**DEPT. COMM. NO. 207**

**JOSH GREEN, M.D.**
GOVERNOR
KE KIA'ĀINA

**KEITH A. REGAN**
COMPTROLLER
KA LUNA HO'OMALU HANA LAULĀ

**MEOH-LENG SILLIMAN**
DEPUTY COMPTROLLER
KA HOPE LUNA HO'OMALU HANA LAULĀ

**STATE OF HAWAI'I | KA MOKU'ĀINA O HAWAI'I**
**DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES | KA 'OIHANA LOIHELU A LAWELAWE LAULĀ**
P.O. BOX 119, HONOLULU, HAWAII 96810-0119

December 19, 2022

**VIA ELECTRONIC MAIL**

The Honorable Ronald D. Kouchi,
President
and Members of the Senate
Thirty-Second State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Scott K. Saiki, Speaker
and Members of the House of
Representatives
Thirty-Second State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

For your information and consideration, I am transmitting a copy of the Report to the 2023 Legislature of the SCR 192 Working Group as required by Senate Concurrent Resolution 192(2022). In accordance with Section 93-16, HRS, a copy of this report has been transmitted to the Legislative Reference Bureau and the report may be viewed electronically at: Report to the 2023 Legislature of the SCR 192 Working Group (hawaii.gov).

Sincerely,

KEITH A. REGAN
Comptroller

# Report to the 2023 Legislature of the SCR 192 Working Group
## December 16, 2022

Pursuant to Senate Concurrent Resolution 192 (SCR 192), the Director of Hawai'i's Office of Information Practices (OIP) is pleased to present to both chambers of the Legislature for the 2023 regular session this final report and attachments, including proposed legislation. This report and the legislative proposal identified as Exhibit C represent the consensus of the working group convened by OIP, with the exception of one member whose dissent to the report and legislative proposal are attached as Exhibit L.

## I. Background of the Working Group

For nearly three decades, OIP had recognized a "deliberative process privilege" (DPP) allowing agencies, with various constraints, to withhold deliberative and pre-decisional records under the frustration exception to mandatory disclosure requirements of the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), for records whose disclosure would frustrate a legitimate government function. The Hawai'i Supreme Court's 2018 decision in Peer News changed the treatment of such records when it found that OIP's recognition of a deliberative process privilege was an erroneous interpretation of the UIPA. Peer News LLC, dba Civil Beat v. City and County of Honolulu, 143 Haw. 472 (2018) (Peer News). As the law currently stands, an agency's desire to shield its internal discussions and deliberations to allow it to fully consider and make sound decisions does not provide a basis for withholding records under the UIPA, and the UIPA thus offers no protection against disclosure for deliberative and pre-decisional records, except insofar as those records may fall under a UIPA exception for some other reason.

SCR 192 (Exhibit A) was adopted by both chambers of the Legislature during the 2022 session and it requested that OIP "convene a working group to develop recommendations for a new UIPA statutory exception and other recommendations for deliberative and pre-decisional agency records to reasonably balance the public's interest in disclosure and the agency's ability to fully consider and make sound and informed decisions[.]" The working group (WG) was asked to "gather and consider information from interested and affected parties as well as examine the law and practices in Hawai'i and other jurisdictions, with the goal of developing recommendations to address government's need for and the public's concern about deliberative and pre-decisional agency processes and records in decision-making[.]"

Pursuant to SCR 192, OIP convened the WG with the following members:

Judge (retired) Karl Sakamoto, Facilitator
Brian Black, Executive Director, Civil Beat Law Center

Lance Collins, Law Office of Lance D. Collins, representing Common Cause
Kaliko'onālani Fernandes, Deputy Solicitor General,
Department of the Attorney General
Douglas Meller, representing League of Women Voters
Carrie Okinaga, General Counsel, University of Hawai'i
Duane Pang, Deputy Corporation Counsel, City and County of Honolulu

The WG worked diligently and collaboratively during the 2022 interim period to develop recommendations for a new UIPA statutory exception and other recommendations for deliberative and pre-decisional agency records to reasonably balance the public's interest in disclosure and agencies' ability to fully consider and make sound and informed decisions. The WG met a total of seven times as a large group, with multiple smaller group meetings as well. Because the WG was formed pursuant to a legislative resolution, not a statute or session law, it was not subject to part I of chapter 92, the Sunshine Law. However, the WG's initial draft proposal (Exhibit B) was presented to the public for comment via the State Calendar and OIP's website, and the WG held and recorded a public meeting via Zoom on October 4, 2022, to obtain public testimony. The WG took the public testimony into account in arriving at its final recommended proposal (Exhibit C), which the majority of the WG reached consensus on and recommends the Legislature pass. Because one member of the group objected to the WG's legislative proposal (Exhibit C), his dissent is attached as Exhibit L.

## II. Work Prior to Public Meeting

After the first meeting on July 15, 2022, the WG drafted a Statement of Common Purpose. The WG was organized into three pairs, each with a member representing a public interest organization and a member representing a government agency subject to the UIPA. Each pair was charged with producing an original proposal. In addition, members were provided research conducted by Mr. Black regarding legislative solutions in other jurisdictions, and research by OIP of prior OIP opinions and examples regarding the deliberative process privilege in Hawai'i. These, together with a copy of SCR 192, draft legislation, minutes of WG meetings, and other records of the WG's work are available on OIP's website at https://oip.hawaii.gov/scr-192-working-group/. A video of the public meeting held on October 4, 2022, is also available on that site, along with the written testimony the WG received, which is attached as Exhibit D. The written minutes of the WG's six non-public meetings held between July 1 and December 8, 2022, are attached as Exhibits E-J. To avoid confusion, documents referenced in the minutes are not included as part of the minutes attached as Exhibits E-J, but are available as part of the materials on OIP's website.

At meetings on August 9, August 25, and September 12, 2022, as well as in smaller group meetings, members discussed their concerns and experiences dealing with the UIPA, and

the advantages, disadvantages, and merits of the proposals presented by the members. At the meeting on September 12, time was of the essence in developing a proposal for public comment in October when a public meeting was scheduled. While there was insufficient time on September 12 to reach resolution on two other matters (reducing times for dispute resolution and incentivizing after-action reviews), members agreed to solicit public comment on a draft proposal (Exhibit B) providing the following statutory amendments to HRS Chapter 92F: (1) revising the definition of "government records" in HRS Section 92F-3 to expressly exclude uncirculated drafts and notes consistent with the language from footnote 15 in the Hawai'i Supreme Court's 2018 decision in Peer News, and (2) adding to HRS Section 92F-13 a new UIPA statutory exception with limited protection for deliberative process materials while the decision-making process remains ongoing.

The proposed UIPA amendment would give government agencies discretion whether to disclose deliberative and pre-decisional government inter-agency or intra-agency records prior to government decisions that do not involve public participation. This would include records reflecting an agency's internal discussions and thought process on a decision that has not yet been made, that are circulated within an agency or even between agencies, but not originating from or shared with someone outside government. And because the public wants to understand why government decisions were made or whether government decisions were capricious, the new exception provides that once a decision has been made or the decision-making process has been abandoned, and unless other exceptions to disclosure apply, the UIPA should require disclosure of deliberative or pre-decisional government records relevant to that decision.

The proposal is intended to encourage frank discussion among an agency's employees about the benefits or detriments, and possible implications, of a proposed course of action, including input from supporters and detractors (including possible whistleblowers). The proposal also is intended to assuage the concerns of employees lacking discretionary or decision-making authority that they may receive unwanted publicity based on their personal contributions to discussion of a controversial issue. To address these concerns, the proposal provides that even after a decision has been made, an agency may still redact the name, title, and other directly identifying information of an official or employee who lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct related to the decision.

This provision allows only directly identifying information to be redacted. After directly identifying information has been redacted, substantive statements must be disclosed, unless other exceptions apply. Further, the provision does not allow redaction of identifying information for an employee engaged in or under investigation for wrongdoing or criminal conduct related to the decision. The proposal recognizes that the public may have an elevated interest in knowing what comments or suggestions came from an employee implicated in wrongdoing or criminal conduct,

to see how that person's contributions may have influenced decision-making. The term wrongdoing is not intended to encompass minor infractions an employee might be written up for, such as tardiness, or to require OIP or a court to make a definite determination that criminal conduct or wrongdoing has actually occurred. Rather, the provision is intended to apply where the agency is aware of an ongoing investigation, or a previous finding, of either criminal conduct or more serious noncriminal misconduct related to the decision as informed by prior court and OIP opinions regarding the public interest in misconduct information.

The proposal is intended to incorporate relevant existing laws, court rulings, and precedents concerning disclosure of government records. Because the proposed new exception to disclosure builds on some concepts from the now defunct DPP as developed by OIP and comparable federal case law, the proposal is intended to incorporate relevant court rulings and OIP precedents applying those concepts unless they are inconsistent with the language in the proposal itself. This includes how to determine when records are deliberative and pre-decisional, and when an agency's decision-making process has been abandoned. OIP's interpretation of cases relating to pending investigations may also be relevant to the new deliberative process exception as it applies to ongoing decision-making.

The proposal also distinguishes between collaborative government decisions that involve public participation (e.g., board meetings and public hearings) and government decisions without public participation (e.g., decisions by a single executive or department head). The WG acknowledged that public participation is not required for all government decisions. But in a situation where public participation is required by law or is being solicited—such as during public meetings of boards subject to the Sunshine Law—the timely disclosure of relevant government records is necessary for meaningful public participation. For timely disclosure to occur, the Sunshine Law and UIPA must continue to require disclosure of any deliberative or pre-decisional government record distributed or discussed at any government meeting or hearing that the public has the right to attend. The proposal does this by specifically providing that the new exception shall not apply to a "board packet" of materials being reviewed by a board prior to a Sunshine Law meeting.

Because government should not selectively decide which members of the public can participate in government decisions, the UIPA generally should continue to require disclosure of any deliberative or pre-decisional government record when the exception has been waived by a prior disclosure. Court and OIP opinions have addressed the concept of waiver by prior disclosure with respect to the UIPA's existing exceptions, and said concept would similarly apply for this exception. The doctrine may not apply where, for instance, a disclosure was to a person who is effectively an "insider" for the purpose of the decision, such as a contractor hired by an agency to research an issue, or when it cannot be factually established that the agency has actually made a prior disclosure of the record in question. However, it would be expected to

apply to require disclosure where an agency has disclosed a record to one journalist, but seeks to deny it to another, or has disclosed it to a lobbyist, but seeks to deny it to a public activist. Similarly, the proposal will continue to treat the UIPA's exceptions as not being mutually exclusive, consistent with how courts and OIP have treated them.

## III. Public Meeting and Subsequent Revisions Made in the Final Proposal

The WG held an online public meeting on October 4, 2022, to afford all interested persons an opportunity to submit orally or in writing their views, data, concerns, and arguments regarding the draft legislation. Based on public input, the WG subsequently continued to discuss and determine additional substantive and technical revisions to the proposed statutory amendment. While the WG kept largely intact the proposal that had been presented to the public, it made technical and substantive revisions to formulate the final proposal (Exhibit C) as discussed below.

### A. Definition of Government Record

In response to testimony that the proposed amendment to the definition of a "government record" was too limiting by referring to "writings" and did not comport with the current definition that includes information maintained by an agency in auditory, visual, electronic, or other physical form, the WG's proposed amendment to section 92F-3, HRS, replaced the reference to truly preliminary "writings" with "records" to state:

> "Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form. <u>"Government record" shall not include truly preliminary records, such as personal notes and rough drafts of memorandum, that have not been circulated.</u>

By replacing "writings," the term "records" now refers back to the current definition of a "government record" and will include notes in the form of a voice memo or recording of dictation, not just written notes, drafts, and similar documents.

Significantly, the proposed exclusion of truly preliminary records from the definition of a government record applies only if the records have not been "circulated." In other words, a rough draft whose author has not yet shared it with anyone else for review, or an employee's personal notes that have not been forwarded to others for their use or comment, would fall within the exclusion and thus not be considered "government records." Notes kept on an agency's computer system that is technically accessible by its information technology staff, but saved in a personal folder not intended for sharing, would not be considered to have been "circulated" by the author. Conversely, a draft or set of notes that has been actively shared by the author becomes a "government record" that must be disclosed upon request unless an exception to disclosure applies.

### B. New Deliberative Process Exception Under HRS 92F-13 for Ongoing Decision-making and Rebuttable Presumption of Abandonment

As described earlier, the proposal to the public included a new deliberative process exception as section 92F-13(6), HRS, that would protect certain deliberative process materials from public disclosure while the decision-making process remains ongoing. Once a decision has been made or decision-making has been abandoned, however, disclosure is required of deliberative or pre-decisional government records relevant to that decision unless another exception applies. Limited redaction may occur of certain directly identifying information for officials or employees who lack discretionary authority, did not make the decision, and are not under investigation for or engaged in wrongdoing or criminal conduct related to the decision.

In response to public concern that an agency could claim its decision-making is ongoing for an indefinite length of time during which it could deny public access to records relevant to an issue, the revised proposal specifies that the records must concern "an agency decision about a government action." The revised proposal also adds a rebuttable presumption that decision-making has been abandoned if three or more years have gone by since an earlier request for the same record(s) was denied on the basis that the decision-making process was still ongoing. Consequently, the final proposed amendment to add a sixth exception to section 92F-13, HRS, states:

> (6) Inter-agency or intra-agency deliberative and pre-decisional government records, other than readily segregable purely factual information, concerning an agency decision about a government action up until the final decision the deliberative government records relate to has been made or until deliberation of the matter has been abandoned; provided that there shall be a rebuttable presumption that a matter has been abandoned if three years have elapsed after a request for records; provided further that once disclosure is required, the name, title, and other information that would directly identify a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct related to the decision. This exception does not apply to board packets as defined in section 92-7.5.

Factors relevant to determining whether a decision-making process has been abandoned could include, but are not limited to:

- evidence of recent discussions, memoranda, notes, or other records indicating that agency staff are still actively working on the issue;

- internal or external statements by agency leadership or similar indications that consideration of the issue either remains a high priority or, to the contrary, has been halted or greatly deprioritized;
- the existence of a deadline or legal mandate for a final decision that has not yet been made;
- evidence that the matter remains under review or pending approval by another entity; and
- other evidence that the agency is proceeding as though the issue remains undetermined with a decision forthcoming or, to the contrary, proceeding as though a decision has already been made notwithstanding the lack of an official announcement or approval.

The proposal recognizes that major decisions and changes often take much longer than three years to be concluded, but that the public is also entitled to know that work is ongoing and the new exception is not being used as a pretext to block access to records. The addition of a three-year window starting when a request is denied, after which there will be a rebuttable presumption that the decision-making pertaining to the requested records has been abandoned, is expressly not intended to force government officials to make a decision within three years. Rather, it sets a timeframe after which, to meet its burden to establish that the exception to disclosure applies, the agency may reasonably be expected to provide a heightened showing that it is still working toward a decision, and ideally an explanation of why the decision-making process remains ongoing.

**C. New Agency Reporting Requirement Under HRS 92F-18(c)**

No part of the following three proposed provisions was included in the proposal presented to the public at the October 4 meeting. However, in response to public concern that the exception could be abused or over-used by agencies, the WG added a new requirement for agencies to report their use of the exception as an amendment to section 92F-18(c), HRS, as follows:

> (c) Each agency shall supplement or amend its public report, or file a new report, on or before July 1 of each subsequent year, to ensure that the information remains accurate and complete. From July 1, 2023, through June 30, 2027, an agency shall report its use of HRS § 92F-13(6), including the text of the request and the agency's notice to requester. Each agency shall file the supplemental, amended, or new report with the office of information practices, which shall make the reports available for public inspection.

General consensus existed that this would require additional agency time (including OIP staff time), but the WG did not agree on the amount of time that would be required. One

member of the WG questioned the usefulness of the data required to be collected in light of the additional expenditure of agency time to do so. OIP also expressed concern that beginning the reporting requirement on July 1, 2023, would be unrealistic, if the bill is passed, but not signed or made effective into law until after July 1, 2023. Moreover, a July 1, 2023, effective date for the law provides very little time for OIP to amend its UIPA Record Request Log forms and training materials and for the multitude of State and county agencies to learn or and begin implementing the new law's reporting requirement and OIP's revised Log forms.

On the other hand, some members insisted that the reporting requirement start at the same time as the effective date of the new exception. Notwithstanding the delay for any training that OIP may conduct, the members expressed the view that an agency that chooses to invoke the proposed exception after the new law necessarily must be aware of the requirement in that same law to track the exception's use. Thus, an agency that does not know what the law requires should not be invoking the exception. Ultimately, the WG agreed to amend its legislative proposal to include an effective date of July 1, 2023, which addressed OIP's concern about having a reporting requirement go into effect before the law itself was changed.

**D. New Savings Clause**

The second completely new provision added to the final proposal as a proposed session law is as follows:

> This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

This provision makes clear that the statutory changes being made are to be applied prospectively and will not affect pre-existing rights and duties.

**E. New Working Group in 2028**

The third completely new provision added to the final proposal as a session law calls for OIP to convene a new working group by January 1, 2028, which would examine agency use of the newly created deliberative process exception and make recommendations to keep or repeal the exception to the 2029 Legislature. Unlike the current WG that was created by concurrent resolution, the new working group would be created by an Act and will need express language to exempt it from the Sunshine Law, which is part I of HRS Chapter 92. The new provision states:

> No later than January 1, 2028, the Office of Information Practices shall convene a working group to examine agency use of the new UIPA statutory exception, HRS § 92F-13(6). The working group shall prepare recommendations for whether to keep or repeal the exception and, if kept,

> for amendments, if any, warranted after reviewing use of the exception. The working group shall include seven members consisting of three individuals representing public interest groups; three individuals representing government agencies subject to the UIPA; and the Director of the Office of Information Practices or the Director's designee, who shall appoint the members and serve as the working group convener. The working group shall be exempt from part I of chapter 92. The Director of the Office of Information Practices shall report the findings and recommendations of the working group to the Legislature no later than twenty days prior to the convening of the Regular Session of 2029.

As noted in Exhibit L, the member dissenting from the final proposal objected in part to the Sunshine Law exemption for the new working group to be created. OIP, too, expressed its concern because it typically does not support a Sunshine Law exemption for a working group created by session law or statute. OIP also emphasizes that its role in the current WG has been as a neutral convener providing support rather than as a voting member, and thus the proposed exemption does not represent a position taken by OIP itself.

