

August 12, 2009

Office of Information Practices
250 South Hotel Street, Suite 107
Honolulu, HI 96813

To Whom It May Concern:

I am writing to appeal a denial of access to government records. (See attached denial letter dated July 29, 2009) The records I seek are held by the Office of the Governor and are related to legislation passed during the 2009 regular legislative session. (A transcript of my requests made via electronic mail is enclosed)

Once all of the surviving pieces of legislation had passed final reading at the legislature, the Governor issued a press release soliciting guidance while the bills were awaiting her approval or veto. (See attached press release dated May 8, 2009) For the purpose of this record request, the relevant part of that press release read, "the Governor is seeking comments on bills from the public, including individuals, businesses, industry and professional associations, nonprofit groups, and community organizations statewide. In addition, the Administration is soliciting input from the counties, law enforcement agencies and state boards and commissions." In another press release (see attached press release dated May 5, 2009) the Governor positioned herself in contrast to the legislature, writing, "the Governor plans to issue her vetoes in a public forum *with the opportunity for members of the community to fully see and understand the basis for her decisions.*" This compares to the practice of the Legislature who render their decisions late at night, frequently behind closed doors, and without the opportunity for public scrutiny." [Emphasis added] Then, on May 27, 2009, in a Honolulu Weekly feature (attached), the Governor again decried the lack of transparency in the legislative process, writing, "the general public may not be aware of how many critical decisions by the Legislature are made behind closed doors during conference committees, instead [of] out in the open during public hearings. This means that *when a bill fails to pass at the last minute, we often have the same questions as the public: "What happened? How come?" Several innovative measures introduced by our Administration, and which had broad bipartisan support, suffered this fate this past legislative session, and were killed during secret sessions and with no explanation.* Until this process is improved and made more transparent, I fear that the Hawaii public will continue to be kept in the dark on issues that affect their quality of life." [Emphasis added]

Despite all of these public statements in favor of transparency and open government, my request for records pertaining to the legislation as it awaited approval or veto was denied. In denying my request the Governor's Chief of Staff cited "executive privilege" and HRS 92F-13(3).

The UIPA, as described in the UIPA manual on the OIP website, is perhaps best summarized in the passage reading, "any doubt regarding disclosure of a record should likely be resolved in favor of access." Put another way, any record not specifically excluded from disclosure shall be disclosed.

The Office of Information Practices has previously noted that the “executive privilege” is not explicit but is related to the “deliberative process privilege” of the HRS 92F-13(3) “frustration exception” to the disclosure of records. That part of the exception is explained thusly: “**Inter-agency or Intra-agency Memoranda or Correspondence** used in the agency’s decision-making that falls under the “**deliberative process privilege**.” This privilege allows an agency to withhold recommendations, draft documents, proposals, suggestions and other opinion materials that comprise part of the process by which the agency formulates its decisions and policies. It protects the quality of agency decisions by encouraging the uninhibited exchange of ideas, recommendations and opinions *within an agency*.” [Boldface in original, italics added]

With this in mind, I am now willing to accept the Office of the Governor withholding its **inter- and intra-agency** memoranda or correspondence. However, “agency” in the UIPA, “is defined broadly to encompass all state and county government units, including corporations or other establishments owned, operated, or managed by or on behalf of the State or any county.” Even though it is characterized as a “broad” definition, in this case that definition is narrow in the sense that “agency” does **not** encompass “the public, including individuals, businesses, industry and professional associations, nonprofit groups, and community organizations statewide.” Thus, **I appeal the denial all applicable records not of the inter- or intra-agency memoranda or correspondence form.**

Neither the UIPA specifically nor the HRS generally provides for any “executive” or “deliberative process” privilege that could justify withholding records not involving inter- or intra-agency memoranda or correspondence. The fallback position, given that combined silence and given the clear legislative intent of the UIPA, should be in favor of disclosure. The Governor’s alternative interpretation, i.e. that any record held by an agency documenting communication **involving any party whatsoever** may be withheld under deliberative privilege, is facially absurd. For the OIP to uphold the assertion of such an overbroad “blanket coverage” deliberate privilege would be to strike a major blow against transparency. The legislature discloses the testimony received on all legislation. The records I seek are of the same nature, dealing with precisely the same topics of public interest, and should be similarly disclosed.

Sincerely,

Douglas White
Poinography.com