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To: House Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: February 12, 2019, 4:00 p.m.
State Capitol, Conference Room 325

Re: Testimony on H.B. No. 1478
Relating to the Uniform Information Practices Act

Thank you for the opportunity to submit testimony on this bill, which would essentially make the judicial functions of the courts of this State subject to the Uniform Information Practices Act (UIPA), chapter 92F, HRS, by changing the definition of an "agency" subject to the UIPA to eliminate the exemption for "the nonadministrative functions of the courts of this State," which is to say the courts' judicial functions. The Office of Information Practices (OIP) provides the following **comments on this bill and suggestions for amendments.**

The Judiciary is an independent branch of government, whose mission is to administer justice in an impartial, efficient, and accessible manner in accordance with the law. In recognition of its independence, the Judiciary's judicial functions are not currently subject to the requirements of the UIPA. Only the Judiciary's non-judicial, administrative functions are subject to the UIPA, which requires disclosure of requested records unless access is restricted or closed by law. HRS § 92F-11(a).

A crucial function of the Judiciary is dispute resolution, which it renders through court rulings, orders, and opinions. If this bill is adopted, drafts of

court rulings, orders, and opinions prepared before the finalization of such decisions, as well as predecisional internal memos between judges/justices and their law clerks or staff, would arguably be open to public inspection under the Hawaii Supreme Court's recent 3-2 decision in Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (2018) (Peer News), which is explained below. OIP believes that such disclosure of predecisional materials in court files could have a deleterious effect on the Judiciary's ability to both efficiently and fairly resolve cases. If, as this bill suggests, the Legislature believes that the Judiciary should be required to disclose its own internal decision-making in the same way it has found the UIPA to require for other government agencies, OIP would respectfully suggest that a more productive way to achieve this result would be for the Legislature to amend this bill to clarify the standard it believes should apply to disclosure of predecisional materials of all government agencies under the UIPA, instead of deleting the UIPA's current exemption for court files. Should this Committee wish to take that approach, OIP has attached language it could use to amend the UIPA to more clearly express the Legislature's intent.

Peer News Case

Although no specific OIP opinion was challenged on appeal,[1] the majority's opinion in Peer News overturned nearly 30 years of precedent in OIP's

[1] OIP was not involved in the case considered by the Hawaii Supreme Court, where Peer News, dba Civil Beat (Appellant), challenged a decision by the City and County of Honolulu (City) and its Department of Budget and Fiscal Services (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 that was ultimately resolved by the Court's decision. The City's arguments before the Court relied heavily upon a long line of OIP opinions that had recognized the deliberative process privilege since 1989, and the Attorney General's office filed an amicus brief in support of the City's position and the deliberative process privilege. Given its long-standing cases adopting and interpreting the deliberative process privilege and the UIPA's clear instruction that courts must consider OIP's opinions and rulings as "precedent unless found to be palpably erroneous," OIP let its prior opinions speak for themselves and continued to work on reducing its formal case backlog and doing its other

opinions recognizing that public disclosure of predecisional and deliberative memoranda and correspondence transmitted within or between government agencies—such as staff recommendations, notes, drafts, and internal memoranda exchanging ideas, opinions, and editorial judgments before a decision or policy is finalized and made public—could impede the candid and free exchange of ideas and opinions within an agency for fear of being subject to public ridicule or criticism, and thus could frustrate agencies' decision making function. Moreover, OIP recognized that the premature disclosure of proposed policies or tentative decisions before they have been finally formulated or adopted can lead to public confusion and unnecessary divisiveness based on reasons, rationales, or proposals that were not ultimately adopted or expressly incorporated by reference into the final document. For these and other reasons, OIP had acknowledged in one of its earliest opinions—OIP Opinion No. 89-09—and many more that followed, that the deliberative process privilege (DPP) protected from disclosure under HRS § 92F-13(3) predecisional and deliberative records that, by their nature, must be confidential in order for government to avoid the frustration of the legitimate government function of decision making.[2]

In December 2019, however, the majority consisting of three justices in Peer News held that OIP was palpably erroneous in recognizing the DPP because it was contrary to the "plain language" of the law and legislative intent at the time of the UIPA's adoption. (**Attachment A**) Strictly construing the UIPA's express

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duties, while leaving it to the Court to ultimately decide the privilege's legal effect. HRS § 92F-15(b) (2012).

[2] HRS § 92F-13(3) provides exceptions to the general rule that government records must be disclosed upon request and states that Part II of the UIPA "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."

language in HRS § 92F-2 stating 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," the majority concluded that the DPP was contrary to the UIPA's policy as it shielded governmental decision-making from disclosure. (Majority at 16-18.) The majority rejected "decision-making" as a legitimate government function that could be protected by the frustration exception of HRS § 92F-13(3) 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. (Majority at 33-34.) Moreover, the majority concluded from the legislative history that the 1988 Legislature had specifically rejected a DPP before enacting the UIPA. (Majority at 31.)

Reading the same law and legislative materials, however, two other justices in the dissenting opinion (**Attachment B**) disagreed with the majority and took a completely opposite interpretation to conclude that OIP was not palpably erroneous in recognizing a DPP. The dissent, however, generally agreed with the majority that OIP's interpretation of the DPP was too broad 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.) Rather than mechanically considering whether a document is predecisional and deliberative to automatically 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. Citing City of Colorado v. White, 967 P.2d 1042 (Colo. 1998), the dissent proposed the adoption of an indexing requirement, known under the federal Freedom of Information Act (FOIA) caselaw

as a "Vaughn index," that was first proposed in Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973).

The majority rejected the dissent's proposal as being inconsistent with Hawaii law and the Rules of Evidence. (Majority at 36-39.) 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." (Majority at 39-40.)

OIP's Position

The majority opinion provided some hints in dicta that certain types of predecisional and deliberative draft documents may still qualify for withholding "when the government can identify a concrete connection between disclosure and frustration of a particular legitimate government function" by "clearly describ[ing] what will be frustrated by disclosure and provid[ing] more specificity about the impeded process than simply 'decision making,'" but OIP would welcome more specific guidance from the Legislature on this issue. (Majority at 18, n. 15.) Given the context in which the UIPA was passed, evidence of which was apparently not presented to or considered by the majority as the legislative history it considered in rendering its Peer News opinion, OIP believes the dissenting opinion more accurately reflects the intent of the 1988 Legislature to leave it to OIP and the courts to develop the common law to interpret and administer the new law because there would be many grey areas and unanticipated issues to be decided as time went on.

OIP also agrees with the majority and dissenting opinions that the DPP should not be an absolute privilege that will be automatically applied to any

document that is predecisional and deliberative, and indeed its opinions have recognized several limitations on the DPP. Rather than disrupting nearly three decades of OIP's caselaw recognizing the DPP, however, OIP would like to continue the development of the common law with more specific guidance from the current Legislature. OIP thus respectfully provides the attached language for consideration by this Committee in amending the current bill. (**Attachment C**)

Specifically, this proposal would add a new exemption to HRS § 92F-13 that would protect from disclosure "[d]rafts, internal memoranda and correspondence, and other deliberative and pre-decisional materials which are a direct part of an agency's internal decision-making process and disclosure of which would impair the agency's ability to make sound and fair decisions, but only to the extent that such impairment outweighs the public interest in disclosure[.]" This new exception would allow agencies to shield the core of their internal decision-making process, but would add a new balancing test to ensure that deliberative and predecisional records could only be withheld on a case by case basis so long as the agency's need for confidentiality outweighed the public's interest in disclosure. As always, the burden remains on the agency to justify this exemption under HRS § 92F-15(c). Merely claiming that a document is predecisional and deliberative would not be sufficient for the proposed exception, as the agency must also specifically show under the balancing test how its need for confidentiality outweighs the public's interest in disclosure.

OIP does not believe that a technical indexing procedure, or what is commonly referred to as a "Vaughn index," should be statutorily mandated in all cases. OIP typically reviews the entire record, already generally obtains the same information on its Notice to Requester form, and OIP does not

believe that burdening agencies with documenting the page by page, line by line technical minutiae required by a "Vaughn index" is necessary in most cases, particularly since the great majority of UIPA requests are not appealed to OIP or the courts. **Instead, OIP would instead like to reserve the need to require such a "Vaughn index" on a case by case basis when considering appeals of denials of access under the UIPA.**

If this Committee chooses to take OIP's proposed amendment to directly address disclosure of predecisional materials instead of removing the Judiciary's UIPA exemption for its judicial functions, the Legislature can avoid engaging in a separation of powers dispute while allowing the decision-making function by all branches of State and County government—executive, legislative, and judicial—to be protected in appropriate circumstances where the agency's need for confidentiality outweighs the public's interest in disclosure.

Thank you for considering OIP's testimony.

ATTACHMENT A

Majority opinion in Peer News

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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PEER NEWS LLC, dba CIVIL BEAT,
Plaintiff-Appellant,

vs.

CITY AND COUNTY OF HONOLULU and
DEPARTMENT OF BUDGET AND FISCAL SERVICES,
Defendants-Appellees.

SCAP-16-0000114

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-16-0000114; CIV. NO. 15-1-0891-05)

DECEMBER 21, 2018

McKENNA, POLLACK, AND WILSON, JJ., WITH NAKAYAMA, J.,
DISSENTING, WITH WHOM RECKTENWALD, C.J., JOINS

OPINION OF THE COURT BY POLLACK, J.

Hawaiʻi law has long stated that "[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." Hawaii Revised Statutes § 92F-2 (2012). Therefore, in establishing the legal framework governing public access to

government records, the Hawaiʻi legislature declared "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." Id.

This case concerns the propriety of State and local agencies withholding certain inter- and intra-office communications when disclosure is formally requested by a member of the public. In a series of eight opinion letters issued between 1989 and 2007, the State of Hawaiʻi Office of Information Practices took the position that, based on a statutory exception provided in Hawaiʻi's public record law that permits the nondisclosure of records that would frustrate a legitimate government function if revealed, a "deliberative process privilege" exists that protects all pre-decisional, deliberative agency records without regard for the relative harm that would result from any specific disclosure. Relying on these opinion letters, the Office of Budget and Financial Services for the City and County of Honolulu denied a public records request for certain internal documents generated during the setting of the City and County's annual operating budget.

We hold that, because the deliberative process privilege attempts to uniformly shield records from disclosure without an individualized determination that disclosure would

frustrate a legitimate government function, it is clearly irreconcilable with the plain language and legislative history of Hawaiʻi's public record laws. The Office of Information Practices therefore palpably erred in interpreting the statutory exception to create this sweeping privilege. Accordingly, we vacate the grant of summary judgment in this case and remand for a redetermination of whether the records withheld pursuant to the purported privilege fall within a statutory exception to the disclosure requirement.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Developing Honolulu's Operating Budget

Each year, the City and County of Honolulu (City) sets its annual operating budget through a series of exchanges between its various departments and branches. The process begins with the Mayor providing a list of intended policies and priorities for the coming fiscal year to the Department of Budget and Fiscal Services (BFS). BFS in turn sends a notice detailing the Mayor's policies and priorities to the directors of the departments that make up the City's executive branch (with limited exceptions[1]), soliciting an operating budget request from each department. Thereafter, the departments each

[1] Pursuant to Sections 7-106(i) and 17-103(2)(f) of the Revised Charter of the City and County of Honolulu, the Board of Water Supply and the Honolulu Rapid Transit Authority prepare their own operating budgets.

prepare and submit a formal memorandum to BFS justifying all proposed expenditures for the coming fiscal year in relation to the Mayor's policies and priorities, thus providing an initial recommendation regarding the money to be allocated to the department. Those departments that generate revenue also provide preliminary projections outlining the funds they expect to take in, thereby giving BFS an estimate of the City's expected revenues and expenditures for the coming fiscal year.

During the months following BFS's receipt of the operating budget request, various parties from BFS engage with the requesting agencies and the office of the City's Managing Director in a series of discussions regarding each department's proposed budget, revising the request as needed to account for budgetary considerations and changes in the Mayor's policies and priorities. The budget request is eventually submitted to the Mayor, who may make further adjustments based on additional discussions with the BFS Director and Managing Director. Once the Mayor makes final decisions regarding each department's budget, BFS produces a combined executive budget for submission to the City Council. After a public hearing, the City Council revises the executive budget as it deems appropriate before formally adopting it, at which point it is presented to the Mayor to be signed or vetoed in the same manner as other

legislation. See Revised Charter of the City and County of Honolulu § 9-104 (1998).

