

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)
Kaliko'onālani 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 Judge 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.