OIP notes, however, that the current WG consists almost entirely of lawyers and its discussions have been as much about specific wording and details of related laws and how this proposal would interact with those laws as it has been about underlying policy decisions. The issues on which the current WG has needed to reach consensus over the course of five months are sufficiently complex that even with seven nonpublic meetings running several hours each, it has been necessary for members to also work through smaller group meetings and use email to circulate and review proposals and suggest edits, which would not be permitted for a board subject to the Sunshine Law. WG members also have been or currently are on opposing sides of some UIPA-related court cases, and the ability to hold nonpublic meetings has helped address WG members' concerns that statements made in the course of the group's work not be used against their clients in related litigation. Thus, the current WG's non-Sunshine Law status has been instrumental in allowing it to arrive at a consensus in the limited time to provide this report to the 2023 Legislature. Although the future working group will theoretically have approximately a year from when the final agency reports on use of the exception are compiled to do its work, the future working group's members are likely to be fully occupied with the legislative session and post-session work for about six months of that time, thus similarly leaving the future group with only half a year to complete its work. Accordingly, the Legislature may find that these considerations provide sufficient reason to create a Sunshine Law exemption for the proposed new working group.

### F. Effective Date

The WG proposal contains an effective date of July 1, 2023.

## IV. Additional Items Considered Where No Consensus Was Reached

### A. Appeal Resolution Time

Some members of the WG considered and proposed ideas to address additional issues they believed were connected to the WG's assignment "to develop recommendations for a new UIPA statutory exception and other recommendations for deliberative and pre-decisional agency records to reasonably balance the public's interest in disclosure and the agency's ability to fully consider and make sound and informed decisions[.]" Although the WG did not ultimately reach consensus on these proposals, they are discussed in the WG report to fully reflect the WG's work.

Some members expressed concern about the length of time typically required from when an appeal is filed with OIP to issuance of an OIP opinion resolving the appeal. In FY 2022, over 89% of inquiries to OIP were informal requests for Attorney of the Day advice (1,456) that were typically resolved within one business day. Of the remaining 11% of requests for which formal case files were opened (177), 70% (124) were resolved within the same year, including 6 of 47 appeals filed in FY 2022. Although appeals constituted less than 3% of the total formal and informal requests for OIP's assistance (1,633), appeals take the most staff time to resolve, especially when written opinions are required. Nonetheless, an appeal may be the only free way for someone challenging a denial of access to records (or a board action under the Sunshine Law) to obtain a binding determination as to whether a violation occurred. In those instances where other forms of assistance do not resolve a dispute and an appeal to OIP is necessary, the time from the filing of an appeal to OIP's resolution is typically between one to three years (excluding any litigation in court). At the same time, members recognized that OIP staff have a great deal of work and other responsibilities besides resolving appeals, such as training and legislation, and there are many reasons, such as the complexity of legal issues involved and training of new attorneys, that require OIP staff to spend significant amounts of time to draft and finalize opinions.

Members also expressed concern about the amount of time spent by agencies, including their own attorneys, in responding to and litigating UIPA record requests. Members also recognized that every piece of legislation passed has fiscal and workload implications, and the WG's consensus proposal will add to OIP's already increasing workload and will need to be operationalized by all government agencies, including OIP.

OIP had supported two legislative solutions during the 2022 session that were intended to help reduce the appeal resolution time and its increasing workload: (1) additional staffing and funding for OIP, which was passed as part of SB 3252, SD 1, HD 1, CD 1, but ultimately vetoed on other grounds by then Governor David Ige, and (2) an amendment proposed by the League of Women Voters and OIP to HB 2037, HD 2, SD 1 (2022), which was not passed, but would have given OIP the discretion to resolve disputes either through an opinion or written guidance. OIP combined these solutions into one revised legislative proposal attached as Exhibit K. While the WG as a whole did not take a position, some members support OIP's pursuit with the Legislature of solutions to address the concerns shared by OIP and the working group.

### B. After-Action Reviews and Agency Self-Audits

Some members of the WG discussed the general desirability of encouraging constant improvement through agency self-audits, after-action reviews, and similar practices where agencies initiate review of actions taken and update policies and practices. This occurs more frequently in the private sector, but the public sector often shies away from doing these self-audits. Some members thought that externally forced reviews are sometimes helpful, but depending on the facts, resulting changes are generally less likely to be sustained over time. And concerns were expressed that when people fear embarrassing coverage or liability, they are less likely to participate or engage in after-action reviews or self-audits. Others disagreed. Although the members could not reach resolution on a separate UIPA exemption applicable to agency self-audits and after-action reviews, and in particular could not agree on specific language that would create an incentive for such internal reviews, the members did agree that agency records of self-audits and after-action reviews would fall within the proposed exception for pre-decisional and deliberative materials related to an ongoing decision-making process. Thus, while the result of a self-audit or after-action review would still become public upon completion, the agency's ability to redact directly identifying information will provide anonymity for employees lacking discretionary or decision-making authority who participate.

## V. Summary

To summarize, after seven WG meetings including a public hearing on the WG's initial draft proposal, and additional small group meetings and discussions, all but one of the WG reached consensus and recommends the Legislature pass its final proposal, attached as Exhibit C. Exhibit C includes a new statutory exception to disclosure under the UIPA that the majority of the WG believes reasonably balances the public's interest in disclosure and the agency's ability to fully consider and make sound and informed decisions.

The WG discussed, but did not reach consensus on, other related UIPA issues. Nonetheless, some WG members supported OIP's pursuit with the Legislature of proposed legislation (Exhibit K) to address the concerns shared by OIP and the WG. Because one member of the group objected to the WG's legislative proposal in Exhibit C and can take no position on OIP's legislative proposal in Exhibit K, his dissent is attached as Exhibit L.

In closing, OIP appreciates the opportunity to convene the WG and all the hard work, collaboration, and thoughtful discussions by the WG's members and volunteer facilitator to provide these findings and recommendations to the Legislature as requested by SCR 192.

Respectfully submitted,

Cheryl Kakazu Park

CHERYL KAKAZU PARK
Director, Office of Information Practices

THE SENATE
THIRTY-FIRST LEGISLATURE, 2022
STATE OF HAWAII

# S.C.R. NO. 192 S.D. 1

# SENATE CONCURRENT RESOLUTION

REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A WORKING GROUP TO DEVELOP RECOMMENDATIONS FOR THE TREATMENT OF DELIBERATIVE AND PRE-DECISIONAL AGENCY RECORDS.

WHEREAS, the 1988 Legislature recognized, when enacting the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (UIPA), that there would be gray areas and unanticipated cases arising in the implementation of the UIPA that should be left to the Office of Information Practices (OIP) and courts to balance competing interests to determine whether disclosure would be required, and the UIPA's exceptions were crafted to allow for the development of such a common law; and

WHEREAS, federal courts created the deliberative process privilege (DPP) in the 1950s to encourage and allow for frank and candid agency deliberations as a means to promote more effective government decision-making; and

WHEREAS, based on the federal Freedom of Information Act (FOIA), relevant state and federal caselaw, and the UIPA's own legislative history, for nearly 30 years, the OIP recognized the DPP as a form of the UIPA's exception to disclosure for records whose disclosure would frustrate a legitimate government function, section 92F-13(3), Hawaii Revised Statutes; and

WHEREAS, the federal DPP has been the subject of significant criticism for abuse by agencies and consequent efforts by Congress to identify "language that will ensure that the executive agencies administering FOIA will strike the appropriate balance between privacy that is absolutely necessary for candid conversations in the development of effective public policy and transparency that is necessary and expected in a government by the people and for the people"; and

WHEREAS, other jurisdictions across the country utilize a wide spectrum of approaches to transparency for agency deliberations; and

WHEREAS, this body believes that in order to reach sound decisions on the various questions that come before them, agencies in some instances need their employees and officers to fully and frankly discuss proposed policies or tentative decisions at an internal level, outside the glare of publicity, and with the freedom to express views or editorial changes that may not be incorporated into the final decision; and

WHEREAS, interested stakeholders should consider the appropriate balance between transparency and deliberative process for effective agency decision-making in Hawaii, and recommend a new statutory standard that balances the various agency and public interests; now, therefore,

BE IT RESOLVED by the Senate of the Thirty-first Legislature of the State of Hawaii, Regular Session of 2022, the House of Representatives concurring, that the Office of Information Practices is requested to convene a working group to develop recommendations for a new UIPA statutory exception and other recommendations for deliberative and pre-decisional agency records to reasonably balance the public's interest in disclosure and the agency's ability to fully consider and make sound and informed decisions; and

BE IT FURTHER RESOLVED that the working group is requested to gather and consider information from interested and affected parties as well as examine the law and practices in Hawaii and other jurisdictions, with the goal of developing recommendations to address government's need for and the public's concern about deliberative and pre-decisional agency processes and records in decision-making; and

BE IT FURTHER RESOLVED that the working group is requested to include seven members consisting of three individuals representing public interest groups; three individuals representing government agencies subject to the UIPA; and the Director of the Office of Information Practices or the

Director's designee, who shall appoint the members and serve as the working group convener; and

BE IT FURTHER RESOLVED that the Director of the Office of Information Practices is requested to report the findings and recommendations of the working group to the Legislature no later than twenty days prior to the convening of the Regular Session of 2023; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Governor, Director of the Office of Information Practices, Executive Director of the Civil Beat Law Center for the Public Interest, President of the League of Women Voters of Hawaii, and Executive Director of Common Cause Hawaii.

Exhibit B

SECTION 1. Section 92F-3, Hawaii Revised Statutes, is amended by amending the definition of "government record" to read as follows:

""Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form. "Government record" shall not include writings that are truly preliminary in nature, such as personal notes and rough drafts of memorandum that have not been finalized for circulation within or among the agency."

SECTION 2. Section 92F-12, Hawaii Revised statutes, is amended to read as follows:

**§ 92F-13. Government records; exceptions to general rule**

This part shall not require disclosure of:

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

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

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

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

(5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature[~~.~~]; and

6) Inter-agency or intra-agency deliberative and pre-decisional government records, other than readily segregable purely factual information, up until the final decision the deliberative government records relate to has been made or until deliberation of the matter has been

abandoned; provided that once disclosure is required, the name, title, or other information that would directly identify a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct. This exception does not apply to board packets as defined in section 92-7.5.

RELATING TO GOVERNMENT RECORDS

SECTION 1. Section 92F-3, Hawaii Revised Statutes, is amended by amending the definition of "government record" to read as follows:

"Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form. "Government record" shall not include truly preliminary records, such as personal notes and rough drafts of memorandum, that have not been circulated.

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

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

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

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

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

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

(5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

(6) Inter-agency or intra-agency deliberative and pre-decisional government records, other than readily segregable purely factual information, concerning an agency decision about a government action up until the final decision the deliberative government records relate to has been made or until deliberation of the matter has been abandoned; provided that there shall be a rebuttable presumption that a matter has been abandoned if three years have elapsed after a request for records; provided further that once disclosure is required, the name, title, and other information that would directly identify a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or

engaged in wrongdoing or criminal conduct related to the decision. This exception does not apply to board packets as defined in section 92-7.5.

SECTION 3. Section 92F-18, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

(c) Each agency shall supplement or amend its public report, or file a new report, on or before July 1 of each subsequent year, to ensure that the information remains accurate and complete. From July 1, 2023, through June 30, 2027, an agency shall report its use of HRS § 92F-13(6), including the text of the request and the agency's notice to requester. Each agency shall file the supplemental, amended, or new report with the office of information practices, which shall make the reports available for public inspection.

SECTION 4. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 5. No later than January 1, 2028, the Office of Information Practices shall convene a working group to examine agency use of the new UIPA statutory exception, HRS § 92F-13(6). The working group shall prepare recommendations for whether to keep or repeal the exception and, if kept, for amendments, if any, warranted after reviewing use of the exception. The working group shall include seven members consisting of three individuals representing public interest groups; three individuals representing government agencies subject to the UIPA; and the Director of the Office of Information Practices or the Director's designee, who shall appoint the members and serve as the working group convener. The working group shall be exempt from part I of chapter 92. The Director of the Office of Information Practices shall report the findings and recommendations of the working group to the Legislature no later than twenty days prior to the convening of the Regular Session of 2029.

SECTION 6. This Act shall take effect July 1, 2023.

Exhibit D

**From:** YANG SUH
**To:** OIP
**Cc:** CIVILBEAT-News
**Subject:** [EXTERNAL] SCR 192 WORKING GROUP PUBLIC MEETING NOTICE AND AGENDA
**Date:** Sunday, October 2, 2022 10:13:51 AM

---

Hawaii Legislature Should Not Mess With Our Public Records Law

Dear Sirs/Madams,

I write this email to support more transparency in how our State/City government functions.

Given the continual charges against past and present government officials using their position to either “sell their votes” and/or to actively participate in the “pay to play” schemes for the benefit of a few well connected “old boys club” members on this island, it is a wonder why the populous do not vote in another party.

But I get it. Given the current state of affairs of the Republican Party, I too “hold my nose” in voting for the incumbent Democrats, but after the mid-terms, I believe a third party that is not beholden to the Democrats nor Republicans that wants to rid this State/City of the old boys club needs to be elected.

Regardless of party affiliation, everyone in government (executive, legislature and judiciary) should be made to run this State/City in the best interest of its Citizens.

Short of this, sunshine and transparency seem like the least we can ask for for our tax dollars.

They work for us, not the other way around.

Regards,
Yang Suh
Columbia MBA 98'

# Exhibit D

**From:** Susan Jaworowski
**To:** OIP
**Subject:** [EXTERNAL] Objections to the SCR 192 WORKING GROUP's proposed draft (10/4/22)
**Date:** Sunday, October 2, 2022 12:40:01 PM

---

Aloha—

As someone who has worked in various branches of government for 35 years, I object to the proposed language as being far too restrictive on the publics right to know. One of the key areas that I think the committee needs to revisit is the restriction on the identity of those involved "if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct[.]". What a suspicious restriction. This would hide, for instance, the identity of any lobbyists who may be at any meeting, helping to guide the decision their way, but who are not an official decision maker. The public would never know that they were there, pulling strings. It would also hide the identity of underlings who were at the meeting, who could report out a different version of events if the official version is massaged to hide the true state of events, simply because these other witnesses are not the "decision makers."

The clause on protecting those who are under investigation is perhaps the most bizarre of all. First of all, who is going to go through all of the records and look up everyone that was there and then try, somehow, to determine, who is under investigation? It is not as though the prosecutors post pending investigations so OIP could neatly check off them off a list, and of course, any civil lawsuit need not be filed until all the information is gathered, so someone may very well be under investigation, but no one will know until the suit is actually filed. This clause is frankly unworkable.

It's almost as though the people drafting this bill know of a specific situation where they want to hide certain people from being disclosed. No, and no again. The public record should be the complete public record, all people in attendance, with no attempt to sanitize who was there. There is no need, and frankly, it just looks suspicious. Everyone at the meeting should be listed in the public record. What's the harm in having everyone's name listed?

—Susan Jaworowski

Exhibit D

**From:** Ryan Ozawa
**To:** OIP
**Subject:** [EXTERNAL] Written Testimony on SCR 192 Proposed Legislation
**Date:** Saturday, October 1, 2022 10:14:48 AM

---

Aloha, members of the SCR 192 Working Group:

I am writing to thank the members of the working group for its discussions and work thus far, and to express support of the draft legislation as prepared for the Oct. 4, 2022 public meeting.

I would like to specifically affirm the importance of the timely expiration of the provided exception, and urge that it not be extended or modified in subsequent drafts. It is important that the exception be valid only "up until the final decision the deliberative government records relate to has been made or until deliberation of the matter has been abandoned."

The public should have immediate access to the materials provided to and reviewed by a deliberative body once that deliberation has concluded.

Thank you for your consideration.

Ryan

--
**Ryan Kawailani Ozawa**
ryan@hawaiihui.com Phone: (808) 520-4820 | Fax: (808) 427-9227
Hawaii Hui, LLC, P.O. Box 892727, Mililani, HI 96789-8332

Exhibit D

PETER L. FRITZ
Telephone T-Mobile Relay 808-568-0077

SCR 192 WORKING GROUP PUBLIC MEETING
Tuesday, October 4, 2022

Members of the Working Group, my name is Peter Fritz. I have experience with blanket denials of requests for government documents. When an agency denied my request for documents, I filed a lawsuit in state court after which the documents were provided. Of course, this entailed a substantial delay and expense on my part. State agencies use blanket denials to delay document production and burden the requester. Any exception must be carefully drafted and any proposal must include protections for requesters. I am opposed to the draft as written.

The proposed draft does not offer protection to the requestor for conclusory blanket denials. Blanket denials do not examine each document. As OIP has noted, an "agency [can waive] its right to not disclose [a record] to a requester if it has or will disclose the record to someone outside the agency." Blanket denials could include documents that are not entitled to protection.

If this matter moves forward, any proposal should include a language to require the agency to create an index of the documents that are being withheld and the justification for such withholding. An example is a Vaughn index. A Vaughn Index originated from Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), wherein the court rejected an agency's conclusory affidavit stating that requested FOIA documents were subject to an exemption. Id. at 828. A Vaughn Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption. A Vaughn Index permits effective and efficient evaluation of the factual nature of disputed information. Any proposal needs similar language.

In addition, any proposal should include an expedited process to provide an effective and efficient evaluation of a denial that does not burden the requestor. Perhaps an administrative panel that is outside of the Office of Information Practices. The Office of Information Practices has a substantial backlog of other matters.

Having requested documents on several occasions, it appears that the standard procedure for handling a document request is for the agency to delay. I want to share an example of an unjustified delay. I attended a legislative hearing. At that hearing, the Director of Taxation referred to and read from a report. I filed a request for the report she read at the hearing and was told that additional time was necessary to research and find the document. I wrote to the Director and mentioned that not too long ago, she read from the report at a hearing and that I could not understand how the Department could legitimately claim that it needed more time to find the report. After receiving my letter, the agency somehow quickly located the document and provided the document without further delay.

Thank you for the opportunity to testify.

Exhibit D

TO: SCR 192 Working Group

FROM: Natalie Iwasa

DATE: Tuesday, October 4, 2022

RE: Proposed Draft Legislation – **Opposed**

Thank you for accepting testimony on the draft legislation that would allow government agencies not to provide certain inter-agency or intra-agency deliberative and pre-decisional government records to the public.

We already have too much secrecy in government, e.g., a legislature that operates under an exemption from the Sunshine Law. Generally, I find that agencies already look for ways to withhold information from the public – we do not need to offer them another option in that regard.