B. Civil Beat's Request

On March 5, 2015, Nick Grube, a reporter for the online news outlet Peer News LLC d/b/a Civil Beat (Civil Beat), sent an email to BFS requesting access to or copies of the "narrative budget memo for Fiscal Year 2016" for each of the City's departments. Grube stated in his email that the request was made pursuant to the Hawaiʻi public records law.[2]

On March 13, 2015, BFS sent a notice to Grube acknowledging his request and informing him that the agency was invoking the "extenuating circumstances" exception contained in the Hawaii Administrative Rules (HAR) to extend its time limit for responding.[3] Then, on April 7, 2015, BFS provided Grube with

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[2] Although Grube did not further identify the legal authority for his request, the disclosure of government records in Hawaiʻi is broadly governed by the Uniform Information Practices Act, which is codified in Hawaii Revised Statutes Chapter 92F. HRS § 92F-11 (2012), which sets forth an agency's affirmative disclosure obligations, provides in relevant part as follows:

> (a) All government records are open to public inspection unless access is restricted or closed by law.
>
> (b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours.

[3] With some exceptions, HAR § 2-71-13(b) (1999) requires an agency to provide notice of whether it intends to withhold or disclose a record within ten business days of receiving a formal public records request and, when appropriate, to disclose the document within five business days thereafter. HAR §§ 2-71-13(c) and 2-71-15 (1999) allow an agency to extend

(continued . . .)

a second notice, this time denying his request in its entirety, stating that the legitimate government function of agency decision-making would be frustrated by disclosure of the requested records.[4]

In a memorandum attached to the second notice, BFS cited a series of opinion letters from the State of Hawai'i Office of Information Practices (OIP) interpreting the provision of the Hawai'i Uniform Information and Practices Act (UIPA) codified in Hawaii Revised Statutes (HRS) § 92F-13(3) (2012), which exempts documents from disclosure when disclosure would frustrate a legitimate government function.[5] The memorandum stated that HRS § 92F-13(3) creates a "deliberative process

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(. . . continued)

the period to twenty business days for providing notice of its intent when extenuating circumstances apply. In its form notice to Grube, BFS checked the boxes indicating that extenuating circumstances were present because Grube's request required "extensive agency efforts to search, review, or segregate the records, or otherwise prepare the records for inspection or copying" and that the agency needed additional time "to avoid an unreasonable interference with its other statutory duties and functions."

[4] BFS or Grube could have requested that the State of Hawai'i Office of Information Practices review the record request pursuant to Hawaii Revised Statutes §§ 92F-15.5(a) or 92F-42(1)-(2) (2012), but neither party elected to do so.

[5] HRS § 92F-13 (2012) provides in relevant part as follows:

> 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[.]

privilege" that shields government records from disclosure when they are pre-decisional and deliberative in nature. (Citing OIP Op. Ltr. No. 00-01 (Apr. 12, 2000); OIP Op. Ltr. No. 90-8 (Feb. 12, 1990).) Under the privilege, BFS stated, agencies are not required to disclose "'recommendations, draft documents, proposals, suggestions, and other subjective documents' that comprise part of the process by which the government formulates decisions and policies." (Quoting OIP Op. Ltr. No. 04-15 at 4 (Aug. 30, 2004).)

Construing Grube's request to refer to the operating budget memoranda from each of the City's departments, BFS argued that disclosure of these documents would have a chilling effect that would lower the quality of the information provided to BFS and consequently impair its decision-making. The requests were thus the precise sort of records the deliberative process privilege created by HRS § 92F-13(3) was intended to exempt from disclosure, BFS concluded.

On April 13, 2015, Civil Beat submitted a letter from its counsel encouraging BFS to favor public access, waive any concerns about the frustration of government functions, and produce the records in the interest of transparency. On April 30, 2015, BFS provided Civil Beat with a third notice revising

its denial to allow partial disclosure of the requested information.[6] The revised notice stated that BFS still intended to withhold the proposed budget amounts and those budget justifications that involved "safety inspections, staffing, training and equipment."[7]

C. Circuit Court Proceedings

On May 8, 2015, Civil Beat filed a two-count complaint against the City and BFS in the Circuit Court of the First Court (circuit court) seeking declaratory and injunctive relief.[8] Count I of the complaint sought an order declaring that the OIP precedent adopting the deliberative process privilege was palpably erroneous, as well as an order enjoining the City and BFS from invoking the purported privilege to deny public access

[6] The City and BFS have at various stages of this case characterized this notice as a waiver of the deliberative process privilege with respect to the portions of the requested records BFS intended to disclose. During oral argument before this court, however, counsel for the City and BFS stated that BFS determined these portions of the records were not protected by the privilege, making a waiver unnecessary. Oral Argument at 00:49:20-58, Peer News LLC v. City & Cty. of Honolulu (No. SCAP-16-114), http://oaoa.hawaii.gov/jud/oa/17/SCOA_060117_SCAP_16_114.mp3.

[7] Additionally, BFS stated that it intended to withhold information regarding specific staff salaries pursuant to HRS § 92F-13(1), which provides as follows: "This part shall not require disclosure of . . . (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-14(b)(6) (2012) elaborates, "The following are examples of information in which the individual has a significant privacy interest: . . . (6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness." Civil Beat does not challenge BFS's right to withhold this information, and we therefore do not address the matter further.

[8] The Honorable Virginia L. Crandall presided.

to governmental records. Count II sought access to copies of the departmental budget memoranda identified in Civil Beat's March 5, 2015 request, subject to the redaction of specific salaries.

The City and BFS filed a joint answer on June 1, 2015,[9] and then filed two joint motions for partial summary judgment on October 19, 2015--one for each count in Civil Beat's complaint. Civil Beat responded by filing two combined opposition/cross-motions for summary judgment on November 13, 2015.

In its oppositions/cross-motions,[10] Civil Beat asserted that a broad deliberative process privilege would contradict the legislature's plainly stated intent that, under the UIPA, agency "deliberations . . . shall be conducted as openly as possible." (Quoting HRS § 92F-2 (2012).) Civil Beat further contended that the UIPA's legislative history indicates that the legislature made a purposeful decision not to adopt a deliberative process privilege, which at the time of the UIPA's enactment was

[9] The City and BFS initially filed a third-party complaint against OIP, arguing that any declaratory relief or litigation expenses that Civil Beat was entitled to should be granted against OIP and not the City or BFS. OIP answered arguing, inter alia, that it had never issued any opinion regarding the records at issue in this case and that it was not responsible for the City or BFS's application of its precedents. On July 23, 2015, the City, BFS, and OIP stipulated to the dismissal without prejudice of the third-party complaint against OIP, which the circuit court approved and ordered.

[10] Civil Beat first presented the arguments contained in its oppositions/cross-motions in a prior motion for summary judgment, which was denied.

codified in both federal law and the model statute upon which the UIPA was based.

Even assuming that the UIPA contains a deliberative process privilege, Civil Beat continued, the exception should be read narrowly to require weighing the public's interest in disclosure against the government's need for secrecy. The privilege should also apply only to documents containing the personal opinions of agency staff, Civil Beat argued, and it should last only as long as the agency decision to which the records pertain remains pending. Here, the public's interest in the disclosure of the budget requests outweighed the City's need for secrecy, Civil Beat contended, arguing that the documents reflected the policy of the various departments rather than the personal opinions of individual staff and that the Mayor's executive budget had already been finalized and publicly released. The budget requests would therefore not be covered by a deliberative process privilege even if such a privilege existed, Civil Beat concluded.

By contrast, the City and BFS argued that the UIPA's legislative history does not show that the legislature intended to omit the deliberative process privilege, but rather to mindfully incorporate it into the broader "frustration of a legitimate government function" exception. Furthermore, they continued, because the privilege originated under the federal

common law, it is alternately supported by HRS § 92F-13(4), which shields "[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure."[11]

On December 3, 2015, following a hearing on all four motions, the circuit court orally ruled in favor of the City and BFS on all issues. The court first found that the OIP opinions adopting the deliberative process privilege were not palpably erroneous because they were not clearly contrary to the legislative intent of HRS § 92F-13(3). The court further found that the requested budget memoranda were pre-decisional, deliberative documents prepared as part of the budget-setting process and were thus covered by the deliberative process privilege. On January 13, 2016, the circuit court entered written orders granting the City and BFS's motions, and final judgment was entered on February 5, 2016. Civil Beat filed a timely notice of appeal.

D. ICA Proceedings and Transfer

Before the ICA, Civil Beat raised three points of error:

[11] The State of Hawaiʻi was granted leave to participate as amicus curiae and filed a brief supporting the City's stance that a deliberative process privilege exists under the UIPA. The State took no position, however, as to whether the City properly applied the privilege when it withheld access to the requested records in the present case.

> 1. Whether OIP and the circuit court erred in recognizing a deliberative process privilege, and thus a presumption of secrecy for records of government deliberations . . . .
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> 2. Whether the circuit court erred in applying the deliberative process privilege standard to bar disclosure of the requested departmental budget memoranda, without weighing the public interest in disclosure of government financial information, the lack of harm to the privilege's core concern for personal opinions of vulnerable employees, or the passage of time. . . .
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> 3. Whether the circuit court erred when it held that the requested departmental budget memoranda "are protected by the deliberative process privilege" – allowing the City to entirely withhold the memoranda – even though the court acknowledged that purely factual information within a privileged record is not protected and the City conceded that portions of the requested records contained purely factual information.[12]

On September 9, 2016, Civil Beat applied for transfer to this court, arguing that the case presents novel legal issues and questions of fundamental public importance. This court granted Civil Beat's application for transfer on October 12, 2016.

II. STANDARDS OF REVIEW

The legislature has directed that OIP's opinions be considered as precedent in a UIPA enforcement action such as

[12] In their answering brief, the City and BFS argue that these points of error are a "gross mischaracterization" of the arguments made below and urge the court to instead accept their alternate points of error. As discussed, Civil Beat argued in its cross-motion for summary judgment in Count II that the circuit court should consider the public's interest in disclosure when determining whether the operating budget requests were protected by the privilege. Civil Beat also contended that OIP's adoption of the deliberative process privilege effectively created a presumption that all agency deliberations are confidential. We therefore hold that all of Civil Beat's points of error were properly preserved, and we consider them accordingly.

this so long as they are not "palpably erroneous." HRS § 92F-15(b) (2012 & Supp. 2017).

This court reviews a grant or denial of summary judgment de novo. Querubin v. Thronas, 107 Hawaiʻi 48, 56, 109 P.3d 689, 697 (2005).

III. DISCUSSION

Although OIP has opined for nearly thirty years that a deliberative process privilege exempts certain inter- and intra-agency documents from the UIPA's disclosure requirements, see, e.g., OIP Op. Ltr. No. 89-9 (Nov. 20, 1989); OIP Op. Ltr. No. F19-01 (Oct. 11, 2018), this court has not heretofore had an opportunity to consider the propriety of this interpretation. We first consider the privilege in relation to the plain language of the UIPA before turning to the UIPA's legislative history for indications of the legislature's intent regarding the public disclosure of deliberative agency records.

A. The Language of the UIPA

As we have often stated, "the fundamental starting point for statutory interpretation is the language of the statute itself." State v. Wheeler, 121 Hawaiʻi 383, 390, 219 P.3d 1170, 1177 (2009) (quoting Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & Cty. of Honolulu (CARD), 114 Hawaiʻi 184, 193, 159 P.3d 143, 152 (2007)). "[W]here the statutory language is plain and unambiguous, our sole duty is to

give effect to its plain and obvious meaning." Id. (quoting CARD, 114 Hawai'i at 193, 159 P.3d at 152).

In adopting the deliberative process privilege, OIP relied upon HRS § 92F-13(3), which shields from disclosure those "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." The unambiguous meaning of this provision is that, to fall within its parameters, a record must be of such a nature that disclosure would impair the government's ability to fulfil its proper duties. But the deliberative process privilege as formulated by OIP gives no direct consideration to whether a particular disclosure would negatively impact a legitimate government function. Instead, a record is shielded by the privilege anytime it is "pre-decisional" and "deliberative." OIP Op. Ltr. No. 90-3 at 12 (Jan. 18, 1990) (explaining that a communication is protected by the privilege if it is made prior to an agency decision and "makes recommendations or expresses opinions on . . . policy matters" (quoting Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975)).

