UFISINAN I MAGA'HÅGA
OFFICE OF THE GOVERNOR

LOURDES A. LEON GUERRERO
MAGA'HÅGA • GOVERNOR

JOSHUA F. TENORIO
SIGUNDO MAGA'LÅHI • LIEUTENANT GOVERNOR

**VIA EMAIL: office@senatorperez.org**

May 21, 2020

**HONORABLE SABINA FLORES PEREZ**
Committee on the Environment, Revenue &
Taxation, and Procurement
*I Mina'trentai Singko na Liheslaturan Guåhan*
194 Hernan Cortez Avenue, First Floor
Terlaje Professional Building
Hagåtña, Guam 96910

**Re: Oversight hearing on Thursday, May 21, 2020**

Dear Senator Perez:

I am saddened that my public comments and private explanations to you regarding these quarantine facilities have not been sufficient. While I respect your desires to hold an oversight hearing to have these explanations repeated, I must also be mindful to protect the privileges of the Executive branch. I was under the impression that by accepting the Speaker's invitation for the informational hearing and spending the considerable time to present, my Administration would have satisfied any outstanding concerns. The Speaker asked that we take the time to respond to any written questions and I happily obliged. To this date, we have not received any additional inquiry from your office.

With that said, I am unsure about the purpose of this oversight hearing. The issues concerning quarantine facilities have been repeatedly addressed in multiple forums. I do not have any other information to provide.

Even so, I continue to stand by my pledge to work and earn the Legislature's trust. However, I will not waive the privilege I hold with my attorneys in the Office of the Governor or the Office of the Attorney General. In that spirit, I have allowed my legal counsels to submit the attached statement which is limited to their specific involvement in these quarantine facilities.

*Senseramente,*

**LOURDES A. LEON GUERRERO**
*I Maga'hågan Guåhan*
Governor of Guam

Enclosure(s): Memorandum 20-0521

cc via email: *Sigundo Maga'låhen Guåhan*
Hon. Tina Rose Muna Barñes, Speaker, 35th Guam Legislature

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# MEMORANDUM

20-0521

Date: May 21, 2020

To: Honorable Sabina Flores Perez
Chairwoman on Committee on the Environment, Revenue
& Taxation, and Procurement
35th Guam Legislature

From: Legal Counsel Haig T. Huynh
Legal Counsel Sophia Santos Diaz
Office of Legal Counsel
Office of the Governor of Guam

cc:

Re: **Virtual Oversight Hearing on Thursday, May 21, 2020**

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The Governor has authorized her Legal Counsel ("LC") to provide the following limited statement at this oversight hearing. This authorization shall not be perceived by the Chairwoman or the Committee as a waiver of executive privilege which includes: the gubernatorial-communications privilege, the deliberative-process privilege, and the attorney-client privilege. Instead, this statement is intended to provide context to previous statements already provided to the public on multiple occasions. We ask that this body refer to Attorney General Opinion 09-1089 for discussion on these privileges and the separation of powers doctrine.

**Electronic Signature.**

Prior to May 1, 2020, the Governor's Legal Office assisted the Director of the Department of Public Health and Social Services ("DPHSS") by attempting to account for all documents in which she signed digitally or with a wet signature. A procedure was developed to log the requests for her signature. This procedure was developed because DPHSS staff, the Joint Information Center, and the Office of the Governor determined that there was a need to have a central repository for all items signed by the Director.

The procedure entailed personal contact with the Director, whether by phone or in person. Then documentation of the approval would occur by virtue of an e-mail to the custodian of the electronic signature. The Director would receive a copy when finalized. The Governor's Legal Office keeps a log and a copy of each document at its office on behalf of the Director.

The Governor's Legal Office sought the Director's digital signature five (5) times. Each time, the Director approved its use.

1. DPHSS Guidance Memo No. 2020-03 (Mar. 29, 2020);
2. Letters re: Use as Non-Congregate Shelters (April 1, 2020 – Not Finalized or Published);
3. DPHSS to Quarantined Individuals (April 3, 2020);
4. DPHSS Guidance Memo No. 2020-05 (April 8, 2020); and
5. DPHSS Guidance Memo No. 2020-06 (April 8, 2020).

Only four (4) of the five (5) approved uses were ever finalized, sent to intended addressees, and/or published. The remaining approved use was prepared, but not finalized, delivered, or published. Those documents are considered drafts and were mistakenly disclosed in response to FOIA requests.

**Procurement of Quarantine/Isolation Facilities.**

**Facts:**

March 14, 2020 - Governor Lou Leon Guerrero issued Executive Order No. 2020-03 declaring a state of emergency to respond to the Novel Coronavirus ("COVID-19"). As part of the Order, statutes, orders, rules, and regulations that would hinder or delay any action necessary to respond to the public health emergency were suspended. More specifically, the Governor invoked her authority to conduct "emergency purchases". The Philippine government had just announced a surge in COVID-19 cases and its President ordered partial closure of the airports. There was an expectation of a large influx of potentially infected persons returning to Guam.

March 16, 2020 - Governor Leon Guerrero issued Executive Order No. 2020-04 in which she invoked the authority under 10 G.C.A. § 3333 to restrict entry into Guam and the authority prescribed in 10 G.C.A. §§ 19604 and 19605 to isolate and quarantine.

March 17, 2020 – It was discovered that the Homeland Security Advisor had not procured quarantine or isolation facilities as previously reported. Homeland Security's reliance on condemning a certain hotel was not approved. LC was instructed to and quickly engaged with Guam Hotel and Restaurant Association ("GHRA") to seek hotel properties willing to serve as quarantine sites. GHRA was later able to report that only the Days Inn, Wyndham Garden, Santa Fe, Perlas Court, and Pacific Star responded. All those facilities were ultimately utilized.

March 18, 2020 – LC contacted BBMR Director Carlson requesting for identification of funds to negotiate with the facilities. Carlson provided a formula of $100 per room as the budget for each property. This would be inclusive of meals, housekeeping services and Hotel Occupancy Taxes. Carlson also directed that he would be the certifying officer and the Director of the Department of Administration ("DOA") would serve as the clearing entity. LC communicated that to GHRA who reported that the participating hotels agreed. LC, utilizing a previous template provided by the Office of the Attorney General ("OAG"), emailed a draft contract to the OAG to review for appropriateness.

March 18 - April 16, 2020 – LC worked with the OAG to draft a contract. Several versions were drafted due to not only the changes in funding sources, but also changes to the use of facilities (i.e. quarantine vs. isolation vs. medical staff housing).

March 25, 2020 – LC relinquished management of the contracts and remainder of procurement to the Office of Civil Defense ("OCD") for completion.

March 26, 2020 - LC was informed that the funding source previously identified by BBMR was not approved. BBMR indicated that it would continue to seek other funding sources. Due to this, LC became involved again in the procurement.

April 15, 2020 – LC sought the assistance of the Chief Procurement Officer ("CPO") to help complete the record.

April 16, 2020 – The CPO suggested that pursuant to the Executive Orders the procurement record may not need to be as detailed as suggested by the OAG.

April 16, 2020 - LC pre-emptively provided OAG with emailed copies of the most recent contracts for all five (5) facilities. It was assumed that the draft record and the contracts would be fully executed and ready for a formal review by the OAG. However, those were never transmitted to the OAG.

May 8, 2020 – The Governor formalized her use of emergency purchase powers invoked by Executive Order 2020-03 and pursuant to Chapter 19, Title 10 of the Guam Code Annotated.

May 18, 2020 – Even with the benefit of: (1) a less heightened emergency; (2) a complete scope of work; (3) a funding source; (4) set rates; and (5) full attention dedicated to the procurement of quarantine facilities, the government of Guam still needed nearly (2) weeks to procure two (2) facilities on an emergency basis.

**Non-Exhaustive list of Applicable opinions and laws with emphasis added.**

**Attorney General Opinion 09-1089 (attached)**

**48 U.S.C. 1421g(a) Public Health Services.** Subject to the laws of Guam, the Governor shall establish, maintain, and operate public health services in Guam, including hospitals, dispensaries, and quarantine stations, at such places in Guam as may be necessary, and he shall promulgate quarantine and sanitary regulations for the protection of Guam against the importation and spread of disease.

**10 GCA 19403(a) Emergency Powers.** During a state of public health emergency, the governor may…

> **10 GCA 19403(a)(1).** through an executive order suspend, the provisions of any regulatory statute prescribing procedures for conducting local business, or the orders, rules and regulations for any government of Guam agency, to the extent that strict compliance with the same would prevent, hinder or delay necessary action *(including emergency purchases)* by the public health authority to respond to the public health emergency, or increase the health threat to the population;
>
> **10 GCA 19403(a)(2).** utilize all available resources of the government of Guam, as reasonably necessary to respond to the public health emergency;
>
> **10 GCA 19403(a)(3).** transfer the direction, personnel or functions of the government of Guam departments and agencies in order to perform or facilitate response and recovery programs regarding the public health emergency.

**10 GCA 19502. Access to and Control of Facilities and Property – Generally.** The public health authority may exercise, for such period as the state of public health emergency exists, the following powers concerning *facilities*, materials, roads or public areas:

> **10 GCA 19502(a). The Use of Materials and Facilities.** To procure, by condemnation or otherwise, construct, *lease*, transport, store, maintain, renovate, or distribute materials and facilities as may be reasonable and necessary to respond to the public health emergency, *with the right to take immediate possession thereof*. Such materials and facilities include, but are not limited to, communication devices, carriers, *real estate*, fuels, food and clothing.