For example, on March 1, 2020, I requested a copy of the signed amended contract with Hitachi for rail operations and maintenance. While I received parts of it, whole appendices and pages were redacted, because the Division of Purchasing of the Department of Budget and Fiscal Services deemed parts confidential. I recently requested copies of several of those appendices, and they were provided after I followed up with another department head – he told me they are not confidential.

If this bill were to pass, I can imagine cases in which an agency would withhold information because it has "not been finalized for circulation." (Note that HART has regularly marked its documents "draft," even when they were finals ready for decision making.)

In addition, the "frustration of a legitimate government function" itself is over used. On November 2, 2018, I was denied access to the "conclusions and recommendations" of an investigation report that was discussed during the October 17, 2018, Honolulu Ethics Commission's meeting. Two reasons were cited for denial – privacy of the officer involved and frustration of a legitimate government function. The name could have been redacted to maintain the individual's privacy, but the public should have been able to access that document and learn at the very least what the officer did that had to be investigated.

As far as redacting names, it might be reasonable to redact a low-level staff person's name. However, the public should be allowed to learn the identities of division heads, deputies, directors and others who put themselves before the public with respect to public policy and decision making.

We should be working to make government more open and transparent, not offering more ways to remain secret. Please do not pass this bill as is.

Exhibit D

**From:** Evans, Mary Alice
**To:** OIP
**Subject:** RE: What"s New: Comments Sought on Draft Amendments to the UIPA
**Date:** Thursday, September 29, 2022 5:01:20 PM

Comment on the Draft Legislation to improve government decision making.

As a government employee with experience with the process of collaborative government decision making, I strongly support the intent of the proposed amendments to Ch. 92F-3 and -13.

As long as rough drafts and personal notes on issues remain accessible through a UIPA request, the candor necessary for good collaborative decision making will be chilled.

---

**From:** OIP <oip@hawaii.gov>
**Sent:** Wednesday, September 28, 2022 4:28 PM
**Subject:** What's New: Comments Sought on Draft Amendments to the UIPA

Aloha Everyone,

Attached is the latest What's New : 9/28/22 Comments Sought on Draft Amendments to the UIPA

For the latest open government news and information, keep watching for these What's New emails or visit OIP's website at www.oip.hawaii.gov. Also, if you are unable to open the attachment or would like to receive the What's New articles in a different format, please contact OIP at (808) 586-1400 or oip@hawaii.gov.

Exhibit D

**From:** maheshi kloepfer
**To:** OIP
**Subject:** [EXTERNAL] Secrecy
**Date:** Sunday, October 2, 2022 12:51:34 PM

---

Aloha. Given the latest scandals in Hawaii, bribery at the DPP, sitting representatives and former representatives being found guilty for enriching themselves over the average Hawaii resident, we need transparency now more than ever. To keep things secret, you will create such incredible mistrust amongst Hawaii voters and that dissatisfaction would lead to republicans being voted in. As bad as some of the democrats are, the republicans have proven they are worse. Give the voters some reason to trust you - transparency is the only way.  Aloha. Irene Kloepfer, Honolulu

Sent from my iPad

Exhibit D

**From:** [redacted]
**To:** OIP
**Subject:** [EXTERNAL] testimony for oct. 4, 2022 public hearing
**Date:** Sunday, October 2, 2022 2:24:38 PM

---

Please accept this as testimony in strong opposition to both proposals. This is an attack on the public's right to know.

It appears there is a new buzzword in town, BALANCE. This isn't balance. It is a giveaway to the legislature which, when it says it wants the public involved, means the opposite. When the State Supreme Court outlawed gut and replace, legislators worked fervently to get around the court decision. This too is an attempt to undo what the court has decreed. The legislature seems intent on destroying, brick by brick, the sunshine law. The same legislature that has exempted itself from adhering to the law. The same legislature whose members do not understand the law. One legislator has said he gets input from his committee members, one by one. He is so proud of himself. He does not know, or does not care, or both, that sequential meetings are illegal under the sunshine law.

The legislature does not comprehend that the public does not trust it. The legislature acts omnipotent. Meanwhile this year we have elected officials pleading guilty to bribery in federal court. The tip of the iceberg? Probably. And these people want the OIP to do their bidding. In your draft proposal, you should tell them they have lost the trust of the people and any attempt to whittle away at the laws mentioned in these proposals further erodes any trust that may be left. If they don't like it, they can get another job. An OIP who instead of promoting transparency promotes opaqueness.

Meanwhile, we have the OIP continually advocating for less public participation. An OIP who has for years had a backlog of requests, an OIP which decided that it did not want to deal with complaints against neighborhood boards and transferred that authority to the Neighborhood Commission, whose members have no comprehension of the statute.

To quotre "Civil Beat" on Sunday, October 3, "The law directs state and local government officials to operate as openly as possible. Allowing them to hide how they've reached a decision until it may well be too late for the public to object is not doing the public's business in the open." Names of agency officials and employees should not be redacted. Authors' names should be clearly displayed. For all we know, items emanating from government may have been drafted by special interests. The public has a right to know. Just like the legislature should not say that an item was introduced by request. The requester must be identified.

Please end this idiocy now. Power to the people, not the electeds and bureaucrats.

lynne matusow
[redacted]
honolulu, hi 96817
[redacted]

Exhibit D

**From:** [redacted]
**To:** OIP
**Subject:** [EXTERNAL] SCR 192 Testimony
**Date:** Monday, October 3, 2022 10:52:18 AM

---

Thanks to multiple corruption convictions (and the promise of more to come) confidence in Hawaii's government is already at an all time low, and secret meetings and procedures will continue to undermine whatever credibility that the state has left. At some point a threshold gets crossed where enough people simply stop recognizing the authority of the state, and the ability to conduct business in the interest of the wider community becomes impossible.
Jacob Holcomb
Honolulu, HI

Exhibit D

LEAGUE OF WOMEN VOTERS® OF HAWAII

SCR 192 Working Group to Develop Recommendations
for the Treatment of Deliberative and Pre-decisional Agency Records
Judge (retired) Karl Sakamoto, Facilitator

Tuesday, October 4, 2022, noon
Held Online Via Zoom

TESTIMONY
Donna Oba, President, League of Women Voters of Hawaii

Aloha Judge Sakamoto and SCR 192 Working Group Members:

**The League of Women Voters of Hawaii supports government transparency and accountability and informed public involvement in government.**

Timely disclosure of relevant government records is necessary for meaningful public participation prior to government decisions. State law should continue to allow public disclosure of any deliberative or pre-decisional government record distributed or discussed at any government meeting or hearing that the public has the right to attend.

Government agencies should not selectively decide which members of the public can participate in government decisions. State law should continue to allow public disclosure of any deliberative or pre-decisional government record that was previously disclosed to any member of the public.

The public wants to understand why government decisions were made, or learn if government decisions were capricious. State law should continue to allow public disclosure of deliberative or pre-decisional government records relevant to government decisions.

People responsible for government decisions should not be totally unaccountable. When a deliberative or pre-decisional government record is publicly disclosed after a government decision has been made, State law should not allow redaction of the names of public officials and employees who participated in or who had "discretionary authority" for that decision.

Thank you for the opportunity to submit testimony.

LEAGUE OF WOMEN VOTERS OF HAWAII
P.O. Box 235026 ◆ Honolulu, HI 96823
Voicemail 808.377.6727 ◆ my.lwv.org/hawaii ◆ voters@lwvhi.org

Exhibit D

GRASSROOT
INSTITUTE OF HAWAII

Oct. 4, 2022
12 p.m.
Online, via Zoom

**To: Office of Information Practices**
**SCR 192 Working Group**

**From: Grassroot Institute of Hawaii**
**Malia Hill, Director of Policy**

RE: PROPOSED AMENDMENTS TO HRS CHAPTER 92F

***Comments Only***

Dear Members of the SCR192 Working Group:

The Grassroot Institute of Hawaii would like to offer its comments on the draft legislation that would incorporate a "deliberative process privilege" (DPP) into the state Uniform Information Practices Act, as well as offer a few comments on the proposed exemption in general.

We appreciate the efforts of the working group to find a compromise on this issue. It is not an easy thing to balance the competing interests of the public's right to know with the need for a state agency to make sound and considered decisions. The Grassroot Institute submitted testimony in opposition to this exemption, but we understand the rationale behind it and support efforts to protect transparency while ensuring efficient and effective governance.

A survey of opinions issued by the state Office of Information Practices regarding the deliberative process privilege demonstrates that this exemption is ripe for misinterpretation and confusion. The OIP opinions illustrate the agency's challenges in navigating these issues and setting a standard that upholds transparency. However, the goal of any legislation that reinstates the privilege should be to set clear standards and minimize the need to appeal to the OIP.

Our primary concern with the return of the DPP is that it will be used by agencies as a tool to avoid disclosure. When crafting a law to reinstate the DPP, it is important to account for the

possibility that agencies may want to avoid disclosure for a variety of reasons. More important, as transparency is one of the ways to ensure clean government, UIPA exemptions must not become tools that can be manipulated by an individual who seeks to cover up corruption.

For that reason, we have two primary concerns with the draft legislation, which we fear does not account for the actions of an agency that is rushed, overwhelmed, or biased against disclosure.

Our first concern applies to the amendment to section 92F-3, which changes the definition of "government record" under the UIPA to exempt predecisional documents:

*"Government record" shall not include writings that are truly preliminary in nature, such as personal notes and rough drafts of memorandum that have not been finalized for circulation within or among the agency.*

While this amendment is an attempt to codify established court opinion on the nature of predecisional documents, we fear that this wording is too broad and could be abused. It should be noted that the Hawaii Supreme Court in *Peer News, LLC v. City & County of Honolulu* used similar wording to describe predecisional documents — with one important difference. The court noted that such "truly preliminary" writings "***may*** not qualify as government records for the purposes of an agency's disclosure obligations." The difference between "may" in the decision and "shall" in the proposed amendment is of immense significance when it comes to the implications for the UIPA.

We must remember that the law makes predecisional documents available for disclosure at a later date. This is important, as influential memoranda, studies, surveys, and opinions may shine a light on how decision-making occurred and what influences were in play during the process.

Consider, for example, an agency that must make a final report to the Legislature recommending sites for a public works project. In the course of such a decision, personal notes and draft communications are created that reflect political pressure to choose a specific site over another. This is information the public deserves to know, but under the above definition, the agency would be justified in treating them as outside the definition of "government records."

The draft amendment does attempt to make a distinction between records of importance and records that are "truly preliminary" by referencing rough drafts and personal notes, but that distinction remains vague and open to interpretation. One can imagine any number of

communications, memoranda, reports, notes, or recordings that could be thought by the agency to be "truly preliminary" but which bear significance to the public as part of the government's decision-making process.

The UIPA's effectiveness leans heavily on the meaning of "government records," and this new definition creates ambiguity as to what could be classified as "truly preliminary." What does it mean to be "finalized for circulation"? Does it mean that only final drafts qualify? What about records other than memos that bear on decision-making but don't ever make it out of the "draft" stage? What does it mean that something has been "circulated"?

What is needed is a bright-line definition that divides the "truly preliminary" from records that should be considered part of the decision-making process. Once a personal note or draft has been shared with others within the agency, it no longer qualifies as an individual's preliminary thoughts, as it has entered the sphere of an agency product. Thus, while it may at that point still be "predecisional," upon being shared, it has become a "government record."

We suggest that the amendment to Ch. 92F-3 creating an exception to the definition of "government records" be changed to provide further clarification and avoid the creation of any loopholes regarding what qualifies as "truly preliminary." We propose the following wording as a replacement:

*"Government record" may not include writings that are truly preliminary in nature, such as personal notes and rough drafts of memorandum that have not been circulated or shared within, among, or outside the agency.*

In addition, we suggest that the working group, and eventually the Legislature, add guidance indicating that the "truly preliminary" exception to the definition of "government record" be narrowly construed so as to encourage transparency and openness.

Our second concern touches on the amendment proposed to Ch. 92F-13:

*6) Inter-agency or intra-agency deliberative and predecisional government records, other than readily segregable purely factual information, up until the final decision the deliberative government records relate to has been made or until deliberation of the matter has been abandoned; provided that once disclosure is required, the name, title, or other information that would directly identify a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged*

*in wrongdoing or criminal conduct. This exception does not apply to board packets as defined in section 92-7.5.*

On the whole, we think this is a laudable attempt to balance disclosure and decision-making. In particular, we appreciate that the exception lapses after the decision has been made or deliberation is abandoned, as that allows for the eventual disclosure of important documents. However, we are concerned that the vague nature of this time limit could be exploited to avoid disclosure.

It is the nature of some agencies that decision-making is ongoing and may be delayed for years at a time, and yet, the public interest in that decision and the factors that go into it is very high.

For example, the Honolulu rail project has been contemplating alternative plans for its completion for many years now. Those alternative possibilities have significant budget and tax implications, and yet, under this exemption, HART could avoid disclosing information about those deliberations and alternatives for years.

The proposed legislation tries to address this by making records available once a decision or deliberation has been "abandoned." Yet, it is easy to imagine an agency arguing that an issue under deliberation has not yet been abandoned, no matter how much time has passed. The vague nature of this formulation requires something more to prevent abuse of the exception.

In order to avoid the use of the DPP to avoid disclosure where decision-making is a long or continuous process, we suggest that the language be altered to put a fixed time limit on how long the exception can apply to records when no final decision or report has been issued. We propose a limit of one year from the creation of the document, i.e. the relevant section of paragraph 6 of Ch. 92F-13 would read:

*Inter-agency or intra-agency deliberative and predecisional government records, other than readily segregable purely factual information, up until the final decision the deliberative government records relate to has been made, the deliberation of the matter has been abandoned, or one year has passed since the creation of the record — whichever is earliest; [...]*

In this way, we hope to preserve the public's right to access government records in a timely way and avoid abuse of the DPP. Moreover, we hope that placing a firm time limit on the extent of the privilege will increase clarity in the law and make it unnecessary for requesters or agencies to continually appeal to OIP as to whether an issue has been abandoned.

As noted above, we continue to have our doubts about the necessity of this exemption. Hawaii's experience of the UIPA without a DPP has demonstrated that the lack of such an exception has not

harmed agency decision-making. Moreover, the need to bolster public trust in the government requires a bias towards transparency.

It is our belief that an exception for government records related to decision-making runs counter to the spirit of Hawaii's UIPA law. The statement of purpose and rules of construction under the UIPA very clearly includes disclosure of agency deliberations and the decision-making process.

HRS Ch. 92F-2 states: "Therefore the legislature declares that it is the policy of this State that the formation and conduct of public policy—the ***discussions, deliberations, decisions,*** and action of government agencies—shall be conducted as openly as possible."

To stay true to the intent of the law means that any exemption should be biased towards timely disclosure, not secrecy. However, if such an exemption is put forward, we ask that the working group make its recommendations in a way that upholds a bias for disclosure, transparency, and open government.

Thank you for the opportunity to submit our comments.

Sincerely,

Malia Hill
Director of Policy
Grassroot Institute of Hawaii

Exhibit D

**From:** Georjean Adams
**To:** OIP
**Subject:** [EXTERNAL] Comments on UIPA Draft Amendments for Oct 4, 2022
**Date:** Sunday, October 2, 2022 4:28:04 PM

---

I offer the following comments as a former rule-writer employed by the US Environmental Protection Agency and Minnesota Pollution Control Agency, corporate regulatory manager and consultant, and university rulemaking instructor, as well as currently serving as a Hawaii County commissioner, experienced in both creating and reviewing government records:

SECTION 1
As a visual brainstorrmer (think flip charts) and often "devil's advocate" to make sure decision makers are considering all points of view, especially at the beginning stages of preparing positions, I support the proposed amendments to exclude preliminary work products and any recordings or transcripts from public review. Even if names are redacted, the fear of "gotcha" will inhibit sharing of ideas and analysis.
- I do not believe the exclusion of personal "writings" is sufficiently broad to protect the free flow of discussion of options and potential impacts. Given the regular electronic "Zoom" meetings that are often recorded or have transcripts as well as flip charts that document (often poorly) discussions, I think the broader description of "government record" should include all media forms.
- I think that materials (eg emails) that are distributed to work groups (intra- or inter-agency) should also be excluded if they are for discussion only.
- Those government records that have been formally considered and either accepted or rejected for final (or published proposed) decision and action should be part of the public record. Certainly factual information that is relied upon in decision making should be publicly available at the time any proposed or final government action is taken. My experience comes from following the Administrative Procedures Act, 5 USC §551 et seq, for public notice and comment of proposed and final federal rules. Information used by the agency must be made publicly available and public comments addressed in the Federal Register at the time of both the proposal and final rules. Hawaii would seem to rely on the public hearing process where only the proposed or final rule text is published and a member of the public can then ask for supporting information HRS §91-3(2). I wish there would be more descriptive information published and/or referenced for public review for new Hawaii rules.

SECTION 2 - You seem to duck defining 'deliberative and pre-decisional' "government records". By definition in Section 1 they are not preliminary rough drafts or by my addition discussion drafts. Odds are good more formal options papers have been written, with factual backup or refutation, prior to those decisions and those should be publicly available. Regardless, I support redacting individual non-decision makers' names.

My suggested edits:

> SECTION 1. Section 92F-3, Hawaii Revised Statutes, is amended by amending the definition of "government record" to read as follows:
> ""Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form. "Government record" shall not include ~~writings~~ information that ~~are~~ is truly preliminary in nature, such as personal notes and rough

drafts of memorandum or discussion drafts for use by work groups that have not been finalized for circulation ~~within or among the~~ as signed agency action."

ADD: "Deliberative and pre-decisional" government records are those used by decision makers in supporting proposed or final actions for publication, including major options that were reviewed and rejected. Such records do not include readily segregable purely factual information.

SECTION 2. Section 92F-12, Hawaii Revised statutes, is amended to read as follows:
This part shall not require disclosure of:
§ 92F-13. Government records; exceptions to general rule
This part shall not require disclosure of:
...
6) Inter-agency or intra-agency deliberative and pre-decisional government records~~; other than readily segregable purely factual information, up until~~ prior to the final decision to publish or dismiss the matter~~; the deliberative government records relate to has been made or until deliberation of the matter has been abandoned; provided that once~~ After disclosure is required, the name, title, or other information that would directly identify a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct.This exception does not apply to board packets as defined in section 92-7.5.

