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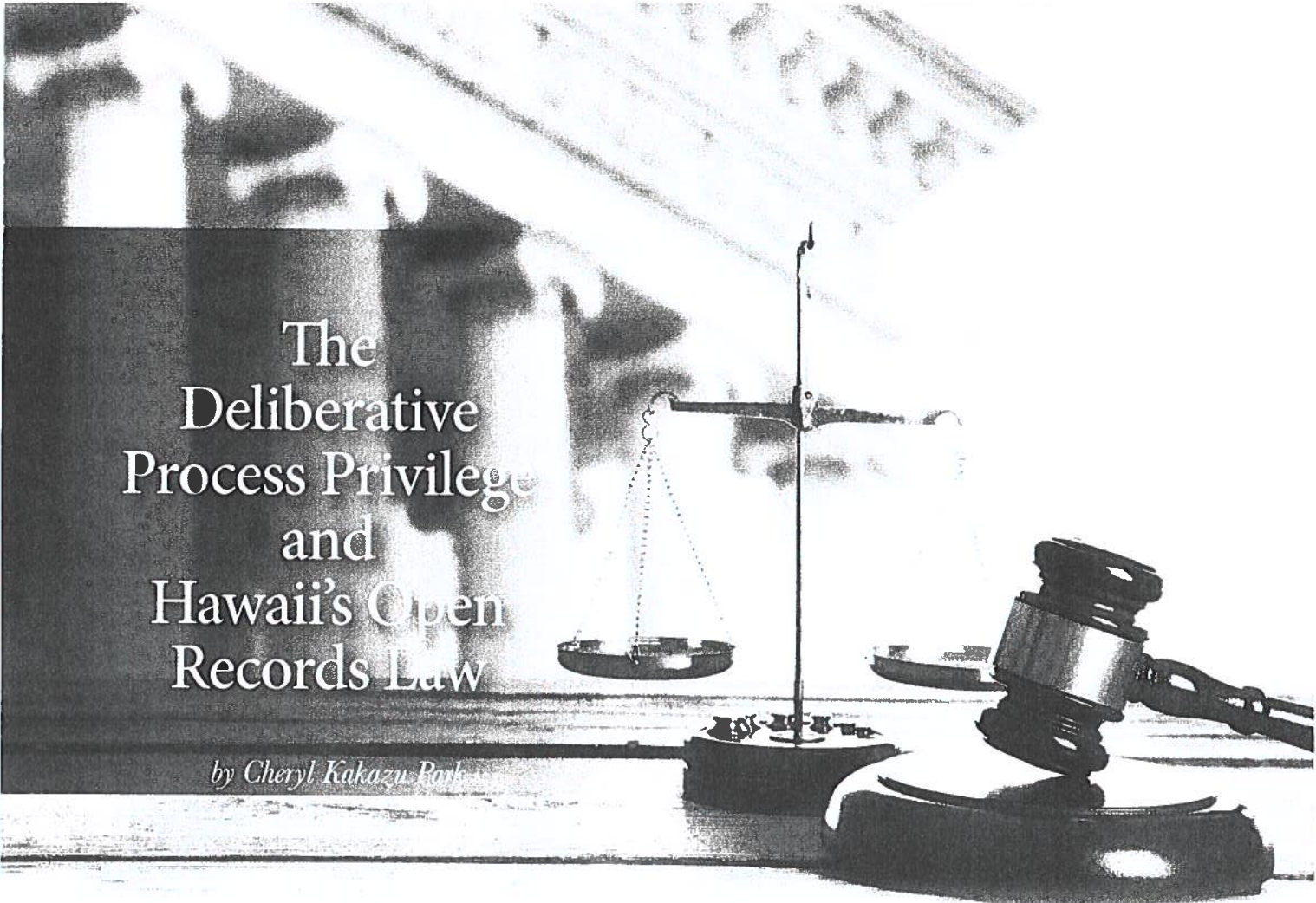
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The Deliberative Process Privilege and Hawaii's Open Records Law