**10 GCA 19506. Compensation.** The government of Guam shall pay just compensation to the owner of any facilities or materials that are lawfully taken or appropriated by a public health authority for its temporary or permanent use under this Article according to the procedures and standards set forth in § 19805 of this Chapter. Compensation shall not be provided for facilities or materials that are closed, evacuated, decontaminated or destroyed when there is reasonable cause to believe that they may endanger the public health pursuant to § 19501.

**10 GCA 19805. Compensation.**

(a) Taking. Compensation for property shall be made only if private property is lawfully taken or appropriated by a public health authority for its temporary or permanent use during a state of public health emergency declared by the Governor pursuant to this Chapter.

(b) Actions. Any action against the government of Guam with regard to the payment of compensation shall be brought in the courts of Guam in accordance with existing court laws and rules, or any such rules that may be developed by the courts for use during a state of public health emergency.

(c) Amount. The amount of compensation shall be calculated in the same manner as compensation due for taking of property pursuant to non-emergency eminent domain procedures, as provided in Chapter 15 of Title 21 of the Guam Code Annotated, except that the amount of compensation calculated for items obtained under § 19505 shall be limited to the costs incurred to produce the item.

*****

COPY

12/28/10

AE's copy

Alicia G. Limtiaco
*Attorney General*

Phillip J. Tydingco
Chief Deputy Attorney General

RECEIVED
DEC 21 2009
Bureau of Statistics and Plans

# OFFICE OF THE ATTORNEY GENERAL

December 18, 2009

RECEIVED
DEC 21 2009
Office of Senator Judith Guthertz
I Mina' Trenta Na Liheslaturan Guahan

**HAND DELIVER**

TO: Senator, Judith P. Guthertz, DPA
I Mina' Trenta Na Liheslaturan Guahan
Committee on the Guam Military Buildup and Homeland Security

FROM: Attorney General

RE: Confidentiality of Draft Environmental Impact Statement – FOIA; Deliberative Process and Executive Privileges; and Separation of Powers

**Facts**

An early release draft Environmental Impact Statement ("EIS") prepared by the United States military for the Joint Guam Program Office ("JGPO") of the United States government was provided to select members of the executive branch of the government of Guam only after they had signed a non-disclosure or confidentiality agreement as a precondition to its release. The non-disclosure agreement reads in part:

> I understand that in the performance of my duties as a member of the Guam/CNMI resource/regulatory agency group requested to undertake an early review of the working DEIS [draft EIS] that I may have access to information of a sensitive nature including, but not limited to, United States Navy and other organizations' proprietary information, Government procurements and planning sensitive information, source selection information, personally identifiable information subject to the Privacy Act of 1974, and information designated For Official Use Only. I agree that I will access such information only to the extent necessary to perform my duties. I further agree that I will not disclose or release such information to any person, or other entity, either within or outside of the United States Government, except as expressly authorized in writing by an authorized representative of Joint Guam Program Office (Forward).

OFFICE OF THE GOVERNOR
4:42
DATE
LEGAL OFFICE

RECEIVED
DATE 12-21-09

287 West O'Brien Drive • Hagåtña, Guam 96910 • USA
(671) 475-3324 • (671) 472-2493(Fax)

> I understand that any unauthorized disclosure or release of such information may result in punitive and/or administrative action as by appropriate Federal Law.
>
> I understand that I have a continuing obligation not to disclose or release such information obtained in my dealings with Joint Guam Program Office (Forward). I understand that my compliance will be monitored in relation to this nondisclosure agreement.

(Emphasis added.) Several Government of Guam officers and employees – including employees of the Governor's staff; the Bureau of Statistics and Planning; Guam Environmental Protection Agency; Department of Agriculture; and Department of Public Works – signed the non-disclosure agreement as a precondition to receipt of preliminary technical documents and prior to their providing comments to the JGPO about the draft EIS.

Approximately two months later, by letter dated October 6, 2008, the chairperson of the 30th Guam Legislature's Committee on the Guam Military Buildup and Homeland Security, Senator Judith P. Guthertz, served on the Governor a "Notice of Oversight Hearing" demanding the presence and testimony of six specifically named individuals on the governor's staff and representatives from five specific agencies, and further making a formal request pursuant to Guam's Freedom of Information Act ("FOIA") or Sunshine Act, *see* 5 GCA § 10101 et seq., that they produce copies of all documents in their possession related to the draft EIS.

> Governor, be informed that I will convene an Oversight hearing in this matter and will require the heads or expert representatives involved in the government of Guam's initial response to JGPO's draft EIS to be present. Please advise all involved in responding to JGPO's draft EIS to follow the spirit and letter of the law of the "Open Government Act" and the "Sunshine Act", **particularly relative to the presentation of testimony and submittal of the draft EIS segments that they received from JGPO and comments submitted in their responses** as they appear before the legislative Committee on Guam Military Buildup and Homeland Security.

(Emphasis in bold and underline in original.) The hearing was scheduled for October 15, 2009, and although the requested representatives were present and addressed the Legislature, the requested documents were not produced pending an opinion from the Attorney General regarding the propriety of compliance in these circumstances.

On October 29, 2009, the Office of the Attorney General received the following communication from Stephen Wenderoth, Esq., Land Use & Environmental Counsel for the Commandant, Headquarters, United States Marine Corps:

> Thank you for your inquiry regarding the nondisclosure agreements we asked all parties to sign as a condition of receiving the "early release draft environmental impact statement (erDEIS)." First, let me state unequivocally that it was never the Navy's intent to hide anything from the legislature or anyone else. The National Environmental Policy Act requires the Navy to publish three documents: the draft environmental impact statement (DEIS), the final environmental impact statement (FEIS) and the record of decision (RoD). There is no obligation to release to anyone our deliberative processes as we work to prepare the DEIS. We released the erDEIS to a select group of Guam and

resource agency staff to facilitate our continuing analysis and discussion of the proposed project's impacts on Guam's environment, population and culture.

As you know, the Guam EIS effort is a massive undertaking involving three proposed actions: home basing 8000 Marines, a new CVN transient pier, and establishment of an Army facility. It has taken us over two years at a cost of tens of million of dollars to get to where we are today. Over those two years we have funded dozens of studies on a host of topics from water capacity to socioeconomics to endangered species in an effort to identify, quantify and qualify the impacts of these actions on Guam.

Rather than prepare such a complicated document in a vacuum, the Navy made the decision to involve Guam and the resource agencies' staff in assisting us in understanding the implications of the proposed action from their perspective and bring their expertise to help us address as many of their unique concerns as possible within the scope and timeline of our NEPA process and schedule. The reason we did not want wide dissemination of the erDEIS is that it is a working document FAR from complete in its analysis and conclusions. In order to insure a free and honest exchange of information, and hopefully prevent the release of an unfinished analysis, we asked all the parties to sign nondisclosure agreements. There was nothing nefarious in our intent; the erDEIS is quite simply a document not to be relied on by anyone in determining the level of analysis or U.S. Government intent with regards to the proposed action.

In three weeks, the Navy will publish the DEIS. Although NEPA requires a minimum of 45 days for review, the Navy will allow 90 days or twice what is regulatory required. While this may be the first time the Guam Legislature sees the entire document, it should become quickly evident to the reader that the Navy was well informed as to Guam's concerns including land control socioeconomics and water usage. We look forward to continue working with the Guam Government and it population over the course of the next nine months as we move from DEIS to FEIS and the Navy's record of decision.

The Attorney General has been asked whether Guam law mandates or excuses compliance with the Committee's Sunshine Act demand despite the non-disclosure agreement. The Attorney General will also discuss the possible legal consequences in the event of non-compliance.

**Summary**

The prepublication review of the *draft* EIS was "pre-decisional." The terms of the non-disclosure agreement evidence the expectations of the federal government that the document and discussion surrounding it are deemed sensitive and confidential, and therefore protected by the deliberative process privilege and executive privilege.

There are two specific statutory exceptions which codify the deliberative process privilege applicable here. *See* 5 GCA § 10108(i) ("All existing privileges or confidential records or other information expressly protected under the law shall *not* be abrogated by this Act.") (emphasis in original); and § 10108(q) (exempting "Draft documents of an Agency"). Nevertheless, Guam law also provides that the limitations on public access to confidential, draft and pre-decisional documents in the custody of

executive branch officials otherwise protected by the deliberative process and executive privileges may not apply to the Legislature if the Legislature should decide to subpoena those documents. *See* 5 GCA § 10108.1 ("Any record or information which may be nondiscloseable under § 10108 that is in the possession of an agency shall be discloseable to the Legislative Oversight Committee upon its issuance of a subpoena duces tecum requesting such record or information or subpoena upon the director"). Guam law further provides that "failing or refusing to appear in compliance with a subpoena, or to produce documents when requested, or, having appeared, fails or refuses to testify under oath or affirmation or to produce documents" or "failing or refusing to answer any relevant question, or failing or refusing to furnish any document subpoenaed" may be punishable as contempt by the Legislature. 2 GCA § 3103(f), (g).

Considerable case authority exists which supports the proposition that even without an express statutory deliberative process or executive privilege contained in a local government's FOIA, compelled disclosure, whether to the general public or to the Legislature pursuant to subpoena under Guam's FOIA would likely be construed by the courts to be a violation of the separation of powers doctrine established by Guam's Organic Act. That is because the purposes of the executive if not the deliberative process privileges are derived or have their origins in the principles which underscore one of the fundamental purposes of the separation of powers doctrine, namely: unwarranted interference in the functions of one branch of government by another. The facts presented here do not suggest a particularized constitutionally grounded need on the part of the Legislature sufficient to overcome the presumption that the executive's pre-decisional communications are privileged. The Legislature's otherwise plenary powers are limited, as in all matters, by the separation of powers doctrine established in the Organic Act, and must yield in this instance to the needs of the executive to be able to perform his responsibilities under the Organic Act unfettered by undue interference from another branch of the same government absent a compelling constitutionally based need.

