

HAWAII

Judge Rules in Favor of Secret Government Deliberations

Civil Beat challenged an interpretation of the Hawaii public records law that allows agencies to withhold documents considered “predecisional or deliberative.”

JULY 28, 2015 • By Nick Grube   

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A Hawaii Circuit Court judge sided with the government Tuesday in a civil lawsuit that challenged broad interpretations of state law that effectively keep secret many of the discussions behind public policy decisions.

Judge Virginia Crandall found that state and local agencies have a legitimate interest in keeping such talks out of public view so as to not interfere with the efficiency of government operations.

The case stemmed from a public records lawsuit filed by Civil Beat on May 8 against the City and County of Honolulu for withholding budget documents that Mayor Kirk Caldwell relied upon to form his spending plan for fiscal year 2016.

Specifically, Civil Beat wanted the city to provide departmental budget memos that laid out what each division was requesting from the mayor. These documents could show, for example, that the Honolulu Police Department wanted more money for service weapons or that the city’s street sweepers were in need of replacement.

Cory Lum/Civil Beat



ity & County of Honolulu in an attempt to free up budget records from the Caldwell administration.

The city denied Civil Beat's records request, saying the documents were "predecisional and deliberative," and therefore not releasable under the [Uniform Information Practices Act](#), which allows agencies to conceal information that might otherwise lead to the "[frustration of a legitimate government function](#)."

Civil Beat challenged the denial, arguing that the UIPA does not actually contain a "deliberative process privilege," and that government agencies here have inappropriately used it as an excuse to repress public information for more than 25 years.

“The federal privilege has been under attack in recent years and has been described as a ‘withhold it because you want to’ privilege,” said Brian Black, the executive director of the nonprofit Civil Beat Law Center for the Public Interest. “We shouldn’t have this situation where government agencies are allowed to withhold records simply because they want to avoid scrutiny.”

The lawsuit blamed the Hawaii Office of Information Practices for much of the confusion, according to documents filed by Black, who represented Civil Beat in the case.

“If the public views every idea that’s suggested by anyone in the government then people would be reluctant to give ideas.” — Derek Mayeshiro, Honolulu deputy corporation counsel

When the Hawaii Legislature crafted the UIPA in 1988, lawmakers intentionally left out the deliberative process privilege, which is an exemption found in the federal Freedom of Information Act.

At the time, the Legislature said that it was “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.”

But the OIP — which is the state agency charged with interpreting the UIPA — issued an opinion less than six months later that adopted the federal deliberative process privilege, “in effect hiding all government deliberations from public scrutiny,” Black said.

Since then, OIP has issued several more opinions supporting the government’s right to use the privilege, even though, as Black argued, it’s not in the state public records law.

Government officials from both the city and state have said the privilege is critical for them to operate efficiently and effectively. Essentially, they argue that they need the ability to have frank discussions without undue scrutiny that could lead to embarrassment for airing ideas prematurely.

Honolulu Deputy Corporation Counsel Derek Mayeshiro wrote in court papers that the

deliberative process privilege “preserves the executive government’s ability to brainstorm ideas without fear of undue public criticism.” Civil Beat’s attempt to invalidate the privilege, he said, could “severely cripple the City’s ability to develop policy and decide critical issues.”

The Hawaii Attorney General’s Office also weighed in on the case, arguing that the deliberative process privilege is “important for the everyday functioning of the State’s many agencies.”

“We shouldn’t have this situation where government agencies are allowed to withhold records simply because they want to avoid scrutiny.” — Brian Black, Civil Beat Law Center for the Public Interest

Both the city and state dismissed Civil Beat’s argument that the privilege was not part of the legislative intent when lawmakers passed the UIPA, saying that it was simply included under the broader context of the “frustration of a legitimate government function” exemption.

Tuesday’s oral arguments before Crandall lasted about a half-hour as each side reiterated its stance on the issue.

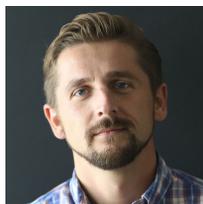
“The government cannot operate in a fishbowl, the government needs the freedom to suggest and solicit ideas, to deliberate and debate suggestions,” Mayeshiro said. “They need that freedom so the government can operate more efficiently, (and) so the government can enhance its decision-making process. If the public views every idea that’s suggested by anyone in the government then people would be reluctant to give ideas.”

Crandall decided that the OIP opinions that have been issued over the years have gone through “a thorough analysis.” She did not make a decision as to whether the city should release its budget documents to Civil Beat, leaving that decision to a future hearing.

Civil Beat Editor and General Manager Patti Epler said the news organization plans to appeal Crandall’s ruling on the deliberative process privilege.

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Frank De Giacomo

No such protection from discovery in civil lawsuits when those decisions go bad. They better get used to the extra scrutiny in advance because if they aren't exercising that caution all the time they will likely regret it in later civil suits.