by Cheryl Kakazu Park

For nearly 30 years, Hawaii's Office of Information Practices ("OIP")¹ had rendered opinions recognizing the deliberative process privilege ("DPP") as a limited form of a statutory exception to the disclosure of public records under Hawaii's open records law. In a December 2018 decision, the Hawaii Supreme Court, in a 3 to 2 decision,² abruptly rejected this practice, reversed a decision of the First Circuit Court, and held that government agencies could no longer use the DPP to justify withholding certain internal records and that "decision-making" was not a government function falling within the frustration exception of the Uniform Information Practices Act ("UIPA"), chapter 92F, Hawaii Revised Statutes ("HRS").

In *Peer News LLC v. City and County of Honolulu*, 143 Haw. 472, 431 P.3d 1245 (2018), Peer News ("Appellant") challenged a decision by the City and County of Honolulu and its Department of Budget and Fiscal Services ("BFS") (together, "Appellees") that withheld certain internal government documents generated during the process of establishing the City's annual operating budget. Neither party sought OIP's opinion, and instead Appellant directly initiated a lawsuit in the First Circuit Court pursuant to HRS § 92F-15(a) (2012).

Although Appellees filed a third-party complaint

against OIP, they stipulated to dismiss their complaint after OIP argued that it had never been asked to opine on 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 OIP's 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,"³ OIP let its prior opinions speak for themselves and left it to the Court to ultimately decide the DPP's legal effect.⁴

Since the *Peer News* decision, OIP has been advising agencies not to use the DPP or the decision-making function to justify nondisclosure under the frustration exception. In May 2019, OIP rejected the use of the DPP in OIP Opinion Letter No. F19-05, which has been appealed to the First Circuit Court in S.P. No. 19-1-0191.

OIP prepared an extensive analysis of the *Peer News* decision and preserved important legislative history and pre-UIPA court decisions, which are posted on the Opinions page at oip.hawaii.gov. OIP's online analysis (1) traces the UIPA's legislative history regarding internal

agency communications and describes the evolution of the DPP, its purposes and limitations, (2) contrasts the Court's majority and dissenting opinions, (3) preserves key facts and arguments not presented to the Court and discusses the 2019 legislative proposals addressing the DPP, and (4) interprets the Court's guidance as to how to apply the UIPA's frustration exception without the DPP. Because the detailed discussions, citations, and supporting documents are in OIP's analysis or posted on OIP's website, they will generally not be provided in this article.

Instead, this article first briefly summarizes the DPP and contrasts the opinions of the majority and dissent. Next, it discusses key facts presented to the 1988 Legislature but not to the *Peer News* Court, which might have resulted in a different judicial conclusion had they been known. Absent any change by the Court or the current Legislature, however, agencies can no longer use the DPP to justify withholding their internal deliberative records.

The Deliberative Process Privilege (DPP)

Based on the parties' representations in *Peer News*, the majority and dissent characterized the DPP adopted by OIP as a simple two-part test that shields records any time they are "predecisional" and "deliberative," citing *OIP Opinion Letter Nos. 90-3 and 04-15*. The full body of OIP opinions on the DPP, however, is much more nuanced and contains many significant limitations. OIP issued at least 38 DPP opinions before *Peer News* and concluded in at least ten opinions not cited by the Court that the DPP was not applicable, had been waived, or could not be used to shield portions of the record. Moreover, OIP has issued opinions applying the DPP to the Judiciary's administrative functions, as well as