Further, Guam's as-yet untested statute, 2 GCA § 3101, *et seq.*, authorizing the Legislature broad powers of investigation and enforcement by legislative contempt is constitutionally suspect, not because of the breadth of the Legislature's investigatory authority which is acknowledged, but because of the vagueness of the process and procedures outlined in the law governing the Legislature's exercise of its contempt powers to enforce compliance.

First, as a matter of procedure, the statute is unclear on its face as to what due process is afforded a person that has been subpoenaed and declines to comply on the basis of a recognized privilege. It is entirely unclear whether an individual facing contempt is afforded not merely notice, but an opportunity to be heard and defend, and whether the defense of privilege is a matter which may lessen or negate a finding of contempt on the merits.

Second, although 2 GCA § 3105(b)(1) provides that at a contempt proceeding before the Legislature the witness shall be "afford[ed] an opportunity to explain and defend," the outright repudiation in the statute governing governmental privileges, *see* 2 GCA § 3107 ("Defenses which are not applicable to persons in the service of the government of Guam shall include, but are not limited to, privacy or confidentiality of documents in the government's possession, be they of a government or non-government character, and the attorney-client privilege for government of Guam attorney-client relationships."), facially rejects even the possibility that the separation of powers doctrine shall be a consideration by the Legislature.

Third, the express limitation on the scope of judicial review by the courts on the merits of a finding of legislative contempt, relegating the courts to merely enforcing a finding of contempt, *see, e.g.*, 2 GCA

§ 3105(b)(1) ("The final determination of Legislative Contempt, approved by the Speaker and the Chairperson of the Committee on Rules, shall not be appealable in the Superior Court of Guam") and § 3105(c) ("The Court's jurisdiction shall be limited to only administering the imposition of the sanction(s) or order(s), or both, provided in the resolution, and the Court shall maintain jurisdiction until such time as the sanction(s) or order(s), or both, is completely executed."), cannot withstand constitutional scrutiny.

## DISCUSSION

To fully appreciate the legal consequences of the Legislature's demand in context it is necessary first to understand the purposes served by the deliberative process privilege and the executive privilege and to appreciate that their origin has a constitutional dimension predicated in the separation of power doctrine. The discussion therefore begins with a brief analysis of the deliberative process privilege and executive privilege, and proceeds with an analysis of the constitutional or Organic Act implications of abrogating those privileges. Finally, this memorandum addresses hypothetical concerns should the Legislature decide to test the limits of its statutory investigatory powers wherein a violation of the doctrine of separation will be asserted in response to a legislative subpoena, and compulsory process in the courts or via the Legislature's threatened exercise of its powers of contempt.

### Guam's Freedom of Information Act

Guam's Freedom of Information Act ("FOIA") or "Sunshine Law" generally permits the public access on demand to "public records," defined as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency in any format, including an electronic format." 5 GCA § 10102(d). "Every person has the right to inspect and take a copy of any public document on Guam, except as otherwise expressly prohibited in law, and except as provided in § 10108 of this Chapter." 5 GCA § 10103(a) (emphasis added).[1]

There are limited exceptions. For example, 5 GCA § 10103(c) provides: "*Except* with respect to public records exempt from disclosure by express provisions of the law, each agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person, upon payment of fees covering direct costs of duplication, or a statutory fee, if applicable. Upon request, an exact copy shall be provided, unless impracticable to do so." (Emphasis added.) Section 10103(c) therefore provides that certain public records may be exempted from disclosure by express provisions found elsewhere in the law.[2] Section 10104 also provides a number of express

[1] Public Law 25-6, also known as "The Sunshine Reform Act of 1999," was signed into law May 12, 1999. The Legislative Findings and Intent contained in P.L. 25-6, section 1, subsections (2) and (3) expressly reference the federal FOIA: "the Sunshine Act of Guam and the Federal Freedom of Information Act have been valuable means through which any citizen can learn how the government operates … those same acts have led to the disclosure of waste, fraud, abuse and wrongdoing in the government, locally and nationally."

[2] Presumably, this includes those privileges established in the Guam Rules of Evidence, including Rule 501. "Except as otherwise required by the Constitution of the United States, by the Organic Act of Guam, by these rules or by the laws of Guam or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness,

exemptions pertaining generally to criminal investigation files; personnel files; and personal tax returns and tax records, "except for real property tax records and returns which shall be public."

Section 10108 identifies specific exceptions to the presumption of mandatory disclosure, two of which are relevant here: Subsection (i) provides, "All existing privileges or confidential records or other information expressly protected under the law shall not be abrogated by this Act."[3] And subsection (q) provides that "Draft documents of an Agency" are not required to be disclosed. Ordinarily, citation to subsections (i) and (q) would be the end of the discussion, because in combination they are certainly broad enough to encompass what is known as the deliberative process privilege which protects drafts and other pre-decisional documents from compulsory disclosure to the public. However, Guam law appears to provide that despite recognized privileges for draft documents, *the Legislature* may still obtain access to any and all records otherwise exempt that are in the possession of an agency of the executive branch.

> Disclosure of Privileged Information to Legislative Oversight Committee. Any record or information which may be nondiscloseable under § 10108 that is in the possession of an agency shall be discloseable to the Legislative Oversight Committee upon its issuance of a subpoena duces tecum requesting such record or information or subpoena upon the director.

5 GCA § 10108.1. It is acknowledged that the Legislature has broad investigatory powers. That, however, does not answer the question whether there are any limitations on the scope of those powers under the Organic Act.

## The Deliberative Process Privilege

"Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *United States v. Nixon*, 418 U.S. 683, 705 (1974).

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person, government, state, territory, commonwealth or political subdivision thereof, shall be governed by the principles of the common law as they may be interpreted by the courts of Guam in the light of reason and experience." (Emphasis added.) Rule 45(c)(3)(A)(ii) of the Guam Rules of Civil Procedure may also have a bearing on the analysis and interpretation of what information and documents are privileged in the event the Legislature resorts to judicial aid in enforcement of a subpoena. The rule provides that a subpoena may be quashed in the event it "requires disclosure of privileged or other protected matter and no exception or waiver applies."

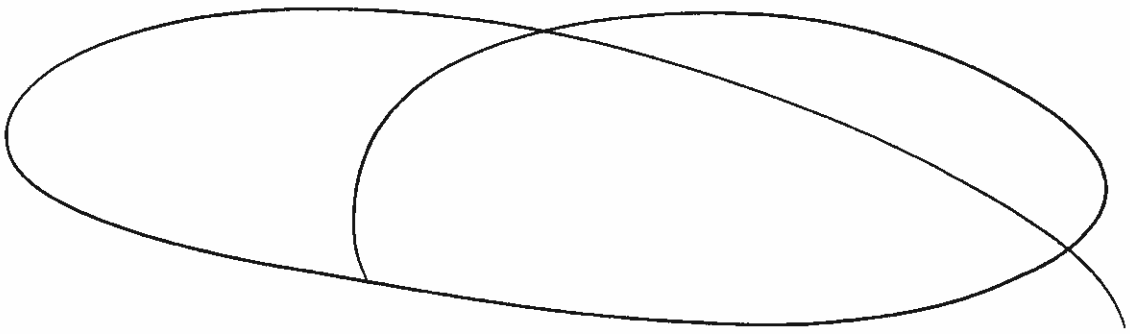
[3] Subsection (i) was added to 5 GCA § 10108 of the Sunshine Act by P.L. 25-78:02, signed into law November 19, 1999. According to the Governor's transmittal letter: "This legislation puts back into the list of exempted documents which do not have to be released to the public the same privileged documents which have always been exempt from release. The Freedom of Information Act which was in place since the Nineteenth Guam Legislature exempted from release information which is 'otherwise privileged' and as 'expressly prohibited in law.' This Public Law No. 25-78 puts back the same language, by exempting from disclosure 'all existing privileges or confidential records or other information expressly protected under the law.' In this respect, this legislation clarifies recent Public Law No. 25-06, but does not add anything to the prior existing law, Public Law No. 19-05." Subsection (q), which exempts draft documents of an agency, was added by P.L. 25-82:03, also signed into law November 19, 1999. There is no statement of legislative intent reflecting why it was added at that time.

> There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. 1 M. Farrand, *The Records of the Federal Convention of 1787*, pp. xi-xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. See 3 Stat. 475, 15 th Cong., 1st Sess., Res. 8 (1818). Most of the Framers acknowledge that without secrecy no constitution of the kind that was developed could have been written. C. Warren, *The Making of the Constitution* 134-139 (1937).

*Nixon*, 418 U.S. 705 n. 15.

As noted previously, 5 GCA §§ 10108(i) and (q) combined may be considered Guam's statutory recognition of the deliberative process privilege. It is comparable to exemptions contained in 5 U.S.C. § 552, the federal Freedom of Information Act, as well as to similar exemptions from mandatory disclosure contained in practically identical freedom of information acts in other jurisdictions.

> The deliberative process privilege protects from discovery "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975); *see also Dep't of Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001). This privilege protects internal communications of a governmental agency when they are deliberative in nature, but not when they are purely factual. *Sears*, 421 U.S. at 149, 95 S.Ct. 1504. The policy rationale behind this privilege is to promote effective governmental decision making by maintaining a free and open exchange of ideas among government officials. *Missouri ex rel Shorr v. United States Corps of Eng'rs.*, 147 F.3d 708, 710 (8th Cir.1998). "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions' ... by protecting open and frank discussion among those who make them within the government." *Klamath*, 532 U.S. at 9, 121 S.Ct. 1060. Therefore, "the key issue in applying this exception is whether disclosure of the materials would 'expose an agency's decision-making process in such a way as to discourage discussion within the agency and thereby undermine the agency's ability to perform its functions.' " *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001) (quoting *Schell v. U.S. Dep't of Health & Human Servs.*, 843 F.2d 933, 940 (6th Cir. 1988)); *see also EEOC v. Texas Hydraulics, Inc.*, 246 F.R.D. 548, 551 (E.D. Tenn. 2007).



