

OIP Formal Opinions Regarding the Deliberative Process Privilege (as of 7/1/2022)(printable)								
No.	Director	Op. No.	DPP Discussed	Waiver Found	Record Disclosed	Agency	Type of Record	Notes
1	KAC	89-9	Yes		Yes	UH Law School	Admissions Committee members' names	Names of faculty members serving on Admissions Committee were not listed in SSCR 2580 as examples of frustration, but this was not an exhaustive list. Based on the UIPA's legislative history, OIP then looked for guidance under FOIA Exemption (b)(5) for inter- and intra-agency records and federal cases recognizing DPP. OIP ultimately concluded that disclosure of members' names "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" so there was no frustration under 92F-13(3).
2	KAC	90-3	Yes	Yes	Yes	DOT	Revenue Audit Reports re: persons with commercial permits or leases at airports	Recommendations were expressly adopted in final report so not protected by DPP. OIP also noted that the DPP does not extend to purely factual matters, or factual portions of otherwise deliberative memoranda.

3	KAC	90-8	Yes		Partial	Hawaii County Planning Dept.	<p>Intra- and inter-agency memoranda, employee notes or draft letters to alleged violating parties that were prepared before final agency decision, including factual material that is inextricably intertwined with the reasoning and conclusions, and may be withheld under DPP. Public portions that are reasonably segregable must be disclosed.</p>	<p>OIP recognized that the disclosure of predecisional and deliberative records would be a frustration of the legitimate government function of agency decisionmaking under sec. 92F-13(3) because the DPP serves (1) to assure that subordinates will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; (2) to protect against premature disclosure before proposed policies are finally formulated or adopted; and (3) to protect against confusing the issues and misleading the public by disseminating reasons and rationales that were not in fact the ultimate reasons for the agency's action. DPP applies to inter- & intra-agency records that are predecisional and deliberative, but not to purely factual information or records that agencies expressly adopt or incorporate by reference into a final decision. But factual material that is inextricably intertwined with the reasoning and conclusions forming the basis for recommendations and advice could be withheld as they may reveal the employee's personal judgment and initial conclusion about an investigation. Public portions that are reasonably segregable must be disclosed.</p>
---	-----	------	-----	--	---------	------------------------------	--	---

4	KAC	90-11	Yes		Partial	UH	Self-study reports and program reviews that were part of the UH's continuing process for evaluation of academic departments may be withheld under DPP. Purely factual portions that are segregable must be disclosed.	DPP protects predecisional and deliberative memo containing staff's recommendations or opinions, but not purely factual portions that are segregable. Unlike the privacy exception, the frustration exception under 92F-13(3) did not depend on a balancing test (at p. 8).
---	-----	-------	-----	--	---------	----	---	---

5	KAC	90-21	Yes		Partial	Protection and Advocacy Agency of Hawaii	A final and compliance audit report of an apparently private organization selected by the State to provide State services, which was prepared by an outside consultant for the State may be withheld under DPP. Purely factual portions that are segregable must be disclosed.	DPP protects predecisional and deliberative inter- and intra-agency memos, but not purely factual materials. An audit prepared by an outside consultant hired by the State, and not by the organization itself, was still considered an agency record subject to the DPP because it contained deliberative and predecisional records providing advice to the Office of the Governor as part of its continuing process of examining its policies toward the organization. The audit's Executive Summary, Finding, and Recommendation sections contained advisory opinions and recommendations to the Governor that were protected from disclosure by DPP. But other sections contained purely factual portions that are segregable and must be disclosed. DPP may be waived. Noted that the frustration exception does not depend upon a balancing test per OIP Op. Ltr. No. 90-11.
---	-----	-------	-----	--	---------	--	--	--