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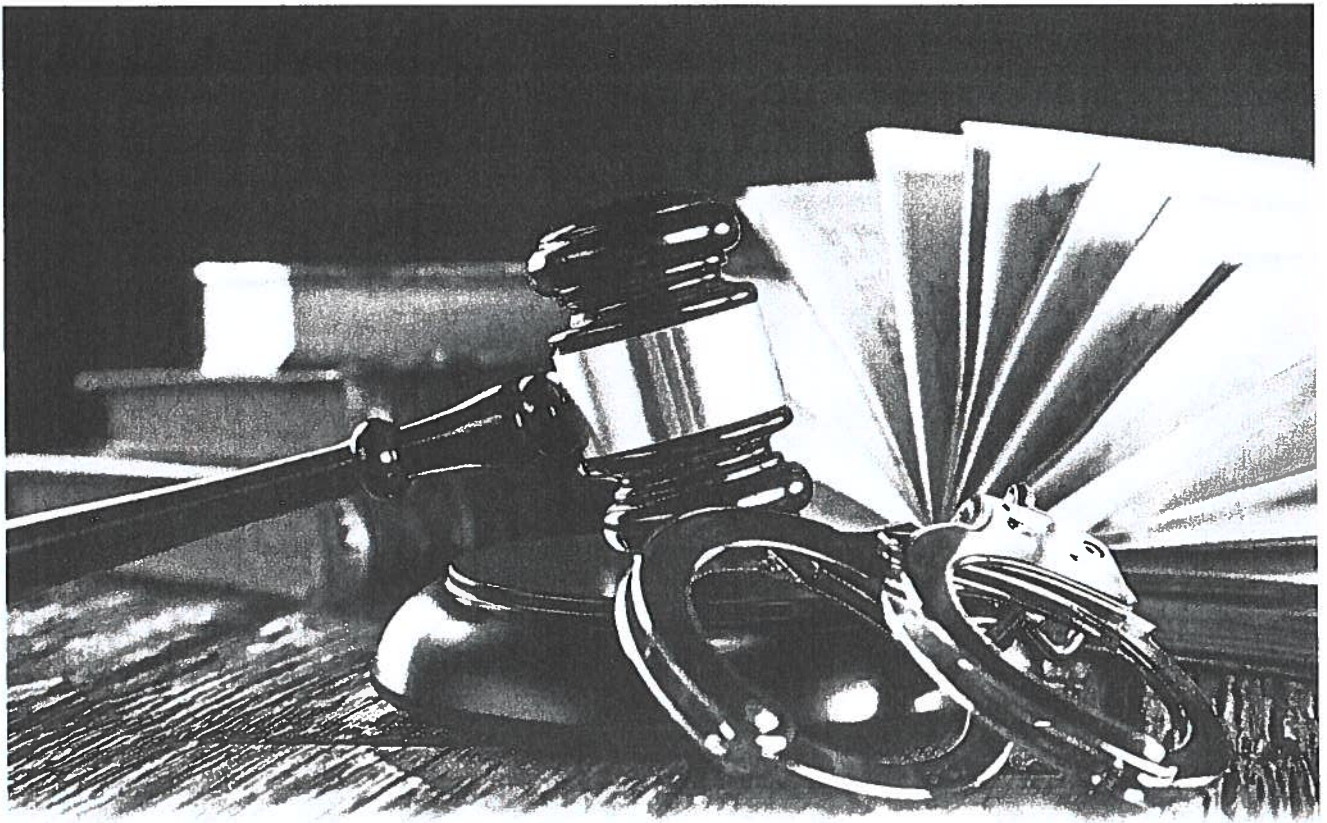
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to the Legislature.³

OIP first recognized the DPP in *OIP Opinion Letter No. 89-9*, based on the UIPA's statutory exception for "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function[.]" HRS § 92F-13(3). After closely examining this statutory exception and its legislative history, which suggested that case law under the federal Freedom of Information Act, 5 U.S.C. § 552(b)(5) ("FOIA") be consulted, OIP recognized the DPP in order to encourage the candid and free exchange of ideas and opinions within and among agencies. This candid exchange is essential to agency decision-making and is less likely to occur when predecisional and deliberative internal documents are subject to public disclosure. Over the following decades, OIP imposed limitations on the DPP, such as requiring the reasonable segregation of deliberative material from factual information and recognizing that the DPP may be waived if protected records are expressly adopted or incorporated by reference into an agency's final decision.