*Equal Employment Opportunity Comm'n v. Burlington & Santa Fe Railway Co.*, 615 F.Supp.2d 717, 719-20 (W.D. Tenn. 2009).[4]

> As numerous courts, including our own, have noted, the privilege protects " 'the deliberative *process* of government and not just deliberative *material*.' " *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325, 283 Cal.Rptr. 893, 813 P.2d 240, 250 (1991) (quoting *Mead Data Cent., Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 256 (D.C.Cir.1977)) (emphasis in original). The interest protected ultimately is not the Governor's right to keep secrets, but the people's right to a fully informed and effective government. "By promoting the effectiveness of the governing process, the privilege protects the welfare of the public, not the government official." *New England Coalition [for Energy Efficiency & Environment v. Office of Governor]*, 164 Vt. [337] at 345, 670 A.2d [818] at 820 [(1995).]

*Herald Assoc. Inc. v. Dean*, 174 Vt. 350, 362-63, 816 A.2d 469, 480 (Skoglund, J., concurring in part, dissenting in part).

In *Edmonds Institute v. U.S. Dept. of Interior*, 460 F.Supp.2d 63 (D. D.C. 2006), the district court for the District of Columbia discussed the deliberative process privilege in the specific context of a FOIA request for a draft Environmental Impact Statement ("EIS") from federal officials.

> Generally speaking, FOIA provides for the release upon request of agency-created documents that do not otherwise fall within one of nine statutory exemptions. 5 U.S.C. § 552(a)(3), (b)(1)-(9); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) ("[T]he Act seeks 'to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' " (quoting S.Rep. No. 89-813, at 3 (1965))). The age Petroleum Info. Corp. v. U.S. Dep't of Interior, 976 F.2d 1429, 1433 (D.C.Cir.1992). Under Exemption 5, disclosure is not required for "inter-agency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." § 552(b)(5). Exemption 5 encompasses civil discovery privileges, including a "deliberative process" privilege that protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001); *Sears, Roebuck & Co.*, 421 U.S. at 150, 95 S.Ct. 1504.

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[4] There is no difference between the expectations of and need for privacy and confidentiality in pre-decisional communications between executive and administrative officials; a judge's legal memoranda from her law clerk; members of an appellate court circulating a draft opinion; or a legislator meeting with her staff or constituents to review *draft* legislation before it is filed – all recognized communication processes no one would contemplate of intruding upon uninvited. " 'Whereas the legislative privilege protects the *legislature's* independence from interference by other branches of government, the deliberative process privilege protects decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions.' " *Kay v. City of Rancho Palos Verdes*, 2003 WL 25294710 * 15 (C.D. Cal. 2003) (quoting *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 147 (2d Cir.1994) (emphasis added by the court; additional internal citations omitted)).

*Edmonds*, 460 F.Supp.2d 69 (editorial brackets in original). The purposes served by the deliberative process privilege are not to be lightly disregarded.

> The deliberative process privilege serves several important functions. Most importantly, the privilege "enhance[s] the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Klamath*, 532 U.S. at 9, 121 S.Ct. 1060 (citation and internal quotation marks omitted). In particular, it "assure[s] that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980); *see also Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C.Cir.1997) ("Exemption 5, and the deliberative process privilege, reflect the legislative judgment that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl ...." (internal quotation marks omitted)). The privilege also protects against the release of information that would "inaccurately reflect or prematurely disclose the views of the agency," *Coastal States Gas Corp.*, 617 F.2d at 866, thereby preventing public confusion and safeguarding the integrity of the decisionmaking process itself. *See, e.g., Petroleum Info. Corp.*, 976 F.2d at 1433 n. 5; *Jordan v. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C.Cir.1978) (en banc), overruled in part on other grounds, *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C.Cir.1981) (en banc).
>
> Only information that is both predecisional and deliberative is protected by the deliberative process privilege. *Petroleum Info. Corp.*, 976 F.2d at 1434. Information is considered "predecisional if it was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take of the consultative process." *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C.Cir.2006) (internal quotation marks omitted). Application of the deliberative process privilege is necessarily "dependent upon the individual document and the role it plays in the administrative process." *Coastal States Gas Corp., 617 F.2d at 867; see also Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 774 (D.C.Cir.1988) (en banc) (assessing deliberative nature of "information requested in light of the policies and goals that underlie the deliberative process privilege").

*Id.*, 460 F.Supp.2d 69-70 (editorial brackets and ellipsis in original; emphasis added).

In *Michigan Council of Trout Unlimited v. Dept. of Military Affairs*, 539 N.W.2d 745, 213 Mich.App. 203 (1995), the Michigan Court of Appeals also discussed the deliberative process privilege in the specific context of a FOIA request for documents related to a draft EIS delivered to a state agency by the federal government, just as in the matter currently under consideration. The trial court held "that all outstanding documents were exempt from disclosure pursuant to provisions of the Michigan and federal FOIAs. In particular, it held that all the documents were federal or quasi-federal draft documents, exempt from disclosure under the preliminary intraagency communication exceptions to the FOIAs." *Id.*, 539 N.W.2d 746, 213 Mich.App. 206-07. Quoting the court of appeals for the District of Columbia's decision in *Jordan v. Dep't of Justice*, 192 U.S.App.D.C. 144, 163-164, 591 F.2d 753 (1978), the Michigan Court of Appeals explained the purposes of the privilege, and the two part test that must be satisfied to properly invoke it. The documents must be (1) predecisional; and (2) deliberative in nature.

> This privilege protects the "consultive functions" of government by maintaining the confidentiality of "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." The privilege attaches to inter- and intraagency communications that are part of the deliberative process proceeding the adoption and promulgation of an agency policy. There are essentially three policy bases for this privilege. First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided[,] not for matters they considered before making up their minds."
>
> Two tests must be met for application of exemption 5. The communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." *Jordan*, *supra*, 591 F.2d at 774. The communication must also be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 173 U.S.App.D.C. 187, 195, 523 F.2d 1136 (1975). Plaintiffs contend that none of the documents in question satisfies both tests.
>
> We agree with the circuit court that the documents at issue are exempt from disclosure under § 13(1)(d) of the MFOIA, M.C.L. § 15.243(1)(d); M.S.A. § 4.1801(13)(1)(d). In *Soave v. Dep't of Ed.*, 139 Mich.App. 99, 102, 360 N.W.2d 194 (1984), this Court held that documents are exempt from disclosure if disclosure is prohibited by federal regulations. Defendant contends that all the documents in question are subject to federal regulations prohibiting their disclosure without federal approval. Plaintiffs do not contest this statement. Therefore, we hold that the trial court properly denied plaintiffs' demand for production of the documents at issue.

*Id.*, 539 N.W.2d 751, 213 Mich.App. 217-18 (editorial brackets in original). The court found "all but one of the documents in question [to be] predecisional and deliberative documents, being draft documents created in connection with the process of preparing an environmental impact statement and other ancillary matters required by federal law." *Id.*, 539 N.W.2d 752, 213 Mich.App. 219.

Directly relevant to the question presented here, the Michigan court of appeals held that "[e]ven in the absence of federal regulations, disclosure was properly denied pursuant to § 13(1)(d) because the documents fall within the deliberative process privilege of exemption 5 of the federal FOIA." *Id.*, 539 N.W.2d 751, 213 Mich.App. 218. Section 13(1)(d) of Michigan's FOIA "exempts from disclosure records or information specifically described and exempted from disclosure by statute." *Id.*, 539 N.W.2d 750, 213 Mich.App. 215. It is the functionally equivalent of § 10108(i) of Guam's FOIA which even more broadly exempts "confidential records or other information expressly protected under the law." What is significant is not that the Michigan court relied upon an express exemption which protects the deliberative process privilege under local law, but that Michigan recognized that its statute also protects documents "exempted

from disclosure" *under federal law*, specifically, the deliberative process privilege recognized by exemption 5 of the federal FOIA.

If federal courts examining whether pre-decisional *draft* environmental impact statements hold that they are protected from disclosure under the federal Freedom of Information Act, it may behoove local governments that have been invited to view those documents only because they have promised to keep them in confidence as a precondition to being invited to participate and have input in an advisory capacity prior to the documents being published for general public comment, to respect those confidences lest future invitations be withdrawn.