Respectfully,
Georjean Adams
Kamuela HI

Exhibit D

**From:** George Smith
**To:** OIP
**Subject:** [EXTERNAL] The Glare of Publicity
**Date:** Sunday, October 2, 2022 3:04:20 PM

---

The following is what I submitted for the Civil Beat editorial. It is in response to Director Park's and the department of OIP attempt to deprive, once again, the citizens of Hawaii a right to open government. Instead of supporting the federal Freedom of Information Act, OIP has become a creation that ensures our citizens are kept in the dark about what state and city government does behind its closed doors. The Hawaii Court has presented its interpretation, explained it, pointed out OIP's misinterpretation of a privilege that doesn't exist, and ruled against OIP. But, Park, OIP, and the actual powers that be that direct Park (Hmm? Governor Ige?) want to present another interpretation? Give it a rest, already.

Interesting rephrasing of the public's right to know by calling it "…the glare of publicity". Makes it sound like the information shared for public scrutiny would reek with sensationalism and interfere with a government process. This desperate attempt to maintain the status quo of the previous misinterpretation of their "deliberative process privilege" is offensive to the people of our government, us, the taxpayer, the voter, the people that pay for responsible leadership. Director Park's efforts do not reflect a support of what we expect from our officials. Promoting a bill that undermines our need to know clearly states an adversarial stance against good government…for the people.

George A Smith
gsmith785230@yahoo

Exhibit D

DAVID Y. IGE
GOVERNOR

JOSH GREEN
LIEUTENANT GOVERNOR

**STATE OF HAWAII**
**OFFICE OF THE DIRECTOR**
**DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**
335 MERCHANT STREET, ROOM 310
P.O. BOX 541
HONOLULU, HAWAII 96809
Phone Number: 586-2850
Fax Number: 586-2856
cca.hawaii.gov

CATHERINE P. AWAKUNI COLÓN
DIRECTOR

JO ANN M. UCHIDA TAKEUCHI
DEPUTY DIRECTOR

October 12, 2022

The SCR 192 Working Group, convened by the Office of Information Practices to develop recommendations for the treatment of deliberative and pre-decisional agency records, circulated proposed draft legislation to amend the Uniform Information Practices Act, Section 92F, Hawaii Revised Statutes.

The Department of Commerce and Consumer Affairs (Department) offers the following comments and recommendations:

SECTION 1 – Section 92F-3

Proposed Language

"Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form. "Government record" shall not include writings that are truly preliminary in nature, such as personal notes and rough drafts of memorandum that have not been finalized for circulation within or among the agency."

Recommended Change

"Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form. "Government record" shall not include information maintained by an agency in written, auditory, visual, electronic, or other physical form that are preliminary in nature, such as personal notes, correspondence and rough drafts of memorandum that have not been finalized for circulation within or among the agency."

Rationale

Government records are subject to the disclosure requirements in Hawaii Revised Statutes ("HRS") Chapter 92F. The definition of government records in HRS § 92F-3, includes information maintained by an agency in written form as well as information maintained by an agency in auditory, visual, electronic, or other physical form. However, the proposed amendment to the definition of a government record excludes only "writings that are truly preliminary nature" despite the fact that information that are

preliminary in nature and necessary to further the deliberative process, may be maintained by an agency in written, auditory, visual, electronic or other physical form.

The plain meaning of the word “writing” requires that the words be written on paper. Thus, if an individual involved in the deliberative process creates and maintains a draft of a document on their computer, it would be an electronic record, not a “writing”, and subject to disclosure. Similarly, information that is preliminary in nature and necessary to the deliberative process, such as emails, drawings and both audio or visual recordings of discussions among staff or a working group would not be protected from disclosure. Thus, in order to encourage the candid and free exchange of ideas and opinions within and among agencies without fear of public ridicule or criticism before a final decision is made, the definition of a government record in HRS § 92F-3 should exclude all government records that are preliminary in nature, not only writings.

SECTION 2 - Section 92F-12 (6)

Proposed Language

(6) Inter-agency or intra-agency deliberative and predecisional government records, other than readily segregable purely factual information, up until the final decision the deliberative government records relate to has been made or until deliberation of the matter has been abandoned; provided that once disclosure is required, the name, title, or other information that would directly identify a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct. This exception does not apply to board packets as defined in section 92-7.5.

Recommendation Change

(6) Inter-agency or intra-agency deliberative and predecisional government records, other than readily segregable purely factual information, up until the final decision the deliberative government records relate to has been made or until deliberation of the matter has been abandoned; provided that once disclosure is required, the name, title, ~~or~~ and other information that would ~~directly~~ identify a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct. This exception does not apply to board packets as defined in section 92-7.5.

Rationale

The proposed language for HRS § 92F-12(6) would allow an agency to withhold from disclosure the name title “or other information” that would directly identify a public official or employee who lacks discretionary authority, did not make the decision and is not under investigation for or engaged in wrongdoing or criminal conduct. While HRS §1-18 states that “each of the terms “or” and “and” has the meaning of the other or of both, in State v. Sorenson, 44 Haw. 601, 604 (1961), the Hawaii Supreme Court acknowledged that the common usage of the word “or” is as a disjunctive, indicating an alternative, and that “[i}t usually connects words or phrases or different meanings permitting a choice of either.” Given that the terms “or” and “and” are interchangeable pursuant to HRS § 1-18, replacing the term “or” with “and”, in the proposed language for subsection (6) would not limit an agency’s ability to withhold from disclosure identifying information about a public official or employee. Furthermore, using the term “and” would lessen the chances that an requester might apply the plain meaning of the term “or” when interpreting the HRS § 92F-12(6) and file an appeal based on an erroneous belief that the agency is required to

choose whether to redact the public official or employee's name, title or other information that would directly identify the official or employee.

Furthermore, the word "directly" should be deleted from the proposed language for HRS § 92F-12(6) as it is superfluous and may lead to an unnecessary increase in the amount of appeals. Typically, if an employee or public official who is involved in the deliberative process submits their recommendations in a document, such as a memorandum, email or letter, the document will include the individual's contact information. If the individual provided a general office number or general mailbox email address in lieu of the individual's direct phone number or email address, a requester may argue that the agency is not permitted to redact this information because it does not directly identify the individual. However, often times an individual's general contact information is sufficient for the public to identify which employee or staff member authored a document since circumstances may dictate that only a certain individual in a particular office would be involved in the decision-making process. Thus, including the word "directly" in HRS § 92F-12(6) is superfluous and may lead to an appeal even if the agency in good faith redacts information that it knows would lead to the identity of the public official or employee.

Exhibit D

**From:** Deborah Aldrich
**To:** OIP
**Subject:** [EXTERNAL] Openness in government.
**Date:** Sunday, October 2, 2022 7:57:20 PM

---

The closed doors behind which decisions are made that affect the taxpayers need to be opened. It's that simple. There needs to be transparency.
Debbie Aldrich
[redacted]

Sent from my iPad

Exhibit D

**From:** Bianca Isaki
**To:** OIP
**Subject:** [EXTERNAL] "SCR 192 Oral Testimony."
**Date:** Saturday, October 1, 2022 8:50:16 AM

---

I'd like to testify on October 4th. Also, in case I can't make it for some reason, here's my comment.
Reinstalling the "deliberative process privilege" even with caveats about draft documents, is a bad idea. Agencies already withhold documents within improper interpretations of UIPA. No discretion should be given in this issue. The current bright line rule articulated under "Peer News" better safeguards the public interest in transparent government.

Thank you,
Bianca Isaki

Exhibit D

**From:** PublicRecord Observer
**To:** OIP
**Subject:** [EXTERNAL] Written Comments on Draft Legislation re SCR 192 Working Group
**Date:** Monday, October 3, 2022 3:24:16 PM

---

Aloha,

I have no objection generally to the purpose and intent of the proposed legislation to allow government agencies to withhold some truly pre-decisional records. I do object specifically to the inclusion of the language that the "name, title, or other information that would directly identify a public official or employee may be withheld if that person lacks discretionary authority".

I have observed that OIP included in its Examples of Records That an Agency Might Seek to Withhold as Deliberative and Predecisional (7.21.2022) the factor: "Personal privacy vs. disclosing the names of evaluators (e.g. selection committee for procurement or recruitment, admission committee for UH programs)." If we are truly concerned with matters of personal privacy, I think the statutory language should be written to empower the individual in question--not the agency--to decide whether they want their name withheld or revealed in public record disclosures. I also think that the reference to a person who "lacks discretionary authority" is too ambiguous.

I have an outstanding appeal (over three years old) with OIP asking for the names of all members of the UH Admissions Committee (including student members). For context, despite a decades old prior ruling from OIP declaring it a matter of public record, to my knowledge Richardson Law School personnel still impose strict confidentiality on student members of the Admissions Committee by telling the student members that they may not reveal they ever participated on the Admissions Committee, In the appeal, UH has been arguing "personal privacy" excuses like revealing the names of student committee members would somehow endanger the students. In actuality, the student members to the committee would merely like to include on their resume or cv that they volunteered and were selected to participate on the Admissions Committee. (Why would anyone volunteer their time for free while also being stressed out studying if they can't even acknowledge to anyone that they did it?) Is a member of a UH Admissions Committee a person who "lacks discretionary authority" within the meaning of the proposed draft language? They do not have "discretionary authority" on their own, but they are part of a group that does.

While that is only one small example, I am sure that other individuals may at times prefer to reveal their names in public records. A government employee may be proud of their work, their statements, and their actions, and want their names to be disclosed in records, especially in situations where individual employees may have been the whistleblower against corruption or standing up to a boss who is making a bad decision. Allowing the agency itself to make a decision about whether to withhold employee names only fosters more government secrecy and allows government to use "personal privacy" as a scapegoat regardless of whether the individuals in question want their involvement to be concealed or not.

--Anonymous

Exhibit D

**From:** Kalakaua Kupihea
**To:** OIP; [redacted]
**Subject:** [EXTERNAL] SCR 192 working group public meeting written testimony
**Date:** Sunday, October 2, 2022 8:55:15 PM

Aloha,
People have a right to know about serious criminal actions done wrongfully and secretly against them.
Aloha,
Children have a right to know about and be protected from harm by omission reporting and criminal wrongdoings using them as scapegoats.
The Hawaii OIP needs to correct problems where government agencies, police departments and prosecutors hide exculpatory evidence, such as non-disclosure sex assaults harming innocent people and children in Hawaii. UIPA must respect and allow vital information to give innocent people the right and freedom to be able to protect themselves and family in Hawaii.
I am stating a case where a public servant, police detective withheld the right to know a case of a false reported sex assault crime he made harming a young Hawaiian Kamehameha graduate and his young daughter. The Ombudsman said that it was not right to withhold that information and to contact the OIP office. The Attorney General's office in recent letter said to contact Chief Pelletier, Amy Lau of the police commission and Mayor Victorino's Board of Ethics.
Mr. Andrew Martin is now aware of the withheld exculpatory evidence committed by either police detective Satterfield or Mr. Hanano directly abusing the Uniform Information Practices Act. Mr. Andrew Martin was hand delivered documents that describe secret abuse done by government agencies not disclosing vital information.
Mr. Andrew Martin recently again requested the same documents. Asst. Chief Randy Esperanza after meeting with us for two hours hand delivered them again to Mr. Andrew Martin who has proof of abuse done within the scope of UIPA. It is the responsibility of Mr. Andrew Martin to do justice and transparency that is due according to UIPA and correct the abuse done by non-disclosure sex assaults and charge the perpetrators of the crime.
Mr. Andrew Martin's responsibility is to address transparency so that a Kamehameha educator with two pending complaints can be disciplined and therapy protocols put in place for a child. The criminal abuse of secret non-disclosure sex assault should never be hidden and no abuse should be allowed by Director Cheryl Park for some benefit to government secrecy. Lives are destroyed when the ability to fight for justice is limited by cover ups, lack of truth and messing with public trust.
I will be available and open for discussion at any time.

Respectfully Mahalo,
Annette Brautigam Su'apaia

Sent from Mail for Windows

**Testimony/Comments on Draft Legislation to Improve Government Decision Making**
October 31, 2022

As a government employee with experience in the process of collaborative government decision making, especially for planning, design, and construction of state facilities, I strongly support the intent of the proposed amendments to HRS, Chapter 92F-3 and 13.

If emails that are deliberative in nature, drafts of documents, and personal notes on issues remain accessible through a UIPA request, the openness, candor, and creativeness for good collaborative decision making will be substantially diminished and is not in the best interest of the public at large and the state.

Just because someone is thinking of something, it does not mean action will be taken on the thought. In today's world, emails are wide used to share thoughts, instead of verbal face to face conversations or phone calls. Because an email is a written document, it can be taken as an official statement rather than just a conversation or a sharing of thoughts: "what do you think if we … or what if…maybe not good idea…" In a verbal conversation this would generally not be held against you, but that same conversation in an email can be definitely used against you and therefore causes frustration to a legitimate government function to perform its duties in the best manner possible. While one could still have verbal discussion, many will prefer emails to discuss matters rather than a verbal discussion. Therefore, emails should not be accessible through the UIPA process unless they are used as an official direction, order or decision and not deliberative or truly preliminary in nature.

In addition, releasing working drafts or drafts not ready for public dissemination can severely cause unnecessary opposition or even favoritism for an issue, project, or other effort prematurely, because the information may be incomplete or even wrong. Therefore, causing premature positions and actions on incomplete or wrong information. To undo this kind of mess can take a lot of time and money, public money. This is unnecessary frustration to the state.

Last but not least, setting a timeframe for release of documents, e.g. one-year maximum timeframe, is also impractical, as many planning or procurement processes exceed that time frame. If working documents must be made public prior to completion of the process, erroneous conclusions may be drawn as described above, at best, or the processes may be deemed invalid, at worst, due to premature disclosure of proprietary or sensitive information.

Please don't interpret this testimony to mean we don't want to be open and transparent. We do want to be open and transparent and I believe we like engaging the public on a project. While we may not be able to always do everything stakeholders desire, engaging and communicating information to the ultimate end users/stakeholder of our project, allows the various stakeholders to understand each other, understand pros and cons of issues from various perspectives, to be a part of and knowing they have contributed to whatever it is that is being proposed.

Respectfully,

Eric K. Nishimoto
Project Management Branch Chief
Public Works Division
Department of Accounting & General Services
State of Hawaii

**SCR 192 Working Group Minutes**
Friday, July 15, 2022, Noon
Hawaii State Art Museum Volunteer Room
250 S. Hotel Street, Honolulu, Hawaii 96813

**Members Present**

Judge Karl Sakamoto (retired), Facilitator
Duane Pang, Deputy Corporation Counsel, City and County of Honolulu (City)
Brian Black, Executive Director, Civil Beat Law Center (CBLC)
Lance Collins, Law Office of Lance D. Collins, representing Common Cause (via Zoom)
Douglas Meller, representing League of Women Voters
Carrie Okinaga, General Counsel, University of Hawaii (UH)
Kalikoʻonālani Fernandes, Deputy Solicitor General, Department of the Attorney General (AG)

**Office of Information Practices (OIP)**

Cheryl Kakazu Park, Director, OIP (via Zoom)
Jennifer Brooks, Staff Attorney, OIP
Lori Kato, Staff Attorney, OIP

**Others Present**

Sharon Moriwaki, Senator, Hawaii State Legislature (via Zoom)

**Opening Remarks by Director Park**

Ms. Park welcomed and thanked the working group members for volunteering to serve on the working group (WG) for Senate Concurrent Resolution (SCR) 192. Ms. Park explained that like Senate Resolution 185, SCR 192 asks OIP to convene a working group:

1. to develop recommendations for a new UIPA statutory exception and other recommendations for deliberative and pre-decisional agency records to reasonably balance the public's interest in disclosure and the agency's ability to fully consider and make sound and informed decisions; and

2. to gather and consider information from interested and affected parties as well as examine the law and practices in Hawaii and other jurisdictions, with the goal of developing recommendations to address government's need for and the public's

concern about deliberative and pre-decisional agency processes and records in decision-making.

Ms. Park stated that OIP would be supporting the WG.

Ms. Park introduced the facilitator, Judge Sakamoto, the WG members and Senator Sharon Moriwaki, Chair of the Senate's Committee on Government Operations, who authored SCR 192.

## I. Welcome by Senator Sharon Moriwaki

Via Zoom, Senator Moriwaki welcomed the members and stated that the Legislature wants to see recommendations from the group for deliberative and pre-decisional agency records which balances the competing interests of the public's interest in disclosure and the government's ability to freely discuss and make sound, informed decisions.

Senator Moriwaki thanked the members and encouraged them to engage in frank discussions. She shared her experience on a recent informal task force involving 14 agencies in her district who wanted to know why we are not ending homelessness. Ms. Moriwaki stated that as a result of frank discussions, the group got comments and solutions, agreed on priority items, including creating a statewide homelessness office, and got 5 bills passed during the past legislative session. Ms. Moriwaki left the Zoom meeting.

## II. Members' self-introductions, disclosure of any conflicts per HRS sec. 84-14(f) and HAR sec. 21-8-4, and concerns

A. Judge Sakamoto introduced himself as a mediator, arbitrator, and retired judge. He disclosed that Mr. Black, Mr. Pang and Ms. Okinaga had appeared before him on various cases while he was a judge. A case with Mr. Black and Mr. Pang involved police misconduct that went up on appeal to the Hawaii Supreme Court (HSC). Judge Sakamoto also disclosed that he knows Ms. Park through his wife, who was in the same college sorority as Ms. Park, and he has worked with them on nonprofit projects.

   Judge Sakamoto stated that he wants to know what the goals are for the working group.

   Mr. Meller introduced himself and stated that since 2013, he has been representing the League of Women Voters on legislative matters.

Mr. Meller stated that he hopes the group will come to consensus on a few pieces of legislation so we can collaborate to get the bills through. He stated that philosophically, there is more buy in and less push back if people are involved.

Mr. Meller disclosed that he spent 15 years with the Department of Transportation (DOT) and received Federal Highway Act training which emphasized involving the public and interest groups in DOT decisions on use of federal highway funds. He stated that the DOT website shows a list of proposed Oahu federal-aid projects for the next 25 years. He believes this approach encourages public consensus - - unlike appropriations which get included in the state budget but no one has seen beforehand.

Mr. Meller also disclosed that he worked for Jeremy Harris in 1983.

Mr. Meller stated that we need clear criteria with specifics of what is protected more than a balancing test, because he doesn't want something that will lead to a lot of lengthy appeals.