Moreover, while OIP's early decisions did not depend on a balancing test, OIP later evidenced an inclination to

balance competing interests to avoid having the DPP exception "swallow" the UIPA's disclosure requirements. *OIP Opinion Letter No. 95-24* at 21-22. Thus, OIP narrowly construed the DPP to be consistent with the need for efficient government operations while preventing the privilege from overwhelming the UIPA's requirement to form and implement public policy as openly as possible, and it concluded in *OIP Opinion Letter No. 95-24* 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.

Although the Appellant in *Peer News* cited *OIP Opinion Letter No. 95-24* and argued as an alternative 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 that "the need to balance the public interest in disclosure falls squarely within the Legislature's intent," the Court did not recognize the DPP as a qualified privilege and the majority rejected the dissent's suggestion to adopt a balancing approach.

A Comparison of the Majority and Dissenting Opinions

Based on their interpretations of the DPP as a simple two-part test, both the majority and dissent agreed that the DPP created an overly-broad exception to the UIPA's general rule requiring public access to government records. The majority and dissent disagreed, however, as to 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 concluded that OIP had palpably erred in adopting the DPP, while the dissent disagreed with this "extreme" position rejecting any DPP. Instead, the dissent suggested 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." While recognizing that "the dissent's approach may well represent sound policy," the majority rejected it 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."

A. "Plain Language" of the Law

Both opinions looked to the UIPA's policy in HRS § 92F-2, which states in relevant part:

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*

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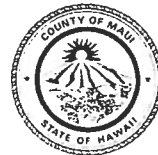
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legislature declares that it is the policy of this State *that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of government agencies—shall be conducted as openly **as possible**.*

Majority at 15 (emphasizing italicized language not bolded); Dissent at 9 (emphasizing bolded language).

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.**”

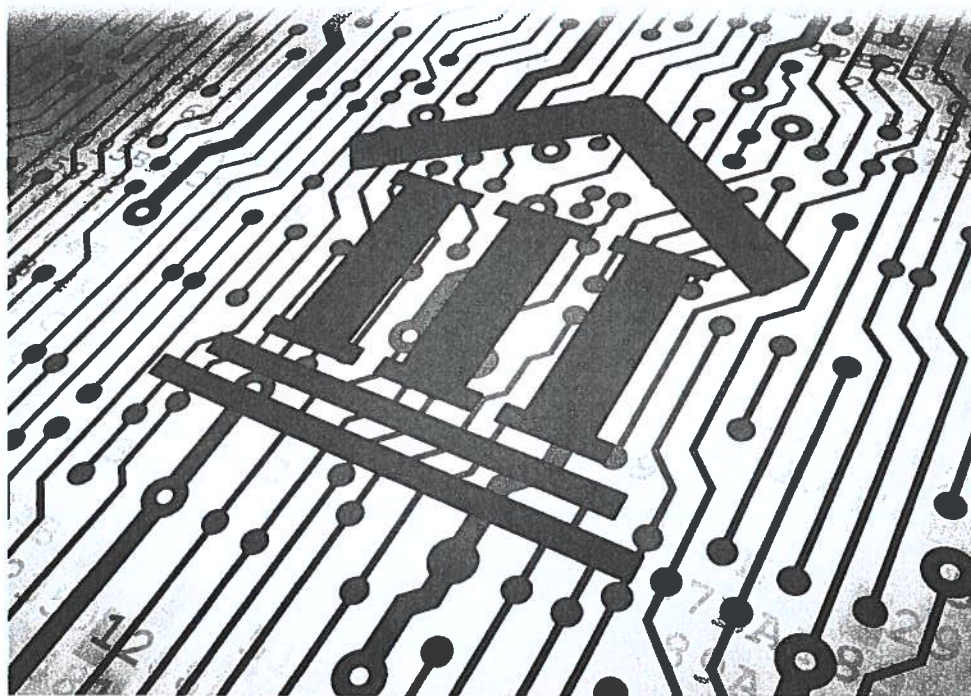
Majority at 16; Dissent at 9 (emphasizing bolded language). Although both opinions looked to the same “plain language” of the UIPA, they disagreed on how to interpret it.