6	KAC	91-3	Yes		Yes	HPD	HPD Standards re: police officer code of conduct	Not all internal documents are protected by DPP, and they must be both deliberative and predecisional. The Standards embody HPD's final decision on issues of personnel policy and contain no advice, opinion, or recommendations from agency subordinates to decisionmakers on issues of agency law or policy, so not protected by DPP.
7	KAC	91-14	Yes		Yes	DHS	Rating Sheets to score purchase of service agreements and names of personnel doing the scoring	Rating Sheets did not fall within the DPP because they were not predecisional and did not express recommendations to an agency decisionmaker. Instead, the Rating Sheets were decisional in nature as they determine which proposal will receive a recommendation for budget funding. Therefore, Rating Sheets must be disclosed as purchasing information per sec. 92F-12(a)(3). Also, the names of agency personnel doing the scoring would not constitute a clearly unwarranted invasion of personal privacy and should not be redacted.

8	KAC	91-15	Yes		Yes	UH Law School	<p>Self-study by the law school and the site evaluation report and official action letters by independent accrediting organizations, along with purely factual information.</p>	<p>The "self study" prepared by the law school contained candid evaluations, opinions, or recommendations, and per OIP Op. Ltr. No. 90-11 it was protected by DPP, except for abundant information that was purely factual. Site evaluation report, prepared by independent accrediting organizations that are not State agencies, contained portions that were predecisional and deliberative but would not frustrate a legitimate government function of decisionmaking by an agency, except portions that quoted/paraphrased and evaluated the quality of the law school's self-study. The official action letters of the accrediting organizations could not be withheld under the DPP. Home addresses, home telephone numbers, birthdates, marital and familial statuses of certain faculty members, and exact salaries of certain law school personnel could be withheld under the privacy exception of sec. 92F-13(1).</p>
---	-----	-------	-----	--	-----	---------------	---	---

9	KAC	91-16	Yes		Partial	DBEDT	<p>Draft master plan for Ka'u spaceport and correspondence between agency and its consultant who prepared draft plan may be withheld under DPP. But correspondence regarding contract negotiations was not protected by DPP and must be disclosed.</p>	<p>Draft plan and correspondence relating to it were predecisional and deliberative, and disclosure would chill agency decisionmaking. Merely designating a record as a "draft" does not exempt a document and the DPP can be lost if the agency formally or informally adopts the draft. But correspondence regarding contract negotiations with the consultant did not aid in the agency's policy deliberations and were not protected from disclosure by the DPP, and contained no confidential commercial or financial information protected under 92F-13(3). Original consultant contract and its amendments are expressly made public as government purchasing information under section 92F-12(a)(3) and must be disclosed.</p>
---	-----	-------	-----	--	---------	-------	--	--

10	KAC	91-22	Yes	Yes	Yes	Hawaii Civil Rights Commsn	<p>DPP was waived as to Dep. Director's memo to commission and staff re: statistics on investigation of complaints and recommendations to reduce the backlog; draft legislative proposals; draft budget, all of which were discussed, but not publicly distributed, at a public meeting. But complaint records could be withheld per a confidentiality statute (not DPP).</p>	<p>Policies underlying the DPP are: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against the premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from the disclosure of reasons and rationales that were not in fact ultimately the grounds for agency action. (Op. at p. 5) DPP protection does not apply to purely factual information and it can be lost if an agency chooses to expressly adopt it or incorporate it by reference as part of agency's decision or policy. The Dep. Director's memorandum, and the draft legislation and draft budget not approved by the Commission would otherwise be protected, but the DPP was waived by agency's voluntary disclosure of its contents at a public meeting. Complaint records, including a list of pending complaints naming complainants and respondents, could be withheld under the confidentiality provisions of section 368-4, HRS.</p>
----	-----	-------	-----	-----	-----	----------------------------	---	--