**Executive Privilege**

The immediate if obvious concern raised by, on its face, the Legislature's unqualified statutory authority to subpoena pre-decisional draft documents otherwise unavailable to the public and which were received by the executive only after agreeing to sign and abide by a non-disclosure agreement is that no person, institution or government doing business with the Government of Guam would be able to rely on representations by the Governor or any member of his cabinet or other executive branch official that confidences would not be breached at the caprice of any member of the Legislature authorized to request that a legislative subpoena issue pursuant to 5 GCA § 10108.1. Acknowledging that the privileges discussed herein are not absolute, but are *qualified* and may be overcome upon a showing of need in appropriate circumstances, for example impeachment and criminal proceedings, if the deliberative process privilege can be waived away by legislative subpoena in *all* circumstances, then the executive branch could be compelled by the Legislature to operate in a fishbowl. For that and related reasons, various courts have recognized the executive privilege for both president and governor, separate and distinct but related in principle to the deliberative process privilege,[5] firmly rooted in the doctrine of separation of powers.[6]

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[5] Some jurisdictions use the terms interchangeably, while some make very clear distinctions between the nature of a constitutionally based executive privilege and its common law cousin deliberative process privilege. *See generally, City of Colorado Springs v. White*, 967 P.2d 1042 (Colo. 1998) (common law governmental deliberative process privilege, also known as "official information privilege," "governmental privilege," and "executive privilege," sanctions nondisclosure by governmental agencies or instrumentalities of information, files, reports, or memoranda maintained by those agencies or instrumentalities, when warranted by the public interest). *Cf. Capital Information Group v. State of Alaska*, 923 P.2d 29, 33-34 (Alaska 1996) ("This court has never explicitly adopted the deliberative process privilege by that name. We have, however, accepted the "executive privilege" articulated in *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), which encompasses the same policy concerns. *Doe* [*v. Alaska Superior Court*], 721 P.2d [617] at 622-23 [(Alaska 1986)]. This privilege "recognizes that a chief executive has a qualified power to keep confidential certain internal governmental communications so as to protect the deliberative and mental processes of decisionmakers." *Id.* Thus, the term "executive privilege" in Doe encompasses what other commentators have called the deliberative process privilege. We consider the terms to be synonymous for purposes of this discussion.").

[6] "The phrase 'executive privilege' may well be an overly narrow term, because the privilege extends beyond the executive branch of government. As it has roots in the constitutional doctrine of separation of powers, a similar privilege extends to the judicial and legislative branches as well. *See United States v. Nixon*, 418 U.S. 683, 705, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 1004-1005, 85 L.Ed. 1429 (1941); *Senate Select Committee on Pres. Cam. Act. v. Nixon*, 498 F.2d 725, 729 (D.C. Cir. 1974); *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325-326 (D.D.C.1966), *aff'd sub nom. V.E.B. Carl Zeiss, Jena v.*

The most frequent form of executive privilege raised in the judicial arena is the deliberative process privilege; it allows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C.Cir.1967); *accord NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-53, 95 S.Ct. 1504, 1516-18, 44 L.Ed.2d 29 (1975); *EPA v. Mink*, 410 U.S. 73, 86-93, 93 S.Ct. 827, 835-39, 35 L.Ed.2d 119 (1973). Although this privilege is most commonly encountered in Freedom of Information Act ("FOIA") litigation, it originated as a common law privilege. *See Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 773 (D.C.Cir.1988) (en banc); *Jordan v. Department of Justice*, 591 F.2d 753, 772 (D.C.Cir.1978) (en banc).[4] Two requirements are essential to the deliberative process privilege: the material must be predecisional and it must be deliberative. *See Army Times Publ'g Co. v. Department of the Air Force*, 998 F.2d 1067, 1070 (D.C.Cir.1993); *Wolfe*, 839 F.2d at 774. Both requirements stem from the privilege's "ultimate purpose[, which] ... is to prevent injury to the quality of agency decisions" by allowing government officials freedom to debate alternative approaches in private. *Sears*, 421 U.S. at 151, 95 S.Ct. at 1516-17. The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations. *See id.* at 150-54, 95 S.Ct. at 1516-18; *Mink*, 410 U.S. at 87-91, 93 S.Ct. at 836-38; *Wolfe*, 839 F.2d at 774; *see generally* Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 Mo. L.Rev. 279, 290-98 (1989).

The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need. This need determination is to be made flexibly on a case-by-case, ad hoc basis. "[E]ach time [the deliberative process privilege] is asserted the district court must undertake a fresh balancing of the competing interests," taking into account factors such as "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees." *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C.Cir.1992) (internal quotations omitted) (quoting *In re Franklin Nat'l Bank Securities Litig.*, 478 F.Supp. 577, 583 (E.D.N.Y.1979)); *see also Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C.Cir.1996) (describing need in the context of the law enforcement investigatory privilege, which involves balancing similar factors, as "an elastic concept"); *Developments in the Law-Privileged Communications*, 98 Harv. L.Rev.. 1450, 1621 (1985) ("courts simply engage in an ad hoc balancing of the evidentiary need against the harm that may result from disclosure"); Larkin, *supra*, § 5.03 at 5-89 to 5-92 ("need for [privileged materials] may vary considerably, depending on the circumstances"). For example, where there is reason to

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*Clark*, 384 F.2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967)." *Hamilton v. Verdow*, 287 Md. 544, 553-54 n. 3, 414 A.2d 914, 920 (Md. 1980).

believe the documents sought may shed light on government misconduct, "the privilege is routinely denied," on the grounds that shielding internal government deliberations in this context does not serve "the public's interest in honest, effective government." *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir.1995); *see also In re Comptroller of the Currency*, 967 F.2d at 634 ("the privilege may be overridden where necessary ... to 'shed light on alleged government malfeasance' ") (quoting *Franklin Nat'l Bank*, 478 F.Supp. at 582).

[4] Some aspects of the privilege, for example the protection accorded the mental processes of agency officials, *see United States v. Morgan*, 313 U.S. 409, 421-22, 61 S.Ct. 999, 1004-05, 85 L.Ed. 1429 (1941), have roots in the constitutional separation of powers. *See* 3 Weinstein's Federal Evidence § 509.21[3] at 509-16.

*In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997) (editorial brackets and ellipsis in original; additional citations and footnote omitted).

**The President's Privilege**

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.[17] In *Nixon v. Sirica*, 159 U.S.App.D.C. 58, 487 F.2d 700 (1973), the Court of Appeals held that such Presidential communications are 'presumptively privileged,' *id.*, at 75, 487 F.2d, at 717, and this position is accepted by both parties in the present litigation. We agree with Mr. Chief Justice Marshall's observation, therefore, that '(i)n no case of this kind would a court be required to proceed against the president as against an ordinary individual.' *United States v. Burr*, 25 F.Cas., at 192.

[17] 'Freedom of communication vital to fulfillment of the aims of wholesome relationships is obtained only by removing the specter of compelled disclosure. . . . (G)overnment . . . needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning.' *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (DC 1966). *See Nixon v. Sirica*, 159 U.S.App.D.C. 58, 71, 487 F.2d 700, 713 (1973); *Kaiser Aluminum & Chem. Corp. v. United States*, 141 Ct.Cl. 38, 157 F.Supp. 939 (1958) (Reed, J.); *The Federalist*, No. 64 (S. Mittell ed. 1938).[7]

[7] "It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *despatch* are sometimes requisite. These are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who

*United States v. Nixon*, 418 U.S. 708.

In *Nixon*, the Supreme Court "weigh[ed] the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice." *Id.*, 418 U.S. 712. The Court specifically confined its analysis to criminal, as opposed to civil trials, or requests for information from Congress. "We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets." *Id.*, 418 U.S. 712, n. 19. Weighing the competing considerations between the president's general need for confidentiality versus a criminal prosecutor's particularized need for evidence, the Court said "the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice." *Id.*, 418 U.S. 712-13. The Court held then that "when the ground for asserting privilege to materials subpoenaed for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.*, 418 U.S. 713. Unlike the facts underlying the rationale of the decision in *Nixon*, the Guam Legislature has not articulated a particularized *and immediate* need for the otherwise privileged information contained in pre-decisional *draft* documents being circulated between government agencies prior to their release for comment to the general public.

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would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest." *The Federalist*, No. 64 (John Jay) (emphasis in italics in original; emphasis in underline added).

## Gubernatorial Privilege

The governor stands in the same relationship to the Legislature as the president stands in relation to Congress. *See Hamilton v. Verdow*, 287 Md. 544, 556, 414 A.2d 914, 921 (Md. 1980) ("We are not aware of any prior cases in this Court expressly dealing with the doctrine of executive privilege. Our cases have recognized, however, that the Governor bears the same relation to this State as does the President to the United States, and that generally the Governor is entitled to the same privileges and exemptions in the discharge of his duties as is the President.") (citing *Magruder v. Swann*, Governor, 25 Md. 173, 212 (1866); and *Miles v. Bradford, Governor of Maryland*, 22 Md. 170, 184-185 (1864)).

> [C]ourts in several states recognized absolute gubernatorial executive privilege as early as the 19th Century as a matter of common law based on principles of separation of powers. *See* Annotation, *Construction and Application, Under State Law, of Doctrine of "Executive Privilege"* (1981), 10 A.L.R.4th 355, 357. Absolute privilege is based on the theory that "the coequal status of the legislative, executive, and judicial branches would be disrupted if one branch, the judiciary, were empowered to compel another branch, the executive, to disclose information against its will." *Id.*
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> Some form of executive privilege has long been accorded the executive branch by state courts as a matter of the common law of evidence, including courts in Alabama, Alaska, Arizona, California, Colorado, Maryland, New Jersey, New York, Pennsylvania, Vermont, and Wisconsin. *See* Annotation, *supra*, 10 A.L.R.4th 355, Sections 2(b) and 4. *See, also, Nero v. Hyland* (1978), 76 N.J. 213, 386 A.2d 846; *Guy v. Judicial Nominating Comm.* (Del.Super.1995), 659 A.2d 777; *Wilson v. Los Angeles Cty. Super. Court* (1996), 51 Cal.App.4th 1136, 59 Cal.Rptr.2d 537.

*State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 853 N.E.2d 263, 264-65 (Ohio 2006).