The majority 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.” Accepting Appellees’ interpretation of the DPP as protecting all predecisional, deliberative records without a determination that disclosure would frustrate a legitimate government

function, the majority stated 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. The majority thus 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)*.”

The dissent emphasized the statutory language in bold above: “as possible” and “unless access is restricted or closed by law.” The dissent stated that “the inclusion of such qualifying language in the UIPA supports that the Legislature may have intended for certain ‘discussions, deliberations, decisions, and action[s] of government agencies,’ *HRS § 92F-2*, to remain confidential” and that “the recognition of a privilege that limits the disclosure of certain types of internal memoranda and communications relating to an agency’s deliberative process in the course of decision-making and policy formation is consistent with such legislative intent.” While agreeing that “the UIPA favors ensuring the transparency of and public access to our government’s decision making and policy-development processes,” the dissent found that “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. Thus, the dissent’s “plain language” interpretation directly contradicted the majority’s “plain language” interpretation.



The dissent, moreover, recognized that the Legislature delegated authority to interpret the UIPA to OIP under *HRS § 92F-42*. Thus, in contrast to the majority, the dissent disagreed that OIP’s adoption of the DPP is palpably

erroneous under the plain language of the statute.

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 examining the same legislative history, the majority and dissent again came to completely opposite conclusions.

The majority first looked at the report by the Ad Hoc Committee on Public Records and Privacy Laws, which had been convened by then Governor John Waihee ("Governor's Committee"). After public hearings, the Governor's Committee produced the four-volume *Report of the Governor's Committee on Public Records and Privacy* (Dec. 1987) ("Governor's Committee Report"), which the Legislature considered during the 1988 session.

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." The majority, however, concluded that "this view was inaccurate" after reviewing statutes and caselaw that existed prior to the enactment of the UIPA. In support of its view that deliberative, predecisional agency records were open to public inspection under HRS Chapter 92, the majority reviewed two Circuit Court orders and concluded, "[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 *Pauoa-Pacific Heights Community Group v. Building Dep't*, 79 HLR 790543 (Jan. 9, 1980) ("*Pauoa-Pacific Heights*") and *Honolulu Advertiser, Inc. v. Iuen*, 79 HLR 790117 (Oct. 10, 1979) ("*Honolulu Advertiser*").

The dissent disagreed that the Managing Director's testimony was inaccurate, noting 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 [the pre-UIPA law.] HRS § 92-50, and therefore, were not available to the public prior to the enactment of the UIPA." 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."

Besides disagreeing over the state of the pre-UIPA law, both opinions also disagreed as to the Legislature's intent in adopting the UIPA in 1988. The majority recounted the House Draft's incorporation of twelve exceptions to disclosure, specifically including an exemption for deliberative agency records. It noted that the Senate heard testimony from a number of parties critical of this exemption. The Senate Draft removed the House Draft's twelve exemptions and instead added four more general exemptions, and in its accompanying committee report SSCR 2580, the Senate cited nine of the twelve exemptions as examples of records for which disclosure would frustrate a legitimate government function. The majority noted that two of the excluded exemptions, relating to non-discoverable litigation materials and individually identifiable records, were encompassed in other provisions of the Senate Draft, but the exemption for deliberative agency records was not reinstated. The Senate examples in SSCR 2580 were later referenced in the Conference Committee's report, which further stated, "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." 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 Hawaii law."

Examining the same legislative history, the dissent 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." The dissent pointed to the same 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 unanticipated cases, under the guidance of legislative policy. To assist the Judiciary in understanding the legislative intent, the following examples are provided.

The dissent then examined the same Conference Committee report previously cited by the majority, but focused on the first sentence which states: "The records which will not be required to be disclosed under Section -13 are records which are currently unavailable."

