 26. The majority noted that two of the excluded exemptions, relating to nondiscoverable litigation materials and individually identifiable records, were encompassed in other provisions of the Senate Draft. Id. at 27 and n. 19. The Senate examples in SSCR 2580 were later referenced in the Conference Committee's report before stating, "The records which will not be required to be disclosed under [this section] are records which are currently unavailable. It is not the intent of the Legislature that this section be used to close currently available records, even though these records might fit within one of the categories in this section." Majority at 27-27, citing CCR 235 at 3 (emphasis in majority opinion). The majority concluded that this legislative history "indicates that the legislature made a conscious choice not to include a deliberative process privilege in the UIPA because it would close off records that were historically available to the public under Hawai'i law." Majority at 28 (footnote omitted).

Examining the same legislative history, the dissenting opinion concluded "that the legislative history underlying the UIPA does not actually indicate that the Legislature clearly intended to omit the deliberative process privilege from the UIPA." Dissent at 13. The dissent pointed to the Senate committee report accompanying the Senate Draft, which stated:

4. A new Section 92-53 is added to create four categorical exceptions to the general rule. Rather 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 in the grey areas and

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<sup>26</sup> "HLR" stands for Hawaii Legal Reporter, a publication found at the law library of the William S. Richardson School of Law. The president of the publisher of the HLR described it in the introduction as being "a unique service for Hawaii's legal and business communities, designed to report on significant legal information drawn from many sources, to be used as guidelines or supportive material by attorney, businesses and government officials, as well as the public at large." George Mason, Vol 79 Hawaii Legal Reporter (January 18, 1980) ([Attachment I](#)). See [Attachments J](#) and [K](#) for the HLR opinions cited above.

unanticipated cases, under the guidance of legislative policy. To assist the Judiciary in understanding the legislative intent, the following examples are provided.

Dissent at 14, citing SSCR 2580 (emphasis in dissenting opinion). The dissenting opinion went on to examine the Conference Committee report cited by the majority above, but also emphasized the first sentence as follows: “The records which will not be required to be disclosed under Section -13 are records which are currently unavailable.” Dissent at 16, citing CCR 235 at 3.

Based on its reading of the same legislative history, the dissent gave three reasons for concluding “that the legislative history of the UIPA does not evince a clear legislative intent to discard the deliberative process privilege.” Dissent at 17. First, the dissent noted that although the DPP was not included in the Senate’s list of examples, “the Senate did not suggest that this list was exhaustive or exclusive” and the omission of the privilege from the list “illustrates, at most, an ambiguous intent.” Id. The dissent noted that while the Senate may have intended to reject the privilege, “it is equally possible that, based on the Senate’s intent to ‘rely on the developing common law . . . in grey areas and unanticipated cases,’ the Senate omitted the deliberative process privilege from its list of examples to allow common law principles to determine whether such documents could fall within HRS § 92F-13(3).” Majority at 17, citing see SSCR 2580 at 3.

Second, the dissent noted that “in other instances where the Senate rejected a rule encompassed in a provision in the House version of H.B. 2002, the Senate expressly stated its intent to do so.” Dissent at 18. Instead, “the Senate did not include such express language suggesting an intent to reject the deliberative process privilege.” Id.

Third, the dissent noted that “the Senate explicitly expressed an intent to adopt a few categorical exceptions ‘[r]ather than list specific records in the statute, at the risk of being over- or under-inclusive.’” Dissent at 19, citing SSCR 2580 at 3. “The Senate explained that its categorical approach, supplemented by application of common law principles, was preferable because the common law was available and ‘ideally suited to the task of balancing competing interest[sic] in the grey areas and unanticipated cases, under the guidance of the legislative policy.’” Id. The dissent concluded that “[i]n this context, the Senate’s statement regarding the common law illustrated an intent to adopt broader categorical exceptions to the general rule requiring access, reject the House’s proposed laundry list of more specific exceptions, and utilize the common law to clarify the ambiguities that might arise when applying the exceptions in new and unforeseen circumstances.” Dissent at 20.

