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.