11	KAC	91-23	Yes, in dicta		N/A	AG	Portions of AG's letters containing legal advice, but were not AG "opinions," which had been summarized in the AG's internal bulletin, could be withheld under the attorney-client privilege (not DPP).	OIP recognized on page 12 that FOIA's Exemption 5 permits withholding of documents covered by privileges recognized at common law, such as the DPP or attorney client privilege. Actual holding was based on the attorney-client privilege (not DPP), which allowed the AG to withhold those portions of its letter concerning the same subject matter that had been summarized in its publicly distributed bulletin. Under the attorney-client privilege, public policy favored the protection of communications between an attorney and a government client because government would be less efficient due to the increased chance of miscommunication if clients felt compelled to revert to unrecorded oral communications to protect records from public disclosure.
----	-----	-------	---------------	--	-----	----	---	---

12	KAC	91-24	Yes		No	Judiciary	Job interview panelists' notes	Interview panelists' notes are predecisional and deliberative because they reflect the "give and take" occurring within the agency before applicant selection. The factual information in the notes was inextricably intertwined with panelists' personal judgments and observation, and are protected from disclosure by the DPP per sec. 92F-13(3). Additionally, the notes contain individually identifiable information about interviewees and thus fall within privacy exception. The summary of interview scores did not identify applicants so it was not protected by the privacy exception or frustration exception.
13	KAC	92-5	Yes		Yes	Commsn on Persons with Disabilities	Document Reviews prepared by the Commission to review agencies' construction plans for public buildings	Although Document Reviews were arguably predecisional and deliberative, their disclosure would not chill the candid exchange of ideas between the Commission and agencies, and the Reviews had historically been made available for public inspection before the UIPA's adoption. The concern that the Reviews could potentially be used in litigation against a government agency was not a valid reason to keep the document confidential in order to avoid the frustration of a legitimate government function.

14	KAC	92-13	Yes		Yes	State Commsn on Memorials for Veterans	Audio tape recording of a public meeting	Although intended to be used only to prepare written minutes, the audio tape recording of a meeting must be disclosed. It did not constitute an intra-agency record that is predecisional and deliberative, the disclosure of which would frustrate agency decisionmaking so DPP was not applicable. Also, it was expressly required to be made public under section 92F-12(a)(16) as information contained in or compiled from a transcript of a proceeding open to the public.
15	KAC	92-15	Yes		Yes	AG	Article in AG's in-house newsletter	DPP did not apply because the article was not written to influence a decisionmaker nor was it part of a "give and take" exchange of ideas among agency members. Also, the in-house article was not a clearly unwarranted invasion of the author's personal privacy protected from disclosure by sec. 91F-13(1).
16	KAC	92-26	Yes		Yes	Convention Center Authority	Drafts and working papers for final report to Legislature recommending potential convention center sites	Draft report was predecisional and deliberative so could be withheld under the DPP. But the final report must be disclosed when it is submitted to the Legislature because it would no longer be "predecisional" and its disclosure would not frustrate the deliberations of the Legislature that have long been conducted in public view. DPP may also be waived.

17	KAC	92-27	Yes		Partial	ERS Board of Trustees	Final draft minutes of a meeting that are to be presented to the Board for approval at its next meeting are not protected by DPP and must be disclosed. But drafts of proposed minutes not presented at the meeting were protected by DPP and may be withheld.	DPP is not applicable to proposed minutes of a meeting that are presented at a public meeting for approval by a board. The "give and take" and "editorial judgments" are exposed to the public in the proposed minutes, and the process for final approval is conducted openly in public. But drafts of the proposed minutes (that were not presented at the meeting) would reveal "editorial judgments" protected by the DPP and may be withheld. Additionally, under the Sunshine Law, minutes must be made available upon board approval, even if the 30-day period to do so under sec. 92-9(b) has not expired.
----	-----	-------	-----	--	---------	-----------------------	--	---

