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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.