B. Mr. Black introduced himself, indicated that he is the Executive Director of the Civil Beat Law Center (CBLC), and disclosed that had a case before Judge Sakamoto as previously mentioned, has worked with Mr. Meller, had cases with Mr. Pang and worked with Ms. Fernandes. Mr. Black stated that he litigated the Peer News case involving the deliberative process privilege (DPP), but that's the past.

   Mr. Black stated he has seen bills trying to reintroduce DPP, and if agencies say they need the full privilege like before, he will have pushback. Mr. Black stated he believes there is something in the middle and is interested in hearing more about concerns from others, addressing them and finding solutions on a forward-looking basis. He stated that what's past is past.

C. Mr. Pang introduced himself and stated that he is a Deputy Corporation Counsel and disclosed that has been on several cases with Mr. Black. He also disclosed that Ms. Okinaga is on the Honolulu Police Commission, which is his client, and he was involved in the Peer News case.

   Mr. Pang stated that a lot of government employees are afraid of stating their opinions because it will get out. He stated that his client, the City Council, looks at the legislative exemption and asks why they can't have the same exception.

   Mr. Pang stated that a concern is that government officials should not have to answer about decisions before making the decision; let the decision maker make the decision and the public can criticize the decision-maker after that.

   Ms. Brooks introduced Ms. Kato and herself as OIP staff attorneys and stated that OIP's role is to support the WG.

D. Ms. Park introduced herself and disclosed that she has been OIP's Director since 2011, and approved 3 formal opinions discussing the DPP - one withheld the records and two other opinions disclosed the records, including an OIP opinion issued after the HSC's 3-2 decision in Peer News that overturned the DPP in 2018. Ms. Park disclosed that she was OIP's Director when Peer News was decided, but OIP was not involved in that appeal to the HSC as there was no OIP opinion being appealed by the parties.

E. Ms. Fernandes introduced herself and stated that she is a Deputy Solicitor General in the AG's Appellate Division, and disclosed that she had interactions on cases with various members of the WG, including Mr. Black and at least one case with Mr. Pang.

   Ms. Fernandes stated that she comes to the working group with an open mind and hopes to find a path to balancing the potentially competing interests.

F. Ms. Okinaga introduced herself and stated that she is General Counsel for UH, and disclosed that she has worked for the government and private sector, and has 2 pending lawsuits with Lance Collins and his clients, and one matter with CBLC involving a UIPA request for the Police Commission that she sits on.

   Ms. Okinaga stated that she believes the word "transparency" is overused, doesn't in and of itself get to good decision-making by the government, and that the private sector could not function under government rules.

   Ms. Okinaga indicated that she agrees with what Mr. Meller said that about carving out a balance, and she believes that there are good people in government trying to do good things.

   Ms. Okinaga raised a concern that she doesn't want anything said during working group meetings to be used against each other and each other's clients outside of the meeting and in litigation.

G. Mr. Collins introduced himself and disclosed that he is an attorney in private practice, a per diem judge, and is on the WG as a representative of Common Cause Hawaii. He indicated that he received approval from the Judicial Conduct Commission to participate in the WG.

   Mr. Collins also stated that he does not believe he has cases with Ms. Fernandes, and disclosed that he has 2 cases on appeal with UH and 1 case on appeal with the City.

   Mr. Collins stated that as we create workable standards, we should consider that when DPP functions are used to prevent disclosure, individual government

employees should not be given unlimited discretion; if information is not disclosed to one, it should not be disclosed to others.

## III. Ground rules, procedures, database

A. Ground rules. After discussion, the group agreed on the following ground rules for all members of the working group:

1. Positions taken by any party should not be used against them or their clients in the future, in litigation or the legislative process.

2. All members shall conduct themselves in good faith and trust.

3. During meetings, all members will speak as individuals and not as representatives of the organizations they represent, with the understanding that members will need to report the discussions and decisions of the group to their respective organizations and leaders.

B. Procedures

1. Mr. Black will check to see if he has access to a room downtown for future meetings.

2. Meetings will not be recorded; OIP will take minutes and provide them to members before the next scheduled meeting.

3. The public meeting on October 4, 2022, will held via Zoom only, and not in person for the public due to logistical challenges. All other meetings will include only group members and OIP and will closed to the public.

4. In addition to OIP's chart of DPP formal decisions already provided to the WG, OIP will create a list of specific predecisional and deliberative examples where agencies may seek to withhold records, for the WG to consider before making any proposals.

5. The group will determine what they agree on for procedures.

6. The group will publicly disclose even "out of the box" ideas that result from its brainstorming sessions so that the public will know what the group considered.

C. SCR 192 Working Group Database (to be posted on OIP's website, open to the public)

1. Should be forward looking and forward thinking. Items to be included in the database will be determined from this point forward.

2. Will include a statement of values, but not subjective opinions.

3. Will include a statement of objectives and analysis of the problems that the group are trying to solve so that the public is educated about how decisions are made, along with specific situations where the DPP may or may not apply in order to reduce the time needed to resolve cases.

4. Will include Mr. Black's chart and OIP's summary of how other states handle DPP.

5. Will not include OIP's analysis and attachments regarding the Peer News decision that was provided to the WG.

## IV. Finalize meeting dates, length, and whether meetings will be in-person and/or public

Except for the public meeting on October 4, all other meeting will involve only group members and OIP and will be closed to the public. The meeting schedule is as follows:

| | |
|---|---|
| August 9 (Tues.), noon | WG meeting to discuss members' proposals |
| August 30 (Tues.), noon | WG meeting to discuss recommendations |
| September 14 (Wed.) | Online postings of WG's recommendations and upcoming public meeting |
| October 4 (Tues.), noon | Public meeting to discuss WG's recommendations |
| Nov. 1 (Tues.), noon | Meeting to approve final recommendations |
| December 8 (Thurs.), noon | Meeting to approve report and proposed legislation |
| December 16 (Fri.) | Submit report to Legislature |

## V. Other issues

A. Judge Sakamoto asked about the objectives for the group.

The group discussed the creation of a statement of objectives, with the following as proposed ideas and goals for the statement: 1) consensus, 2) collaborative, 3) process, 4) specific examples/scenarios, 5) define public interest, 6) balancing test, 7) middle ground, 8) concerns, 9) fulfill needs of employees, 10) serves people/public, 11) standards, 12) timing of DPP, and 13) educate (each other and the public).

B. Judge Sakamoto stated that he wants the group to have a statement of objectives by the next meeting. Ms. Okinaga will work on drafting a statement for the group so members should email their draft statements to her.

C. Judge Sakamoto also asked the members to work on proposals by the next meeting in the following pairs: 1) Ms. Fernandes and Mr. Black; 2) Mr. Pang and Mr. Collins; and 3) Ms. Okinaga and Mr. Meller.

D. Mr. Collins left the meeting at 1:29 p.m.

## VI. Next meeting to discuss proposals: August 9, 2022 (Tuesday), noon

The meeting will be held in person and via Zoom. The group will discuss the statement of objectives and the proposals that the pairs present for further consideration by the entire group.

The meeting was adjourned at 1:55 p.m.

**SCR 192 Working Group Minutes**
Tuesday, August 9, 2022, Noon
700 Bishop Street, Suite 1707
Honolulu, Hawaii 96813

**Members Present**

Judge Karl Sakamoto (retired), Facilitator
Duane Pang, Deputy Corporation Counsel, City and County of Honolulu (City)
Brian Black, Executive Director, Civil Beat Law Center (CBLC)
Lance Collins, Law Office of Lance D. Collins, representing Common Cause (via Zoom)
Douglas Meller, representing League of Women Voters
Carrie Okinaga, General Counsel, University of Hawaii (UH)
Kalikoʻonālani Fernandes, Deputy Solicitor General, Department of the Attorney General (AG)

**Office of Information Practices (OIP)**

Cheryl Kakazu Park, Director, OIP
Jennifer Brooks, Staff Attorney, OIP
Lori Kato, Staff Attorney, OIP

## I. Approval of minutes of July 15, 2022

The working group (WG) discussed the changes suggested by members and the comment by Ms. Okinaga to the revised draft minutes that had initially been sent to the group by Ms. Park on August 5, 2022. In response to Ms. Okinaga's comment, Ms. Park stated that OIP would be willing to post on its website the database that the WG decided to make readily available to the public, and this would not affect what OIP decides to post on the rest of its website. Ms. Okinaga moved to approve the minutes with the suggested changes and without her comment, and Mr. Pang seconded. Vote was taken and meeting minutes were unanimously approved, as amended.

## II. Review of ground rules

The ground rules that were stated in the approved minutes were also approved by the WG.

## III. Statement of Objectives

From proposals submitted by WG members Meller, Pang and Black, Ms. Okinaga drafted the Statement of Common Purpose and Objectives (Objectives) after the meeting on

July 15, 2022, which were emailed to the WG. The WG agreed that it did not need to further discuss the Objectives at this time.

## IV. Members' proposals and possible recommendations

A. Ms. Park thanked the group for their hard work and providing proposals in advance. (See three attached proposals)

B. Mr. Meller and Ms. Okinaga gave a summary presentation of their joint proposal and statutory amendments (MO Proposal).

Mr. Meller explained that the MO Proposals differentiated between collaborative government decisions that involve public participation (e.g., board meetings and public hearings) and government decisions without public participation (e.g., decisions by a single executive or department head). Mr. Meller stated there are times when public participation is required by law and there are times when you want to solicit public participation, but public participation should not be required in all government decisions.

MO Proposal 4 is that other MO proposals are *subject to existing constitutional, statutory, or formal written legislative or judicial, requirements and exceptions concerning disclosure of government records.*

Because timely disclosure of relevant government records is necessary for meaningful public participation prior to government decisions, MO Proposal 5 requires disclosure of any deliberative or pre-decisional government record distributed or discussed at any government meeting or hearing that the public has the right to attend.

Because government should not selectively decide which members of the public can participate in government decisions, MO Proposal 6 requires disclosure of any deliberative or pre-decisional government record that was previously disclosed to any member of the public.

Although the disclosure of deliberative or pre-decisional records prior to decisions in effect solicits public comments, it may be counterproductive to solicit public comments prior to government decisions that do not involve public participation. That's why only MO Proposal 6 requires disclosure of deliberative or pre-decisional government records prior to government decisions that do not involve public participation.

Because the public wants to understand why government decisions were made, or learn if government decisions were capricious, MO Proposal 7 requires post-decision disclosure of deliberative or pre-decisional government records relevant to government decisions.

Ms. Okinaga stated that Proposal 1 was an effort to codify footnote 15 in the Peer News decision and briefly explained some of the other proposals. Proposal 2 recognized the WG's objective to develop a deliberative process for government records (DPGR). Proposal 3 states that DPGR should be narrowly defined. Proposal 4 recognizes that the DPGR provisions should not supersede constitutional, statutory, or formal written legislative or judicial requirements and exceptions concerning disclosure. Proposal 6 recognizes the UIPA's presumption of disclosure of any DPGR previously disclosed to the public.

With respect to Proposal 8, OIP had provided a copy of HRS section 92F-19 for the WG to review. Ms. Brooks reiterated OIP's concerns that were previously sent to the group in OIP's comments. Ms. Brooks also gave an overview of the law under chapter 92F, HRS, and explained that the provisions of 92F-19, HRS, provides when an agency can share non-public information with another agency without waiving objections to disclosure. She also stated that it was not necessary to specifically state that other exceptions may still apply only in the one DPGR exception under section 92F-13, as it could have the unintended consequence of limiting the applicability of multiple exceptions for the other section 92F-13 exceptions that do not so specify.

Proposal 9 states, "Agencies should constantly strive to improve themselves, and internal management audits and after-action reviews conducted by an agency should be protected from mandatory disclosure." Mr. Meller explained that this proposal was intended to encourage agencies to correct their processes without fear of making internal discussions public.

Mr. Collins expressed his concern that if a document needs to be withheld from all people, he would not want low-level employees to have the arbitrary discretion to decide who can get the document and to share it with only certain private consultants not involved in the decision-making but not with the rest of the public.

Mr. Meller discussed Proposal 10, and asked, what happens in situations if government does not have enough money or staff to implement a decision, so a decision is not made? Should the public know why things are not happening?

C. Ms. Fernandes gave a summary presentation of her and Mr. Black's joint proposal, which was submitted to the WG prior to the meeting. Mr. Black stated that their proposal was similar to the proposals of the others in the WG, also relied upon footnote 15 from Peer News, and explained that it was analogous to how records in pending investigations are currently treated.

Ms. Brooks and Ms. Park agreed that the Fernandes-Black (FB) Proposal was clear and easier for OIP to administer, because it time-based and similar to the existing exceptions for pending investigations. Ms. Brooks commented that the FB Proposal would protect drafts even after a decision was made. Mr. Black said that it was not intended to do so.

Mr. Black explained that the provision was simply intended to incorporate footnote 15 from Peer News regarding truly preliminary drafts and was not intended to offer post-decision protection for drafts that had been circulated within an agency.

Ms. Park also noted that the FB Proposal does not foreclose other concepts that OIP has recognized in past DPP opinions, like waiver, and asked to what extent past OIP opinions would still be applicable, because OIP would be able to decide appeals much faster if it can continue to rely upon prior precedents. For example, OIP has opinions reflecting that if information is factual, it needs to be disclosed; but if the facts are so intertwined with deliberative materials, the agency doesn't need to disclose.

Ms. Brooks did not believe it is necessary for OIP to change its analysis concerning factual information and factual segregable information. She stated that the former deliberative process privilege (DPP) did not have a time element and agreed with Mr. Black that the exceptions for open investigations are analogous.

Mr. Collins asked whether the language in the FB Proposal needs to be modified to reflect federal case law regarding pre-decisional and deliberative. Ms. Brooks responded that the former DPP did not have a time element to no longer apply after the final decision, so it is not necessary to use federal case law to decide if a record is pre-decisional. Mr. Black stated that deliberative and pre-decisional information invokes prior federal law and OIP opinions. He further explained that with FOIA, DPP never goes away. But under the FB Proposal, DPP goes away after the final decision is made or abandoned.

Ms. Brooks explained that pending investigations fall under the UIPA's frustration exception for general government records as well as under the ongoing investigation exemption for personal records. Once the investigation is closed, all investigation records cannot be withheld unless another exception applies. Similarly, under the FB Proposal, once the final decision is made, DPP would no longer apply and records must be disclosed unless another exception applies.

D. Mr. Pang gave a summary presentation of his proposal, which was submitted to the WG just before the meeting, and stated that it was not much different from the FB Proposal. And like the MO Proposal, his proposal added a definition of government record that was taken from footnote 15 in the Peer News decision.

Mr. Pang stated that other exceptions may apply, such as those protecting the identity of a person. Timing of the disclosure is important, and he has not been advising his clients to withhold documents submitted to a board for a meeting where the board will be making a decision based on the documents. He also gets a lot of questions about

what to do with meeting notes and stated that proposed drafts or notes from an aide to a council member may be deliberative.

Mr. Collins stated that he had a concern as to what's included in definition of "pre-decisional" and compliance with HRS section 91-3 rulemaking requirements. He believes that any statement of agency policy, even if it is not officially adopted, should not be withheld and that compliance with the rulemaking requirements of section 91-3 is not required to adopt a policy.

Ms. Brooks suggested that a policy not signed by a director, but being used by an agency, is probably not pre-decisional.

Ms. Okinaga stated that the goal is good government and building people's faith in government. Any entity hoping to make good decisions requires the space between pre-decisional and post decisional to deliberate honestly and openly, and to encourage frank discussions where people will never have to worry that these discussions will be disclosed. Ms. Okinaga stated that there aren't enough legal counsel like Mr. Pang and herself in government to constantly advise regarding open record requests, and that the law should be clear so that line employees are able to make decisions about what needs to be disclosed.

Mr. Collins stated that government employees are making policy choices, and that's why people are interested; with the exercise of power, how does the public get involved?

**Mr. Collins left the meeting at 1:16 p.m.**

The WG continued with a general discussion of all proposals in general and questions about what would be considered opinions "so personal" that identifying information can be withheld under the FB proposal. Examples or a purpose statement could be included in the bill, rather than in the statute itself.

Mr. Meller stated that he feels strongly that the waiver idea should be in the statute. He also stated that whole categories of things that should be disclosed if given to the board at a Sunshine Law meeting or administrative hearings.

Like her earlier advice against a specific reference to other exceptions still being potentially applicable in a new DPP exception under section 92F-13, Ms. Brooks advised against including a specific reference to waiver. She also stated that if materials go to the board like the board packet, there are OIP opinions about waiver, and the issue of drafts going to the board is also addressed in the Sunshine Law. Ms. Park stated that changes to the Sunshine Law can be discussed separately from the WG's proposal to address UIPA issues. Ms. Brooks and Mr. Black agreed that the Sunshine Law's board

packet provision could be amended to address public access to predecisional documents distributed to a board for consideration at a meeting.

Mr. Black stated he has problems with the internal audit language in the MO proposal because the language is so broad and everything will be withheld as a "self-initiated" agency audit, which is similar to a question that OIP raised. He also stated that after a decision is made, the public should know about it and other proposals. Ms. Okinaga stated that she and Mr. Meller both agreed upon and jointly proposed this exception to encourage government to self-assess itself and improve, like normal organizations do. Examples of when an internal audit could be very beneficial is to reflect upon and improve how an agency dealt with COVID issues; when the DOH wants to examine HIPAA compliance; if the DOT wants to examine areas needing improvement without encouraging litigation; or after incident reports by HIEMA. Mr. Black and Ms. Okinaga will continue to work on an internal audit provision.

Ms. Brooks summarized her understanding of the WG's agreement: 1) the question of drafts for board review can be addressed in the Sunshine Law's board packet provision; 2) there will be no audit language for now; and 3) as to the draft proposals, there will be the addition of the definition of government record with a revision to the last proviso in subsection (6) regarding "personal" opinions.

Mr. Black stated that with the addition of the government record definition, he wants to remove from the FB Proposal the first proviso stating "that after the final decision has been made or deliberation of the matter has been abandoned, disclosure of preliminary drafts and notes is not required." He will work on revised language for the rest of the FB Proposal.

Mr. Pang stated that there is no need to add any of his proposal to the FB Proposal. The WG agreed to work off of the FB Proposal and add the definition of government record based on footnote 15 of the Peer News decision, which was found in both the MO and Pang proposals. Also, the first part of section 6 of the FB Proposal will refer to "readily

segregable and purely factual information" that cannot be withheld. Per the discussion above, the first proviso will be deleted and the second proviso will be revised.

In response to a question posed by Ms. Okinaga, Mr. Black stated that Civil Beat Law Center's goal is to try to find an in-between path so it need not engage in legal fights.