The dissenting opinion further rejected as inapplicable Appellant’s argument, which the majority opinion accepted, that the Legislature had rejected the DPP as an evidentiary privilege when it had earlier adopted the Hawaii Rules of Evidence (HRE) and in particular, HRE Rule 501. Dissent at 23-24; Majority at 28, n. 20. The dissent also rejected as inapplicable the Appellant’s additional argument concerning the Legislature’s actions subsequent to the UIPA’s enactment that removed language recognizing the DPP from a bill relating to the Employees’ Retirement System (ERS). Dissent at 24-25. Instead, the dissent took the contrary view that the Senate’s initial inclusion of the language “subject to the deliberative process privilege under section 92F-13(3)” in S.B. 1208 during the 2015 session “arguably implies that the Senate had acknowledged and accepted the deliberative process privilege under the UIPA, insofar as the Senate attempted to import the doctrine from the UIPA into the ERS.” Dissent at 26.



The dissent concluded that “the plain language of the UIPA, the legislative history underlying the UIPA, and the Legislature’s actions prior and subsequent to the UIPA’s enactment do not suggest to me that the Legislature clearly intended to reject the deliberative process privilege as an exception to the UIPA’s general rule requiring public access to government records.” Dissent at 26. Thus, contrary to the majority, the dissent did not view OIP’s recognition of the DPP under HRS § 92F-13(3) to be palpably erroneous.

### III. KEY FACTS AND ARGUMENTS NOT DISCUSSED BY EITHER THE MAJORITY OR DISSENTING OPINIONS, AND SUBSEQUENT LEGISLATIVE PROPOSALS

Absent from the both the majority and dissenting opinions were important materials and arguments that apparently were not presented to the Court.<sup>27</sup>

**First, there was substantial additional evidence, not cited in the majority opinion, to support the Governor’s Committee Report’s statement that internal agency correspondence and memoranda “are not currently viewed as public records by government officials under Chapter 92, HRS, though there are records which the courts have opened up on an individual basis.”** Majority at 21, citing [Vol. I Governor’s Committee Report](#) at 101 (emphasis added). The majority had considered this view to be “inaccurate” and noted that it was “based on testimony from the Honolulu Managing Director.” *Id.*; see [Attachment L](#) for testimony of Managing Director Jeremy Harris. **The majority, however, did not cite any of the Exhibits found in the Governor’s Committee Report with Managing Director Jeremy Harris’s testimony, which included adopted rules and legal memoranda supporting his testimony that internal documents were not public records.**

As earlier described, Exhibit A consisted of the Managing Director’s “Rules and Regulations Governing the Accessibility, Maintenance and Storage of Public and Confidential Records of All City Agencies” (MD’s Rules), which had been duly adopted on October 18, 1978. Vol. III Governor’s Committee Report at 369-77, Exhibit A ([Attachment M](#)). In the section defining confidential records, the rules clearly exempted from public access and deemed confidential records “related solely to the internal personnel, rules and procedures of an agency,” “[i]nteragency or intraagency memorandums or letters which would not be available by law to a party other than one in litigation with the agency, and “[a]ny record which falls within a common law privilege of confidentiality.” Vol. III Governor’s Committee Report at 374-75 ([Attachment M](#)). These City rules clearly supported the Managing Director’s June 22, 1987 written testimony that “[t]he current laws prevent public disclosure of various government records, including, but not limited to, . . . inter- and intra-agency correspondence or memoranda” and that “[t]he City is of the opinions that these records must continue to be confidential.” Vol. II, Governor’s Committee Report at 126 ([Attachment L](#)).

Also included with Harris’s testimony as Exhibit B was the previously described December 1983 memo by Deputy Corporation Counsel Kathleen A. Callaghan, which opined that the MD’s Rules continued to apply to non-personal records, even though the personal record rules adopted by the State would supersede the MD’s Rules with respect to personal records. Vol. II Governor’s Committee Report

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<sup>27</sup> The appellate briefs are attached as follows: Plaintiff-Appellant’s Opening Brief dated May 2, 2016 ([Attachment C](#)); State of Hawaii’s Amicus Brief dated June 13, 2016 ([Attachment D](#)); Defendants/Third-Party Plaintiffs-Appellees City and County of Honolulu, and Department of Budget and Fiscal Services’ Answering Brief dated July 27, 2016 ([Attachment E](#)); and Plaintiff-Appellant’s Reply Brief dated August 22, 2016 ([Attachment F](#)).

at 382 ([Attachment N](#)). This memo also supported Harris's testimony that current laws, in the form of the MD's Rules, prevented public disclosure of inter- and intra-agency correspondence or memoranda, and further demonstrates that the person who was to become OIP's first Director<sup>28</sup> clearly knew of these City rules and their legal import.