18	KAC	93-13	Yes		Yes	Judicial Council	List of nominees to State Ethics Commission, which was transmitted to the Governor before he makes his appointment	DPP is not applicable. Although the list of nominees is predecisional, it is not deliberative because it merely contains the names of nominees and does not reflect the "give and take" of an agency's consultative process, and the list represents the final decision of the Judicial Council and is not an opinion or recommendation. Withholding of the list would not protect the opinions and recommendations of subordinates to superiors in the decisionmaking process, nor would it impede or chill the candid and free exchange of ideas and opinions of Council members. FN 4 distinguishes the Judicial Council's list from the Judicial Selection Commission's list of judicial nominees that by constitution and its rules are confidential and thus protected from disclosure.
19	KAC	93-19	Yes		No	DOT	Draft of proposed State Enforcement Plan (SEP)	DPP protected from disclosure a predecisional and deliberative draft for a proposed new SEP that described how DOT will spend federal grants to enforce motor carrier safety and hazardous material safety regulations. But the final plan, even though it was stamped "Draft," must be made public, after redaction of exact compensation of identifiable employees per sec. 92F-12(a)(14).

20	KAC	94-6	Yes		No	Archives	Former Governors' records held in Archives	Records may be protected by DPP, but no specific record was identified or analyzed. Instead, records could be withheld based on the Archives' longstanding practice, since before the UIPA's adoption, of waiting 10 years after term expiration before disclosure. After 10 years, records must be disclosed without any segregation of information.
----	-----	------	-----	--	----	----------	--	---

21	KAC	94-8	Yes		Yes	HPD	Exam score worksheets, with the candidate's name removed, which rated the candidate's performance on the exam and interview by assigning points for various criteria.	DPP did not protect from disclosure exam score worksheets. They are not predecisional intra- or interagency memoranda because when totaled and adjusted, they determine the final rankings of all candidates, and they were not used to administer an examination but instead reflected the Panel's evaluation of each candidate. As in OIP Op. Ltr. No. 91-24, candidates' privacy interest in the score sheets was not implicated because their names had been removed. With respect to the applications of unsuccessful candidates, the privacy exception also allowed redaction of individually identifiable information, including the candidate's social security number, home address and telephone number, current position at HPD, business telephone number, previous work experience, education, and training, but not citizen status, residency, qualification for veteran's preference without details, and availability for employment. For the successful candidate, the following information must be disclosed: name, business telephone, education, training, current position at HPD, and previous work experience. Also, exam and interview questions are likely to be reused, so they may be withheld as they fall within the examples of examination materials referred to in the legislative history of the frustration exception under section 92F-13(13).
----	-----	------	-----	--	-----	-----	---	---

22	KC	95-5	Yes, in dicta		N/A	DLIR's OSHA Division	Records and reports without information identifying individuals and regarding the administration and enforcement of HRS Chapter 396 are public, but DPP may apply to records not examined in the opinion.	Fn 4 recognized that the common law DPP protects from disclosure those portions of intra-agency memoranda that are deliberative and predecisional, but not purely factual information. This advisory opinion did not analyze whether DPP applied in that case.
23	KC	95-12	Yes		Yes	DHRD	The names and qualifications of unpaid or paid consultants, whether government employees or private sector employees, who assist in reviewing an employment application	Even if the consultants participated in decision making, the DPP did not apply because the names and qualifications would not disclose any predecisional or deliberative communications, citing by analogy OIP Op. Ltr. No. 89-9 (discussing DPP) and 90-16 (discussing privacy exception).

24	MTDG	95-24	Yes		Partial	DHRD	<p>Aggregate data compiled from responses of survey respondents to objective standardized survey questions, and summaries thereof, are largely a factual compilation and not protected by DPP. But the verbatim comments of survey respondents may be withheld under the DPP.</p>	<p>DHRD contracted with a private company to identify and monitor employee satisfaction and productivity, and management effectiveness, which resulted in several reports. OIP stated at pages 21-22 that the DPP "must be narrowly construed consistent with the need for efficient government operations" and to "prevent the privilege from 'swallowing' an open records or freedom of information law, and permit disclosure of information that is of legitimate public interest." Although OIP's earlier opinions (90-11 and 90-21) had not applied a balancing test for the DPP, OIP here recognized federal and other states' decisions as "appropriately balanc[ing] the often competing policies underlying freedom of information laws, and those that underlie the deliberative process privilege." Additionally, OIP concluded that disclosure would serve the public interest by revealing, among other things, how top level agency administrators are perceived to be performing their responsibilities and thus, would not constitute a clearly unwarranted invasion of the administrators' personal privacy under sec. 92F13-(1).</p>
----	------	-------	-----	--	---------	------	---	---