Based on its reading, 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." 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." The dissent stated 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)."

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." Instead, the dissent asserted "the Senate did not include such express language suggesting an intent to reject the deliberative process privilege."

Third, the dissent concluded that the Legislature did not reject the DPP, as the Senate had expressly intended ambiguities under the broadly worded exceptions to disclosure to be interpreted by the common law. The dissent reasoned 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." . . . 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." . . .

In 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



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unforeseen circumstances. In my view, this statement does not suggest that the Legislature intended to reject the deliberative process privilege[.]

(Citations omitted.)

The dissent further rejected as inapplicable Appellant's argument, which the majority 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. 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). 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."

Finally, 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." 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 in light of the legislative history.

III. Key Missing Facts

Neither the majority nor the dissent appear to have been presented with key facts, known to the Legislature when the UIPA was adopted in 1988, which might have resulted in a different conclusion by the Court 30 years later in *Peer News*.

First, there was substantial additional evidence, not cited in either 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." The majority had considered this view to be "inaccurate" and noted that it was "based on testimony from the Honolulu Managing Director." The

majority, however, did not cite to any of the Exhibits to Managing Director Jeremy Harris's testimony, which included City rules and legal memoranda supporting his contention that internal documents were not public records. These Exhibits are in Volume III of the Governor's Committee Report, and it appears neither the Court, nor the parties' briefs, cited to material contained beyond Volume I of the Report.

In Volume III, Exhibit A of Harris's testimony 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 were adopted on October 18, 1978. 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." These City rules directly supported Harris's 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 opinion that these records must continue to be confidential."

Also included with Harris's testimony as Exhibit B was a 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 rules adopted by the State would supersede the MD's Rules with respect to personal records. This memo supported Harris's testimony that then existing laws, in the form of the MD's Rules, allowed agency withholding of inter- and intra-agency correspondence or memoranda, and further demonstrates that Callaghan, who was to become OIP's first Director, obviously knew of these City rules and their legal import.

Another Deputy Corporation Counsel's memorandum (dated October 13, 1983) was included as Exhibit D and supported Harris's testimony by advising that building permit plans, prior to issuance of the permit, were not "public records" under HRS § 92-50 and distinguished the *Pauoa-Pacific Heights* case that was later cited by the *Peer News* majority. Contrary to the majority's argument that the Circuit Court's decision in *Pauoa-Pacific Heights* showed that the pre-UIPA public records law required disclosure

of deliberative materials, the Exhibit D memo noted that the basis for the order was unclear because it did not mention the term "public records" or section 92-50. Notwithstanding the *Pauoa-Pacific Heights* order, the Exhibit D memo opined 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."

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

Second, although the issue in *Peer News* concerned internal predecisional and deliberative documents exchanged between the City's budget office and the Mayor's office, the majority did not dis-

cuss testimony in Volume III of the Governor's Committee Report that considered similar internal deliberative material from the State Budget and Finance Department to the Office of the Governor to be "privileged" and confidential. Immediately following Harris's exhibits in Volume III was testimony by Yukio Takemoto, then Director of the State Department of Budget and Finance. Consistent with Harris's testimony, Takemoto provided written testimony to the Governor's Committee describing 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." Thus, consistent with the City's assertions, the 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 Volume III of the Governor's Committee Report, wherein the Senate, like the City and a key State Executive branch department, considered certain internal budget documents to not be subject to public disclosure. In his written testimony, 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. Wong's testimony referred to a Circuit Court decision holding that "the worksheets were not public records" and stated his "position that such documents are

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confidential internal working papers of the Senate and are not public records.”

Fourth, the Court in *Peer News* apparently was unaware of the court decision referenced in Wong’s testimony, *Abercrombie v. The Senate*, S.P. No. 6126 (1st Cir. 1983), 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 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 Sode-tani held an expedited hearing, which included testimony by Senators Yamasaki and Carpenter, argument by Senator Cayetano, and a Supplemental Memorandum filed by Senators Cayetano and Fernandes Salling asserting violations of the pre-UIPA public record law.