Another Deputy Corporation Counsel's memorandum included with Harris's testimony as Exhibit D supported his testimony by advising that building permit plans, prior to issuance of the permit, were not "public records" under HRS § 92-50. Vol. III Governor's Committee Report at 475-77 ([Attachment O](#)). This memorandum distinguished the Circuit Court's decision in Pauoa-Pacific Heights, where the court had ordered disclosure of building plans and specifications. As Exhibit D noted, the Circuit Court's January 9, 1980 order did not mention the term "public records" or section 92-50, HRS, so the basis for the Circuit Court's decision was unclear. Instead, based on a prior opinion of the Corporation Counsel's office (SR 73-4) that had previously opined that building permit plans were not public records prior to approval of the permit, the memo likewise reasoned that (1) the specifications and design details were subject to change during the review process and were not final products until approved; (2) the plans were not "required to be kept by law" where the permit was not issued; and (3) they were the applicant's private property, which the applicant could withdraw at any point, and did not become public records until after issuance of the permit. Consequently, it was the Deputy Corporation Counsel's opinion that "the plans and specifications that accompany applications for building permits are not classified as 'public records,' subject to disclosure, until after the issuance of the permit." Vol. III Governor's Committee Report at 477.

Despite the importance of these exhibits supporting Harris's view that inter- and intra-agency documents were not public records, they were not discussed by the majority opinion in Peer News when it concluded that the view was "inaccurate."

**Second, even though the issue in Peer News concerned internal predecisional and deliberative documents between the City's budget office and the Mayor's office, the majority opinion did not discuss testimony in the Governor's Committee Report from the State Budget and Finance Department that considered similar internal deliberative material for the office of the Governor to be confidential.** Immediately following Harris' exhibits was testimony by Yukio Takemoto, then the Director of the State Department of Budget and Finance. Consistent with Harris's testimony, Takemoto provided written testimony dated October 14, 1987 to the Governor's Committee that described an exception from disclosure for "'staff work' which may be considered 'privileged information.' These documents include working documents, correspondence, internal references and other staff work for the Office of the Governor." Vol. III Governor's Committee Report at 615, 616 ([Attachment P](#)). **Thus, consistent with the City's assertions, the influential State Budget and Finance Department considered certain internal documents to the Governor to be "privileged" and not subject to public disclosure.**

**Third, the Peer News opinions did not refer to the August 14, 1987 testimony by Senate President Richard Wong that was also included in the Governor's Committee Report. Like the City and a key State Executive branch department, the Senate also considered certain internal budget documents to not be subject to public disclosure. ([Attachment H](#))** In his written testimony, Senate President Wong opposed a suggestion to include as "public records" the Senate's unfiled committee reports and budget worksheets prepared by the Senate Ways and Means Committee staff for use by the Senate conferees in their negotiations with the House. Senate President Wong's testimony referred to a

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See n. 4, supra.

Circuit Court decision holding that “the worksheets were not public records” and that it was “my position that such documents are confidential internal working papers of the Senate and are not public records.” Vol. III Governor’s Committee Report at 199 ([Attachment H](#)). **Although it is clear from Senate President Wong’s testimony to the Governor’s Committee that internal predecisional deliberative documents in the form of the Senate’s conference budget worksheets were held by a court to not be open to public disclosure and inspection, these facts were not cited by either opinion in Peer News, where similar internal predecisional deliberative documents in the form of the City’s budget memoranda were at issue.**