The City and BFS argue that all pre-decisional, deliberative records would frustrate a legitimate government function if disclosed. Administrators faced with the possibility that their remarks will be publicly disseminated are

less likely to offer frank and uninhibited opinions for fear of public criticism or ridicule, they argue, and inhibiting the free exchange of ideas will in turn diminish the quality of agency decision-making. Thus, a determination that a record is pre-decisional and deliberative is functionally equivalent to a finding that disclosure of the record would impair a legitimate government function, the City and BFS appear to conclude.

But the UIPA itself makes clear that these generalized concerns alone are not sufficient to constitute frustration of a legitimate government function within the meaning of the statute. HRS § 92F-2, which sets forth the legislature's purposes in enacting the UIPA and provides principles for interpreting the law, states in relevant part the following:

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

(Emphases added.) The statute goes on to provide that the UIPA "shall be applied and construed to promote its underlying purposes and policies," including, inter alia, to "[p]romote the public interest in disclosure" and "[e]nhance governmental accountability through a general policy of access to government records."

Insofar as a tradeoff exists between inhibiting the frank exchange of ideas and ensuring agency accountability through public oversight, HRS § 92F-2 clearly expresses a policy preference in favor of "[o]pening up the government processes to public scrutiny." The list of the UIPA's underlying purposes and policies, which was provided to guide our interpretation, repeatedly emphasizes that ensuring government accountability through public access and disclosure was among the legislature's top priorities in enacting the statute.[13] Moreover, the law expressly states that "the formation . . . of public policy," including "discussions" and "deliberations," "shall be conducted as openly as possible." HRS § 92F-2.

As the City and BFS readily admit, the deliberative process privilege is specifically designed to protect from public scrutiny "documents reflecting advisory opinions, recommendations[,] and deliberations comprising part of a process by which government decisions and policies are formulated"--the precise opposite of the policy HRS § 92F-2 explicitly declares the UIPA should be interpreted to promote. (Emphasis added) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S.

[13] The only countervailing consideration included in the rules of construction is the personal privacy of individuals. See HRS § 92F-2(5) (stating the UIPA should be interpreted to "[b]alance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy").

132, 150 (1975)). Indeed, adopting the City and BFS's argued interpretation would render much of HRS § 92F-2 a dead letter, for one is hard pressed to imagine "deliberations" or "discussions" constituting the "formation . . . of government policy" that are not pre-decisional and deliberative.[14] Such a result would be contrary to the "cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute." Coon v. City & Cty. of Honolulu, 98 Hawai'i 233, 259, 47 P.3d 348, 374 (2002) (quoting Franks v. City & Cty. of Honolulu, 74 Haw. 328, 339, 843 P.2d 668, 673 (1993)). 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." Id. (quoting Franks, 74 Haw. at 339, 843 P.2d at 673).

[14] Communications 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. See Deliberation, Black's Law Dictionary (10th ed. 2014) ("The act of carefully considering issues and options before making a decision or taking an action[.]"); Abramyan v. U.S. Dep't of Homeland Sec., 6 F.Supp.3d 57, 64 (D.D.C. 2013) ("A record is deliberative if 'it reflects the give-and-take of the consultative process.'" (emphasis added) (quoting Judicial Watch, Inc. v. FDA, 449 F.3d 141, 151 (D.C. Cir. 2006)); OIP Op. Ltr. No. 90-3 at 12 (explaining that a document is deliberative when it "makes recommendations or expresses opinions on . . . policy matters"). Thus, the City and BFS's analysis effectively reads out of HRS § 92F-2 the express "policy of this State that the formation and conduct of public policy--the discussions, deliberations . . . of government agencies--shall be conducted as openly as possible."

In light of the policy statement and rules of construction contained in HRS § 92F-2, the disclosure of pre-decisional, deliberative records cannot be said to inherently frustrate a legitimate government function within the meaning of the UIPA.[15] Thus, because the deliberative process privilege

[15] 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 the 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 & Assocs., 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.").

(continued . . .)

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).

B. The Legislative History of the UIPA

A review of the UIPA's legislative history confirms that HRS § 92F-13(3) was not intended to create a blanket privilege for deliberative documents.

Prior to 1988, public access to government records in Hawaiʻi was governed by two primary statutes that were often in tension, as well as a wide range of other statutes concerning access to specific records. See 1 Report of the Governor's Committee on Public Records and Privacy apps. B-D (1987) (setting forth statutes governing disclosure of government records) (hereinafter Governor's Report). Hawaiʻi's "Sunshine Law," codified in HRS Chapter 92, contained a broad disclosure mandate. The law stated that "[a]ll public records shall be available for inspection by any person" with limited exceptions for documents related to litigation, certain records that would

(. . . continued)

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.

damage the "character or reputation of any person," and specific records for which state or federal law provided otherwise. HRS § 92-51 (1985). Hawai'i's Fair Information Practice law, on the other hand, contained a broad prohibition on the disclosure of "personal records," which were expansively defined to include "any item, collection, or grouping of information about an individual that is maintained by an agency." HRS § 92E-1 (1985); see also HRS § 92E-4 (1985).

The tension between HRS Chapters 92 and 92E, which were "written at different times for different purposes and without regard for each other," created substantial conflict and uncertainty, leading Governor John Waihee to convene an Ad Hoc Committee on Public Records and Privacy Laws in 1987 to consider possibilities for reform. Governor's Report at 2-3. After receiving public comment and holding a series of public hearings, the Committee produced a four-volume Governor's Report that comprehensively detailed the competing interests implicated on a wide range of related issues in order to provide a factual foundation for sound policy making. Id. at 5.

In its chapter on "Current Issues and Problems," the Governor's Report contained a section entitled "Internal Government Processes." Id. at 101. The Report described the internal processes of government as "[o]ne of the areas of greatest tension in any review of public records law," noting

the conflict between ensuring government accountability and permitting agencies to freely communicate internally. Id. While discussing the differing interests at stake in the disclosure of internal agency correspondence and memoranda, the Governor's Report noted that, based on testimony from the Honolulu Managing Director, "[t]hese 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." Id.

However, a review of applicable statutes and caselaw makes clear that this view was inaccurate. Under HRS Chapter 92, public records were expansively defined to include essentially all written materials created or received by an agency, save only those "records which invade the right of privacy of an individual." HRS § 92-50 (1985) ("As used in this part, 'public record' means any written or printed report, book, or paper . . . of the State or of a county . . . in or on which an entry has been made . . . or which any public officer or employee has received . . . ." (emphases added)).[16] The definition did not exclude deliberative communications, nor were

[16] The dissent's attempted narrowing of HRS § 92-50's parameters, Dissent at 22 n.3, is contrary to the plain text of the statute.

such public records excluded from the broad disclosure mandate contained in HRS § 92-51.

Thus, prior to the enactment of the UIPA, deliberative, pre-decisional agency records were open to public inspection under the plain language of HRS Chapter 92. It is therefore unsurprising that both available court decisions on the subject resulted in an order that the government agency disclose the deliberative materials sought. See Pauoa-Pacific Heights Cmty. Grp. v. Bldg. Dep't, 79 HLR 790543, 790556 (Jan. 9, 1980) (ordering disclosure of "building applications, building plans, specifications, supporting documentation and inter and intra office memorandum, reports and recommendations requested by Plaintiffs" (emphasis added)); Honolulu Advertiser, Inc. v. Yuen, 79 HLR 790117, 790120, 790128 (Oct. 10, 1979) (ordering the release of "all interoffice and intraoffice memorandum, memos to file, or telephone logs pertaining to the Mililani Sewage Treatment Plant").[17]

[17] In the order issued in Yuen, the court initially stated that "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, regulation, court rule, or common law privilege." Yuen, 79 HLR at 790128. Prior to filing its order, however, the court crossed out "or common law privilege," appearing to specifically reject upon further consideration any argument that the government could rely upon common law principles like the deliberative process privilege to resist its statutory disclosure obligations. See id.

Spurred by the release of the Governor's Report, legislators in the Hawai'i House of Representatives in 1988 introduced the bill that would become the UIPA, largely basing the law on the Model Uniform Information Practices Code (MUIPC) that had been promulgated in 1980 by the National Conference of Commissioners on Uniform State Laws. H. Stand. Comm. Rep. No. 342-88, in 1988 House Journal, at 972. As adopted by the House, the bill incorporated twelve exceptions to disclosure derived from Section 2-103 of the MUIPC, including an exemption for deliberative agency records:

> § -13 Information not subject to duty of disclosure. (a) This chapter shall not require disclosure of:
>
> (1) Information compiled for law enforcement purposes, including victim or witness assistance program files, if the disclosure would:
>
> (A) Materially impair the effectiveness of an ongoing investigation, criminal intelligence operation, or law enforcement proceeding;
>
> (B) Identify a confidential informant;
>
> (C) Reveal confidential investigative techniques or procedures, including criminal intelligence activity; or
>
> (D) Endanger the life of an individual;
>
> (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[.]
>
> (3) Material prepared in anticipation of litigation which would not be available to a party in litigation

> with the agency under the rules of pretrial discovery for actions in a circuit court of this State;
>
> (4) Materials used to administer a licensing, employment, or academic examination if disclosure would compromise the fairness or objectivity of the examination process;
>
> (5) Information which, if disclosed, would frustrate government procurement or give an advantage to any person proposing to enter into a contract or agreement with an agency including information involved in the collective bargaining process provided that a roster of employees shall be open to inspection by any organization which is allowed to challenge existing employee representation;
>
> (6) Information identifying real property under consideration for public acquisition before acquisition of rights to the property; or information not otherwise available under the law of this State pertaining to real property under consideration for public acquisition before making a purchase agreement;
>
> (7) Administrative or technical information, including software, operating protocols, employee manuals, or other information, the disclosure of which would jeopardize the security of a record-keeping system;
>
> (8) Proprietary information, including computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by the agency or entrusted to it;
>
> (9) Trade secrets or confidential commercial and financial information obtained, upon request, from a person;
>
> (10) Library, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed on the material;
>
> (11) Information that is expressly made nondisclosable or confidential under federal or state law or protected by the rules of evidence.
>
> (12) An individually identifiable record not disclosable under part III.

H.B. 2002, 14th Leg., Reg. Sess., § 1 at 8-10 (1988) (emphasis added).

During consideration by the Senate, the Senate Government Operations Committee heard testimony from a number of parties critical of the exemption for inter-agency or intra-agency advisory, consultative, or deliberative material. The witnesses argued that the exemption would close many agency records that were open to the public under then-existing law. The Chairman of the non-profit government watchdog group Common Cause Hawaiʻi, for example, testified that the exemption "relating to inter and intra-agency records . . . would result in closing off access to records which are currently open to the public," resulting in "a major NET loss of public information." The Honolulu Advertiser and KHON-TV also objected to the exemption, stating that it would "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 one of the former members of the Ad Hoc Committee on Public Records and Privacy that created the Governor's Report testified that the provision "relating to inter- and intra-agency records would result in closing off access to records which are currently open to the public."[18]

[18] The former Ad Hoc Committee member noted that "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."

After receiving this testimony, the Senate version of the bill was amended to remove the twelve specific exemptions in the House bill and add four of the more general exemptions contained under current law, including the frustration of a legitimate government function exception now codified in HRS § 92F-13(3). S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1095. Nine of the twelve exemptions contained in the House bill were included in the Standing Committee Report--in the same order in which they occurred in the House bill--as examples of records for which disclosure would frustrate a legitimate government function:

> (b) Frustration of legitimate government function. The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function,
>
> (1) Records or information compiled for law enforcement purposes;
>
> (2) Materials used to administer an examination which, if disclosed, would compromise the validity, fairness or objectivity of the examination;
>
> (3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract agreement with an agency, including information pertaining to collective bargaining;
>
> (4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;
>
> (5) Administrative or technical information, including software, operating protocols and employee manuals, which, if disclosed, would jeopardize the security of a record-keeping system;
>
> (6) Proprietary information, such as research methods, records and data, computer programs and

> software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;
>
> (7) Trade secrets or confidential commercial and financial information;
>
> (8) Library, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed by the contributor; and
>
> (9) Information that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule.

Id. Of the three exemptions contained in the House bill that were not included as examples of records that would frustrate a legitimate government interest if disclosed, two were encompassed by other provisions of the Senate bill.[19] Only one exemption that was present in the House bill was omitted entirely: the deliberative process provision that the testifying witnesses had objected to on the basis that it would close records that were open under then-existing law. Compare id., with H.B. 2002, 14th Leg., Reg. Sess., § 1 at 8-10 (1988).

