

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)
Kaliko'onālani 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.