**Fourth, the Court in Peer News did not appear to have been aware of the decision referenced in Senate President Wong’s testimony, Abercrombie v. The Senate, S.P. No. 6126 (1<sup>st</sup> Cir. 1983) ([Attachment G](#)), in which internal predecisional deliberative documents of a Senate conference committee, namely operating budget worksheets, were expressly held to not be public records open to inspection under HRS §§ 92-51 and 92-52, the precursors to the UIPA.** In that 1983 case, six state Senators—Neil Abercrombie, Dante Carpenter, Benjamin Cayetano, Lehua Fernandes Salling, Duke Kawasaki, and Charles Toguchi—along with Ian Lind, a private citizen who was then the Executive Director of Common Cause, filed an Application for an Order Allowing Inspection of Certain Public Records Relating to the State Budget, which named as defendants the Senate (1983 session), Senate President Richard S. H. Wong, and Senator Mamoru Yamasaki, who was the Senate’s Ways and Means Committee Chairman and the Chairman of the Senate Conferees on the operating budget bill. Circuit Court Judge Toshimi Sodetani held an expedited hearing on April 22, 1983, which included testimony by Senators Yamasaki and Carpenter, argument by Senator Cayetano, and a Supplemental Memorandum filed in open court that day by Senators Cayetano and Fernandes Salling which stated:

Obviously, defendants must have difficulty comprehending the plain and unequivocal language of HRS 92-50 and HRS 92-51 which clearly state that the discussions, deliberations, decisions, and action of governmental agencies shall be conducted publicly and which define “public records” to be “any paper” upon which entry has been made by a “public officer” or “employee.”

[\(Attachment G\)](#)

On May 18, 1983, Judge Sodetani filed a four-page Findings of Fact, Conclusions of Law, and Order Denying the Application, which included the following factual findings:

2. The worksheets are merely internal, preliminary work papers prepared by the conferees or their staff to assist the conferees, and to be used only in their discussion and negotiations during the conference sessions.

....

7. The worksheets are no more than informal reference or working papers.

Based on the factual findings, Judge Sodetani entered the following conclusions of law:

1. The worksheets do not constitute a “public record” within the meaning and contemplation of H.R.S. § 92-50.

2. The worksheets are not official or public records of the Senate of the State of Hawaii.

3. The worksheets are not subject to public inspection pursuant to H.R.S. § 92-51.
4. The Application is without merit or legal basis, and accordingly, should be denied.

**Thus, only five years before the adoption of the UIPA, the First Circuit Court had expressly ruled that Senate conference committee budget worksheets were not public records subject to public disclosure under the public records law existing at that time.**<sup>29</sup>

Fifth, rather than citing Judge Sodevani's on point decision, the majority in Peer News cited what it apparently thought were the only two decisions concerning pre-UIPA public records law and whose distinguishable facts made it "unsurprising that both available court decisions on the subject resulted in an order that the government agency disclose the deliberative materials sought." Majority at 22. The first order cited by the majority (Majority at 22) was Pauoa-Pacific Heights Community Group v. Building Department, City and County of Honolulu, 79 HLR 790543 (First Cir., Jan. 9, 1980) ([Attachment J](#)), which as previously discussed, was distinguished in Exhibit D of Managing Director Jeremy Harris's testimony to the Governor's Committee. OIP has examined the available records in the Hawaii Legal Reporter, which show that the plaintiffs had argued (1) that the materials were public records under HRS § 92-50 and HRS § 92-1, and (2) the equities of the case in which the plaintiffs owned properties adjoining a proposed high rise condominium development and were not able to obtain the information needed to protect their interests until after the permit was issued and it would become more expensive and risky for them to contest the development. While Judge Arthur S. K. Fong's two-page order required the disclosure of "the building applications, building plans, specifications, supporting documentation and inter and intra office memorandum, reports and recommendations requested by Plaintiffs," the order is silent as to the basis for the decision. There was no specific determination that the City's internal documents were public records required by law to be disclosed, or that the facts and equities of the case demanded that all records be disclosed to the plaintiffs. As the basis for the order was not stated, Judge Fong's decision in Pauoa-Pacific Heights does not clearly support the proposition that predecisional and deliberative agency records were open to public inspection under the public records law preceding the UIPA.