That the omission was intentional is confirmed by the report of the Conference Committee, which opted to adopt the general exceptions to disclosure contained in the Senate's version of the bill. In discussing the frustration of a

[19] Section -13(a)(3), which exempted nondiscoverable litigation materials, was recodified as a separate exception to disclosure in the provision that would become HRS § 92F-13(2). Similarly, section -13(a)(12), which exempted individually identifiable records, was encompassed by the provision that would become the HRS § 92F-13(1) exception that shields records when disclosure would constitute "a clearly unwarranted invasion of personal privacy."

legitimate government function exception, the Conference Committee Report referenced the examples listed in the Senate Standing Committee 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." Conf. Comm. Rep. No. 112-88, in 1988 House Journal, at 818 (emphasis added).

Thus, the legislative history of the UIPA 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 Hawaiʻi law.[20] OIP's adoption of such a privilege is

[20] Other legislative history further demonstrates the Hawaiʻi legislature's rejection of the deliberative process privilege. When adopting the Hawaii Rules of Evidence (HRE) in 1980, for instance, the Hawaiʻi legislature disclaimed all common law privileges that were not codified by statute--including the deliberative process privilege that existed under federal common law. See HRE Rule 501 & cmt. In choosing which privileges to so codify, the legislature and judiciary declined to adopt a deliberative process privilege despite one being contained in the proposed federal rules after which the HRE were modeled. See Rules of Evidence for the United States Courts & Magistrates, 56 F.R.D. 183, 251-52 (Nov. 20, 1972) (containing a proposed Rule 509 granting the government a privilege to refuse disclosure of "official information," which was defined to include "intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions"); HRE Rule 501 cmt. (noting that the proposed Rules of Evidence for U.S. Courts and Magistrates served as a model for the HRE).

therefore contrary to the clear signals the legislature provided as to the intended functioning of the statute.

C. OIP's Interpretation of HRS § 92F-13(3) is Palpably Erroneous

The legislature has provided that OIP's interpretations of the UIPA in an action to compel disclosure should generally be considered precedential. HRS § 92F-15(b). Nevertheless, our precedents and the UIPA itself make clear that we are not bound to acquiesce in OIP's interpretation when it is "palpably erroneous." Peer News LLC v. City & Cty. of Honolulu, 138 Hawaiʻi 53, 67, 376 P.3d 1, 15 (2016); HRS § 92F-15(b). This is to say that "judicial deference to an agency's interpretation of [even] ambiguous statutory language is 'constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history.'" Kanahele v. Maui Cty. Council, 130 Hawaiʻi 228, 244, 307 P.3d 1174, 1190 (2013) (quoting Morgan v. Planning Dep't, Cty. of Kauaʻi, 104 Hawaiʻi 173, 180, 86 P.3d 982, 989 (2004)).

We have held that, even when OIP has maintained a position for many years without challenge, it is this court's duty to reject that position if it is plainly at odds with the UIPA. In ʻŌlelo: The Corp. for Community Television v. OIP, for instance, this court considered the "totality of the circumstances" test OIP had adopted from out-of-jurisdiction precedent to identify an "agency" for purposes of the UIPA. 116

Hawaiʻi 337, 346-49, 173 P.3d 484, 493-96 (2007). Though the test had been applied in nine OIP opinions over the course of seventeen years,[21] this court nonetheless held it invalid because it was contrary to the "plain and unambiguous" definition of "agency" contained in HRS § 92F-3 (1993). Id. at 351, 173 P.3d at 498. Similarly, in a previous case also entitled Peer News LLC v. City & County of Honolulu, this court determined that a nineteen-year-old OIP opinion stating that police officers have only a de minimis privacy interest in employment-related misconduct information was palpably erroneous because the interpretation rendered portions of the UIPA a "nullity." 138 Hawaiʻi at 67, 376 P.3d at 15. Such a result was "inconsistent with [the] underlying legislative intent" of the statute, we held. Id. at 67 n.10, 376 P.3d at 15 n.10.

Like OIP's interpretation of HRS § 92F-3 in ʻŌlelo, OIP has maintained in multiple opinions issued over an extended period that HRS § 92F-13(3) creates a deliberative process privilege.[22] As discussed, however, such an interpretation is

[21] See OIP Op. Ltr. Nos. 05-09, 04-02, 02-08, 94-24, 94-23, 94-05, 93-18, 91-05, 90-31.

[22] See OIP Op. Ltr. No. F19-01 at 9 (Oct. 11, 2018) ("OIP has issued a long line of opinions since 1989 that recognize and limit the deliberative process privilege as a form of the frustration exception in section 92F-13(3)."); see also, e.g., OIP Op. Ltr. Nos. 07-11, 04-15, 00-01, 93-19, 91-24, 90-8, 90-3, 89-9.

(continued . . .)

contrary to the clear and unambiguous language of HRS § 92F-13(3) and the statement of purposes and policies contained in HRS § 92F-2. And, like in Peer News, the privilege is plainly inconsistent with the legislative history of the UIPA, which indicates that the legislature specifically rejected a deliberative process exception before enacting the law.[23] OIP therefore palpably erred in adopting an interpretation of HRS § 92F-13(3) that is irreconcilable with the plain text and

(. . . continued)

The City and BFS argue that, by failing to act to correct these OIP opinions, the legislature has tacitly approved OIP's interpretation of HRS § 92F-13(3). As the United States Supreme Court has stated, even a very long period of legislative silence cannot be invoked to validate a statutory interpretation that is otherwise impermissible. Zuber v. Allen, 396 U.S. 168, 185 n.21 (1969). Legislative inaction may indicate a range of conditions other than approval, including "unawareness, preoccupation, [] paralysis," or simply trust in the state's court system to correct a clearly inconsistent interpretation. Id. We therefore decline to recognize legislative acquiescence in OIP's interpretation of HRS § 92F-13(3).

[23] The OIP opinions do not truly engage with the clear negative implication of the UIPA's legislative history. In the 1989 opinion adopting the privilege, OIP set forth the Senate Committee Report's examples of records that may fall under HRS § 92F-13(3) before summarily asserting 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." OIP Op. Ltr. No. 89-9 at 9. The opinion then discussed a number of federal cases interpreting the deliberative process exception contained in the federal Freedom of Information Act, 5 U.S.C. § 552(b)(5). OIP Op. Ltr. No. 89-9 at 9-11. But these cases interpreting the federal statute are relevant to the Hawai'i legislature's intent when enacting the UIPA only insofar as they demonstrate that the legislature was clearly aware that other jurisdictions had codified the deliberative process privilege, thus making their rejection of such a privilege all the more clear. Importantly, in adopting the privilege, OIP failed to consider or even mention those aspects of the UIPA's legislative history that demonstrate that the privilege had been intentionally omitted from the final version of the statute.

legislative intent of the statute.[24] See Peer News, 138 Hawai'i at 67, 376 P.3d at 15; ʻŌlelo, 116 Hawai'i at 349, 173 P.3d at 496. We accordingly conclude that the circuit court erred by upholding OIP's interpretation and by granting summary judgment to the City and BFS.

D. The Requirements of HRS § 92F-13(3)

Because we hold that OIP palpably erred in adopting a deliberative process privilege pursuant to the HRS § 92F-13(3) exception for documents that would frustrate a legitimate government function if disclosed, we now provide guidance as to the provision's proper application. The 1988 Senate Standing Committee Report, which included examples of records that may fall under the HRS § 92F-13(3) exception "[t]o assist the

[24] The City and BFS alternatively argue that the deliberative process privilege may be based on the HRS § 92F-13(4) exemption for "[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure," contending that the provision incorporates the federal common law deliberative process privilege. This novel theory has not been adopted by OIP, which has made some statements indicating that it takes a contrary position. See, e.g., OIP Op. Ltr. No. 05-06 at 3 (Mar. 22, 2005) (stating that HRS § 92F-13(4) applies "only where that record is made confidential by another statute" (emphasis omitted and added)). Whether reviewed under a palpably erroneous or de novo standard, the government's argument fails to regenerate the privilege from federal common law.

Further, as stated, a deliberative process privilege is contrary to the plain language of HRS § 92F-2 and the legislative history of the UIPA as a whole. We accordingly hold that the legislature did not intend HRS § 92F-13(4) to incorporate the federal common law deliberative process privilege, which applies exclusively in federal courts when jurisdiction is based on a question of federal law. See Young v. City & Cty. of Honolulu, No. CIV 07-00068 JMS-LEK, 2008 WL 2676365, at *4 (D. Haw. July 8, 2008); supra note 20 (describing the Hawai'i legislature's rejection of the common law privilege when enacting the HRE).

Judiciary in understanding the legislative intent," is highly instructive. S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1095; see also Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 387-89, 846 P.2d 882, 891-92 (1993) (holding that competing development proposals would frustrate a legitimate government function within the meaning of HRS § 92F-13(3) if disclosed prior to the agency's final selection of a developer because, inter alia, the records fell "within one or more of the classes of information described in the" Senate Standing Committee Report). 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.

Notably, 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. By contrast, the City and BFS argued that the legitimate government function that may be frustrated by the disclosure of deliberative records was simply agency decision-making. But "decision-making" 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.

Indeed, even illegitimate actions beyond the government's legal authority could likely be described as decisions. Thus, to claim the protections of HRS § 92F-13(3), 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.[25] To hold otherwise would result in the provision having no meaningful limitations.

Further, the Senate Standing Committee Report indicates that not even the expressly enumerated categories of records are automatically exempt from disclosure; the report describes the enumerated documents as "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function." S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1095 (emphasis added). Thus, HRS § 92F-13(3) calls for an individualized determination that disclosure of the particular record or portion thereof would frustrate a legitimate government function.[26] That a record is of a certain type--whether that type is deliberative, pre-

[25] Under HRS § 92F-15(c), "[t]he agency has the burden of proof to establish justification for nondisclosure."

[26] As BFS correctly determined in this case, 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. See Peer News, 138 Hawaiʻi at 73, 376 P.3d at 21.

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 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.

E. The Dissent's Proposed Rule

The dissent characterizes our holding--that a deliberative process privilege is clearly unsupported by the plain text and legislative history of the UIPA--as an "extreme position[]," [27] and instead advocates for an approach similar to

[27] It is noted that several other states have provided through statute and judicial determination that, as we hold today, deliberative agency records are generally not exempted from public records request. See, e.g., Conn. Gen. Stat. § 1-210(e)(1); Vt. Stat. tit. 1, § 317(c)(4); Braddy v. State, 219 So.3d 803, 820 (Fla. 2017)("Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records . . . ." (quoting Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633, 640 (Fla. 1980)). And an administrative decision in at least one other state has adopted a similar position in the absence of judicial guidance or an explicit statutory directive. See McKitrick v. Utah Attorney General's Office, No. 2009-14, ¶ 7 (Utah State Records Comm. Sept. 17, 2009), https://archives.utah.gov/src/srcappeal-2009-14.html ("The AG's Office also argued that access should be restricted . . . because the common law recognizes . . . a 'deliberative process privilege' for documents created within the executive branch of government. However, the cases proffered by the AG's office supporting such position clearly predate the enactment of [Utah's public record's law]."); see also S. Utah Wilderness All. v. Automated Geographic Reference Ctr., Div. of Info. Tech., 200 P.3d 643, 656 (Utah 2008) (holding that the requested internal agency records did not fall

(continued . . .)

that taken by the Colorado Supreme Court in City of Colorado Springs v. White. Dissent at 4-5 (citing 967 P.2d 1042 (Colo. 1998) (en banc)). From White, the dissent derives a proposed framework for applying a circumscribed variation of the deliberative process privilege that shields agency deliberations only when an agency provides a detailed explanation of why the record qualifies for the privilege and the government's interest in confidentiality outweighs the requester's interest in disclosure. Dissent at 30-32. But material differences in Colorado's public records statute 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.

