

Examples of Records That an Agency Might Seek to Withhold as Deliberative and Predecisional (7.21.2022)

For the SCR 192 Working Group's consideration, OIP has brainstormed various situations where an agency might seek to withhold records as being deliberative and predecisional. Please note that these examples are **not** intended to represent records where the former deliberative process privilege would have applied. Some of these are situations where OIP said or would have said information could be withheld under the privilege, some are situations where OIP said or would have said it could not be withheld at all, and some are situations where there is no OIP opinion on the issue. The intent is to give the members some specific examples to discuss of what they think should, or should not, be public information.

The spreadsheet previously provided by OIP summarizing OIP's formal opinions on the former deliberative process privilege gives more detail on those records that were addressed in a formal opinion, including what OIP decided.

General factors of potential relevance

Waiver – even if record can be properly withheld, has the agency waived its right to not disclose it to a requester if it has or will disclose the record to someone outside the agency?

Opinion/deliberative material vs. factual material – either clearly separated or intertwined

Timing of disclosure – while decision is being made, right after decision is made, a period of time after decision is made?

What does internal mean: can a private contractor hired to do an audit/report for an agency be considered agency staff for the purpose of that work; is it still internal if a program/division is doing the work but talking to other programs/divisions; is it internal if an agency had decided to make a recommendation to executive for approval but it is still within the same branch of government?

Personal privacy vs. disclosing the names of evaluators (e.g. selection committee for procurement or recruitment, admission committee for UH programs)

Personal, confidential, trade secret, attorney work product, attorney-client privileged, and other information protected under other provisions of the UIPA

Other laws providing confidentiality and protection from disclosure, such as the procurement code and HIPAA.

EXAMPLES:

Drafts

Drafts of administrative rules:

- Not approved, but being referenced and somewhat followed by the agency
- Not approved, not being used, still in the process of being drafted or edited within the agency

- Not approved, not being used, still in the process of being drafted or edited within the agency and shared with Attorney General (AG) or other agencies for comments and review
- Not approved, not being used, sent to other agencies (AG, Gov, Mayor) for approval
- Final version approved, request is for prior drafts that have editorial and/or substantive differences

Drafts of internal policies (not going through rulemaking) - internal staff manual, workflow:

- Not signed off on by director, but being somewhat followed by the agency
- Not signed off on by director, not being followed yet, still being drafted or edited
- Final version signed by director, request is for prior drafts that have editorial and/or substantive differences

Draft reports:

- Final version, not a report specifically intended for public release
- Final version, due to be released to the public on a specified future date (*e.g.* HTA monthly reports released at its meeting, or budget forecast due to be released at a specific time, if requested before official release date) – and does it make a difference whether the agency has a reason for releasing it at a set time, such as avoiding giving a leg up to one business over another?
- Draft report, not yet approved as final
 - o investigation report
 - o agency annual report
 - o special report on controversial issue
 - o budget forecast
 - o spending report
 - o internal audit of agency leases
 - o internal program evaluations
 - o disability review of other agency's planned construction
 - o report on possible project sites with recommendation
 - o new plan for enforcement of regulations / civil law by agency including planned spending
- Draft report, not yet approved as final, by non-government contractor hired by agency
 - o To do an internal audit
 - o To investigate and/or make recommendations on a policy issue
 - o To investigate an internal personnel dispute
 - o To conduct internal employee satisfaction survey with report, including all data and actual comments
 - o To conduct internal employee satisfaction survey with report, including aggregate, de-identified data and actual comments by unidentified employees
- Final version approved, but request is for prior drafts that have editorial and/or substantive differences

Draft memoranda or correspondence:

- Draft of not yet sent interoffice memo or internal correspondence

- Draft of memo intended to be publicly issued but not yet sent out
- Draft of correspondence intended for external recipient, not yet sent

Draft opinions / violation notices (agencies that make administrative law decisions):

- Draft of opinion still being written / reviewed
- Draft of opinion close to final, not yet issued
- Opinion issued, request for prior drafts that have editorial and/or substantive differences

Draft legislation and/or budget requests:

- Still in the process of being written / edited within originating agency
- Originating agency has sent its draft to other agencies / GOV / Mayor for approval, but not yet sent to Legislature / Council for its consideration
- Final version has been sent to Legislature / Council, but request is for prior versions with editorial and/or substantive differences

Notes / recordings

- Of staff meeting discussing ongoing workflow
- Of staff meeting discussing how to address a policy issue
- Of non-Sunshine Law working group meeting with agency staff and people from other agencies / private sector organizations / individuals tasked with developing recommendations to present to agency head / Chief Justice / Legislature / Governor / Mayor / Council
- Of meeting between staff and legislators to present information on agency issues and/or prospective legislation
- Of meeting between legislators, in legislative caucus, or with legislative staff or constituents
- Of job interview impressions
- Of public hearing, by members of board or panel conducting the administrative hearing

Notes

- To file of planned next steps
- Of possible analysis or approaches to a policy issue
- Of observations made during a site inspection for potential inclusion in a later report or action
- Of concerns to be brought to division head or director
- Of telephone conversations with people outside agency
- Personal notes not relevant to record being requested
- Notes by whom? Agency secretary; subject matter staff; supervisor; manager; director?

Emails, memos and other internal agency correspondence

- Regarding possible analysis or approaches to a policy issue, where the memo was written before any decision was made, but requested after the agency has decided or acted

- on Maunakea or homelessness or a similarly controversial issue; what is the threshold for “controversial?”
 - on an issue with less widespread public attention, such as possible updates to cesspool rules, whether the ERS trust fund should consider a particular investment, or how to update a county tsunami evacuation map
 - on the agency’s budget request in the process of being drafted
 - on whether to send agency staff to a conference
 - on proposed legislation in the process of being drafted
 - on a potential violation of law enforced by agency with hypotheticals about how the law applied
 - on budget impact of a proposed tax credit including forecasts
- Regarding the progress of agency work on an issue
 - an ongoing investigation, either internal or public (*e.g.* of planning violations, licensing violations, health violations),
 - revisions to internal procedures
 - updating a database
 - internal progress on coordinating with another agency or an outside organization to implement a mental health initiative
 - putting together a request for proposals
- Regarding procurement, job recruitment, or admission to a program
 - Scoring sheets or criteria for an ongoing procurement / recruitment / admission – or for a completed procurement / recruitment / admission
 - Other materials for procurement / recruitment / admission that are considered before the final decision is made, such as applications or references
- Regarding staffing / employee scheduling (not yet finalized) for an upcoming period
- Article in agency’s in-house newsletter