The second Circuit Court order cited by the Peer News majority was also decided by Judge Arthur S. K. Fong (Majority at 22) and unsurprisingly required disclosure of all records sought because of the facts establishing a clear waiver in that case. In Honolulu Advertiser, Inc. v. Yuen, 79 HLR 790117 (October 10, 1979) ([Attachment K](#)), a Honolulu Advertiser reporter was denied access to records that had already been made fully accessible to a reporter for the rival Sun Press newspaper. Given this clear waiver, it is no wonder that the First Circuit Court's October 10, 1979 order allowing inspection determined that the agency's refusal to make the requested records available "was without good cause

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<sup>29</sup> Although the issue was raised by the plaintiffs, the Circuit Court's order in Abercrombie v. The Senate did not address a senator's right to access those documents as a member of the Senate.

Additionally, while it may be argued that Judge Sodevani's decision was ultimately codified as a separate exception for legislative materials in HRS § 92F-13(5), which expressly includes budget worksheets, that exception does not cover all internal records of a legislator. As will be discussed next, individual legislators have internal documents similar to those of state and county agencies that were previously recognized by OIP as being excepted from disclosure under the DPP and cannot be withheld under HRS § 92F-13(5).

Judge Sodevani's order was unsuccessfully appealed to the Hawaii Supreme Court, which dismissed it as moot. 67 Haw. 671 (1984).

and in derogation of HRS 92-50.” The order continued, “the State of Hawaii has no discretion to withhold the requested records contained in its files from the public unless the records requested are specifically exempted from public inspection by constitution, statute, *properly enacted regulation, or court rule[.]*” HLR at 790128. The italicized words were handwritten, and the judge apparently crossed out at the end of the sentence “or common law privilege,” over which appeared to be the judge’s initials. HLR at 790128. The majority opinion interpreted these handwritten revisions to be a specific rejection by the Circuit Court of “any argument that the government could rely upon common law principles like the deliberative process privilege to resist its statutory disclosure obligations.” Majority at 22, n. 17. A review of the available documents in the Hawaii Legal Reporter, however, shows that the common law privileges had not been argued in that case, which may have equally accounted for the judge’s striking of that phrase.

In contrast to Judge Sodetani’s detailed findings of fact, conclusions of law, and order expressly concluding that the public records law in 1983 did not require disclosure of the Senate’s budget conference worksheets ([Attachment G](#)), Judge Fong’s summary orders and the factual circumstances of the underlying cases do not clearly establish that the internal deliberative documents released in his cases were actually considered by him to be public records under the law in 1979 ([Attachments J](#) and [K](#)). **Thus, the only definitive court decision—rendered after a hearing, testimony, affidavits, and memoranda directly addressing the public records law preceding the UIPA—had clearly held that deliberative materials in the form of budget conference worksheets were not public records subject to disclosure by the Senate.**

**Sixth, contrary to the public testimony credited by the majority opinion, there is substantial evidence to show that the 1988 Legislature knew when it enacted the UIPA that internal documents were not considered public records by the State Executive branch, the City and County of Honolulu, the Senate, and the Circuit Court in [Abercrombie v. The Senate](#).** Although there had been public testimony that was critical of an exemption for inter- or intra-agency deliberative material and had claimed that it would “result in closing off access to records which are currently open to the public” (Majority opinion at 25), the 1988 Legislature knew this was inaccurate in light of the decision in [Abercrombie v. The Senate](#). Indeed, **two of the defendants in that case, Senators Wong and Yamasaki, had direct knowledge of the decision and had retained their leadership positions as Senate President and Senate Ways and Means (WAM) Committee Chair, respectively, during the 1988 session.**