Ms. Okinaga also asked if there is a meet and confer process, to which Ms. Park explained OIP's current mediation process and advised against requiring one in the statute itself.

Instead of statutory amendments, Ms. Park stated that the WG's report to the Legislature can include statements of the WG's intent, specific examples, waiver, or the use of OIP opinions as persuasive guidance.

## V. Database contents

The group did not discuss the contents of its database.

## VI. Other issues

The group did not discuss any other issues.

## VII. Next meeting to make recommendations for public meeting: August 26, 2022 (Friday), 11:30 a.m.

The meeting will be held in person and via Zoom. The group will discuss the WG's recommendation for the public meeting, and what will be in the database.

Ms. Fernandes will need to leave the meeting by 1:50 p.m. To maximize the available meeting time, the August 26 meeting will convene at 11:30 a.m. and recess until Mr. Collins can join, which will hopefully be before noon.

WG Tentative Schedule:

| | |
|---|---|
| September 14 (Wed.) | Online postings of WG's recommendations and upcoming public meeting |
| October 4 (Tues.), noon | Public meeting to discuss WG's recommendations |
| Nov. 1 (Tues.), noon | Meeting to approve final recommendations |
| December 8 (Thurs.), noon | Meeting to approve report and proposed legislation |
| December 16 (Fri.) | Submit report to Legislature |

The meeting was adjourned at 2:45 p.m.

**SCR 192 Working Group Minutes**
Friday, August 26, 2022, 11:30 a.m.
700 Bishop Street, Suite 1707
Honolulu, Hawaii 96813

**Members Present**

Douglas Meller, representing League of Women Voters
Carrie Okinaga, General Counsel, University of Hawaii (UH)
Duane Pang, Deputy Corporation Counsel, City and County of Honolulu (City)
Lance Collins, Law Office of Lance D. Collins, representing Common Cause (via Zoom)
Brian Black, Executive Director, Civil Beat Law Center (CBLC)
Kalikoʻonālani Fernandes, Deputy Solicitor General, Department of the Attorney General (AG)

**Office of Information Practices (OIP)**

Cheryl Kakazu Park, Director, OIP
Jennifer Brooks, Staff Attorney, OIP
Lori Kato, Staff Attorney, OIP

**The meeting was convened at 11:30 a.m., and recessed until 11:55 p.m. when it continued.**

**I. Approval of minutes of August 9, 2022**

The working group (WG) unanimously approved the minutes, as amended.

**II. Discussion of members' proposals/revisions and recommendations to post for public consideration**

Ms. Okinaga explained that after the last WG meeting on August 9, Mr. Black drafted an amendment proposed by him and Ms. Fernandes, so she met with him and Mr. Meller to discuss the proposal. Prior to today's meeting, Ms. Okinaga submitted the attached proposal, which states in relevant part:

(6) Inter-agency or intra-agency deliberative and pre-decisional government records, other than readily segregable purely factual information, up until the final decision the deliberative government records relate to has been made or until deliberation of the matter has been abandoned; provided that once disclosure is required, identifying information of public officials or employees without discretionary authority and not making the decision may be withheld without a showing of wrongdoing or criminal conduct, or without the agency's showing of compelling reasons for non-disclosure. This exception does not apply to board packets as defined in section 92-7.5.

None of the above exceptions shall be mutually exclusive.

Ms. Okinaga acknowledged that the language in the final provision after "may be withheld" (highlighted in yellow above) needs more work. To address Mr. Meller's concerns, the language regarding board packets was added. The "inter-agency and intra-agency" language is intended to consciously narrow and qualify the deliberative process privilege (DPP) per the Peer News decision. Ms. Okinaga also explained that for the provision regarding names, the idea was to carve out space for lower-level people who are doing the work, but with no authority to make decisions, to not expect their names to be disclosed. The default is that names will be redacted.

Mr. Black referenced the proposal he had emailed on August 10, 2022, which had been discussed at the prior WG meeting:

(6) Deliberative and pre-decisional materials, including, but not limited to, preliminary drafts, notes, interagency or intra-agency memoranda, correspondence, and recommendations, other than readily segregable purely factual information, up until the final decision the deliberative and pre-decisional materials relate to has been made or until deliberation of the matter has been abandoned; provided that, once disclosure is required, when compelling reasons show that public disclosure would likely inhibit future frank discussion between public officials and employees, identifying information of the public official or employee expressing the opinion may be withheld.

Mr. Black stated that for this proposal, the first question is, do we specify things so there is an automatic non-disclosure of names? The second question is, do we have all the factors? He also asked, if the compelling reason test is removed, does the provision contain all the factors to consider in withholding names?

Mr. Black stated that discretionary authority could include decisions by deputy directors who don't have actual authority. Mr. Meller stated that people don't care who made the decision so it's a waste of time to redact. Mr. Black stated that people will ask for everything and agencies will redact, so will people challenge the redactions?

Mr. Pang stated that the City has a lot of non-discretionary things it must approve, for example building permits, and asked why redact? Mr. Black stated that it is possible for employees to have discretionary authority to make decisions to not issue building permits.

Mr. Pang stated that he is not sure if the provision relating to names is needed and that the provision could end after "abandoned." Ms. Fernandes stated she was not sure if she agrees with Mr. Pang and whether it would work for the Attorney General's office.

Mr. Black stated that for emails between employees, the names are not needed and can come out. Mr. Pang stated that if a secretary transmits something, he would redact the secretary's name.

Mr. Collins stated that there is a whole area of labor relations law relating to confidential employees, which could provide the appropriate analysis regarding confidential employees, and this could perhaps be referenced in the committee report if not to the statute itself.

Ms. Fernandes stated that she is not familiar with the labor law concept of confidential employees and wants to give government some space to come up with good decisions. The redaction of identifying information gives employees assurance to speak without fear, while carving out criminal conduct from protection.

Mr. Collins stated that the identity of employees is important, for example, at the City's Department of Planning and Permitting where people are being indicted for wrongdoing. Employees should not have their names redacted if they are making policy decisions along the way. The public has an interest in certain employees making policy. Confidential employee cases in labor law may provide a good analytical framework.

Ms. Brooks asked whether we will end up having a default: can redact names unless there's a good reason to disclose, or can't redact names unless the agency makes a strong showing of the need for redaction. Which is the default presumption and what are the factors to determine when the presumption is overcome?

Ms. Okinaga stated that Mr. Collins is coming from a different viewpoint, and that his view flips the presumption to "will disclose," but without looking at ability for people to communicate. By disclosing, the decision will already be compromised.

Mr. Collins stated that current state law is no deliberative process privilege. Ms. Fernandes stated that the WG was set up by the Legislature to attempt to compromise.

Mr. Black suggested removing the language in his proposal stating, "or without the agency's showing of compelling reasons for non-disclosure." There will be automatic redactions if the listed factors for redaction are met: discretionary authority; person made the decision; wrongdoing. Should any other factors be listed?

Mr. Meller stated there are other exceptions, such as privacy and pending investigation. Mr. Black responded that the exceptions referenced by Mr. Meller are in other exceptions covered elsewhere in the UIPA; for example, confidentiality under 92F-13(3) and privacy under 92F-13(1).

Ms. Brooks asked the group whether they are thinking that, if you are not a line employee, you have discretionary authority. Mr. Black stated that "discretionary

authority" does not refer to the decision maker, and could be a senior person, but not a purely administrative employee. He stated in the Hawaii Supreme Court's Nakano Sunshine Law decision, the constitutional privacy analysis includes some discussion of what discretion is not purely discretionary.

Mr. Black stated that an example is the Peer News decision, in which a budget memo was sent to the Mayor, who was the decision maker. But the budget director was sending the memos; deputy division heads are not simply doing ministerial work like clerks; and the budget analyst is in a grey area.

Mr. Collins stated that the main factor is discretionary authority and Common Cause's view is that the employees don't have a reasonable expectation of privacy so why shouldn't their names be disclosed. He also stated that with confidential relationships, such as a private secretary's communication to the boss, the communication doesn't fall under section 3, so an exception is needed under new section 6.

Mr. Black stated that under section 6, the communication between the secretary and boss would still be disclosed, and only the names would be withheld.

Ms. Brooks asked Mr. Collins whether he was uncomfortable with the default of redacting names. Mr. Collins stated the default should be that names are open. It is important to know when low-level people who are not elected are influencing other people not elected.

Ms. Okinaga disagreed with Mr. Collins, as his view of the default being to release employee names will affect the behavior of government decisionmakers. For example, it's like having no shower curtains or bathroom doors, which will affect people's behavior and as well as government decision making. She stated that Mr. Collins' premise is that someone is always doing something wrong; but the flip side is that a lot of decisions are being done by people with integrity and without any criminal conduct.

Ms. Okinaga asked whether Common Cause's position is that every government employee should expect their emails and records to be open 100 percent. Mr. Collins stated it was not Common Cause's position, but that all things are subject to discovery in litigation, which every government employee should know. Mr. Collins stated that he deals with the 1 percent of wrongdoers, and that public employees have no reasonable expectation of privacy in their government work. Ms. Okinaga stated that there is the privacy exception under 92F-13(1).

Mr. Black stated that he was interested in what the public has to say about the group's proposals, and if they come up with other factors. Mr. Black suggested using as a first draft Ms. Okinaga's proposed language with a period inserted after "criminal conduct" and deleting the language following "criminal conduct." Ms. Fernandes and Ms.

Okinaga agreed with Mr. Black's concept and stated they could work on revising the language.

Ms. Brooks stated that the burden is on the agency to establish non-disclosure of names. Mr. Collins agreed that if there is non-disclosure, the burden is on the agency, not the public.

Ms. Brooks stated her understanding is that Mr. Black, Ms. Fernandes, Ms. Okinaga, Mr. Meller and Mr. Pang agree that the default is the redaction of most names, and that the group will see how the public testifies on that proposal.

Mr. Collins stated that he was okay with proceeding as the other group members proposed.

The WG, Ms. Brooks and Ms. Park discussed the proposed provision regarding "without a showing of wrongdoing or criminal conduct" and the WG agreed that the language needs revising. Ms. Fernandes and Mr. Black agreed to work on revising the language.

Mr. Black stated that he likes Mr. Meller's proposal to exempt board packet documents from pre-decisional status when the board is using them to make decisions at the meeting, but cautioned that accommodating an amendment in the Sunshine Law will lead to potential problems of information not being redacted in the packets. Mr. Black stated that he is inclined to instead state in the UIPA amendments that the new section 6 does not apply to Sunshine Law board packets.

Mr. Pang stated that he was also troubled by moving the UIPA concept into the Sunshine Law. Sunshine Law boards need to make decisions in the open, and he questioned why we need a deliberative process exception for those decisions. He stated that the only overlap between the UIPA and Sunshine Law is in the board packet language, and he does not want the WG to touch the Sunshine Law. He agreed with Mr. Black that an exception for board packets should be in new section 6 of the UIPA.

Mr. Collins wondered why the proposed language has to be so specific to board packets and questioned if there is another way to craft the language to be broader. Mr. Collins also stated that he is okay with moving forward with the proposal for public comments, and with removing the language, "None of the above exceptions shall be mutually exclusive," from the proposal and explaining it in the WG's report.

While Ms. Fernandes and Mr. Black will continue to work on the wrongdoing language, the group agreed to move forward in concept and to seek public comment on the following language to the new section 6:

<u>(6) Inter-agency or intra-agency deliberative and pre-decisional government records, other than readily segregable purely factual information, up until the final decision the</u>

deliberative government records relate to has been made or until deliberation of the matter has been abandoned; provided that once disclosure is required, identifying information of public officials or employees without discretionary authority and not making the decision may be withheld without a showing of wrongdoing or criminal conduct. This exception does not apply to board packets as defined in section 92-7.5.

The group discussed the final report to the Legislature, including an explanation of the waiver concept. Mr. Meller proposed that that the report explain what the WG is trying to accomplish in plain English.

The group also agreed that it was not necessary to post a preliminary report for the public hearing. Mr. Pang pointed out that what the group is trying to accomplish is already in the SCR 192 resolution, which could be used to explain why the public hearing is being held. Testimony from the public hearing can be part of the final report to the Legislature.

Ms. Brooks stated that certain WG recommendations can be put in the bill and in the purpose clause, and examples can be provided in the report. Mr. Black stated that he wants to include the purpose in the final report because purpose clauses get removed from bills in the legislative process.

The WG discussed the resolution of disputes and the self-audit provisions of the MO proposal from the prior meeting. Ms. Okinaga also raised the possibility of adding a meet and confer process to the law, which Mr. Pang stated he was not in favor of adding.

If anyone in the group has a dispute resolution proposal, they should email each other.

## III. Logistics, length, and agenda for public meeting on October 4, 2022

The WG agreed that for the public meeting on October 4, 2022, they will not have a presentation and will only receive testimony from the public, testimony will be taken remotely, no decisions will be made at the meeting, and it can be recorded via Zoom so that written minutes would not be required.

Mr. Black stated that he will have the conference area at his office available if the WG wants to gather in one location to listen to the public testimony. If not, all WR members can remotely participate and listen to public testimony from their own offices.
The group agreed that future WG meetings would not be public, unless there is a huge amount of public testimony.

## IV. Public database contents

The group did not discuss the contents of the public database and will do so at the next meeting.

## V. Other issues

The group did not discuss other issues.

## VI. Next meeting: September 12, 2022 (Monday), noon

The next meeting will be held in person and via Zoom on September 12 at noon. The WG members' calendars were clear until 2 p.m. to discuss the WG's draft recommendations for the public meeting and the contents of the database.

WG Tentative Schedule:

| | |
|---|---|
| Sept. 12 (Mon.), noon | Meeting to discuss WG's recommendation for the public meeting and database contents. |
| By Sept. 16 (Fri.) | OIP to post online the WG's draft recommendations and upcoming public meeting notice |
| Oct. 4 (Tues.), noon | Public meeting to discuss WG's draft recommendations |
| Nov. 1 (Tues.), noon | Meeting to approve final recommendations |
| Dec. 8 (Thurs.), noon | Meeting to approve report and proposed legislation |
| Dec. 16 (Fri.) | Submit report to Legislature |

The meeting was adjourned at 1:41 p.m.

**SCR 192 Working Group Minutes**
Monday, September 12, 2022, noon
700 Bishop Street, Suite 1707
Honolulu, Hawaii 96813

**Members Present**

Douglas Meller, representing League of Women Voters
Carrie Okinaga, General Counsel, University of Hawaii (UH) (via Zoom)
Duane Pang, Deputy Corporation Counsel, City and County of Honolulu (City)
Lance Collins, Law Office of Lance D. Collins, representing Common Cause (via Zoom)
Brian Black, Executive Director, Civil Beat Law Center (CBLC)
Kalikoʻonālani Fernandes, Deputy Solicitor General, Department of the Attorney General (AG)

**Office of Information Practices (OIP)**

Cheryl Kakazu Park, Director, OIP
Jennifer Brooks, Staff Attorney, OIP
Lori Kato, Staff Attorney, OIP

**I. Approval of minutes of August 26, 2022**

The working group (WG) unanimously approved the minutes of August 26, 2022

**II. Discussion of members' proposals/revisions and recommendations to post for public consideration**

After the last meeting, OIP had emailed to the WG the proposal originally drafted by Ms. Okinaga, with the attached revisions. Besides amending the definition of a government record in section 92F-3, the group's August 26 proposal added a new UIPA exception in section 92F-13(6), which protects from disclosure

Inter-agency or intra-agency deliberative and pre-decisional government records, other than readily segregable purely factual information, up until the final decision the deliberative government records relate to has been made or until deliberation of the matter has been abandoned; provided that once disclosure is required, identifying information of public officials or employees without discretionary authority and not making the decision may be withheld without a showing of wrongdoing or criminal conduct. This exception does not apply to board packets as defined in section 92-7.5.

Prior to the September 12 meeting, Mr. Black and Ms. Fernandes had proposed the attached "FB revision" to the August 26 proposal, which revises the proviso highlighted above in yellow to state:

provided that once disclosure is required, identifying information of a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct.

Mr. Collins had also emailed the group his attached revisions to the same proviso to state:

provided that once disclosure is required, the name of an employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct.

Mr. Black noted that the essential difference between the two proposed revisions is the use of "identifying information" v. "names." The idea in both is that once a decision is made, there will be disclosure. "Identifying information" as used in the FB revision, however, is a broader term than "names" and it would include position titles and other information that could identify a person. Describing some of the records he has received in the past, Mr. Black stated that agencies have gone so far as to sometimes redact pronouns and generic titles like "teacher" as identifying information. Mr. Black expressed his concern that the use of the term "identifying information" in the FB revision could be construed too broadly as to allow for the redaction of substantive statements that would identify a person.

Mr. Pang noted that sometimes you might have only one person in the office who has a certain job title who can be identified.

Ms. Fernandes joined the meeting at 12:05 p.m.

Mr. Collins stated that a literature professor can identify an author based on word choices and that any communication can be identified if someone went through that trouble. His point was that as a practical matter, allowing for the redaction of names would protect the identity of most people in 99% of the cases.

Mr. Pang stated that the Hawaii Supreme Court is clear that agencies can go line by line to redact. He agreed with Mr. Black that if a person has no discretionary authority but participates in a decision by making a recommendation, the person should be identified

and that the public should know the recommendation. Mr. Meller agreed with Mr. Pang.

Ms. Brooks stated that what Mr. Pang was talking about is different from "confidential source," another form of frustration for personal records, which may allow an agency to broadly withhold substantive statements in records when necessary to protect the identify of a source who furnishes information to the agency under an express or implied promise of confidentiality. In those cases, it may be necessary to redact substantive statements to protect the confidential source from being identified. In contrast, for the deliberative materials being discussed by the WG, the consensus of the group appears to be that redaction should not extend to a substantive statement just because it identifies a person, and OIP has never okayed redactions of pronouns. Whether "identifying information" or just "names" are redacted, the actual substantive statement should not be redacted from deliberative materials.

Mr. Collins referred to Justice Pollack's concurrence in the Peer News case, which stated that the public has an interest in monitoring the conduct of public employees.

Ms. Okinaga stated if government can't delete the identities of employees without decision-making authority, that would defeat the purpose of the carve-out. Those employees should not have to worry that 5 years after the fact, someone will be second guessing who made the recommendation and call them out. She stated that no one is saying that deleting identities should result in redaction of entire statements, and that she fully supports the FB revision that used the term "identifying information."

Ms. Fernandes agreed that if only names can be redacted, then it would be too limiting and the purpose of the exception would be defeated.