In White, the Colorado Supreme Court held that a deliberative process privilege inhered not in a public records exception for records that would frustrate government functions if disclosed, but rather an exception that expressly protected "privileged information" from disclosure. 967 P.2d at 1045-46 (citing Colo. Rev. Stat. § 24-72-204(3)(a)(IV) (1998)). Unlike

(. . . continued)

within the narrow exception in Utah's public record law for "temporary drafts" produced by an agency).

the Hawaii Rules of Evidence (HRE), the Colorado Rules of Evidence (CRE) provide that claims of privilege are governed by, inter alia, "the principles of the common law as they may be interpreted by the courts of the State of Colorado in light of reason and experience." CRE Rule 501. The Colorado Supreme Court was thus acting within the bounds the legislature had established when in White it recognized a qualified deliberative process privilege "as part of the common law of Colorado" and held that the privilege and the balancing test it encompassed had been incorporated into the statutory public records exception for "privileged information." 967 P.2d at 1050, 54-55.

In contrast, the dissent does not attempt to ground its deliberative process privilege in a UIPA exemption for documents that would be undiscoverable in litigation due to an evidentiary privilege. This is unsurprising because, as discussed supra, note 20, the HRE do not allow for common law privileges, and the legislature specifically declined to adopt a deliberative process privilege when codifying those evidentiary privileges that are available. See HRE Rule 501 (2006). Thus, unlike in the Colorado public records law that was interpreted in White, there is no basis to incorporate a common law qualified deliberative process privilege or the balancing test it encompasses into the UIPA.

Indeed, not only is the dissent's interpretation lacking in affirmative support, but there are strong textual signals in the UIPA actively weighing against such a reading. HRS § 92F-14 (2012) provides a statutory framework for evaluating when a record qualifies for withholding under HRS § 92F-13(1), which shields "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." HRS § 92F-14(a) explicitly calls for a balancing test similar to the test the dissent would apply here, stating that a record will not qualify for withholding when "the public interest in disclosure outweighs the privacy interest of the individual." No analogous provision exists for the HRS § 92F-13(3) frustration of a legitimate government function exception. The implication of this absence is that "the legislature clearly knew how to" prescribe a balancing test, and its failure to do so with respect to HRS 92F-13(3) represents a conscious decision that one should not be applied. Lales v. Wholesale Motors Co., 133 Hawaiʻi 332, 345, 328 P.3d 341, 354 (2014) (quoting White v. Pac. Media Grp., Inc., 322 F.Supp.2d 1101, 1114 (D. Haw. 2004)).

The dissent's approach may well represent sound policy, and we express no opinion as to its advisability as matter of public administration. But

> [w]e are not at liberty to interpret a statutory provision to further a policy that is not articulated in either the language of the statute or the relevant legislative history, even if we believe that such an interpretation would produce a more beneficent result, for the Court's function in the application and interpretation of such laws must be carefully limited to avoid encroaching on the power of the legislature to determine policies and make laws to carry them out.

Lopez v. State, 133 Hawai'i 311, 323, 328 P.3d 320, 332 (2014) (original alterations and quotations omitted) (quoting Ross v. Stouffer Hotel Co. Ltd., Inc., 76 Hawai'i 454, 467, 879 P.2d 1037, 1050 (1994) (Klein, J., concurring and dissenting)). The 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. So long as no such exception exists in the UIPA, this court may not supply its own.

IV. CONCLUSION

The circuit court in this case erred in determining that the City and BFS were entitled to withhold the budget requests pursuant to a deliberative process privilege, which finds no basis in the plain text or legislative history of the UIPA. Accordingly, we vacate the circuit court's January 13, 2016 Order Granting Defendants 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 Order Granting Defendants City and County of Honolulu and Department of Budget and Fiscal Services' Motion for Partial Summary Judgment on Count II of the Complaint filed

October 19, 2015; and February 5, 2016 Judgment. We remand this case for further proceedings consistent with the principles set forth in this opinion.

Robert Brian Black
Sarah Goggans
for appellant

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

Duane W.H. Pang
for appellees

/s/ Michael D. Wilson

Marissa H.I. Luning
for amicus curiae
State of Hawaiʻi

ATTACHMENT B

Dissenting opinion in Peer News

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---o0o---

PEER NEWS LLC, dba CIVIL BEAT,
Plaintiff-Appellant,

vs.

CITY AND COUNTY OF HONOLULU and
DEPARTMENT OF BUDGET AND FISCAL SERVICES,
Defendants-Appellees.

SCAP-16-0000114

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-16-0000114; CIV. NO. 15-1-0891)

DECEMBER 21, 2018

DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH RECKTENWALD, C.J., JOINS

At issue in this case is whether the Office of Information Practices' (OIP) adoption of a deliberative process privilege, which shields any government record that is deemed "predecisional" and "deliberative" from disclosure to the public, is palpably erroneous. While I respectfully disagree with the

Majority that OIP's recognition of a deliberative process privilege is not supported by the language or legislative history of the Uniform Information Practices Act (UIPA), I believe OIP's current test that determines whether a government record falls within the privilege is palpably erroneous.

In 2015, a reporter from Plaintiff-Appellant Peer News LLC, dba Civil Beat (Civil Beat), requested access to the operating budget requests from each of Defendant-Appellee City and County of Honolulu's (the City) executive departments for the 2016 fiscal year, pursuant to Hawaiʻi Revised Statutes (HRS) § 92F-11(a). Defendant-Appellee Department of Budget and Fiscal Services (BFS) denied the reporter's request, stating that the requested documents fell within the deliberative process privilege, and therefore, were protected from disclosure pursuant to HRS § 92F-13(3).

Following the denial of its request, Civil Beat filed a two-count complaint in the Circuit Court of the First Circuit (circuit court) seeking the following forms of declaratory relief: (1) an order (a) declaring that OIP's adoption of the deliberative process privilege was palpably erroneous and (b) enjoining the City and BFS (collectively "Defendants") from invoking the privilege to deny Civil Beat access to the requested documents; and (2) an order directing Defendants to disclose the

records sought in Civil Beat's original request.

Defendants filed two motions for summary judgment, one for each count in the complaint. Civil Beat filed two cross-motions for summary judgment. Following a hearing, the circuit court granted summary judgment to Defendants on both motions. The circuit court ruled that OIP's recognition of the deliberative process privilege under HRS § 92F-13(3) was not inconsistent with legislative intent, and therefore, was not palpably erroneous. Additionally, the circuit court found that the operating budget requests sought by Civil Beat were predecisional and deliberative, and therefore protected by the deliberative process privilege. Civil Beat appealed.

On appeal, this court must resolve two issues: (1) whether OIP's recognition of the deliberative process privilege is palpably erroneous; and (2) whether OIP's current two-part test that determines whether a document is protected by the privilege is palpably erroneous. In other words, this court must decide whether OIP's interpretation of the UIPA, which generally receives deference, HRS § 92F-15(b) (2012), is so inconsistent with the legislative intent of the statute that it is palpably erroneous. See Kanahele v. Maui Cty. Council, 130 Hawaiʻi 228, 245-46, 307 P.3d 1174, 1191-92 (2013).

Unlike the Majority, I do not believe that OIP's

recognition of the deliberative process privilege is palpably erroneous. The plain language of HRS § 92F-2 (2012), the legislative history underlying the UIPA, and the Legislature's actions prior and subsequent to the enactment of the UIPA do not suggest to me that the Legislature clearly intended to reject the deliberative process privilege as an exception to the general rule requiring public access to government records. Accordingly, I would hold that the circuit court did not err in granting Defendants' motion for summary judgment on Count I.

However, I believe that OIP's two-part test that currently determines whether a document is protected by the deliberative process privilege is palpably erroneous. OIP's test creates a broad exception that favors non-disclosure over public access, and thus conflicts with the Legislature's intent that the UIPA be construed to promote the public interest in disclosure through a general policy of access to government records. Therefore, I would hold that the circuit court erred in granting Defendants' motion for summary judgment with respect to Count II, insofar as the circuit court applied OIP's current test to conclude that the requested operating budget requests fell within the deliberative process privilege.

In contrast with the extreme positions adopted by the Majority, which would reject any deliberative process privilege

altogether, and OIP, which adopted an unduly expansive interpretation of the privilege, I would adopt 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. See City of Colorado Springs v. White, 961 P.2d 1042 (Colo. 1998) (en banc). Such an approach would protect the public's right of access to documents without unduly impeding the ability of government officials to reach sound decisions through the free and candid exchange of ideas. Accordingly, I would adopt that approach here, and remand to the circuit court to apply it to the City's budget memoranda at issue in this case.

I. DISCUSSION

To resolve (1) whether OIP's recognition of the deliberative process privilege is palpably erroneous; and (2) whether OIP's two-part test for determining whether a document is protected by the privilege is palpably erroneous, this court must evaluate whether OIP's interpretation of the UIPA, codified at HRS Chapter 92F, is palpably erroneous. Thus, my analysis begins with an overview of HRS Chapter 92F and OIP's adoption of the deliberative process privilege thereunder.

The purpose of the UIPA, as defined in HRS § 92F-2

(2012), provides 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 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.

As to public access to government records, HRS § 92F-11(a) (2012) provides: "All government records are open to public inspection unless access is restricted or closed by law." HRS § 92F-13 (2012), which identifies five exceptions to the foregoing rule, states in pertinent part: "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[.]"

The Legislature delegated authority to interpret the UIPA to OIP. HRS § 92F-42 (2012). Therefore, in an action to compel disclosure filed in the circuit court pursuant to HRS § 92F-15(a),[1] the "[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[.]" HRS § 92F-15(b) (2012).

[1] HRS § 92F-15(a) (2012) provides that "[a] person aggrieved by a denial of access to a government record may bring an action against the agency at any time within two years after the agency denial to compel disclosure."

OIP's Opinion Letter No. 04-15 summarizes the nature and extent of the deliberative process privilege:

> In previous advisory opinions, the OIP recognized that the disclosure of certain intra-agency and inter-agency memoranda or correspondence would frustrate the legitimate government function of agency decision-making by injuring the quality of agency decisions. The OIP thus extended the "frustration" exception under the UIPA, in line with case law interpreting the federal Freedom of Information Act, to allow the withholding of agency records protected by the executive or "deliberative process privilege." The deliberative process privilege shields from disclosure "recommendations, draft documents, proposals, suggestions, and other subjective documents" that comprise part of the process by which the government formulates decisions and policies.
>
> "This privilege, which protects the deliberative and decisionmaking processes of the executive branch, rests most fundamentally on the belief that were agencies forced to 'operate in a fish bowl,' the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." The privilege protects the quality of agency decision-making, specifically, by encouraging subordinates to provide uninhibited opinions and recommendations to decision-makers without fear of public ridicule or criticism; by protecting against premature disclosure of proposed policies or decisions before they are finally formulated or adopted; and by protecting against any confusion of the issues and misleading of the public that might be caused by dissemination of documents suggesting reasons and rationales that are not in fact the ultimate reasons for an agency's action.

OIP Op. Ltr. 04-15 at 4 (emphases added) (citations omitted).

With these principles in mind, I now consider Civil Beat's points of error.

A. OIP's recognition of the deliberative process privilege is not palpably erroneous.

With respect to its first point of error, Civil Beat asserts that the circuit court erred in ruling that OIP's

recognition of the deliberative process privilege is not palpably erroneous. In support of this position, Civil Beat contends that: (1) OIP's recognition of the deliberative process privilege is inconsistent with the plain language of HRS § 92F-2; (2) the legislative history underlying the UIPA indicates that the Legislature unequivocally intended to reject the deliberative process privilege under the UIPA; and (3) the Legislature's actions prior and subsequent to the UIPA's enactment support that the Legislature did not intend to recognize a deliberative process privilege under the statute.

For the reasons discussed below, I am not persuaded by any of Civil Beat's arguments on this point, and therefore cannot conclude that OIP's adoption of a deliberative process privilege under HRS § 92F-13(3) is palpably erroneous.

1. Plain language of HRS § 92F-2

First, Civil Beat contends that OIP's adoption of the deliberative process privilege is palpably erroneous because such an interpretation of HRS § 92F-13(3) "ignored the plain language of the UIPA declaration of State policy that 'deliberations . . . shall be conducted as openly as possible.'" (ellipsis in original) (quoting HRS § 92F-2). To Civil Beat, OIP's adoption of a privilege that exempts certain memoranda and communications that are part of an internal deliberative process is inconsistent

with the foregoing policy declarations espoused in HRS § 92F-2. Accordingly, Civil Beat asserts that because OIP's recognition of the deliberative process privilege runs afoul of the language in HRS § 92F-2, and would render such statutory language meaningless, the circuit court erred in ruling that OIP's adoption of the privilege was consistent with the Legislature's intent.