**Additionally, there was extensive testimony to the Legislature from the Corporation Counsel for the City and County of Honolulu that public disclosure was not required for internal documents of government agencies. ([Attachment Q](#).)** In February 9, 1988 testimony to the House Judiciary Committee that was considering the UIPA bill, the Corporation Counsel specifically incorporated by reference Managing Director Harris’s testimony at “Volume II, pp. 116-131 and at Volume III, pp. 369-614” of the Governor’s Committee Report. ([Attachment L](#) at 1.) In his testimony regarding real property records, the Corporation Counsel further stated, “We have no objection to these categories of information being specified as records which must be disclosed. However, we would consider internal working documents, certain individually identified records, material prepared in anticipation of litigation and attorney-client communications to be confidential even though they contain ‘real property tax information.’” ([Attachment Q](#) at 5, emphasis added.) **Thus, despite the opposing testimony, the Legislature in 1988 had direct knowledge and other testimony to conclude that the pre-UIPA law did not require disclosure of certain internal documents of government agencies.**

**Seventh, if the 1988 Legislature intended to change the law to require disclosure of internal predecisional and deliberative records of government agencies, it could have expressly done so, but did not do so. Instead, in carving out the legislative and frustration exceptions from disclosure, the 1988 Legislature left it to OIP and the courts to determine to whether disclosure of such records would be required.** As subsequent Legislatures have not acted to invalidate OIP's rulings on the DPP for the past three decades by amending the UIPA, there is no express legislative intent to reject the DPP, which applies to all branches of State and County government, including the Legislature.

While the Legislature does have a specific legislative exception from disclosure for certain documents, not all legislative documents fall within it. HRS § 92F-13(5) creates a specific legislative exception that protects from disclosure “[i]nchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.” Although the plain language of this exception applies to certain internal predecisional deliberative records of legislative committee and the personal records of legislative members, it is silent as to the internal work records of individual legislators. Thus, the internal documents of individual legislators, like that of State and County agencies, were not specifically excepted from public disclosure under the UIPA.

Prior to Peer News, these internal documents of individual legislators, like that of employees in State and County agencies, would potentially have qualified for the DPP under the “frustration exception” in HRS § 92F-13(3). In OIP Opinion No. 00-01 discussed earlier and cited in the majority’s opinion, OIP specifically recognized that the DPP, with limitations, could apply under the frustration exception to the internal records of individual legislators, including correspondence between a legislator and his staff or other elected officials regarding draft language for legislation and strategy, as well as personal notes from a majority caucus.

**The types of internal records discussed in OIP Opinion Letter No. 00-01 are little different from the types of predecisional, deliberative internal documents that the State and County Legislative and Executive branch agencies have considered to be privileged and confidential, even in 1988 when the UIPA and the legislative and frustration exceptions from disclosure were enacted. They are also little different from the Court’s own internal documents, which the Judiciary sought to protect from disclosure during the 2019 legislative session.**

**After the Peer News decision, the Legislature considered bills that would have essentially made the Court’s draft opinions, law clerk memos, and other internal communications subject to public disclosure, consistent with that decision.** During the 2019 legislative session, House Bill 1478 and Senate Bill 1453 proposed changing the UIPA’s definition of “agency” to include “the nonadministrative functions of the courts,” which would essentially have placed the courts’ functions under the UIPA’s disclosure requirements. As a result, based on its decision in Peer News that eliminated the DPP and the use of decision-making to justify nondisclosure of internal government records, the Court’s own internal deliberative documents could have become subject to the UIPA’s disclosure requirement.<sup>30</sup>

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<sup>30</sup> House Bill 1478 and Senate Bill 1453 contained identical content and were entitled, “Relating to the Uniform Information Practices Act.” When these bills were introduced, OIP immediately recognized the (continued on next page)

**For the same reasons that the Executive and Legislative branches had been allowed by the DPP to withhold internal decision-making records, the Judiciary opposed making public its own internal decision-making documents, such as draft opinions and law clerk memos.** In identical written testimony to the Legislature, the Judiciary strongly opposed both bills, testifying that publicly disclosing its draft opinions and written communications between justices, law clerks, and others “*could create a chilling effect that would substantially inhibit the flow of communication, and could adversely impact the very decision-making process that is imperative to well-conceived and appropriately vetted court opinions.*”<sup>31</sup> Other testifiers explained that “[t]he courts would be **less likely to freely and fully communicate with staff and other judges about issues in cases, because documents containing such information would then be accessible to parties and others in ongoing cases or for use in subsequent cases.** . . . [P]arties would constantly seek access to pre-decisional documents in an effort to impact cases,” thereby disrupting case management, delaying resolution of litigation, and impairing merit-based decisions.<sup>32</sup>

These reasons for not wanting the courts’ internal decision-making open to public access were the same reasons OIP cited in recognizing the DPP that applied for nearly 30 years to all agencies as currently defined by the UIPA, thus covering the Executive and Legislative branches as well as to the Judiciary’s administrative functions. OIP discussed the “chilling effect” in one of its earliest opinions, explaining why the DPP justifies an exception from disclosure to prevent frustration of an agency’s decision-making function.