Ms. Brooks asked if the WG is looking at a concept like "plausible deniability," whereby a newspaper can't definitively say who made a suggestion even if it can figure out the probable source.

Mr. Pang stated that the public interest is not the same as the media's interest. The public interest includes who made the decision. He stated that the recommendation should be there, but not who made it. Mr. Pang agreed that employers should not disclose names if they want employees to participate.

Ms. Okinaga stated that we she wants to encourage all employees, including people who disagree, to participate in decision-making, but asked why do we need to identify them?

As a compromise, Mr. Black proposed the redacting of specifically "names and titles" instead of "identifying information," which he stated is a term that has been used by

agencies to withhold records. He stated that direct contact information is already protected from disclosure.

Ms. Okinaga stated that she prefers the language "identifying information" and suggested adding "specifically" to "identifying information."

Ms. Brooks stated that from OIP's perspective, Mr. Black's proposal of redacting name and position is clear. With respect to a suggestion that the term "personally identifiable information" (PII) could be used, it is not the same thing as the type of identifying information being discussed for potential redaction.

Mr. Black stated that "identifying information" is a broader term, according to a decision by Justice Eddins in a case involving Civil Beat. Although that case involved a different exception (privacy), Mr. Black did not want to use the same words that could possibly be broader than what the group considered acceptable and would lead to the redaction of an entire substantive statement on the basis that it would disclose the identity of an employee.

Mr. Collins stated that as a practical matter, excluding name and title would shield 99 percent of people, and the other 1 percent can be figured out by research, so the exclusion does not need to be broader. He's not sure what would be gained by excluding more than names, and he did not want substantive statements to be redacted.

Ms. Okinaga stated that she doesn't know what Mr. Collins' statistics are based on, but the whole purpose for having the exception is to encourage honest, frank discussion. She asked if you could identify the person, why would they feel more free to give honest feedback? Ms. Okinaga proposed that the committee report explain that only the identifying information, and not the substantive statement, will be redacted. She asked what is the significance of using the term "identifying information" under the UIPA.

Ms. Brooks explained that in the privacy context, identifying information would be things like name, title and other information that could reasonably lead to identifying someone. In the confidential source context, if the person's identity is already known or it's a small group, the agency can redact the whole statement; the allowable redactions go beyond identifying information. Ms. Brooks suggested that the group should use a different term than "identifying information."

Ms. Okinaga stated that redacting only the "name and title" is too narrow, and Mr. Pang and Ms. Fernandes agreed. She asked Ms. Brooks if she had any suggested language.

Ms. Brooks proposed using an adverb like "clearly" identifying information.

Mr. Black suggested using the items listed in HRS section 92F-12(a)(14), which permits name, compensation, job title, business address, background, and other listed items to be redacted, but not a person's statements. The group reviewed the statutory language in HRS section 92F-12(a)(14).

Mr. Collins stated that the listing categories and having a clear standard to apply would have the benefit of saving agency time in redacting and resolving disputes.

Ms. Fernandes stated that it's difficult to come up with a universe of what can be redacted without still identifying a person. For example, a statement such as, "I need to pick up my son John" at the end of an email could still identify an unnamed person. Mr. Black stated he would not object if that statement was redacted. Ms. Brooks, however, stated that there are no past OIP opinions that found that familial relationships are protected.

Mr. Meller stated that he was okay with referring to "name, position and personal information" and including in the committee report that substantive statements cannot be redacted.

Mr. Black stated that he is not in favor of the language "personally identifiable information" and that the rest of the proviso relates to when agencies can redact; i.e., redaction is allowed when the employee has no discretionary authority. Mr. Black does not want a standard that would lead to redaction of a substantive statement, which is currently allowed to protect the identities of confidential sources.

Ms. Fernandes stated that if the term "identifiable information" has too much baggage, the group can find a different term, but it should be more than "name and title."

After further discussion, the group agreed on moving forward for public comment with the language:

Provided that once disclosure is required, the name, title, or other information that would directly identify. . .

With respect to the next phrase of the proviso in question, Ms. Park asked the group if they were okay with including "public official or employee" as opposed to only the name of an "employee" that Mr. Collins had proposed, and whether the group intended to include consultants and volunteer board members. The group agreed that a public official is not the same as a contractor, but public official includes a board member. Mr. Collins expressed his concern with including "public official" in the language, and stated that if you add unnecessary things, it doesn't serve the public. Mr. Collins stated that Black's Law Dictionary defines public official as someone elected or appointed to public office, and doesn't include interns or volunteers. Despite his concerns, Mr. Collins agreed with the other members to move forward with the language "public official or

employee" for the public meeting, with the understanding that the language could change after the meeting.

With respect to the last phrase in the proviso, Ms. Park expressed her concern that despite Mr. Black's statements in his email explaining the FB revision that employees' names should not be disclosed simply based on an accusation of wrongdoing and that OIP should not have to engage in a probable cause determination of whether criminal conduct had occurred, the actual language of the statutory proposal is not limited to instances where there is an investigation but also extends to situations where the employee must not "be engaged in criminal conduct or other wrongdoing." Ms. Fernandes stated that she wanted the committee report to include a clarification of "wrongdoing." Mr. Black stated that OIP decisions discuss the levels of wrongdoing. The WG further discussed what was meant by being "engaged in criminal conduct or other wrongdoing," but made no changes as it is necessary to have a proposal to submit for public comment on October 4.

While not everyone agreed with the language as their final recommendation, the WG agreed to solicit public comments at the October 4 meeting on the attached proposal for a legislative amendment to the UIPA.

Mr. Pang left the meeting at 2 p.m.

## III. Presentations and moderator for public meeting on October 4, 2022

The group did not discuss having presentations and a moderator for the public meeting.

## IV. Public database contents

Ms. Park stated that she wanted to post notice of the public meeting by the end of this week and asked the remaining WG members what they wanted to post.

Ms. Okinaga stated that she was okay with posting the WG's minutes.

Mr. Black stated the resolution, proposed language, statement of common purpose and objectives should be posted.

Mr. Black left the meeting at 2:05 p.m.

Ms. Okinaga stated she was okay with posting the initial proposals and emails with attachments from OIP.

Ms. Fernandes left the meeting at 2:09 p.m.

Mr. Collins left the meeting at 2:10 p.m.

Ms. Park stated that she will email the group a list of what she intends to post for the public meeting.

## V. Other issues

Ms. Okinaga stated that she will talk to Ms. Fernandes about after-action items and stated that she wants it covered in the final report.

Per Ms. Okinaga's notes of their August 30, 2022 Zoom meeting, she, Mr. Meller, Mr. Black and Mr. Pang could not reach resolution on a self-audit provision in the proposal. The four members agreed at that meeting that the committee report should state that self-audits by agencies are included in the deliberative process exception.

Mr. Meller agreed that no changes would be made to the Sunshine Law by the WG.

After discussion about how to present the proposed language to the public, and the need to provide background and context, Ms. Okinaga said she would try, if she had time, to prepare an interim report of the WG to provide context for the public at the October 4 meeting.

## VI. Next meeting for public testimony: October 4, 2022 (Tuesday), noon

The next meeting will be held via Zoom on October 4, 2022 at noon to hear public testimony on the attached draft legislation, without any decision-making by the WG at that meeting.

WG future tentative schedule:

| | |
|---|---|
| By Sept. 16 (Fri.) | OIP to post online the WG's draft legislation and upcoming public meeting notice |
| Oct. 4 (Tues.), noon | Public meeting to discuss WG's draft recommendations |
| Nov. 1 (Tues.), noon | Meeting to approve final recommendations |
| Dec. 8 (Thurs.), noon | Meeting to approve report and proposed legislation |
| Dec. 16 (Fri.) | Submit report to Legislature |

The meeting was adjourned at 2:26 p.m.

**SCR 192 Working Group Minutes**
Tuesday, November 1, 2022, Noon
700 Bishop Street, Suite 1707
Honolulu, Hawaii 96813

**Members Present**

Brian Black, Executive Director, Civil Beat Law Center (CBLC)
Duane Pang, Deputy Corporation Counsel, City and County of Honolulu (City)
Douglas Meller, representing League of Women Voters
Carrie Okinaga, General Counsel, University of Hawaii (UH)
Kalikoʻonālani Fernandes, Deputy Solicitor General, Department of the Attorney General (AG)
Lance Collins, Law Office of Lance D. Collins, representing Common Cause (via Zoom)

**Office of Information Practices (OIP)**

Cheryl Kakazu Park, Director, OIP
Jennifer Brooks, Staff Attorney, OIP
Lori Kato, Staff Attorney, OIP

**The meeting was convened by Ms. Park at 12:11 p.m.**

## I. Posting of testimony on SCR 192 website

Ms. Park reported that all testimony, including late testimony and the recorded minutes of the video of October 4, 2022 meeting are posted on the SCR website.

## II. Discussion of testimony, proposals/revisions, and final recommendations for the SCR 102 Working Group's (WG) report and legislative proposals to the 2023 Legislature

Prior to the November 1 meeting, OIP sent to the WG OIP's email including its proposals (see OIP's attached proposals), and responsive email threads, including the Meller-Okinaga notes of their August 30 meeting and the League of Women Voters' testimony in support of amendments to HB 2037.

Mr. Black also submitted his attached proposal, which states in relevant part:

**1. 92F-3**
"Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form. "Government record" shall not include truly preliminary writings ~~that are truly preliminary in nature~~, such as personal notes and

rough drafts of memorandum, that have not been ~~finalized for~~ circulated~~ion within or among the agency~~.

**2. 92F-13**

6) Inter-agency or intra-agency deliberative and pre-decisional government records, other than readily segregable purely factual information, up until the final decision the deliberative government records relate to has been made, ~~or until~~ deliberation of the matter has been abandoned, or, if earlier, one year has elapsed after a request for the record; provided that once disclosure is required, the name, title, or other information that would directly identify a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct. This exception does not apply to board packets as defined in section 92-7.5.

**3. 92F-18 and Two Freestanding Provisions**

(b) . . . The public reports shall include: . . .
(11) The agency procedures whereby an individual may request access to records; ~~and~~
(12) The number of written requests for access within the preceding year, the number denied, the number of lawsuits initiated against the agency under this part, and the number of suits in which access was granted; and
(13) The agency's use of HRS § 92F-13(6), including the date of each denied request and the text of the request.

(c) Each agency shall supplement or amend its public report, or file a new report, on or before July 1 of each subsequent year, to ensure that the information remains accurate and complete. Each agency shall file the supplemental, amended, or new report with the office of information practices, which shall make the reports available for public inspection.

This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

No later than January 1, 2028, the Office of Information Practices shall convene a working group to examine agency use of the new UIPA statutory exception, HRS § 92F-13(6). The working group shall prepare recommendations for whether to keep or repeal the exception and, if kept, for amendments, if any, warranted after reviewing use of the exception. The working group shall include seven members consisting of three individuals representing public interest groups; three individuals representing government agencies subject to the UIPA; and the Director of the Office of Information Practices or the Director's designee, who shall appoint the members and serve as the working group convener. The Director of the Office of Information Practices shall report the findings and recommendations of the working group to the Legislature no later than twenty days prior to the convening of the Regular Session of 2029.

Mr. Black explained that his proposed amendments to HRS 92F-3 were intended to address the apparent confusion expressed in testimony by Bianca Isaki, Natalie Iwasa, and the Grassroots Institutes about the scope of the exclusion from government records.

Ms. Park stated that she also wanted to address the Department of Commerce and Consumer Affairs' (DCCA) late testimony defining a "government record" and suggested using "records" instead of "writings" in the second sentence because the information could be in auditory or electronic form, or could be pictures and charts, and not necessarily in written format.

Mr. Black noted that the government records definition took into account the OIP opinion referenced in the Peer News case, and the sort of records discussed in that opinion are usually writings.

Ms. Park stated that drafts could be in audio form. Ms. Brooks noted that voice recordings or dictation software are sometimes used to create drafts so there would be an audio recording.

Mr. Black stated that he did not object to changing "writings" to records."

Ms. Brooks stated that if a dispute came up now over similar records to those in the referenced OIP opinion now, under the UIPA's current definition OIP could end up finding that the records were actually government records maintained by the agency, as OIP explained in a footnote in its first formal opinion addressing the Peer News decision (OIP Opinion Letter Number F19-05, fn 5). Being in electronic versus paper form makes a difference as to whether individual calendars and preliminary drafts are considered records "maintained" by the government versus being personal records accessible only by an employee. Calendars, notes, and drafts are now more typically in electronic form and stored on shared servers, rather than paper records or electronic records stored only on an individual desktop. Ms. Brooks stated that Mr. Black's proposed changes to 92F-3 narrows the definition of "government record" from the UIPA's current definition.

Ms. Okinaga stated that if records are in her office's shared file server, even if other attorneys in her office have access to it, they should be truly preliminary under 92F-3. Mr. Pang agreed that if he had a rough draft in his folder that is accessible by others, but was not circulated for review, then his draft is not a government record.

Mr. Collins joined the meeting at 12:25 p.m. via Zoom.

Ms. Fernandes asked whether "circulate" means to anyone—inside and outside, and if you send email notes to yourself, it's not circulated.

Ms. Okinaga suggested the language, "communicated to others."

Ms. Brooks stated that the language currently proposed for the amendment to 92F-3 seems to fit the group's intent since circulated could mean sent a link to others to review something.

As to his proposed changes to HRS section 92F-18 and two freestanding provisions, Mr. Black stated that there have not been exceptions added to the UIPA since the beginning, so it makes sense to evaluate the changes after some time by having a working group convene in five years to study the effects of the proposed amendments. Mr. Black also stated that there should be no retroactive effect by the changes to the law.

Regarding his proposed changes to 92F-18(b), Mr. Black stated that the purpose of gathering data for the public reports is to see if it is consistent with the intent of the revisions to the law and the Working Group, and whether the exception is being abused. Mr. Black noted that the exception should not be used in 99 percent of cases, and that the data will indicate if the request is within the exception, which will add one column to the UIPA Record Request Log.

Mr. Pang noted that the clerks in his office will complete the Logs.

Mr. Collins stated that he made a UIPA request to OIP and OIP was able to give him the 12 cases he requested.

Ms. Park noted that Mr. Black's proposal to collect information about requests denied under the new exception belongs under HRS 92F-18(c), not (b). Ms. Park also stated that OIP will need more time and positions to revise the Log, collect data, do reports and to train the agencies on the new reporting requirements.

Mr. Black stated that he does his own reports from the data reported by the agencies to OIP, which does not take him much time to do. Ms. Park stated that it takes OIP much time before that to train State and county agencies about new laws, to revise the Log form, to check on submissions and repeatedly remind agencies to submit their Log reports, and to have OIP compile and chart the Log data from all agencies. Therefore, depending on if and when the new law is adopted and goes into effect, OIP will need time and personnel to do all the additional new work and get agencies to comply

Mr. Collins stated his belief that OIP should get more funding, but because of the advice he received from the Commission on Judicial Conduct, he will not be participating in the discussion on additional funding for OIP.

Ms. Brooks noted that the changes will be more work for government agencies.

Ms. Okinaga agreed, and stated that she wants to make sure that the extra work would ensure the future working group actually gets useful data from the Logs.

Mr. Black stated that if the agencies don't track the information, it will be impossible to determine the effect of the new law down the line. At the time agencies submit their Log reports to OIP, he would also want them to attach their Notice to Requesters that deny in whole or in part record requests based on the new exception.

Ms. Park reiterated that OIP will need new resources do the additional work required by the new changes to the UIPA and had provided proposals, including one previously supported by the League of Women Voters, for the WG to consider.

Ms. Okinaga referenced her earlier email (sent on October 21), which recognized that the proposal would add to OIP's workload to operationalize the changes and she had suggested language to include in the WG's final report.

Mr. Collins left the meeting at 1:34 p.m.

As to Mr. Black's proposed changes to HRS section 92F-1, Ms. Okinaga stated that that she was not in favor of the one- or two-year time timeframe, because it often takes a longer time for government to make good decisions regarding difficult issues.

Ms. Brooks stated that 80 years from creation, records become public, so there is already a bright line under current law after which records are definitely open. The question for the group is whether they can agree on an earlier bright line for how long it takes for records being withheld based on deliberative process exception to become public regardless of whether a decision has been made.

Mr. Black stated that he wants to understand why decisions were not made.

Ms. Okinaga also stated that the addition of "one year" to the proposal is a game changer, which she cannot support. She noted that the proposed changes are intended to substantively affect timeframes for policy making and requested that the WG not affect things this way because it will not be conducive to good decision making on hard issues.

Ms. Fernandes stated that a one year timeframe felt arbitrary. Mr. Black agreed that one to two years was arbitrary, but it creates a hard stop when there is concern about what is going on with a decision.

Mr. Pang stated that when he spoke to Mr. Black about the proposal, they discussed that there is no deliberative process privilege today and he is not sure if the Legislature will move forward with a proposal without a timeframe. But he agreed that one year was a very short period and even the City's budget operates on a two-year period.

Mr. Meller noted that the State's general obligation bonds are for a three-year time period.

Mr. Black stated that getting access to predecisional records based on abandonment requires a fight because agencies will argue that the process is still ongoing, just delayed, and that giving access lets requesters see what's going on that has caused the delay.

Ms. Brooks stated that she understood Mr. Black to be suggesting you should be able to look over government's shoulder when something has been delayed, and asked the WG if they are actually trying to clarify when something has been abandoned. Ms. Brooks raised the idea of adding a presumption of abandonment after a number of years and asked the group for comments.

The group discussed the concept of adding a presumption with a time element to the proposal but did not agree to do so.

The group also discussed that final decisions cannot truly be made on certain big concepts, like climate change or homelessness, which are open-ended and ongoing discussions. Mr. Black stated that if the topic being discussed by an agency is amorphous like climate change for which a decision cannot be made, the new exception would not protect that.

Mr. Pang stated that some agencies need to come up with a 20-year plan, and that he was trying to pick a number for the proposal that will get past the Legislature.

Ms. Okinaga and Ms. Fernandes left the meeting at 2:21 p.m.

Mr. Black noted that it could take years to decide on certain issues relating to homelessness. Mr. Meller suggested tying the decision and exception to records relating to specific government actions or projects and noted that "action" and "project" are defined by federal law and cases. Mr. Black did not want to use the federal definitions, but was amenable to adding "concerning an agency decision" or "a proposed government action" to the language he proposed to amend HRS 92F-13.