In my view, Civil Beat's argument is not convincing. Although HRS § 92F-2 certainly supports that the UIPA favors ensuring the transparency of and public access to our government's decisionmaking and policy-development processes, the plain language of several provisions in the UIPA indicates that the Legislature did not intend for such transparency and accessibility to be absolute. In particular, HRS § 92F-2 states 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." (Emphasis added.) Additionally, HRS § 92F-11(a) provides: "All government records are open to public inspection unless access is restricted or closed by law." (Emphasis added.) I believe 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. From my perspective, 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.

Moreover, I do not agree with Civil Beat that the phrase "deliberations . . . shall be conducted as openly as possible" is effectively read out of HRS § 92F-2 as a consequence of OIP's recognition of the deliberative process privilege. True, the privilege, as properly applied, exempts some government deliberations from disclosure under the UIPA. But the exemption of one category of documents relating to government deliberations in certain contexts, such as internal, predecisional communications containing opinions and recommendations about proposed policies, will not necessarily deny the public access to all government deliberations as Civil Beat suggests.[2]

2. Legislative history

Civil Beat also argues that the UIPA's legislative history supports the Legislature's clear intent to "omit the

[2] As I describe in Section I.B infra, a proper application of the deliberative process privilege requires balancing the government's interest in protecting from disclosure documents involved in the deliberative process with the public's interest in disclosure. Should the public's interest outweigh the government's, disclosure of the deliberative document would be required.

deliberative process privilege" from the UIPA.

Civil Beat notes that the House's draft of House Bill No. 2002 (H.B. 2002), the bill that would ultimately become the UIPA, initially identified twelve specific exceptions to the general rule mandating public access to government documents. Civil Beat observes that the Senate declined to adopt the House's approach, and instead created four general categories of documents that would be exempt from disclosure. Civil Beat emphasizes, "[t]he only [House] exception not referenced in the Senate draft [of the bill] or Senate committee report was the deliberative process privilege."

Accordingly, Civil Beat argues that the Senate purposefully omitted the deliberative process privilege from its list of documents that would fall within the "frustration of legitimate government function" exception. Such action by the Senate, Civil Beat contends, indicates a clear intent to omit the privilege from the UIPA. Further, Civil Beat asserts that the Conference Committee, which attempted to resolve the differences between the House and Senate versions of H.B. 2002, adopted the Senate's intent to omit the deliberative process privilege when it favorably referred to the Senate's more general list of exceptions of documents that fell within the "frustration of government function" exception.

Additionally, Civil Beat cites two other statements in the UIPA's legislative history as supportive of its position that the Legislature did not intend to acknowledge the deliberative process privilege. Civil Beat asserts that "the Senate stated clearly that it did not intend OIP or the courts to create exemptions that it had anticipated and rejected" when it remarked in a committee report that "[t]he common law is ideally suited to the task of balancing competing interest in the grey areas and unanticipated cases, under the guidance of the legislative policy." (Citing S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1094 (alteration in original) (emphasis omitted)). Additionally, Civil Beat highlights that the Conference Committee stated: "The records which will not be required to be disclosed . . . 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." (Citing Conf. Comm. Rep. No. 112-88, in 1988 House Journal, at 818, 1988 Senate Journal, at 690.) To Civil Beat, because "[t]he only category of records consistently highlighted by testifiers as available under pre-UIPA law was government deliberations," the Conference Committee report supports the Legislature's intent to omit the deliberative process privilege.

However, it appears to me 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. As drafted by the House, Section 13 of H.B. 2002 provided that the following types of government records would not be subject to public disclosure:

> (1) 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;
>
> (3) Material prepared in anticipation of litigation[;]
>
> (4) Materials used to administer a licensing, employment, or academic examination if disclosure would compromise the fairness or objectivity of the examination process;
>
> (5) Information which, if disclosed, would frustrate government procurement or give an advantage to any person proposing to enter into a contract or agreement with an agency including information involved in the collective bargaining process provided that a roster of employees shall be open to inspection by any organization which is allowed to challenge existing employee representation;
>
> (6) Information identifying real property under consideration for public acquisition before acquisition of rights to the property[;]
>
> (7) Administrative or technical information[;]
>
> (8) Proprietary information[;]
>
> (9) Trade secrets or confidential commercial and

> financial information obtained, upon request, from a person;
>
> (10) Library, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed on the material;
>
> (11) Information that is expressly made nondisclosable or confidential under federal or state law or protected by the rules of evidence.
>
> (12) An individually identifiable record not disclosable under part III.

H.B. 2002, H.D. 1, 14th Leg., Reg. Sess. (1988) (emphasis added).

The Senate revised the House's version of H.B. 2002 significantly. In particular, the Senate enumerated four broad categories of documents that would be exempt from disclosure, in contrast with the House's approach of identifying more specific types of records that could be kept from public view. See S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1094. One of the Senate's categorical exceptions encompassed documents that, by their nature, must be confidential to avoid the frustration of a legitimate government function. Id. On this revision, the Senate commented:

> 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.
>
> . . . .

> (b) Frustration of a legitimate government function. The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.
>
> (1) Records or information compiled for law enforcement purposes;
>
> (2) Materials used to administer an examination which, if disclosed, would compromise the validity, fairness, or objectivity of the examination;
>
> (3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining;
>
> (4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;
>
> (5) Administrative or technical information[;]
>
> (6) Proprietary information[;]
>
> (7) Trade secrets or confidential commercial and financial information;
>
> (8) Library, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed by the contributor; and
>
> (9) Information that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule.

Id. at 1094-95 (emphasis added).

A Conference Committee attempted to resolve the differences between the House and Senate versions of H.B. 2002. Regarding its approach to determining which government records would be exempt from the general rule requiring public access

thereto, the Conference Committee remarked:

> Both the earlier House and Senate drafts of this bill provided a general rule of access with a limited set of exceptions to that general rule. In doing so, both the House and Senate made clear their shared view that an open government is the cornerstone of our democracy. . . .
>
> The House and Senate in their earlier drafts, however, took markedly different paths to reaching the shared goal of access. The House chose, with some modification, to use the Uniform Information Practices Code of the National Conference of Commissioners on Uniform State Laws. The Senate, on the other hand, chose to modify existing laws in part because the House bill appeared to have been significantly misunderstood and in part because a set of amendments which directly attacked the current problems appeared to be a preferable course of action.
>
> After substantial debate and discussion, your Committee believes that there is wisdom in both approaches and that a synthesis of the versions is appropriate. . . .
>
> The major features of the conference draft are discussed below and are intended to serve as a clear legislative expression of intent should any dispute arise as to the meaning of these provisions.
>
> . . . .
>
> 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 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 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.

Conf. Comm. Rep. No. 112-88, in 1988 House Journal, at 817-18, 1988 Senate Journal, at 690 (emphases added).

I believe that the legislative history of the UIPA does not evince a clear legislative intent to discard the deliberative process privilege for three reasons.

First, although the deliberative process privilege was not included on the Senate's list of examples of documents that need not be disclosed because disclosure would frustrate a legitimate government function, the Senate did not suggest that this list was exhaustive or exclusive. Absent any restrictive language, I believe that the Senate's omission of the privilege from its list of examples of documents that could fall within the frustration of legitimate government function exception illustrates, at most, an ambiguous intent. It is possible that the Senate's omission suggests an intent to reject the privilege, especially because the other exceptions identified in the House's version of H.B. 2002 were included on the list. Majority at 27. However, 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). See S. Stand. Comm. Rep. No. 2580, in 1988

Senate Journal, at 1094. Therefore, the Senate's list of examples of records that could fall within HRS § 92F-13(3), and the Conference Committee's adoption thereof, does not illustrate a clear intent by the Legislature to reject the deliberative process privilege under the UIPA.

Second, 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. For example, with regard to its amendment to another section of the House version of H.B. 2002, Section 92-50, the Senate explained:

> (c) The words "by law" have been deleted. By this deletion, your Committee specifically rejects the application of the "legal requirement" test in Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. 682, 282 N.E. 2d 379 (1972) and Dunn v. Board of Assessors of Sterling, 1972 Mass. A.S. 901, 282 N.E.2d 385 (1972) (cited in the May 6, 1976 Attorney General's memorandum to former Governor George Ariyoshi) to qualify entries that were made. Nor should a "legal requirement" test be applied to records which are "received" for filing.

S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1094 (emphasis added). By contrast, with respect to the Senate's omission of inter- or intra-agency deliberative memoranda from its list of examples of records that may be kept confidential to avoid the frustration a legitimate government function, the Senate did not include such express language suggesting an intent to reject the deliberative process privilege. Therefore, I believe the absence of explicit language specifically indicating

that such an omission by the Senate was deliberate (which is present in other sections of the Senate Standing Committee report) further supports that the Legislature did not clearly intend to reject the privilege's inclusion under HRS § 92F-13(3).

Third, when read in context, the Senate's statement regarding the use of the common law and the Conference Committee's statement regarding "currently available records" do not suggest that the Legislature intended to reject the deliberative process privilege.

Civil Beat misconstrues the Senate's remark that "[t]he common law is ideally suited to the task of balancing competing interest in the grey areas and unanticipated cases[.]" S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1094. In explaining its approach to defining exceptions to the general rule requiring public access to government records, 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." Id. 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 in the grey areas and unanticipated cases, under the guidance of the legislative policy." Id.

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 unforeseen circumstances. In my view, this statement does not suggest that the Legislature intended to reject the deliberative process privilege, as Civil Beat claims.

Similarly, Civil Beat's argument based on the Conference Committee's comment that "[i]t 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," Conf. Comm. Rep. No. 112-88, in 1988 House Journal, at 818, 1988 Senate Journal, at 690, is unpersuasive.

In support of its assertion that documented inter- and intra-agency deliberative communications were publicly available under the predecessor to the UIPA such that the Legislature did not contemplate their exemption from disclosure under the UIPA, Civil Beat relies upon the testimony of several witnesses before the Senate Government Operations Committee. These witnesses testified that the House version of H.B. 2002 "would result in

closing off access to [inter- and intra-agency] records which are currently open to the public." Majority at 25. Because the Conference Committee did not intend for the frustration of government function exception to "close off currently available records, even though these records might fit within one of the categories in this section," Civil Beat uses this testimony to argue that the Conference Committee did not intend to recognize the deliberative process privilege.

However, the 1987 Report of the Governor's Committee on Public Records and Privacy, which the Legislature considered in developing the UIPA, see H. Stand. Comm. Rep. No. 342-88, in 1988 House Journal, at 969-70; S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1093, also stated that City Managing Director Jeremy Harris (Managing Director Harris) testified that "internal 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." 1 Report of the Governor's Committee on Public Records and Privacy at 101 (1987). Therefore, insofar as the record does not clearly support Civil Beat's position that inter- and intra-agency deliberative communications and memoranda were categorically available to the public prior to the UIPA's enactment, I do not believe that Civil Beat's argument based on

the foregoing language in the Conference Committee report is persuasive.[3] Because the legislative history of the UIPA does not clearly indicate to me that the Legislature meant to reject a deliberative process privilege, OIP's adoption of the privilege is not palpably erroneous.

3. The Legislature's actions prior and subsequent to the enactment of the UIPA

Finally, Civil Beat argues that the Legislature's

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[3] According to the Majority, Managing Director Harris's testimony reflects an inaccurate view as to whether internal agency correspondence and memoranda constituted "public records" before the UIPA's enactment. Majority at 21. Instead, the Majority posits that all deliberative, predecisional agency records were "public records" within the meaning of HRS § 92-50 (1985), the predecessor to the UIPA, because thereunder, "public records were expansively defined to include essentially all written materials created or received by an agency, save only those 'records which invade the right of privacy of an individual.'" Majority at 21 (quoting HRS § 92-50 (1985)). Hence, the Majority concludes that "deliberative, pre-decisional agency records," including internal agency memoranda and communications generated as a part of an agency's decision-making process, "were open to public inspection under the plain language of HRS Chapter 92." Majority at 22.

Although the definition of "public record" in HRS § 92-50 was broad, I am not certain that it necessarily encompassed all "written materials created or received by an agency." Contra Majority at 22. HRS § 92-50 contained restricting language that appears to limit the types of records generated or received by an agency that could constitute "public records." For example, HRS § 92-50 required that, in order to be a "public record," the document must have been of the type "in or on which an entry has been made or is required to be made by law." Alternatively, HRS § 92-50 provided that if the document was one that an "employee has received or is required to receive for filing," such a document could have qualified as a "public record" thereunder. Moreover, "public records" did "not include records which invade the right of privacy of an individual." HRS § 92-50.