[I]t serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency’s action.

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adverse impact they would have on the Judiciary and the ensuing possibility of a separation of powers battle between the Judiciary, Legislature, and Executive branches. Thus, consistent with its practice and duty under HRS § 92F-42(7) to recommend legislative changes, OIP provided testimony advising against changing the UIPA’s “agency” definition to include the courts’ functions, informing the Legislature of the Peer News decision, and suggesting amendments on both bills. ([Attachments W](#) and [X](#).)

<sup>31</sup> The Judiciary’s testimony on House Bill 1478 to the House Judiciary Committee (February 12, 2019) and on Senate Bill 1453 to the Senate Judiciary Committee (February 20, 2019) ([Attachment Y](#)) (emphasis added).

<sup>32</sup> Testimony of Ivan M. Lui-Kwan and John M. Tonaki on House Bill 1478 to the House Judiciary Committee (February 12, 2019) and their testimony dated February 15, 2019 on Senate Bill 1453 to the Senate Judiciary Committee (February 20, 2019) ([Attachment Z](#)) (emphasis added).

Other parties’ testimony and any updated status on the bills can be found at the Legislature’s website at <https://www.capitol.hawaii.gov>.

OIP Op. Ltr. No. 90-8 at 5 (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)). Of particular concern was the chilling effect on the free exchange between employees and their superiors during the editing process of draft documents, which could expose the tentative substance, wording, and format proposed by an employee and the editorial judgments of a superior who accepted, rejected, or revised the draft. Id. at 8.

Similarly, in OIP Opinion Letter No. 04-12, OIP further explained

[t]he rationale behind this privilege is “the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance ‘the quality of agency decisions,’ by protecting open and frank discussion among those who make them within the Government.”

OIP Op. Ltr. No. 04-12 (quoting Tigue v. United States DOJ, 312 F.3d 70, 76 (2<sup>nd</sup> Cir. 2002) (citations omitted)). Thus, the same chilling effect on the Judiciary would seem to equally apply to the Executive and Legislative branches of government.<sup>33</sup>

As of February 28, 2019, the Legislature deferred decision-making on House Bill 1478 and Senate Bill 1453, so the bills will carry over to the 2020 session but will no longer be considered during the 2019 session. Whether or not the Legislature will take further action is unknown. **In the absence of any legislative action or expression of its intent, OIP will continue to adhere to the Peer News decision and has already been advising agencies that they can no longer use the DPP or argue that decision-making is a function that could be frustrated to justify an exception to disclosure under HRS § 92F-13(3).**

#### **IV. What Guidance was Provided by the Hawaii Supreme Court?**

OIP has closely examined both the majority and dissenting opinions for guidance on how to implement the Peer News decision.

While the dissent disagreed that OIP had palpably erred in recognizing the DPP, it did conclude that a rigid two-part test to determine whether a document falls within the DPP is palpably erroneous. Dissent at 26. Interpreting the DPP to be automatically applied after a two-part test, the dissent objected to it as broadly shielding from public access a document that is (1) predecisional because it “was generated within a specific chronological window (i.e., at some point during the deliberative process prior to the adoption of an agency policy or finalization of an agency decision)”; and (2) deliberative because its “contents contained personal opinions, advice, or recommendations of agency staff that played some role, regardless of how significant or minute, in the deliberative process.” Dissent at 29. Thus, the dissent stated, “[a]s a consequence of this test’s application, an extensive,

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<sup>33</sup> During the Senate Judiciary Committee’s hearing on February 20, 2019 regarding Senate Bill 1453, a Senator questioned the Judiciary’s Chief Staff Attorney and Director about the Peer News decision and asked whether the Executive and Legislative branches’ decision-making functions were equally important as the Judiciary’s adjudicatory function.



sweeping range of documents – all documented inter- and intra-agency communications generated in the course of agency decision-making and policy development – is completely shielded from public view.” Id.