On May 18, 1983, Judge Sode-tani filed a four-page Findings of Fact, Conclusions of Law, and Order Denying the Application in *Abercrombie v. The Senate*, 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 Sode-tani 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. Judge Sode-tani’s order was unsuccessfully appealed to the Hawaii Supreme Court, which dismissed it as moot. *Abercrombie v. The Senate*, 67 Haw. 671 (1984) (memo opinion). Therefore, the only court decision directly addressing the public records law that existed prior to adoption of the UIPA had held that the Senate’s internal budget worksheets were not public records open to inspection.

Fifth, instead of Judge Sode-tani’s public records decision, the majority in *Peer News* cited two Circuit Court decisions whose facts were distinguishable and did not show clear violations of the pre-UIPA public records law. The first order cited was the 1980 *Pauoa-Pacific Heights* decision, 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 § 92-51, 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 when 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, as Harris’s Exhibit D had noted. There was no specific determination that the City’s internal documents were public records required by law to be disclosed, or, alternatively, that the facts and equities of the case justified disclosure. Because 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 other Circuit Court decision cited by the

majority was also written by Judge Fong and unsurprisingly ordered disclosure of all records sought by a reporter because they had already been given to a rival newspaper. Given this clear waiver in the 1979 *Honolulu Advertiser* case, Judge Fong's order allowing inspection determined that the agency's refusal to make the requested records available "was without good cause 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[.]" The italicized words were handwritten, and Judge Fong apparently crossed out at the end of the sentence "or common law privilege," over which appeared to be the judge's initials. The majority interpreted these handwritten revisions to be a specific rejection by Judge Fong of "any argument that the government could rely upon common law principles like the deliberative process privilege to resist its statutory disclosure obligations." 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 more likely explained Judge Fong's striking of that phrase.

In contrast to Judge Sodeani'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, Judge Fong's summary orders and the factual circumstances of his cases did not clearly establish that he ordered the release of internal deliberative documents because he actually considered them to be public records under the law existing in 1979. Thus, the only definitive court decision—rendered by Judge Sodeani after a hear-

ing, testimony, affidavits, and memoranda directly addressing the public records law preceding the UIPA, and which was unsuccessfully appealed to the Hawaii Supreme Court—had clearly held that internal 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 in *Peer News*, 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 the majority extensively discussed 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," the 1988 Legislature knew this view was inaccurate in light of *Abercrombie v. The Senate*. Indeed, two defendants in that case, Senators Wong and Yamasaki, had direct knowledge of Judge Sodeani's decision and had retained their key leadership positions as Senate President and Senate Ways and Means Committee Chair, respectively, during the 1988 session when the UIPA was being considered for adoption.

Additionally, there was extensive testimony to the Legislature from the Honolulu Corporation Counsel that public disclosure was not required for all internal documents of other government agencies. The Corporation Counsel's February 9, 1988 testimony to the House Judiciary Committee 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



Judge Daniel R. Foley (ret.)

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Report. In 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.’” Thus, contrary to the testimony cited in *Peer News*, both chambers of the Legislature in 1988 had direct knowledge and substantial testimony to conclude that the pre-UIPA law did not require disclosure of certain internal documents of government agencies.

Seventh, although the Legislature specifically protected certain of its own documents from disclosure by adopting the legislative exception found in HRS Section 92F-13(5),⁶ there is no clear showing of its intent to disclose the internal records of nonlegislative agencies. Rather, there is specific legislative intent to exclude from disclosure records that were unavailable in 1988, which would thus have excluded the internal documents of state and county government agencies based on the testimony presented to the Legislature in 1988, but not presented to the Court in *Peer News* decades later. To avoid being over- or under-inclusive, the Senate declined to statutorily list specific records to be excepted from disclosure and instead created four categorical exceptions that could be implemented under the common law. The final bill adopted the Senate’s categorical approach, including the frustration exemption in HRS § 92F-13(3). The accompanying Conference Committee report explained that “[t]he records



which will not be required to be disclosed under Section -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[.]” When the missing facts discussed above are considered, there was substantial testimony to the Legislature in 1988 supporting the argument that the internal records of state and county government agencies were “records which are currently unavailable.”