Thus, 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. Hence, it is also possible that Managing Director Harris's testimony on this point was not wholly inaccurate. Even taking into account other testimony to the contrary, 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.

actions prior and subsequent to the enactment of the UIPA in 2012 indicate that the Legislature intended to reject the deliberative process privilege under the UIPA.

As to the Legislature's actions prior to the enactment of the UIPA, Civil Beat refers to the Legislature's adoption of the Hawaiʻi Rules of Evidence (HRE). Civil Beat observes that pursuant to HRE Rule 501,[4] the Legislature chose to only recognize the evidentiary privileges required under the federal and Hawaiʻi constitutions and statutes, or provided in the HRE or other rules adopted by this court. Civil Beat reasons that because the Legislature did not incorporate the deliberative process privilege into the HRE, "the Legislature soundly rejected the deliberative process privilege as an evidentiary privilege in Hawaiʻi state courts."

But the Legislature's rejection of the deliberative process privilege as an evidentiary privilege, which would

[4] HRE Rule 501 provides:

> **Privileges recognized only as provided.** Except as otherwise required by the Constitution of the United States, the Constitution of the State of Hawaii, or provided by Act of Congress or Hawaii statute, and except as provided in these rules or in other rules adopted by the Supreme Court of the State of Hawaii, no person has a privilege to:
>
> (1) Refuse to be a witness; or
> (2) Refuse to disclose any matter; or
> (3) Refuse to produce any object or writing; or
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

preclude the use of inter- and intra-agency deliberative memoranda generated in the course of decision-making and policy development as evidence in court proceedings,[5] does not necessarily equate to a rejection of the deliberative process privilege as an exception to the general rule requiring disclosure of government records under the UIPA. See Harwood v. McDonough, 799 N.E.2d 859, 864 (Ill. App. Ct. 2003) (noting that the Illinois Supreme Court's rejection of the deliberative process privilege as an evidentiary privilege did not constitute a rejection of the privilege as an exemption from the disclosure requirements under the Illinois public records law).

As to the Legislature's actions subsequent to the UIPA's enactment, Civil Beat avers that in 2015, the Senate introduced Senate Bill No. 1208 (S.B. 1208). Civil Beat contends that S.B. 1208 "would have recognized the deliberative process privilege as part of the UIPA frustration exception." However, Civil Beat argues, the Legislature "rejected that language [referencing the privilege] and ultimately enacted the bill without codifying the deliberative process privilege."

Civil Beat's argument is unpersuasive because S.B. 1208 and its accompanying legislative history do not relate to whether

[5] Regarding the scope of the HRE's applicability, HRE Rule 101 states: "These rules govern state proceedings in the courts of the State of Hawaii, to the extent and with the exceptions stated in rule 1101."

the deliberative process privilege has been recognized under the UIPA. S.B. 1208 concerns the Employees' Retirement System (ERS), not the UIPA. As initially drafted, S.B. 1208 would have authorized the ERS Board of Trustees to hold meetings closed to the public in order to, inter alia, "consider draft reports, memoranda, and preliminary recommendations from staff, consultants, actuaries, and other agencies, subject to the deliberative process privilege under [HRS] section 92F-13(3)." S.B. 1208, 28th Leg., Reg. Sess. (2015) (emphasis added).

It is true that the relevant legislative history underlying S.B. 1208 indicates that the Senate subsequently removed "the description of the privilege . . . as a deliberate process privilege." S. Stand. Comm. Rep. No. 663, in 2015 Senate Journal, at 1097. But, prior to describing the nature and extent of its amendments to the original version, the Senate explained:

> Your Committee finds that the Board of Trustees of the Employees' Retirement System have a fiduciary duty to invest funds for the benefit of the System and its members. On many occasions, this may require that the Board of Trustees review and consider confidential or proprietary information relating to investments. Your Committee finds that in appropriate situations, it would be beneficial for the Board to be able to review and consider such information in executive session.

Id. While the Committee's explanation appears to elucidate its reasons for removing the "deliberative process privilege" language from the original draft of S.B. 1208, this explanation

sheds no light on whether the deliberative process privilege was properly recognized under the UIPA. In fact, the Senate's initial inclusion of the language "subject to the deliberative process privilege under section 92F-13(3)" in S.B. 1208 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.

To conclude, 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. Therefore, in my view, OIP's recognition of the deliberative process privilege under HRS § 92F-13(3) is not palpably erroneous. Consequently, I would hold that the circuit court did not err in granting summary judgment in favor of Defendants on Count I.

B. OIP's current test which determines whether a document falls within the deliberative process privilege is palpably erroneous.

Civil Beat's second point of error requires this court to decide whether OIP's two-part test for determining whether a

document falls within the deliberative process privilege is palpably erroneous. OIP has articulated its test as follows:

> To invoke the deliberative process privilege, an agency must show that the document sought to be protected meets two requirements: First, the document must be "predecisional," i.e., received by the decision-maker prior to the time the agency decision or policy is made. Second, the document must be "deliberative," i.e., a recommendation or opinion on agency matters that is a direct part of the decision-making process. The privilege thus protects the back-and-forth discussions that lead up to the agency's decision, not the final policy of the agency.

OIP Op. Ltr. 04-15 at 4-5 (emphasis added) (citations omitted).

Civil Beat contends that even if OIP's adoption of the deliberative process privilege is not palpably erroneous, OIP's current two-part test is. Civil Beat argues that the test currently applied by OIP is overbroad, as it improperly "assume[s] that disclosure of agency deliberations will frustrate government function in every case." Civil Beat asserts that the scope of the privilege should be much narrower, and suggests that "[i]n light of Hawaii's unique declaration of policy favoring access to deliberative records, a purported Hawaiʻi deliberative process privilege must diverge from the expansive . . . federal privilege." Accordingly, Civil Beat argues that the privilege "must be balanced against the public interest in disclosure of the departmental budget memoranda."

I agree. HRS § 92F-2 states in relevant part:

> 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, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible.
>
> . . . .
>
> 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 governmental 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.

(Emphases added.)

In other words, while the Legislature acknowledged that the UIPA does not mandate the disclosure of all government records, see HRS § 92F-13, it also declared that "it is the policy of this State that the formation and conduct of public policy . . . shall be conducted as openly as possible." HRS § 92F-2. As such, the language in HRS § 92F-2 indicates that the Legislature intended that exceptions to the general rule requiring public access, like the deliberative process privilege, be narrowly construed. Consistent with this intent, OIP has acknowledged that the UIPA's exceptions to the general rule requiring public access to government records "should be narrowly

construed with all doubts resolved in favor of disclosure." OIP Op. Ltr. 90-3 at 7.

Notwithstanding the aforementioned principles, OIP's test creates a fairly broad exception to the UIPA's general rule regarding public access to government records. Under the current test applied by OIP, an agency need only demonstrate two general requirements before the document may be shielded from public access under the deliberative process privilege: (1) that the document 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 the finalization of an agency decision); and (2) that the document's contents contained personal opinions, advice, or recommendations of agency staff that played some role, regardless of how significant or minute, in the deliberative process. Put differently, OIP's current test presumes that the disclosure of any and all predecisional and deliberative documents would equally impact the quality of agency decision-making at all levels and all stages of the deliberative process. As a consequence of this test's application, an extensive, 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.

Accordingly, OIP's recognition of an expansive, rather than narrow, exception to the general rule requiring public access to government records is inconsistent with the Legislature's explicit intent to "[p]romote the public interest in disclosure" and "[e]nhance governmental accountability[.]" See HRS § 92F-2. This test is therefore palpably erroneous.

I believe there is a better approach to resolving whether certain government records may be shielded from public disclosure that is more consistent with the UIPA than OIP's overly expansive interpretation of the deliberative process privilege or the Majority's unduly narrow reading of the statute. This approach 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. See HRS § 92F-2.

This approach is not unlike the test developed by the Colorado Supreme Court in White, 967 P.2d 1042. The White court, in recognizing the deliberative process privilege for the first time, imposed technical procedural requirements on the government to ensure that a "party's interest in the information is not 'submerged beneath governmental obfuscation and mischaracterization[.]'" 967 P.2d at 1053 (citing Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973)). These procedural

requirements, which the White court stated could be established through an indexing system,[6] should (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. Id. at 1053. These requirements would provide parties seeking disclosure with information about the allegedly privileged material and provide them with a meaningful opportunity to challenge the government's claims. Id. at 1053-54.

Even after establishing a preliminary showing, in accordance with the Legislature's stated purpose to "[e]nhance governmental accountability through a general policy of access to government records," a court must balance the government's interest in confidentiality with the discoverants' interest in disclosure of the materials.[7] See HRS § 92F-2; see also Fuller

[6] This indexing system was first introduced by the D.C. Circuit in Vaughn, and is referred to in several jurisdictions as the "Vaughn index."

[7] While it is true that HRS § 92F-13(3) does not explicitly provide a balancing of interests, Majority at 39, as noted previously, the Legislature (continued...)

v. City of Homer, 75 P.3d 1059, 1063 (Alaska 2003). In doing so, a court should not mechanically consider whether a document is "predecisional" and "deliberative". Instead, a court should weigh the government's interest in confidentiality with a party's interest in disclosure on a case-by-case basis.

Here, in concluding under OIP's current test that the memoranda at issue were predecisional and deliberative, the circuit court did not appropriately balance the public interest in disclosure when it granted summary judgment to Defendants on Count II. Therefore, I would vacate the circuit court's grant of summary judgment as to Count II and remand to the circuit court to apply the considerations articulated above to the documents at issue in this case.

II. CONCLUSION

Although I believe that OIP's recognition of a deliberative process privilege is not palpably erroneous, OIP's adoption of its current test that governs whether a document is covered by the privilege is palpably erroneous.

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[7](...continued)
contemplated that exceptions to public disclosure be developed through the common law. Indeed, the Senate stated that it wished to "rely on the developing common law," which was "ideally suited to the task of balancing competing interest in the grey areas and unanticipated cases," to determine which records would remain confidential. See S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1094. The Senate's exceptions to the rule requiring disclosure were eventually adopted by the report of the Conference Committee. Conf. Comm. Rep. No. 112-88, in 1988 House Journal, at 818, 1988 Senate Journal, at 690.

I would therefore vacate in part the circuit court's February 5, 2016 judgment, vacate the circuit court's January 13, 2016 order granting Defendants' motion for summary judgment on Count II, and remand for further proceedings consistent with the principles outlined above. I would affirm the circuit court's January 13, 2016 order granting Defendants' motion for summary judgment as to Count I.

Accordingly, I respectfully dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

ATTACHMENT C

OIP's proposed amendment to HB1478

SECTION 1. In 1988, the legislature passed the uniform information practices act (modified), chapter 92F, Hawaii Revised Statutes. The legislature declared in the uniform information practices act 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."

Part II of the uniform information practices act requires state and county government agencies, including the legislature and the judiciary's administrative offices, to allow, upon request, public access to government records, unless the records qualify for one of five exceptions to disclosure found in section 92F-13, Hawaii Revised Statutes. When it passed the uniform information practices act, the legislature did not intend to list specific records that could be withheld but instead created categories of reasons for withholding records or information with the intent to rely on the common law being developed by the courts and the decisions of the newly created office of information practices.

Beginning in 1989, the office of information practices recognized that public disclosure of pre-decisional and deliberative memoranda and correspondence transmitted within or between government agencies, such as staff recommendations, notes, drafts, and internal memoranda exchanging ideas,

opinions, and editorial judgments before a decision or policy is finalized and made public, could impede the candid and free exchange of ideas and opinions within an agency for fear of being subject to public ridicule or criticism and could thus frustrate agencies' decision-making function. Moreover, the premature disclosure of proposed policies or tentative decisions before they have been finally formulated or adopted can lead to public confusion and unnecessary divisiveness based on reasons, rationales, or proposals that were not ultimately adopted or expressly incorporated by reference into the final document.

The legislature finds that the protection of internal decision-making materials is necessary to protect agencies' ability to freely and candidly share views internally and thus reach sound and fair decisions, which is consistent with the legislature's original intent in passing the uniform information practices act.

On December 21, 2018, however, a majority of three justices of the Hawaii supreme court in *Peer News LLC v. city and County of Honolulu*, 143 Hawai'i 472 (2018), concluded that the legislature never intended for such pre-decisional and deliberative records to be withheld from public access under the uniform information practices act exception in section 92F-13(3), Hawaii Revised Statutes.