Mr. Black stated that he thought the group was close to a consensus, but was not sure that Ms. Okinaga would agree to current proposal.

Ms. Park asked the group for clarification on the presumption language.

Mr. Black stated that what constitutes abandonment should be in the report to the Legislature, not the law. Mr. Black stated he would talk to Ms. Fernandes and propose language to distribute to the group.

Ms. Brooks stated that in terms of interpretation, a presumption related to time makes things easier. Ms. Park stated that she wants clear statutory language regarding a presumption.

Mr. Black stated that he does not want to add language to the law about how to overcome the presumption. He stated that he would talk to Ms. Fernandes regarding the time limit and presumption and circulate a revised proposal to the others in the group. He suggested that the group could try to reach a decision via email before the next meeting.

## III. Other issues

The group did not discuss other issues.

## IV. Next meeting for approval of SCR 192 Working Group's report and legislative proposals: December 8, 2022 (Thursday), noon

The next meeting will be held in person and via Zoom. If the group is able to reach a final decision on proposed recommendations in enough time before the meeting, then OIP will hopefully be able to provide a draft report for the WG to discuss and approve for submission to Legislature in December, along with proposed legislation.

WG future tentative schedule:

| | |
|---|---|
| Dec. 8 (Thurs.), noon | Meeting to approve report and proposed legislation |
| Dec. 16 (Fri.) | Submit report to Legislature |

The meeting was adjourned at 3:32 p.m.

Exhibit J

**SCR 192 Working Group Minutes**
Thursday, December 8, 2022, Noon
700 Bishop Street, Suite 1707
Honolulu, Hawaii 96813

**Members Present**

Brian Black, Executive Director, Civil Beat Law Center (CBLC)
Duane Pang, Deputy Corporation Counsel, City and County of Honolulu (City)
Douglas Meller, representing League of Women Voters
Carrie Okinaga, General Counsel, University of Hawaii (UH)
Kalikoʻonālani Fernandes, Deputy Solicitor General, Department of the Attorney General (AG) (via Zoom)
Lance Collins, Law Office of Lance D. Collins, representing Common Cause (via Zoom)

**Office of Information Practices (OIP)**

Cheryl Kakazu Park, Director, OIP
Jennifer Brooks, Staff Attorney, OIP

**The meeting was convened by Ms. Park at 12:15 p.m.**

**I. Approval of November 1, 2022 minutes**

The attached minutes of November 1, 2022 were approved and will be posted on the SCR 192 website.

**II. Discussion of testimony, proposals/revisions, and final recommendations for the SCR 102 Working Group's (WG) report and legislative proposals to the 2023 Legislature and Collins' dissent**

Ms. Park began this portion of the meeting by thanking the members of the working group (WG) for their diligence, hard work, and long hours in trying in good faith to reach consensus pursuant to SCR 192's direction "to develop recommendations for a new UIPA statutory exception and other recommendations for deliberative and pre-decisional agency records to reasonably balance the public's interest in disclosure and the agency's ability to fully consider and make sound and informed decisions." She read from SCR 192 the Legislature's expressed belief that "in order to reach sound decisions on the various questions that come before them, agencies in some instances need their employees and officers to fully and frankly discuss proposed policies or tentative decisions at an internal level, outside the glare of publicity, and with the freedom to

express views or editorial changes that may not be incorporated into the final decision." She also summarized the WG's Statement of Common Purpose and Objectives developed at its initial meeting and went on to review the work the WG had done from July 2022 to the present.

After this introductory review of the group's work, the WG discussed the attached draft report and legislation, along with the attached dissenting report sent by Mr. Collins the prior evening.

In response to requests for clarification from various members, Mr. Collins stated that the Common Cause board had reviewed the draft report and it is the organization's position that they object to the proposed legislation that would establish a deliberative process exception and to excluding the proposed future working group from the Sunshine Law. He also stated that pursuant to the advice he received from the Judicial Council, his role as a judge precluded him from participating in the portion of the report regarding OIP's funding and staffing requests and thus he takes no position on that issue, and he wanted his last sentence in his dissent to be added to the WG's final report.

Ms. Park asked if a consensus with one dissent was acceptable to members. The WG thereafter engaged in lengthy discussions about whether the final report reflected the group's "consensus" and whether it should include Mr. Collins's dissent as an attachment to the final report or instead be on the SCR website and attached to these minutes. Mr. Pang did not want the WG to submit two or more separate reports written by different members each expressing their own organization's concerns and stated that one report can note that Mr. Collins, like another group members, did not want to change the law as it exists. Mr. Collins said he didn't want this group's report to be like the situation with a 1990s working group where the minority was not able to express its view in the report or do an official minority report, so there ended up being an unofficial minority report circulating separately, and he noted that the definition of "consensus" means general agreement. Ms. Okinaga said she had agreed to the WG's consensus legislative proposal because she thought Mr. Collins had also agreed to it; if the WG does not have a consensus on the legislative proposal, then maybe she too would like to express her concerns in a separate report. Mr. Meller noted that all members of the WG, except one, did not oppose the legislative proposal and the report could say so. Mr. Black stated that if most of the WG agrees that it's worthwhile to move on, then it should. Ms. Okinaga said it sounds like no matter what, the WG will have a consensus proposal with a dissent, not a unanimous consensus.

After further discussion about how to amend the report to accommodate Mr. Collins's dissent, Ms. Okinaga stated that she felt strongly that the report should be in the form of a consensus report, with Mr. Collins's dissent separately attached to the report, since her understanding was that he was unwilling to sign off on the WG's legislative proposal

no matter what changes were made to the report. Mr. Black reminded the group that certain members were representatives and that the group agreed at the outset that those members would need to obtain approval from others before final approval. Mr. Collins confirmed that he would not have authority to sign off on the WG legislative proposal, even if the Sunshine Law exemption for the future WG was removed from it, because Common Cause objected to changing the UIPA to recognize a deliberative process exception. The remaining WG members then agreed that the report would have to take the form of a consensus report by five WG members and a separate dissent by Mr. Collins as an attachment to the report. Ms. Okinaga stated that OIP is a WG member according to SCR 192. Ms. Park said that OIP's role has been as the convener.

The WG reviewed page by page the attached draft report to discuss all the comments and changes reflected in it. The WG's consensus on the wording of the report is reflected in the final language of the report itself, so is not set out in detail in these minutes. However, topics discussed included:

- Hyphenating "pre-decisional" to be consistent with SCR 192
- Changing the wording to focus on what the consensus proposal will do rather than on the WG itself
- Specifying that the wrongdoing or criminal conduct of employees whose names cannot be redacted must be "related to the decision"
- Adding "after redaction of directly identifying information" to the beginning of a sentence that substantive statements cannot be redacted
- Specifying that the wrongdoing provision applies when an agency is aware of an ongoing investigation or previous finding of wrongdoing
- Eliminating duplicative language
- Refining the discussion of waiver by a prior disclosure and suggesting addition of an example in editing
- Clarifying that disclosure is required after either a decision has been made or decision-making has been abandoned
- Refining the discussion of the rebuttable presumption of abandonment after three years
- Refining the discussion of interaction between the reporting dates for agency use of the new exception and the proposal's effective date
- Clarifying the intent of a section by adding "Where No Consensus Was Reached" to the heading for "Additional Items Considered"
- Using language previously recommended by Ms. Okinaga with OIP's modifications in place of the report's language regarding some WG members' support of OIP's pursuit of its own proposals.

Additionally, the WG agreed to revise the legislative proposal as follows:

Exhibit J

- Added "related to the decision" to the proviso regarding the wrongdoing or criminal conduct to be considered if directly identifying information such as names are to be redacted, so that section 92F-13(6) will state in relevant part, "provided further that once disclosure is required, the name, title, and other information that would directly identify a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct related to the decision"
- Added an effective date of July 1, 2023.

After the WG concluded its detailed review of the draft report, it was agreed that an in-person meeting will not be needed to finalize and approve the report as two members will be leaving on international trips soon and will have intermittent or no internet connection. Therefore, Mr. Black offered to do the initial edit of the draft report by the next day (December 9) to have it focus on what the consensus proposal will do rather than on the WG itself, as he had requested. OIP will email the final versions of the report and proposed legislation for the WG's review and approval by next Tuesday (December 13). The WG's scheduled date for submission to the Legislature is December 16, 2022.

The meeting was adjourned at 2:38 p.m.

Exhibit K

RELATING TO THE OFFICE OF INFORMATION PRACTICES

SECTION 1. The legislature finds that the state office of information practices (OIP) has been given more responsibilities over the years and needs additional personnel to do meet its increasing workload. The legislature further finds that OIP would be able to more efficiently and effectively resolve disputes concerning the chapter 92F, Hawaii Revised Statutes (Uniform Information Practices Act, Modified)("UIPA")and part I of chapter 92, HRS ("Sunshine Law") if it had the discretion to provide written guidance in lieu of opinions in appropriate cases. While a formal opinion is sometimes necessary to obtain an agency's or board's compliance, or to hold it to the "palpably erroneous" standard of review upon appeal to a court, there are other times when OIP need not undergo the time-consuming process for an opinion and can instead provide more timely written guidance to explain its reasons why it is inclined to conclude that an agency's or a board's actions did not violate the UIPA or Sunshine Law.

The purposes of this Act are to provide OIP two new permanent positions and funding, and with the statutory discretion to decide whether to provide an opinion or written guidance to resolve a dispute under the UIPA or Sunshine Law.

SECTION 2. Section 92F-3, Hawaii Revised Statutes, is amended by adding three new definitions to be appropriately inserted and to read as follows:

""Guidance" means a written discussion of the major legal and factual issues raised by an inquiry, including the most likely resolution of a complaint made in the inquiry, if applicable, but does not rise to the level of an opinion.

"Opinion" means a written discussion of legal and factual issues raised by an inquiry, including the findings and conclusions reached by the director of the office of information practices regarding those issues, regardless of whether the inquiry alleges violations of this chapter or part I of chapter 92 or otherwise raises disputed issues of law or fact, or the inquiry seeks an advisory legal interpretation of this chapter or part I of chapter 92.

"Ruling" means a written opinion providing firm and final legal determination of all disputed issues raised by an inquiry alleging violations of this chapter or part I of chapter 92."

SECTION 3. Section 92F-42, Hawaii Revised Statutes, is amended to read as follows:

"**§92F-42 Powers and duties of the office of information practices.** The director of the office of information practices:

(1) Shall, upon request, review and [~~rule~~] issue a ruling on an agency denial of access to information or records, or an agency's granting of access; provided that any review by the office of information practices shall not be a contested case under chapter 92 and shall be optional and without prejudice to rights of judicial enforcement available under this chapter; provided further that if the office of information practices issues written guidance to a complainant concluding that an agency denial of access most likely will be upheld, including reasons for that decision, and informing the complainant of the right to bring a judicial action under section 92F-15(a), then no further action is required by the office of information practices;

(2) Upon request by an agency, shall provide and make public advisory guidelines, opinions, or other information concerning that agency's functions and responsibilities;

(3) Upon request by any person, may provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under this chapter;

(4) May conduct inquiries regarding compliance by an agency and investigate possible violations by any agency;

(5) May examine the records of any agency for the purpose of paragraphs (4) and (18) and seek to enforce that power in the courts of this State;

(6) May recommend disciplinary action to appropriate officers of an agency;

(7) Shall report annually to the governor and the state legislature on the activities and findings of the office of information practices, including recommendations for legislative changes;

(8) Shall receive complaints from and actively solicit the comments of the public regarding the implementation of this chapter;

(9) Shall review the official acts, records, policies, and procedures of each agency;

(10) Shall assist agencies in complying with the provisions of this chapter;

(11) Shall inform the public of the following rights of an individual and the procedures for exercising them:

(A) The right of access to records pertaining to the individual;

(B) The right to obtain a copy of records pertaining to the individual;

(C) The right to know the purposes for which records pertaining to the individual are kept;

(D) The right to be informed of the uses and disclosures of records pertaining to the individual;

(E) The right to correct or amend records pertaining to the individual; and

(F) The individual's right to place a statement in a record pertaining to that individual;

(12) Shall adopt rules that set forth an administrative appeals structure which provides for:

(A) Agency procedures for processing records requests;

(B) A direct appeal from the division maintaining the record; and

(C) Time limits for action by agencies;

(13) Shall adopt rules that set forth the fees and other charges that may be imposed for searching, reviewing, or segregating disclosable records, as well as to provide for a waiver of fees when the public interest would be served;

(14) Shall adopt rules which set forth uniform standards for the records collection practices of agencies;

(15) Shall adopt rules that set forth uniform standards for disclosure of records for research purposes;

(16) Shall have standing to appear in cases where the provisions of this chapter or part I of chapter 92 are called into question;

(17) Shall adopt, amend, or repeal rules pursuant to chapter 91 necessary for the purposes of this chapter; and

(18) Shall take action to oversee compliance with part I of chapter 92 by all state and county boards, including:

(A) Receiving and resolving complaints[~~:~~] by issuing a ruling on whether a violation occurred; provided that if the office of information practices issues written guidance to a complainant concluding that a board most likely did not violate part I of chapter 92, and including reasons for that decision, and informing the complainant of the right to bring a judicial action under section 92-12(c), then no further action is required by the office of information practices;

(B) Advising all government boards and the public about compliance with chapter 92; and

(C) Reporting each year to the legislature on all complaints received pursuant to section 92-1.5.

SECTION 4. There is appropriated out of the general revenues of the State of Hawaii the sum of $185,000 or so much thereof as may be necessary for fiscal year 2023-2024 and the same sum or so much thereof as may be necessary for fiscal year 2024-2025 for two full-time equivalent (2.0) permanent positions to be placed within the office of information practices.

The sums appropriated shall be expended by the office of information practices for the purposes of this Act.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. Sections 1, 2, and 3 of this Act shall take effect on January 1, 2024. Section 4 shall take effect on July 1, 2023.

Exhibit L

I deeply respect the hard work that went into the crafting of the proposed language that our Working Group is presenting together with its final report. For the following reasons, however, as the designated representative of Common Cause Hawai'i on the Working Group, I must respectfully dissent.

## I. Lack of Need

It has been claimed repeatedly that without the deliberative process privilege, the work of agencies will be significantly impaired. It has been four years since *Peer News LLC v. City and County of Honolulu*, 143 Hawai'i 472 (2018) was decided. That decision invalidated OIP's palpably erroneous creation of the "deliberative process privilege". No empirical evidence has been presented, to date, to demonstrate or support the claim that agencies' decision-making have been or are being impaired. There has been no need demonstrated by the experience of the last four years.

Rather, looking at government testimony in support of measures in recent legislative sessions urging the legislature to adopt a deliberative process privilege, agencies advocating for the adoption of the privilege speculate that a government employee, at some future time, will not feel comfortable freely sharing their opinion about matters pending before a supervisor and that will somehow impair agency decision-making.

First, information available to decision makers is always constrained in a variety of ways. There may be persons outside of government service who, if granted complete confidentiality, may be more willing to share their opinions. Without a privilege allowing that, it would follow that agency decision-making might be impaired. Authorship imposes upon every author certain contextual restraints in the making and distribution of their statements. This imposition is not limited to government employees and an exemption from the open records law for government employees will not change that. It will only secret away or obscure the influence of some individuals on the decision making of others.

Second, there is no empirical evidence to support the theory since the privilege was invalidated four years ago and agency decision-making has not been demonstrably impaired.

## II. The Exception to Swallow the Rule

As noted by the U.S. Congress, "Some have taken to calling it the 'withhold it because you want to' exemption ... The deliberative process privilege is the most used privilege and the source of the most concern regarding overuse." H.R. Rep. No. 114-391 at 10. For that reason, Congress has amended the Freedom of Information Act to limit its use.

The reason for this tendency toward abuse is the natural consequence of the concept behind the "deliberative process privilege". Virtually all activities of an agency other than a final decision, that executive agencies make, can be and have been characterized as part of the deliberative process and subject to the invalidated privilege.

## III. Policy Reasons Supporting Similar Privileges Do Not Apply in Proposed Context

There is a long recognized privilege at common law and within constitutional law protecting confidential communications among judges and their staff in the performance of their judicial duties as well as protecting drafts of opinions or orders of a judge. Confidentiality in this context is essential to the personal independence of the judge and to the integrity of a functioning independent judiciary. To allow otherwise would strike at the heart of judicial independence -- whether being compelled to testify before the other branches of government or having the how and

why of how a judge reached their decision publicly available.

Similarly, the courts have long recognized an executive privilege against disclosure of confidential communications regarding military and diplomatic secrets on the basis that such disclosure would impair the national security.

The policy reasons for judicial privilege are entirely absent in the context of executive branch employees. There is no constitutional or other basis to confer on executive branch employees the protection of judicial independence. To the contrary, the executive branch is the political branch of government and must rely for its mandate on public support. To moderate the role of popular sovereignty in the execution of laws, the people of Hawai'i have adopted as a matter of constitutional policy both the merit principle in selection and retention of most employees in the civil service as well as the right of public employees to organize for collective bargaining. Rather than judicial independence in executive decision-making, the people of Hawai'i have instead moderated their own influence on public employees by adopting the merit principle and collective bargaining but not otherwise.

There is equally no justification to confer on every public employees the protections afforded military or diplomatic secrets. The kinds of documents withheld under the invalidated deliberative process privilege such as budget requests, agency recommendations on publicly discussed permit applications, reports on agency performance or consultant reports certainly share none of the characteristics of military or diplomatic secrets that justify their secrecy.

## IV. Exemption from the Sunshine Law

There must be a compelling reason to grant a board or commission an exemption from the Sunshine Law.

The stated reasons to exempt the proposed future working group from Part I, Chapter 92, HRS, are not well-founded. There is no general justification for why the future working group, which would fall within the definition of "board" in HRS § 92-2, ought to be exempt from the Sunshine Law.

In two key ways, a statutorily established working group would be different from this Working Group that by operation of law is not subject to the Sunshine Law. First, the future working group would have a whole year to conduct it's work with much of the information to be considered already generated and previously available. Second, that working group's decision-making would occur by majority vote, and not by "consensus". HRS § 92-15 The work of the future working group is no different than any other constitutionally or statutorily created board or commission charged with determining a highly contentious policy preference in a limited amount of time. It has not been established what characteristic of this future working group warrants an exception to the rule that applies to all other boards and commissions.

## IV. Conclusion

For the foregoing reasons, on behalf of Common Cause Hawai'i, I respectfully dissent. I have also taken no part in the portion of the report regarding the funding and staffing requests for the Office of Information Practices and take no position as to that part.