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)

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