The legislature further finds that the dissenting opinion by two justices of the Hawaii supreme court in *Peer News LLC* provided a more accurate assessment of the legislature's intent when it established the uniform information practices act. The dissent concluded that the legislative history underlying chapter 92F, Hawaii Revised Statutes, did not actually indicate that the legislature intended to omit the deliberative process privilege. However, while the legislature believes that the government should justify why a specific document qualifies for protection and that the government's interest in confidentiality must be balanced against the public's interest in disclosure, the legislature rejects the dissent's proposal, which would require all agencies to provide an index as described in *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973), whenever an agency denies access to all or a portion of a record. Instead, the legislature will leave it to the courts and the office of information practices, which hear appeals of denials of access under the uniform information practices act, to decide if such an index is desirable on a case-by-case basis.

The legislature further intends that government records should be disclosed when the public interest in disclosure outweighs the potential impairment to the agency's ability to reach sound and fair decisions. Consequently, in applying the deliberative process privilege, the courts and the office of

information practices must balance the interests of the public and government agencies.

The purpose of this Act is to clarify the legislature's intent regarding internal deliberative and pre-decisional materials of government agencies.

SECTION 2. Section 92F-13, Hawaii Revised Statutes, is amended to read as follows:

"**92F-13 Government records; exceptions to general rule.** This part shall not require disclosure of:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

(2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

(4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; [~~and~~]

(5) Drafts, internal memoranda and correspondence, and other deliberative and pre-decisional materials which are a direct part of an agency's internal decision-making process and disclosure of which would impair the agency's ability to make sound and fair decisions, but only to the extent that such impairment outweighs the public interest in disclosure; and

(6) 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."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary
Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 12, 2019 4:00 PM
State Capitol, Conference Room 325

WRITTEN TESTIMONY ONLY
by
Susan Pang Gochros
Chief Staff Attorney and Director
Intergovernmental and Community Relations Department

Bill No. and Title: House Bill No. 1478, Relating to the Uniform Information Practices Act

Purpose: Includes the nonadministrative functions of the courts of the State within the definition of "agency" under the Uniform Information Practices Act (Modified), (UIPA), chapter 92F, Hawaii Revised Statutes (HRS).

Judiciary's Position:

The Judiciary respectfully, but strongly, opposes this bill that seeks to repeal the exemption for records of “the nonadministrative functions of the courts of this State” from the UIPA.

The Judiciary fully supports measures that promote public interest and scrutiny and the stated purpose of UIPA, set forth in HRS § 92F-2 (“Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.”). However, UIPA requirements governing records relating to the Judiciary's administrative functions are, and should remain, separate and distinct from Hawaii Supreme Court-promulgated rules applicable to records of the nonadministrative functions of the courts, i.e., court records and documents. This delineation has existed for the past 30 years, since the UIPA was first enacted, and there appears no reason to doubt that this is, and remains, a viable distinction given the inherent authority and constitutionally-endowed rulemaking authority of the Hawaii Supreme Court.

Thus, for the reasons set forth below, the Judiciary opposes this bill.

The Reasons that the Legislature Exempted the Nonadministrative Functions of the Judiciary From the UIPA Upon Its Enactment Remain Valid Today

Since the inception of the UIPA, the nonadministrative functions of the Judiciary were excluded from being part of an "agency" subject to the UIPA. Haw. Rev. Stat. Section 92F-3 (2012). Administrative functions have been deemed to exclude matters involved in the adoption of rules of court that directly control the conduct of litigation or that set the parameters of the adjudicative process and regulate interactions between litigants and the courts. Thus, matters such as judicial assignments and scheduling constitute administrative functions subject to UIPA. By contrast, nonadministrative records of the court – the subject of this bill – are those records that are provided to or developed by the court incident to the adjudication of legal matters before the court.

In distinguishing between administrative and nonadministrative functions of the court, the Hawai‘i Legislature, in drafting the UIPA, was guided by the recommendations of the Governor's Committee of Public Records and Privacy. (*See* S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess. Haw. S.J. 1093, 1095 (1988).) The Governor's Committee Reports details a comprehensive discussion of the reasons for exclusion of Judiciary records. The Report states that "the application of . . . [the UIPA] to the Judiciary should effect (sic) primarily administrative records." Governor's Committee Report, Volume 1, 94-5 (1987). The primary reason for excluding records of the Judiciary was the recognition that UIPA confers a right to correct and amend factual errors, misrepresentations and misleading entries contained in personal records. The Governor's Committee noted that:

> In the context of a judicial case, the record is established through a series of proceedings and filings. The total record provides the views of all parties, and once all appeals are exhausted, the record is complete. The notion of correcting the record through an additional process simply does not apply in specific judicial proceedings.
>
> Governor's Committee Report, Vol. 1, 95 (1987).

As the Office of Information Practices (OIP) noted in OIP Op. Ltr. No. 02-10, pg. 6: "[B]y excluding the Judiciary's non-administrative records from the UIPA, conflict with judicial procedures is avoided. It is essential for appeals courts to not be required to correct adjudicative records, because appeals courts "cannot consider matters outside the record which could not have been considered by the trial court at the time its judgment was rendered." (Case citation omitted.)

The Hawai'i' Court Records Rules Effectively Balance Open Government with Individuals' Privacy Interests

The Hawai'i State Constitution confers upon the Supreme Court the power to "promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law." (Hawai'i Constitution, Article VI, Section 7). Pursuant to that constitutional authority, the Supreme Court promulgated the Hawai'i Court Records Rules in 2010.

The Hawai'i Court Records Rules grant the public access to court records while also protecting the privacy interests of the people whose information may be subject to disclosure. Rule 10 of the Hawai'i Court Records Rules, provides:

> Except as otherwise provided by statute, rule, or order, court and ADLRO (Administrative Driver's License Revocation Office) records shall be accessible during regular business hours, subject to priority use by the court, court staff, ADLRO and ADLRO staff. Closed and archived records shall be accessible within a reasonable time after a request is made. . . .

The Hawai'i Court Records Rules were promulgated after years of discussion and consultation with and training for litigants, judges, and court users. Because the Rules presented a departure from past practice, the implementation date of the Rules was postponed twice to ensure that all stakeholders understood how the rules would be applied to court records.

The Rules also provide needed guidance to Hawai'i Judiciary staff. Requests to inspect or obtain court records are made pursuant to these rules. Unless these rules are rescinded, the inclusion of nonadministrative court functions under the UIPA will undoubtedly create confusion for court users and court staff alike, as both the UIPA and the Hawai'i Court Records Rules conceivably would simultaneously control access to court records.

UIPA Disclosure Exceptions Could Make Access to Court Records More Restrictive

The Hawai'i Court Records Rules provide relatively few possibilities for deeming a court document confidential. Rule 9 specifies precisely which information is not provided under the Hawai'i Court Records Rules and that information is generally limited to financial account information and personal information (e.g., social security numbers, dates of birth (except for traffic citations), names of minor children, bank or investment account numbers, medical and health records, and social service reports. (See Rule 2.19, Hawai'i Court Records Rules)

Again, the Judiciary agrees that to the greatest extent possible, court documents (and proceedings) must be open to the public. However, through court rules, the Judiciary is presently achieving this goal. There is a real possibility for confusion to abound if nonadministrative functions of the court are subject to the UIPA. For example, in 1993, OIP opined that records containing a bar examinee's scores, answers and corrected answers are records relating to the nonadministrative functions of the Hawai‘i Supreme Court and that access to those records is thus governed by court rule and not UIPA. If this bill is enacted, would such records now be governed by UIPA? And, if so, what would be the result?

This bill would, at best, create confusion as to competing rules and statutes, and at worst, undermine and limit the availability of nonadministrative court records to the public.

Requiring Disclosure of Draft Appellate Opinions and Correspondence Relating to Court Opinions Strikes at the Core of the Adjudicative Process

The Hawai‘i Supreme Court, like other courts, invites the public to its court proceedings. In fact, it has set up a Courts in the Community Program to enable the public to better see and understand our judicial process at work. The Hawai‘i Judiciary has also ensured that court records are as accessible as possible to the public through online court records programs such as Ho‘ohiki and E-kokua.

Another aspect of our appellate courts' routine work is disseminating among justices and their staff, pre-decisional drafts and correspondence, developed and communicated for the purpose of final decision-making. This procedure is essential to the adjudicatory process. If nonadministrative court documents become subject to the UIPA, these drafts and written communications between justices, law clerks and other staff could be subject to disclosure. This 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. Impeding that fundamental process would undermine the adjudicatory process that lays at the core of our judicial system.

Exempting the Judiciary's Nonadministrative Records from the UIPA is Consistent with Federal Law and Other States' Freedom of Information Laws

The federal Freedom of Information Act (FOIA), which establishes the public's right to access federal agency records, excludes "the courts of the United States" from the definition of "agency." 5 U.S.C 551(1)(B).

Further, other states' laws also distinguish between a judiciary's administrative functions and its nonadministrative functions, and establish separate access requirements for each. For

instance, Arkansas, California, Florida, Georgia, Louisiana, Michigan, Nevada, and New York exclude court records from their respective freedom of information laws.

Conclusion:

The Hawai‘i State Judiciary both appreciates and shares the Legislature’s goal as articulated in HRS § 92F-2 (2012): “Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.”

To this end, the Judiciary has embarked on numerous projects and programs designed to ensure that precise goal. However, court records accessibility is best left to court rules. Those rules must, and do, establish both a manageable process and an appropriate balance of individuals’ privacy rights with the goal of transparency.

If modifications are needed to court rules, the Judiciary is open and receptive to considering them. We are not, however, aware of any discontent with, or confusion arising from, the present court rules. Moreover, we have concerns that opening the UIPA to include the records of the nonadministrative functions of the state courts will be confusing to the public, inconsistent with the very goals that both the Legislature and the Judiciary have worked so hard to achieve.

For the reasons set forth above, the Judiciary respectfully opposes this bill. Thank you for the opportunity to testify in its opposition.

The undersigned John M. Tonaki and Ivan M. Lui-Kwan are board members of the American Judicature Society, but present the following testimony in opposition to HB 1478 as individuals.

We oppose HB 1478 for the following reasons:

1. **The proposed amendment would allow access to, among other things, documents related to the pre-decisional considerations of courts in adjudicating the merits of cases.** In considering and analyzing the merits of a case, the courts often consider a variety of matters, including memoranda or other documents prepared by law clerks, staff or other judges. In considering the material facts in the court record and the applicable legal authorities, it is important for a court to fully vet the parties' respective positions, to consider the pros and cons of each side, and to have the ability to frankly assess the merits of a case. Should the pre-decisional documents of a court be subject to public access, it will greatly hinder a court's ability to fully consider and render its decisions. The 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. This would have a detrimental impact on the course of litigation in many cases, as parties seek to use information gained through UIPA in making future arguments and affecting the positions of the parties. In short, parties would constantly seek access to pre-decisional documents in an effort to impact cases going forward, which would be significantly disruptive to the courts and the parties in managing cases, in seeking to timely resolve litigation, and in allowing courts to make decisions based solely on the merits of the cases before the court. Most importantly, the proposed revision to Hawaii Revised Statutes section 92F-3 would negatively affect the judiciary's ability to conduct full, frank and thorough analyses of all sides of the issues that come before the courts.

2. **The proposed amendment could also open to public access documents that are currently deemed confidential under court rules or procedures.** Another concern posed by HB 1478 is that it may have a variety of unintended consequences, such as making open to public access court documents that are currently deemed confidential given the circumstances of cases and the types of information involved. For instance, in criminal cases, reports related to a defendant's sentencing are often kept confidential to the parties involved because they contain a variety of personal information.

Ivan M. Lui-Kwan

John M. Tonaki

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HOUSE COMMITTEE ON JUDICIARY

Tuesday, February 12, 2019, 4 PM, Conference Room 325
HB 1478, Relating to the Uniform Information Practices Act
COMMENTS
Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Lee and Committee Members:

The League of Women Voters of Hawaii has the following comments on HB 1478 which makes UIPA applicable to non-administrative functions of state courts.

While the LWV-HI supports public access to most government records, we recommend caution with HB 1478. We do not understand which government records this bill concerns and we do not know what problems this bill might cause for the Judiciary.

Thank you for the opportunity to present testimony.