Eighth, in carving out the categorical exceptions from disclosure, the 1988 Legislature left it to OIP and the courts to determine whether disclosure of such records would be required as unanticipated cases arose. As the dissent noted, in rejecting a specific listing of records and instead creating the categorical exceptions to access, the Senate’s committee report stated it “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.” The final bill granted OIP various powers in HRS §92F-42 to investigate, review and rule on agencies’ denial or granting of access to information and to provide opinions and guidance on the UIPA, subject to judicial review and enforcement. OIP’s opinions since 1989 have recognized the DPP under the frustration exception to disclosure, and subsequent legislatures have not acted to invalidate those rulings for the past three decades.

Unless the Court reverses its *Peer News* decision, however, the Legislature would have to act to restore the DPP. Indeed, 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 all of the courts’ functions under the UIPA’s disclosure requirements and would have essentially made the Court’s own internal deliberative documents, such as draft opinions, law clerk memos, and other internal communications, subject to public disclosure under *Peer News*.

For the same reasons that OIP had recognized that the DPP allowed the Executive, Legislative, and Judicial agencies to withhold internal deliberative records, the Judiciary opposed legislation that would have subjected its own internal deliberative documents to public disclosure under *Peer News*. The Judiciary’s written testimony strongly opposed both 2019 bills on the basis that publicly disclosing 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.” 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. These reasons for not wanting the courts’ internal decision-making open to public access were some of the same reasons OIP cited in its opinions recognizing the DPP.

Although the Legislature deferred decision-making on these 2019 bills, they have carried over to the 2020 session. Absent any change by the Legislature or Court, however, OIP will continue to abide by the *Peer News* decision and advise agencies that they can no longer use the DPP to justify an exception to disclosure under HRS § 92F-13(3). Thus, agencies can no longer argue that decision-making is a function that could be frustrated and must instead 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.

¹ Created in 1988, OIP is the single state agency administering both the UIPA, chapter 92F, HRS, Hawaii’s open records law, and the Sunshine Law, Part I of chapter 92, HRS, the open meetings law. One or both laws are applicable to all state, county, and independent agencies in all three branches of government.

² The majority opinion was written by Justice Richard Pollack and joined by Justices Sabrina McKenna and Michael Wilson. The dissenting opinion was written by Justice Paula Nakayama and joined by Chief Justice Mark Recktenwald. The opinions, legislative and court documents, and other materials referenced in this article are posted on the Opinions page at oip.hawaii.gov.

³ HRS § 92F-15(b) (2012) states 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[.]” For an explanation of the UIPA’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).

⁴ The State of Hawaii filed its own amicus brief and did not represent OIP on appeal.

⁵ See, e.g., *OIP Opinion Letter No. 03-20* (concluding 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); *OIP Opinion Letter No. 91-24* (determining 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 Opinion Letter No. 00-01* (concluding that the DPP and frustration exception may apply to: (1) internal correspondence between a legislator and his staff; (2) correspondence between elected officials; (3) correspondence containing draft legislation, soliciting recipients’ input, and noting comments and responses; (4) correspondence and emails between elected officials relating to strategy; and (5) personal notes taken at a majority caucus on an issue).

⁶ HRS § 92F-13(5) protects from disclosure “[i]nchoate and draft working papers of legislative committee 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 the members of the legislature.”

Appointed since 2011, Cheryl Kakazu Park, J.D., M.B.A., is the longest serving Director of Hawaii’s Office of Information Practices, and she has extensive legislative experience since 1976, before the UIPA was enacted. Ms. Park also served the Hawaii and Nevada judiciaries for eight years and was in private practice for nine years.