Like · Reply · 2 · Jul 28, 2015 10:46pm



Rick Tubania · University of Hawaii at Manoa

not positive but you cannot sue a government employee or agency involved in decisions and lawmaking and those decisions and laws do not work out. otherwise, government cannot make important decisions without fear of reprisal; this would defeat the purpose of government. if a bad law or decision is made, then it should be corrected but those responsible are not subject to criminal or civil suits.

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Frank De Giacomo

Aloha Rick, I actually worked up preparations for a section 1983 suit against a city council, and under federal law the decision making process showed who knew what when, and that placed the entire city on the hook for a Constitutional tort. One councilmember screws up, the rest know about it, do nothing, then the whole city is on the hook. The individual employees/officials *may* not be liable for their decisions civilly (criminally they would be) - but that is only as long as they are acting in the scope of their official duties. However, the whole governmental entity can be held responsi... See More

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Rick Tubania · University of Hawaii at Manoa

Frank De Giacomo - in the 1983 case, there was a criminal act committed, yes, people/agency can be held liable but for doing their jobs as employees/agencies, as long as they act within their authority, they cannot be held personally liable for making a "bad" decisions, judgments or laws don't believe that it is a matter of being embarrassed by their deliberative process, they simply do not want outside influences to hamper their ability to do their work. Once their work is finished and implemented, then anyone can challenge the final product and the agency should explain why and how their decision was made. This is the transparency part, prior to a final product, outside influences or intervention would only complicate the process.

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Arvid Youngquist

I recognize this justice's name. Some judges need close scrutiny for retention every ten years and others deserve elevation to the Supreme Court or the Federal Circuit Court. I noticed that some District Court judges are also shy when it comes to the separation of the branches of government and the status quo locally. We need judges to exercise judgement and decide on the weight of public interest rather than bureaucratic foot dragging.

Like · Reply · 2 · Jul 28, 2015 11:53pm



Rick Tubania · University of Hawaii at Manoa

you don't seem to understand the judicial process - 1st of all, there is no Federal Circuit court, it is Federal District Court. secondly, the state court that is comparable to the federal district court is called the State Circuit Court, hawaii has a district court but it lower than the circuit courts. Thirdly, judges should rule on the facts and apply the applicabl law - public opinion should have no consideration in the judges decision.

Like · Reply · Jul 29, 2015 12:11pm



Frank De Giacomo

Aloha Rick, Sadly, the operative word in your answer is "should". While they should decide on the facts before them and the applicable law, that is not always the case - here in Hawaii and elsewhere. Lots of influence peddaling of all kinds. I think that's what Arvid may be thinking about. That and judges read the papers too, and generally loathe to decide on controversial political issues (see Calvin Say cases for most recent examples).

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Rick Tubania · University of Hawaii at Manoa

Frank De Giacomo - guess you believe that our state judges are not independent but biased and can be bought by political influences? that is a bold statement. if you have any proof than you should bring it up because this is not the way the judicial system supposed to work. the issue here is whether the agency must provide its predecisional and deliberative documents to cb, it is not a controversial or political issue but interpretations of the HRS and UIPA.

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Andy Parx

Ah, that old "legitimate government function" of treating the public like mushrooms- keeping them in the dark and feeding them, ah, manure.

Funny how the law itself includes "discussions (and) deliberations" and contain no exemption for administrations.

Like · Reply · 5 · Jul 29, 2015 1:14am



Bert Thomas

Is Hawaii part of a Communistic State? I hope not. Why the "secrecy"? In "all" the USA, anyone who works for the Government is "fair game", and "openness" is mandatory - not an individual choice. Period.

Like · Reply · 1 · Jul 29, 2015 10:40am



Robert Manning · Church College of Hawaii

Remember judge Shintaku?...

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PJ Kumu Stewart · Santa Rosa Junior College

Our public servants are ALL FIRED! The President, Vice President and ALL CIVIL OFFICERS of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

You have no immunity to me in a suit for damages or for jail time in either your private or public servant capacity. TITLE 42 § 12202 A State shall not be immune. TITLE 15 § 1122 No Immunity to state actors. TITLE 42 § 1983, 1985 & 1986 which he had knowledge were about to occur and power to prevent, a deprivation of constitutional rights..

TITLE 5 PART... See More

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Starlyte Yockman · President William McKinley High School

thank u

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Starlyte Yockman · President William McKinley High School

for letting us know what is going on

Like · Reply · Aug 2, 2015 5:03pm



Debra Kekaulua · Executive Committee at Self Employed and Loving It!

Brah i could really use some of your writing technique to an arrest hearing aug 5 9am lihue, NO longer willing to sit quietly and be punished for nothing, but had it been a 'local', as Maryann Kusaka once said, only Haole respond in the public arena, "locals are well-trained". This case had it been a true local, there would be no allowances, so it is fortunate that THIS ohana will practice their due diligence AND prevail against dasturd KPD/khs FEED the press releases continuing "only on Wala'au Kaua'i shibai"

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Ranette Freeman Robinson Strinz · Office at Hawaiian linen supply



WE are the government! What happened to the "sunshine" law?

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