> Many courts have recognized that the scope of a governor's executive privilege overlaps the more general deliberative-process privilege in significant ways. The differences between the gubernatorial-communications privilege we recognized in [*State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472] *Dann v. Taft I* and the deliberative-process privilege primarily concern the underpinnings of the two privileges and the identity of individuals entitled to assert them. As we observed in *Dann v. Taft I*, the gubernatorial-communications privilege is grounded on the constitutional principle of separation of powers, while the deliberative-process privilege is grounded in the common law of evidence. *Id.* at ¶ 43. The deliberative-process privilege is actually broader in one sense than the gubernatorial-communications privilege because it may be asserted by various executive officials, while only a governor may assert the gubernatorial-communications privilege. *Id.* at ¶ 42.
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> [I]t is initially the governor's decision to assert gubernatorial-communications privilege when gubernatorial documents are requested by a member of the public. However, we also stated in *Dann v. Taft I*: "The gubernatorial-communications privilege protects the public by allowing the state's chief executive the freedom that is required to make decisions." (Emphasis added.) 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 56. We recognized that the privilege advances the public's interest in sound executive decisionmaking. *Id.*, citing *United States v. Nixon*, 418 U.S. at 708, 94 S.Ct.

> 3090, 41 L.Ed.2d 1039. In addition we cautioned that executive privilege "should not be lightly invoked." *Id.* at ¶ 70.

*State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 258-59, 853 N.E.2d 263, 269-70 (Ohio 2006). "In order to overcome an assertion of qualified gubernatorial-communications privilege, a requester 'must demonstrate particularized, rather than generalized, need and explain why that need outweighs the qualified privilege.' " (quoting *Dann v. Taft I*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 67).

The gubernatorial or executive privilege referenced here simply recognizes the qualified prerogative of the governor embodied in the doctrine of separation of powers to determine in the first instance whether a confidential non-disclosure agreement is necessary or required in the interests of the territory. Without the privilege to determine what confidences he is able to keep, certainly in the recognized area of pre-decisional *draft* documents, the Governor's ability to communicate effectively within his own staff and the departments he oversees, and to provide reasonable assurances to third parties that confidences will be kept, is effectively meaningless.

> The separation-of-powers doctrine requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government. The gubernatorial-communications privilege protects the public by allowing the state's chief executive the freedom that is required to make decisions. Recognition of a qualified gubernatorial-communications privilege advances the same interests advanced by the analogous presidential privilege, including the "public interest in candid, objective, and even blunt or harsh opinions" in executive decisionmaking. [*United States v.*] *Nixon*, 418 U.S. [683] at 708, 94 S.Ct. 3090, 41 L.Ed.2d 1039 [(1974)].
>
> We agree with the unassailable premise established in *Nixon*, and reiterated in federal and state case law, that the public interest is served by allowing a chief executive officer of a state or the federal government to receive information, advice, and recommendations unhampered by the possibility of compelled disclosure of every utterance made, and every piece of paper circulating, in the governor's office.
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> The people of Ohio have a public interest in ensuring that their governor can operate in a frank, open, and candid environment in which information and conflicting ideas, thoughts, and opinions may be vigorously presented to the governor without concern that unwanted consequences will follow from public dissemination. It is for the benefit of the public that we recognize this qualified privilege and not for the benefit of the individuals who hold, or will hold, the office of governor of the state of Ohio.
>
> Consequently, and in accordance with the persuasive weight of authorities that have addressed these issues, we recognize a qualified gubernatorial-communications privilege in Ohio. Because communications to or from an Ohio governor are qualifiedly privileged, a governor's initial assertion that a communication is within the scope of this privilege is not conclusive. It is ultimately the role of the courts to determine, on a case-by-case basis, whether the public's interest in affording its governor an umbrella of confidentiality is outweighed by a need for disclosure.

> Accordingly, we hold that a governor of Ohio has a qualified gubernatorial-communications privilege that protects communications to or from the governor when the communications were made for the purpose of fostering informed and sound gubernatorial deliberations, policymaking, and decisionmaking. This qualified gubernatorial-communications privilege is overcome when a requester demonstrates that the requester has a particularized need to review the communications and that that need outweighs the public's interest in according confidentiality to communications made to or from the governor.

*State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 376-77, 848 N.E.2d 472, 484-85 (Ohio 2006) (footnote omitted).

The Ohio Supreme Court suggested a three part balancing test to be applied to claims of executive privilege, never to be invoked lightly, but which places the burden on the requesting party to demonstrate a particularized need for the requested documents.

> Once the governor asserts the privilege, the burden shifts to the party seeking disclosure to produce evidence demonstrating a particularized need to overcome the privilege and examine the documents at issue. The requester, without relying on civil discovery to establish it, must demonstrate particularized, rather than generalized, need and explain why that need outweighs the qualified privilege.
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> A requester with the authority and obligation to investigate criminal or civil matters may demonstrate a particularized need when documents are required to fully
>
> prosecute civil or criminal matters. Thus, for example, an authorized legislative committee or a grand jury may demonstrate a particularized need to obtain communications to or from the governor. Similarly, a court may find a particularized need when disclosure is sought by a uniquely qualified representative of the general public who demonstrates that disclosure of particular information to it will serve the public interest. Particularized need, however, does not exist when privileged information can be obtained elsewhere. Whether a requester's asserted need is sufficient is a matter of law.
>
> In the absence of a proper demonstration of need, a court should respect the governor's characterization of the material as warranting confidentiality. In deferring initially to the governor's own evaluation of communications to him or her as confidential, the judicial branch accords the governor autonomy consistent with the principle of separation of powers.
>
> We share the sentiment of the Supreme Court of the United States that executive privilege should not be lightly invoked. *United States v. Reynolds*, 345 U.S. 1, 7, 73 S.Ct. 528, 97 L.Ed. 727. When executive privilege is asserted in court proceedings, the judiciary "is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's [constitutional] prerogatives. This inquiry places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These 'occasion[s] for constitutional confrontation between the two

> branches' should be avoided whenever possible." *Cheney v. United States Dist. Court for the Dist. of Columbia* (2004), 542 U.S. 367, 389-390, 124 S.Ct. 2576, 159 L.Ed.2d 459, quoting *Nixon*, 418 U.S. at 692, 94 S.Ct. 3090, 41 L.Ed.2d 1039.
>
> Where both of the first two steps have been satisfied, the court will undertake an in camera review of the requested materials and either uphold or reject the governor's claim of confidentiality. In conducting the balancing of the competing public interests of gubernatorial confidentiality and the demonstrated, particularized need for disclosure, a court may uphold, or reject, the claim of privilege in its entirety. It may require disclosure of some, but not all, of the materials sought.

*Id.*, 109 Ohio St.3d 378-79, 848 N.E.2d 486 (emphasis added; editorial brackets in original). The Ohio court's balancing test, which recognizes a qualified privilege, presents a reasonable approach to a deliberative process analysis. Under this test, a proper showing of need for pre-decisional documents and information is required. It is our opinion that a qualified privilege exists in the separation of powers doctrine in Guam's Organic Act. And this privilege would protect pre-decisional documents related to the draft EIS from disclosure.

**The Guam Legislature's Exception to the Exemption**

Notwithstanding the fact that a pre-decisional *draft* EIS would unquestionably be protected from compulsory disclosure under federal law, if not the law of all other United States jurisdictions, and notwithstanding the fact that 5 GCA § 10108 expressly provides that draft documents are not subject to disclosure under FOIA, Guam law, 5 GCA § 10108.1, provides: "Any record or information which may be nondiscloseable under § 10108 that is in the possession of an agency shall be discloseable to the

Legislative Oversight Committee upon its issuance of a subpoena duces tecum requesting such record or information or subpoena upon the director." Guam law is unique in this regard. No comparable statute authorizing a state or local legislature to disregard executive privileges in this manner has been located in any other jurisdiction.

Guam law further provides that "failing or refusing to appear in compliance with a subpoena, or to produce documents when requested, or, having appeared, fails or refuses to testify under oath or affirmation or to produce documents" or "failing or refusing to answer any relevant question, or failing or refusing to furnish any document subpoenaed" may be punishable as contempt by the Legislature. 2 GCA § 3103(f), (g). Those statutes raise questions about the enforcement of a legislative subpoena.

**Separation of Powers under Guam Law**

There is of course no doubt that the separation of powers doctrine applies to the Government of Guam; the cases applying the separation of powers doctrine under the Organic Act of Guam are numerous enough. "[U]nder the Organic Act, the government of Guam is comprised of three separate but co-equal branches of government." *In re Request of Gutierrez*, 2002 Guam 1 ¶ 32; *Hamlet v. Charfauros*, 1999 Guam 18 ¶ 9; *Taisipic v. Marion*, 1996 Guam 9 ¶ 6.

> The applicability of the separation of powers doctrine is evident in the language of the Organic Act itself, which provides that "[t]he government of Guam shall consist of three branches, executive, legislative, and judicial...." 48 U.S.C. § 1421a (1992); *see also*

> *Hamlet*, 1999 Guam 18 at ¶ 9 ("By its very language, therefore, the Organic Act requires application of the constitutional doctrine of separation of powers to government of Guam functions.") (citation omitted)."

*Villagomez-Palisson v. Superior Court*, 2004 Guam 13 ¶ 14 (editorial brackets in the original).

