

PROPOSALS AND POSSIBLE STATUTORY AMENDMENTS

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PROPOSALS

Proposal No. 1: Define “government record” to exclude that which the Hawaii Supreme Court identified in the Peer News LLC decision as not qualifying as government records for purposes of an agency’s disclosure obligations”.

Proposal No. 2: Deliberative Process Government Records (DPGR) should be recognized as different from other government records which sometimes always have to be disclosed and at other times never have to be disclosed.

Proposal No. 3: DPGR should be “narrowly” defined under UIPA as pre-decisional subjective, non-factual notes, opinions, evaluations, recommendations, and draft proposals by government employees or officials.

Proposal No. 4: HRS Chapter 92F provisions concerning DPGR should not supersede constitutional, statutory, or formal written legislative or judicial, requirements and exceptions concerning disclosure of government records.

Proposal 5: HRS Chapter 92F should require disclosure of any DPGR distributed or discussed at any government meeting or hearing which the public has the right to attend including but not limited to board meetings under the Sunshine Law, public contested case hearings and public hearings concerning permit applications.

Proposal 6: HRS Chapter 92F should require disclosure of any DPGR previously disclosed to any member of the public.

Proposal 7: HRS Chapter 92F should require post-decision disclosure of DPGR relevant to government decisions, subject to existing constitutional, statutory, or formal written legislative or judicial, requirements and exceptions concerning disclosure of government records.

Proposal 8: When Proposals 3-7 do not apply, HRS Chapter 92F should allow, but not require, disclosure of DPGR, notwithstanding HRS § 92F-19.

Proposal 9: 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.

Proposal 10: DPGR applies when a decision has been or will be made. If the working group is not able to define the types of “decisions” contemplated by the DPGR exception, the working group should suggest a range of decisions contemplated.

JOINTLY PROPOSED STATUTORY AMENDMENTS

§92F-3 General definitions. Unless the context otherwise requires, in this chapter:

“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.

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

(6) Inter-agency or intra-agency advisory, consultative, or deliberative government records other than factual information if communicated for the purpose of decision-making, subject to the following:

(a) Prior to agency decision-making, a requesting party may seek relief from this exception by demonstrating that the requestor has a compelling need for disclosure that clearly outweighs the public’s interest in full and frank deliberation that is part of an agency’s decision-making process.

(b) After agency decision-making has been completed, this exception shall not apply unless the agency demonstrates that another exception to the disclosure requirement applies and that the agency’s interest in the deliberative process outweighs the public’s interest in disclosure.

(c) This exception shall not apply to government records distributed by an agency to any member of the general public, generated by the public and maintained by an agency for consideration in decision-making, or discussed at any agency meeting open to the public, including public meetings conducted by boards as defined in chapter 92, by the legislature, or by the nonadministrative functions of the courts of this State.

(d) The above and section 92F-19 notwithstanding, an agency may choose to disclose inter-agency or intra-agency advisory, consultative, or deliberative government records if the agency determines disclosure benefits the public interest.

(7) Government records relating to self-initiated intra-agency management audits or after-action reviews specifically intended to improve agency performance.

(a) The above and section 92F-19 notwithstanding, an agency may choose to disclose these audits and reviews if the agency determines disclosure benefits the public interest.

Doug's 8-1-22 Draft Proposals on Deliberative and Pre-Decisional Government Records (DPGR)

Proposal No. 1: UIPA provisions concerning DPGR should not supersede Constitutional, other statutory, formal written legislative, or formal written judicial requirements concerning disclosure of government records.

Proposal No. 2: DPGR should be "narrowly" defined under UIPA as subjective, non-factual notes, opinions, evaluations, recommendations, and draft proposals.

Proposal 3: UIPA should require disclosure of any DPGR distributed or discussed at any government meeting or hearing which the public has the right to attend including but not limited to board meetings under the Sunshine Law, adjudication of contested cases, and public hearings concerning permit applications.

Proposal 4: UIPA should require disclosure of any DPGR previously disclosed to any member of the public.

Proposal 5: UIPA should require post-decision disclosure of DPGR relevant to government decisions.

Proposal 6: UIPA should clarify the range of government decisions (including decisions to postpone or not to take action) to which Proposal 5 might apply.

Proposal 7: When Proposals 1-5 do not apply, UIPA should allow, but not require, disclosure of DPGR.

CARRIE'S PRELIMINARY NOTES FROM 7/25/22 DISCUSSION:

All of the following are “principles” discussed and identified for further analysis and development.

PRINCIPLE: Single executives should be encouraged, but cannot be forced, to engage in collaborative decision-making.

PRINCIPLE: Records that are pre-decisional and used to deliberate towards decision-making by a single executive should be protected during decision-making.

- A request for records from an interested bidder and a request from the media will need to be treated the same by government, and a request from the media should not be equated automatically with “the public interest”.
- Records that are protected by other privacy laws, e.g., FERPA and HIPAA, do not lose their confidentiality by being used to deliberate towards decision-making.
- Question as to City/County Councils and the ability to confer with constituents and support offices (like the Office of Council Services) in advance of open meetings.
 - There is an analytical and policy gap given HRS Section 92-10 re the legislative branch being able to create its own rules, while the county legislative bodies are subject to HRS Chapter 92.
- Question as to what a covered “decision” is (only by “higher level employees”?) and with what level of finality.
- Question as to deliberation: By whom? Just one level down from decision-maker?
- Question as to whether the reason for the request matters; goes to balancing.

PRINCIPLE: Timing matters. After the “decision” has been made, weighing should occur about the public’s access to the basis for the decision, i.e., the pre-decisional records relied upon by the decision-maker.

- Same questions as above.

PRINCIPLE: Re the “bucket” of materials that should not ever be required to be disclosed: written records that are truly preliminary in nature, such as personal notes and rough drafts of memorandum which have not been finalized for circulation within or among other impacted agencies (FN15 from the Peer News LLC decision) should be excluded from the definition of “Government record” in HRS 92F-3.

- There are no blanket requirements that these types of preliminary records be retained.
- Without the ability to take personal notes during meetings (especially with external people) and not worry that someone will be requesting copies of those notes, meetings have diminished utility, and the likelihood of decision-making occurring as a result of these meetings is also diminished.

PRINCIPLE: Categories and clarity matter. Responding to HRS 92F requests are very time-consuming, and government attorneys are not always available to advise, nor should they be. Hopefully, we can come up with a couple of pages of categories or examples to demonstrate the types of records that are protected and those that are not, so that the public and government employees can have shared expectations.

- For example, finalized reports, even if they contain opinion mixed with facts, should be disclosable in a timely manner, e.g., UHERO report.
- That said, perhaps the Governor had a reason for withholding, so there might be an “exigent circumstance” reason for withholding even after finalized.
- And please note the presumption under HRS 92F-19 that government records are proprietary.

PRINCIPLE: Process matters. What about a meet-and-confer requirement?

- We discussed that this would place a great onus on government if every 92F request had to be conferred about with the requesting part.
- *We did not discuss this, but after you left I was thinking that the only way to make this requirement palatable to government might be at the OIP complaint stage (HRS [92F-15.5](#)). OIP might facilitate a meet-and-confer to have both sides understand the grounds for maintaining the deliberative process privilege, and resolve cases this way instead of waiting for an OIP determination.*

PRINCIPLE: Logic matters. We should be able to explain why the framework we are trying to create only applies to the executive branch, or clarify the definition of “Agency” in [HRS 92F-3](#) excluding “nonadministrative functions of the courts”, and [HRS 92F-13\(5\)](#) re legislative working papers.