25	MTDG	98-3	Yes, in dicta		N/A	Honolulu Prosecuting Attorney	Internal memoranda and internal work order, which included factual and deliberative information, were considered attorney work product that was protected from disclosure.	The records discussed legal strategies and proposed work to be done on the case, as well as recommendations of investigations to be made. Some records discussed the results of investigations or correspondence received. Although no court case had yet been initiated, OIP found that the requested documents were prepared in anticipation of litigation and they appear to consist primarily of attorney work product that was protected under sec. 92F-13(2) and(3) and OIP Op. Ltr. No. 92-14. To the extent that factual information has already been disclosed and is not protected under the DPP or the attorney work product privilege, factual information should be disclosed to the extent they are reasonably segregable.
----	------	------	---------------	--	-----	-------------------------------	--	--

26	MTDG	00-01	Yes		No	Senate	<p>Information that is both predecisional and deliberative could be withheld from: (1) internal correspondence between a Senator and his staff summarizing the legal and practical aspects of issues and areas for further research; (2) correspondence between Senator 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 Senator and other elected officials relating to strategy to address the issue, including emails; and (5) personal notes from a majority caucus on the issue.</p>	<p>DPP could apply to withhold information per sec. 92F-13(3), so long as the info is not mandated to be disclosed under sec. 92F-12. The record must have been created before adoption of an agency's policy and must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal policy matters," citing OIP Op. Ltr. No. 90-21 at 5. Even a document created outside of an agency may fall within the DPP if they have been solicited by the agency and are deliberative and predecisional. Purely factual material that is segregable does not ordinarily implicate the decision-making process and is often not protected by the DPP, unless the document employs specific facts out of a larger group of facts and this very act is deliberative in nature, or where the information is so inextricably connected to deliberative materials that its disclosure will expose or cause harm to the agency's deliberations, citing OIP Op. Ltr. No. 89-9. Also, the DPP may be waived if an agency's final decision expressly adopts or incorporates by reference a record otherwise protected. Opinion did not address the legislative exception found at sec. 92F-13(5).</p>
----	------	-------	-----	--	----	--------	---	---

27	LHK	Op. 03-20	Yes		No	Family Court's Oversight Committee	Judge's notes that were responsive to a request for "all records and information concerning the makeup, structure, organization, and outputs of this Oversight Committee; its members and how they are selected (including term lengths); all meeting minutes and recommendations, reports, or written products; and any other records relating to the Oversight Committee's role with respect to, and effect upon, Family Court."	Even assuming that the notes at issue do not relate to the Judiciary's nonadministrative functions and thus are subject to the UIPA, the DPP protected the records from disclosure. Although the Committee does not make policy or act as a body to create recommendations for policy changes, its discussions involve suggestions by individual participants for improvements to the Family Court and thus qualify as deliberative. Although they originated from outside, they were solicited by the Family Court through the Committee process. The Committee's suggestions were also predecisional, as the Family Court had yet to decide whether to act upon them. Additionally, the portions that would identify a confidential source would also fall under the frustration exception. The Committee meetings were not subject to the Sunshine Law and a judge's notes of the meeting are not required to be disclosed by section 92F-12(16).
----	-----	-----------	-----	--	----	------------------------------------	--	--