> The issue before us is clearly an Organic Act issue. * * * This is because of the "well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act." *In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam* ("*In re Request of Governor Camacho 2004*"), 2004 Guam 10 ¶ 33 (quoting H.R. Rep. No. 105-742 (1998), 1998 WL 658802 at *3); *see also In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Section 11 of the Organic Act of Guam* ("*In re Request of Governor Camacho 2003*"), 2003 Guam 16 ¶ 15 n. 5.
>
> "We underscored this principle in *In re Request of Governor Gutierrez*, when we stated that 'the legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act.' " *In re Request of Governor Camacho 2004*, 2004 Guam 10 ¶ 33 (quoting *In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1 ¶ 41).
>
> The Ninth Circuit Court of Appeals also recognizes that Guam's self-government is "constrained by the Organic Act" and therefore, courts are compelled to "invalidate Guam statutes in derogation of the Organic Act." *Haeuser v. Dep't of Law*, 97 F.3d 1152,
>
> 1156 (9th Cir.1996); *see also In re Request of Governor Camacho* 2004, 2004 Guam 10 ¶ 33. Thus, the Legislature's powers are broad, but are constrained by the provisions of Organic Act of Guam, and in turn, this court's interpretation of such law. "[T]he court must declare a legislative enactment unconstitutional if an analysis of the constitutional claim compels such a result." *In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 41.

*Underwood v. Guam Election Comm'n*, 2006 Guam 17 ¶¶ 19-21 (editorial brackets in original; editorial ellipsis supplied).

> We recognize that, under the separation of powers doctrine, one branch of government is prohibited from either delegating its enumerated powers to another branch of the government or aggrandizing its powers by reserving for itself the powers given to another branch. *See Santos v. Calvo*, Civ. No. 80- 0223A, 1982 WL 30790, at * 3 (D. Guam App. Div. Aug. 11, 1982); *Territorial Prosecutor v. Superior Court*, Civ. No. 82-0215, 1983 WL 30224, at * 5 (D. Guam App. Div. May 26, 1983); *Communications Workers of Am. v. Florio*, 130 N.J. 439, 617 A.2d 223, 232 (1992). At least one court has noted that "the *taking* of power is more prone to abuse and therefore warrants an especially careful scrutiny." *Communication Workers*, 617 A.2d at 232 (emphasis added). Even absent a finding that one branch has usurped a power exclusively reserved for another branch, a separation of powers violation may be found if "one branch unduly interferes with another branch so that the other branch cannot effectively exercise its

constitutionally assigned powers." *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex.Crim.App.1990) (citations omitted); *see Perez*, 1999 Guam 2 at 17.

*In re Request of Governor Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1 ¶¶ 34, 35 (footnote omitted; emphasis supplied by the court).

> As articulated in Territorial *Prosecutor v. Superior Court*, "the legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act." *Territorial Prosecutor*, 1983 WL 30224, at * 5, 6 (invalidating section 7100(b) of the Territorial Prosecutor's Act because it "impermissibly encroaches upon the Governor's removal powers...."). This limitation on the Legislature's power is specifically set forth in the Organic Act, which prohibits the Legislature from enacting laws that are "inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a (1992) (emphasis added). The "chapter" referred to is the Organic Act; therefore, the Legislature is prohibited from enacting laws that are inconsistent with the Organic Act, including the Organic Act's grant of power to the other branches of the government. *See id.*; *see also Territorial Prosecutor*, 1983 WL 30224, at * 5 (discussing a Ninth Circuit case that held that section 1423a limits the legislative power to enact legislation to subjects not inconsistent with the Organic Act). The problems inherent in allowing the Legislature to enact laws which encroach upon the executive's or Governor's powers are evident:
>
> > If ... [the courts] were to permit the legislature to do so, not only would it render the concept of the separation of powers meaningless and be inconsistent with mandate of the Organic Act, but it could possibly result in the Governor being divested of his executive authority and power at the whim of the legislature.
>
> *Territorial Prosecutor*, 1983 WL 30224, at * 5.

*In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 36 (editorial brackets and ellipses in original).

In *People of Guam v. Perez*, 1999 Guam 2, the Guam Supreme Court adopted the United States Supreme Court's framework for analyzing claims that the doctrine of separation of powers has been violated:

> The United States Supreme Court set forth a framework for evaluating separation of powers challenges:
>
> > In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.
>
> *Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977) (citation omitted). Thus, two separate elements must be evaluated:

> (1) whether the statutory provision prevents the accomplishment of constitutional functions and (2) if so, whether the disruptive impact is justified by any overriding constitutional need.

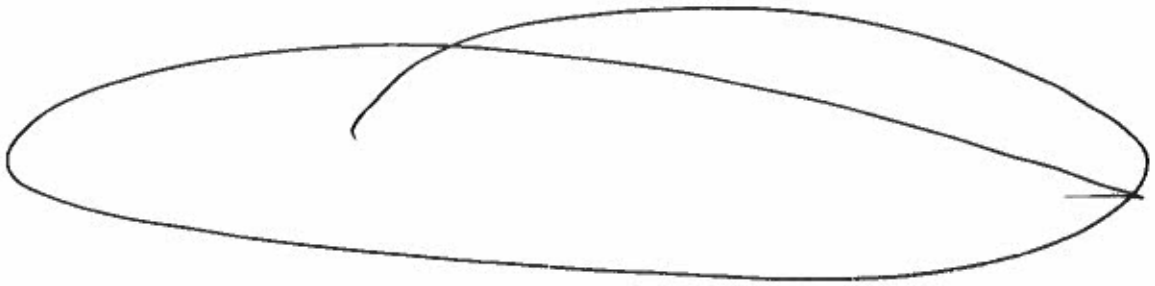
*People of Guam v. Perez*, 1999 Guam 2 ¶ 17. "Even absent a finding that one branch has usurped a power exclusively reserved for another branch, a separation of powers violation may be found if 'one branch *unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers.' " *In re Request of Governor Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1 ¶ 35 (quoting *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex.Crim.App.1990); and citing *Perez*, 1999 Guam 2 ¶ 17) (emphasis in original).

As described in the context of applicability of the separation of powers doctrine to the president's privileged communications,

> [t]he ultimate question is whether restricting the presidential communications privilege to communications that directly involve the President will "impede the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691, 108 S.Ct. 2597, 2619, 101 L.Ed.2d 569 (1988); *see also Loving v. United States*, 517 U.S. 748, ----, 116 S.Ct. 1737, 1743, 135 L.Ed.2d 36 (1996) ("[e]ven when a branch does not arrogate power to itself, ... the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties"). If it does, the constitutional separation of powers will be violated. In *Nixon* the Court recognized that the President's access to honest and informed advice and his ability to explore possible policy options privately are critical elements in presidential decisionmaking. Given the President's dependence on presidential advisers and the inability of the deliberative process privilege to provide advisers with adequate freedom from the public spotlight, we conclude that limiting the privilege in this fashion would indeed impede effective functioning of the presidency.

*In re Sealed Case*, 121 F.3d 729, 571, 326 U.S.App.D.C. 276, 298 (D.C. Cir. 1997).

The same analysis is applicable under Guam law, and the question then is simple: Whether the threat of a legislative subpoena and judicial enforcement or the process of a legislative contempt proceeding "*unduly* interferes with" or is likely to "prevent[] the accomplishment of constitutional functions" entrusted to the executive branch, and "if so, whether the disruptive impact is justified by any overriding constitutional need." On the facts presented here, the Legislature's pursuit of pre-decisional *draft* documents otherwise protected by the deliberative process and executive privileges, and for which the Legislature has not articulated a constitutionally compelling and immediate need, would "*unduly* interfere[] with" and is more than likely to "prevent[] the accomplishment of constitutional functions" entrusted to the executive branch.



**Constitutional Concerns with the Legislature's Contempt Statute**

The constitutional parameters of the Guam Legislature's contempt powers have yet to be tested in the courts. Title 2 GCA § 3101, *et seq.*, purports to authorize the Legislature extraordinarily broad powers of investigation and *enforcement* that raises serious constitutional questions. It is the latter which is of concern here. The statute is not clear on its face what due process is afforded a person that has been subpoenaed and declines to comply on the basis of a privilege otherwise recognized in the law. It is unclear whether an individual facing contempt is afforded not merely notice, but an actual opportunity to be heard and defend, and whether the defense of privilege is available to an individual charged with legislative contempt which may lessen or negate a finding of contempt on the merits.

Although 2 GCA § 3105(b)(1) provides that at a contempt proceeding before the Legislature the witness shall be "afford[ed] an opportunity to explain and defend," the explicit repudiation of governmental privileges as a defense, *see* 2 GCA § 3107 ("Defenses which are not applicable to persons in the service of the government of Guam shall include, but are not limited to, privacy or confidentiality of documents in the government's possession, be they of a government or non-government character, and the attorney-client privilege for government of Guam attorney-client relationships."), rejects even the possibility that the separation of powers doctrine is an available defense that may be considered in mitigation by the Legislature. Even if defenses asserted under the Constitution and the Organic Act were to be considered by the Legislature, the statutory denial of judicial review by the courts on the merits of a finding of legislative contempt – relegating the courts to merely enforcing a finding of contempt, *see, e.g.*, 2 GCA § 3105(b)(1) ("The final determination of Legislative Contempt, approved by the Speaker and the Chairperson of the Committee on Rules, shall not be appealable in the Superior Court of Guam") and § 3105(c) ("The Court's jurisdiction shall be limited to only administering the imposition of the sanction(s) or order(s), or both, provided in the resolution, and the Court shall maintain jurisdiction until such time as the sanction(s) or order(s), or both, is completely executed.") – cannot withstand constitutional scrutiny.

There are limits on even the plenary powers of the Legislature, and it is the courts that are the final arbiter of those limits when constitutional concerns are raised. In *Kilbourn v. Thompson*, 103 U.S. 168 (1880), the Supreme Court said:

> It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. An act of Congress which proposed to adjudge a man guilty of a crime and inflict the punishment,
>
> would be conceded by all thinking men to be unauthorized by anything in the Constitution. That instrument, however, is not wholly silent as to the authority of the separate branches of Congress to inflict punishment. It authorizes each House to punish its own members. By the second clause of the fifth section of the first article, 'Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member,' and by the clause immediately preceding, it 'may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.' These provisions are equally instructive in what they authorize and in what they do not authorize. There is no express power in that instrument conferred on either House of Congress to punish for contempts.