The dissent, however, 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.” Dissent at 30. Even the Appellant, as an alternative argument, had advocated for the adoption of a balancing approach.<sup>34</sup>

The dissent likened its approach to the test developed by the Colorado Supreme Court in City of Colorado v. White, 967 P.2d 1042 (Colo. 1998), which imposed technical procedural requirements on the government that could be established through an indexing system,<sup>35</sup> and would

(1) provide a specific description of the document claimed to be privileged; (2) explain why the document qualifies for the privilege, including descriptions of the deliberative process to which the document is related and the role played by the document in that process; (3) discuss why disclosure of the document would be harmful; and (4) in the case of a large document, distinguish between those portions of the document that are disclosable and those that are allegedly privileged.

Dissent at 30-31, citing White, 967 P.2d at 1053. After establishing a preliminary showing through an indexing system, the dissent further proposed that the government’s interest in confidentiality be balanced with the discoverants’ interest in disclosure of the materials. Id. at 31. 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. at 32.

The majority opinion rejected the dissent’s proposed approach. Majority at 36. The majority stated that “material differences in Colorado’s public records statutes and evidentiary rules make White inapposite to Hawai`i’s UIPA, and 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.” Id. at 37. Unlike Colorado, the majority asserted that Hawaii’s Rules of Evidence do not allow for common law privileges and concluded that there was “no basis to incorporate a common law qualified deliberative process

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<sup>34</sup> Appellant’s Opening Brief at 26 ([Attachment C](#)); Appellant’s Reply Brief at 10. See n. 20, supra.

<sup>35</sup> The dissenting opinion described the indexing system that is widely known as the “Vaughn index,” which is used by federal courts interpreting FOIA and had first been introduced in Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973). Dissent at 31, n. 6. OIP testified to the Legislature that a Vaughn index could be required as necessary by OIP or the courts when considering an appeal on a case-by-case basis, and that it was not necessary to statutorily mandate it in all cases. OIP generally obtains the same information on its Notice to Requester form and did not believe that the page-by-page, line-by-line technical minutiae required by a Vaughn index was necessary in most cases, particularly since the great majority of UIPA requests are not appealed to OIP or the courts, and when they are, OIP typically reviews the entire record. OIP testimony on HB 1478 at 6-7 ([Attachment W](#)); OIP testimony on SB 1453 at 9 ([Attachment X](#)).

privilege or the balancing test it encompasses into the UIPA.” *Id.* at 38. The majority also noted that the balancing test explicitly recognized in HRS § 92F-14(a)<sup>36</sup> had no analogous provision for the HRS § 92F-13(3) frustration exception. *Id.* at 39. 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 39-40.

The majority opinion provided guidance as to the application of the frustration exception and used as a starting point the examples found in SSCR 2580. 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.” *Id.* at 33. The majority 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 33-34. 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 34, n. 25.

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.” *Id.* at 34 (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 majority 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 under HRS § 92F-13(3) was not justified because the university “has

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<sup>36</sup> This test is used to determine whether disclosure would be a clearly unwarranted invasion of personal privacy. It requires a balancing of the public interest in disclosure against the privacy interest of an individual when a requested record contains personal information about that individual. HRS §§ 92F-14(a), 92F-13(1) (2012; Supp. 2018).

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.* at 34-36 (emphasis in original).

Significantly, the majority in footnote 15 on page 18 of its opinion recognized that certain types of deliberative communications may still 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 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.

Id. at 18-19, n. 15 (emphasis added).

With this guidance from the Court, it is now up to the agencies to provide new arguments to justify nondisclosure. If they continue to rely upon the frustration exception, the bottom line is that the DPP can no longer to be used, decision-making cannot be a government function that may be frustrated under HRS § 92F-13(3), and agencies 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.