28	LHK	Op. 04-12	Yes		No	DLNR's Division of Aquatic Resources	Intra-agency emails concerning an alleged violation of law, which posed different factual scenarios as to how the law would apply, before a final decision was made.	<p>Almost all emails were protected by the DPP so that the agency could candidly and freely exchange ideas and opinions. Protected document must contain a communication that is "antecedent to the adoption of an agency policy" and "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal policy matters."</p> <p>Purely factual material is often not protected under the DPP because it ordinarily does not implicate the decision making process, unless it is not reasonably segregable. Here, what little factual information existed was intertwined with evaluative and policy discussions protected under the DPP, so disclosure was not required. Portions containing the alleged violator's name and identifying information could also be redacted under the privacy or criminal investigation exceptions.</p>
----	-----	-----------	-----	--	----	--------------------------------------	--	--

29	LHK	Op. 04-15	Yes		No	Tax Research and Planning Office	Staff forecasts of tax credit data tables prepared for use by the Council on Revenues in deliberating and preparing the forecast of state general fund tax revenues	Staff forecasts were work product reflecting the staff's preliminary judgments and opinions, not the Council's final policy or determination, and had not been expressly adopted or incorporated into the Council's forecast. Thus, they met the DPP requirements to be predecisional and deliberative and could be withheld. OIP recognized on page 5 that the "Council must be able to ensure that its staff produces future forecasts uninhibited by fear of public ridicule or criticism and to prevent the confusion of the issues and the misleading of the public that might occur by dissemination of staff prepared forecasts that do not in fact reflect the ultimate basis for the Council's revenue estimates."
----	-----	-----------	-----	--	----	----------------------------------	---	---

30	CLT	Op. 07-11	Yes		No	DLNR and BLNR	Recommendations and comments received by DLNR from its staff and solicited from outside consultants, which may then be included in DLNR's comments and recommendations submitted to the BLNR for approval of applications for permits to enter and conduct activities in a marine refuge.	The recommendations and comments were predecisional and deliberative materials that could be withheld under the DPP recognized under the frustration exception of sec. 92F-13(3), unless the BLNR waives the DPP by publicly disclosing the records by publication or specifically referring to them in discussion of the applications, or by expressly incorporating them into its final decision. The permit applications, however, must be disclosed with limited personal or confidential business information redacted per the privacy and frustration exceptions.
31	CLT	Op. 10-02	Yes - dicta		N/A	UH	Faculty names and University email addresses	DPP and OIP Op. Ltr. No. 90-8 was recognized in dicta on page 4. UH provided a printed directory of the faculty and staff and it was not required to compile an electronic list of only faculty email addresses, unless properly withheld data was segregable and the creation of an electronic list was readily retrievable under its programming capabilities.

32	CKP	F19-01	Yes		No	Hawaii Parole Authority	Minimum Decision Records containing parole board members' handwritten notes of their immediate impressions and opinions after a hearing and their collective deliberations of the appropriate criteria and level of punishment for an inmate	Although not titled as a draft, the Minimum Decision Record (MDR) could be withheld in its entirety under the DPP because it effectively served as a draft version of the final Notice and Order of Fixing Minimum Terms, and the Parole Board may still exercise its editorial judgment to insert or delete material or change the focus or emphasis when the final Notice and Order were prepared. The MDR was not expressly incorporated or adopted by reference in the Notice and Order. Additionally, the MDR could be withheld as a criminal law enforcement report under the personal records exemption of sec. 92F-22(1)(B).
----	-----	--------	-----	--	----	-------------------------	--	--

33	CKP	F19-02	Yes		Yes	DLNR's Division of Boating and Ocean Recreation	Agency agenda and handouts from a meeting with legislators regarding ongoing work on rule amendments	Records were not "internal working documents" and were not protected by the DPP since they had been shared outside the agency and were not a direct part of the agency's internal decisionmaking process. Agency claimed that it took no notes at the meeting and had no minutes, but the agenda and handouts were deemed responsive to the request seeking "notes for" and "minutes from" the meeting. OIP found the documents to not be "deliberative" as there was no evidence that (1) the legislators were agency consultants, (2) the agency was seeking legislators' assistance as part of its internal give and take, or (3) the legislators were in some other way functionally acting as a direct part of the agency's decisionmaking process.
----	-----	--------	-----	--	-----	---	--	--