*Kilbourn*, 103 U.S. 182 (emphasis added). Thus, while it is recognized that legislatures may punish their own members, any attempt to exercise the power of legislative contempt against persons not a member would be "unauthorized by anything in the Constitution." Under the Organic Act, just as in every other system of law based on the United States constitution, and unlike other systems in other nations that may allow for the commingling of legislative and judicial function, the power of final review is reserved to the judicial branch.

> The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative.

*Kilbourn*, 103 U.S. 192-93.

> But the court in its reasoning goes beyond this, and though the grounds of the decision are not very clearly stated, we take them to be: that there is in some cases a power in each House of Congress to punish for contempt; that this power is analogous to that exercised by courts of justice, and that it being the well-established doctrine that when it appears that a prisoner is held under the order of a court of general jurisdiction for a contempt of its authority, no other court will discharge the prisoner or make further inquiry into the cause of his commitment. That this is the general rule, though somewhat modified since that case was decided, as regards the relations of one court to another, must be conceded.
>
> But we do not concede that the Houses of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited, as we have already attempted to show. If they are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown, and we cannot give our assent to
>
> the principle that, by the mere act of asserting a person to be guilty of a contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made. This necessarily grows out of the nature of an authority which can only exist in a limited class of cases, or under special circumstances; otherwise the limitation is unavailing and the power omnipotent. The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding. *See Williams v. Berry*, 8 How. 495; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. The Gas-Light & Coke Co.*, 19 *id.* 58; *Pennoyer v. Neff*, 95 U. S. 714.

*Kilbourn*, 103 U.S. 197-98.

> But we have found no better expression of the true principle on this subject than in the following language of Mr. Justice Hoar, in the Supreme Court of Massachusetts, in the case of *Burnham v. Morrissey*, 14 Gray, 226. That was a case in which the plaintiff was imprisoned under an order of the House of Representatives of the Massachusetts legislature for refusing to answer certain questions as a witness and to produce certain books and papers. The opinion, or statement rather, was concurred in by all the court, including the venerable Mr. Chief Justice Shaw.
>
> > 'The house of representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That house is not the legislature, but only a part of it, and is therefore subject in its action to the laws, in common with all other bodies, officers, and tribunals within the Commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void. The house of representatives has the power under the Constitution to imprison for contempt; but the power is limited to cases expressly provided for by the Constitution, or to cases where the power is necessarily implied from those constitutional functions and duties, to the proper performance of which it is essential.'
>
> In this statement of the law, and in the principles there laid down, we fully concur.
>
> We must, therefore, hold, notwithstanding what is said in the case of *Anderson v. Dunn*, that the resolution of the House of Representatives finding Kilbourn guilty of contempt, and the warrant of its speaker for his commitment to prison, are not conclusive in this case, and in fact are no justification, because, as the whole plea shows, the House was without authority in the matter.[8]

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[8] *Anderson v. Dunn*, 19 U.S. 204 (1821), recognized generally that Congress, in addition to express powers to try impeachments and its own members, has the implied power to punish non-members for contempt. But the Court did not have occasion to address the question of the unavailability of judicial review of any legislative finding holding a non-member in contempt. The Court made clear, however, that the American system of delegated powers was decidedly different from the former English system which permitted its House of Commons to prosecute and punish contempt, without further judicial review. "This view of the subject necessarily sets bounds to the exercise of a caprice which has sometimes disgraced deliberative assemblises, when under the influence of strong passions or wicked leaders, but the instances of which have long since remained on record only as historical facts, not as precedents for imitation. In the present fixed and settled state of English institutions, there is no more danger of their

*Kilbourn*, 103 U.S. 199-200.

The Supreme Court's determination that the Legislature is not constitutionally authorized to be prosecutor, jury *and final judge* of contempts before it was affirmed in *Marshall v. Gordon*, 243 U.S. 521 (1917). It noted again that although there may have been a commingling of legislative and judicial functions authorized under the English system in its House of Commons, the U.S. Constitution simply does not permit the Congress to be prosecutor, jury, executioner, and final judge in matters of contempt before it.

> The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers, manifested in state Constitutions even before the adoption of the Constitution of the United States, by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion, and yet, at the same time, not substantially interfere with the great guaranties and limitations concerning the exertion of the power to criminally punish, - a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted.
>
> It is suggested in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings. The argument is irrelevant because we are of opinion that the premise upon which it rests is unfounded. But indulging in the assumption to the contrary, we think it is wholly without merit, as we see no reason for holding that if the situation suggested be assumed, it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides, it must be apparent that the suggestion could not be accepted without the conclusion that, under the hypothesis stated, the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and
>
> limitations imposed by the Constitution upon that authority,-a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted. How can this be escaped, since it is manifest that if the argument were to be sustained those things which, as pointed out in *Re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677, were distinct and did not therefore the one frustrate the other, - the implied legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so, - would

being revived, probably, than in our own. [¶] But the American legislative bodies have never possessed, or pretended to the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment." *Id.*, 19 U.S. 231.

> become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other. Again, accepting the proposition, by what process of reasoning could the conclusion be escaped that the right to exert implied authority by way of contempt proceedings in so far as essential to preserve legislative power would become itself an exertion of legislative power and thus at once be subject to the limitations as to modes of trial exacted by the guaranty of the Constitution on that subject? We repeat, out of abundance of precaution, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends.
>
> It follows from what we have said that the court below erred in refusing to grant the writ of habeas corpus, and its action must be and it is, therefore, reversed, and the case remanded with directions to discharge the relator from custody.

*Marshall*, 243 U.S. 546-48. The relevance of this holding to a constitutional analysis of 2 GCA § 3101, *et seq.* is pertinent. The preclusion of judicial review by the courts of Guam on the merits of a finding of legislative contempt is unconstitutional. It is inorganic.[9]

A legislative determination of guilt and imposition of punishment without judicial review is, in fact, a bill of attainder.

> The Constitution contains two provisions barring enactment of "bills of attainder," the first constraining Congress and the second constraining the states. U.S. Const. art I, §§ 9, 10. Originally, bills of attainder were acts whereby Parliament sentenced a person to death without judicial trial, and "tainted" the condemned such that his property escheated to the Crown. Bills of pains and penalties were similar except that they carried some sentence short of death. *See generally In re Extradition of McMullen*, 989 F.2d 603, 604-06 (2d Cir.1993) (en banc) (recounting origins of bills of attainder). In modern American law, a bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an individual without ... the protections of a judicial trial." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); *see also United States v. Lovett*, 328 U.S. 303, 315, 106 Ct.Cl. 856, 66 S.Ct. 1073, 90 L.Ed. 1252 (1948) (attainder bills are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a away as to inflict punishment"). Hence, the elements of a bill of attainder

[9] Even without resorting to analogous federal precedent under the United States Constitution for analysis of Guam's Organic Act, the Guam Supreme Court is not a stranger to reviewing similar preclusion of judicial review statutes like the instant legislative contempt statute as being contrary to its own separation of powers jurisprudence. *See, Villagomez-Palisson v. Superior Court*, 2004 Guam 13 ¶ 17 ("If the statute does not preclude judicial review or enforcement, the judicial power is not infringed.") (citing *Linder v. Smith*, 629 P.2d 1187, 1194 (Mont. 1981); *Attorney Gen. v. Johnson*, 385 A.2d 57, 65 (Md. 1978), *appeal dismissed*, 439 U.S. 805 (1978), *disapproved on other grounds*, *Newell v. Richards*, 594 A.2d 1152, 1161 (Md. 1991); *Firelock Inc. v. Dist. Ct.*, 776 P.2d 1090, 1094-95 (Colo. 1989)).

> claim are (1) a legislative act, (2) that "determines guilt and inflicts punishment," (3) upon an identifiable individual, and (4) without a judicial trial. *See Nixon*, supra, 433 U.S. at 468.

*Kay v. City of Rancho Palos Verdes*, 2003 WL 25294710 * 6 (C.D. Cal. 2003). Thus, even though the statute setting forth the procedure for a finding of legislative contempt appears to have some features of due process – including minimal notice and right to counsel – the fact that judicial review on the merits of a finding of legislative counsel is not permitted, coupled with the likelihood that the proposed contemnor would not even be permitted to offer a defense of privilege, renders the whole legislative contempt process unconstitutional and inorganic.

**Conclusion**

Without a particularized need sufficient to overcome the presumption of privilege with respect to the executive's pre-decisional communications, were the Legislature to pursue compulsory process and seek either judicial enforcement through the courts or to hold the non-complying parties in contempt within the Legislature itself, it is our opinion that the Legislature's otherwise plenary powers of investigation are limited, as in all matters, by the limits of the separation of powers doctrine expressly stated in the Organic Act of Guam. On the facts presented here, it is our opinion the deliberative process and executive privileges, rooted in the doctrine of separation of powers established in the Organic Act, are due to be protected from Legislative inquiry. Finally, the statute governing the Legislature's contempt procedures that appear to bar even the mention of governmental privileges and separation of powers as an argument before the Legislature in defense of a subpoena, and the exclusion of even the possibility of judicial review on the merits of a finding of legislative contempt is simply unauthorized in our constitutional system of laws. The preclusion of meaningful judicial review of the merits of a finding of legislative contempt of a person not a member of the Legislature is, on its face, inorganic.

Alicia G. Limtaico

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cc: Director, Bureau of Statistics and Planning