

SCR 192 Working Group Minutes
Tuesday, November 1, 2022, Noon
700 Bishop Street, Suite 1707
Honolulu, Hawaii 96813

Members Present

Brian Black, Executive Director, Civil Beat Law Center (CBLC)
Duane Pang, Deputy Corporation Counsel, City and County of Honolulu (City)
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)
Lance Collins, Law Office of Lance D. Collins, representing Common Cause (via Zoom)

Office of Information Practices (OIP)

Cheryl Kakazu Park, Director, OIP
Jennifer Brooks, Staff Attorney, OIP
Lori Kato, Staff Attorney, OIP

The meeting was convened by Ms. Park at 12:11 p.m.

I. Posting of testimony on SCR 192 website

Ms. Park reported that all testimony, including late testimony and the recorded minutes of the video of October 4, 2022 meeting are posted on the SCR website.

II. Discussion of testimony, proposals/revisions, and final recommendations for the SCR 102 Working Group's (WG) report and legislative proposals to the 2023 Legislature

Prior to the November 1 meeting, OIP sent to the WG OIP's email including its proposals (see OIP's attached proposals), and responsive email threads, including the Meller-Okinaga notes of their August 30 meeting and the League of Women Voters' testimony in support of amendments to HB 2037.

Mr. Black also submitted his attached proposal, which states in relevant part:

1. 92F-3

"Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form. "Government record" shall not include truly preliminary 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.

2. 92F-13

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, or, if earlier, one year has elapsed after a request for the record; 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.

3. 92F-18 and Two Freestanding Provisions

(b) . . . The public reports shall include: . . .

(11) The agency procedures whereby an individual may request access to records; ~~and~~

(12) The number of written requests for access within the preceding year, the number denied, the number of lawsuits initiated against the agency under this part, and the number of suits in which access was granted; and

(13) The agency's use of HRS § 92F-13(6), including the date of each denied request and the text of the request.

(c) Each agency shall supplement or amend its public report, or file a new report, on or before July 1 of each subsequent year, to ensure that the information remains accurate and complete. Each agency shall file the supplemental, amended, or new report with the office of information practices, which shall make the reports available for public inspection.

This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

No later than January 1, 2028, the Office of Information Practices shall convene a working group to examine agency use of the new UIPA statutory exception, HRS § 92F-13(6). The working group shall prepare recommendations for whether to keep or repeal the exception and, if kept, for amendments, if any, warranted after reviewing use of the exception. The working group shall include seven members consisting of three individuals representing public interest groups; three individuals representing government agencies subject to the UIPA; and the Director of the Office of Information Practices or the Director's designee, who shall appoint the members and serve as the working group convener. The Director of the Office of Information Practices shall report the findings and recommendations of the working group to the Legislature no later than twenty days prior to the convening of the Regular Session of 2029.

Mr. Black explained that his proposed amendments to HRS 92F-3 were intended to address the apparent confusion expressed in testimony by Bianca Isaki, Natalie Iwasa, and the Grassroots Institutes about the scope of the exclusion from government records.

Ms. Park stated that she also wanted to address the Department of Commerce and Consumer Affairs' (DCCA) late testimony defining a "government record" and suggested using "records" instead of "writings" in the second sentence because the information could be in auditory or electronic form, or could be pictures and charts, and not necessarily in written format.

Mr. Black noted that the government records definition took into account the OIP opinion referenced in the Peer News case, and the sort of records discussed in that opinion are usually writings.

Ms. Park stated that drafts could be in audio form. Ms. Brooks noted that voice recordings or dictation software are sometimes used to create drafts so there would be an audio recording.

Mr. Black stated that he did not object to changing "writings" to records."

Ms. Brooks stated that if a dispute came up now over similar records to those in the referenced OIP opinion now, under the UIPA's current definition OIP could end up finding that the records were actually government records maintained by the agency, as OIP explained in a footnote in its first formal opinion addressing the Peer News decision (OIP Opinion Letter Number F19-05, fn 5). Being in electronic versus paper form makes a difference as to whether individual calendars and preliminary drafts are considered records "maintained" by the government versus being personal records accessible only by an employee. Calendars, notes, and drafts are now more typically in electronic form and stored on shared servers, rather than paper records or electronic records stored only on an individual desktop. Ms. Brooks stated that Mr. Black's proposed changes to 92F-3 narrows the definition of "government record" from the UIPA's current definition.

Ms. Okinaga stated that if records are in her office's shared file server, even if other attorneys in her office have access to it, they should be truly preliminary under 92F-3. Mr. Pang agreed that if he had a rough draft in his folder that is accessible by others, but was not circulated for review, then his draft is not a government record.

Mr. Collins joined the meeting at 12:25 p.m. via Zoom.

Ms. Fernandes asked whether "circulate" means to anyone—inside and outside, and if you send email notes to yourself, it's not circulated.

Ms. Okinaga suggested the language, "communicated to others."

Ms. Brooks stated that the language currently proposed for the amendment to 92F-3 seems to fit the group's intent since circulated could mean sent a link to others to review something.

As to his proposed changes to HRS section 92F-18 and two freestanding provisions, Mr. Black stated that there have not been exceptions added to the UIPA since the beginning, so it makes sense to evaluate the changes after some time by having a working group convene in five years to study the effects of the proposed amendments. Mr. Black also stated that there should be no retroactive effect by the changes to the law.

Regarding his proposed changes to 92F-18(b), Mr. Black stated that the purpose of gathering data for the public reports is to see if it is consistent with the intent of the revisions to the law and the Working Group, and whether the exception is being abused. Mr. Black noted that the exception should not be used in 99 percent of cases, and that the data will indicate if the request is within the exception, which will add one column to the UIPA Record Request Log.

Mr. Pang noted that the clerks in his office will complete the Logs.

Mr. Collins stated that he made a UIPA request to OIP and OIP was able to give him the 12 cases he requested.

Ms. Park noted that Mr. Black's proposal to collect information about requests denied under the new exception belongs under HRS 92F-18(c), not (b). Ms. Park also stated that OIP will need more time and positions to revise the Log, collect data, do reports and to train the agencies on the new reporting requirements.

Mr. Black stated that he does his own reports from the data reported by the agencies to OIP, which does not take him much time to do. Ms. Park stated that it takes OIP much time before that to train State and county agencies about new laws, to revise the Log form, to check on submissions and repeatedly remind agencies to submit their Log reports, and to have OIP compile and chart the Log data from all agencies. Therefore, depending on if and when the new law is adopted and goes into effect, OIP will need time and personnel to do all the additional new work and get agencies to comply

Mr. Collins stated his belief that OIP should get more funding, but because of the advice he received from the Commission on Judicial Conduct, he will not be participating in the discussion on additional funding for OIP.

Ms. Brooks noted that the changes will be more work for government agencies.

Ms. Okinaga agreed, and stated that she wants to make sure that the extra work would ensure the future working group actually gets useful data from the Logs.

Mr. Black stated that if the agencies don't track the information, it will be impossible to determine the effect of the new law down the line. At the time agencies submit their Log reports to OIP, he would also want them to attach their Notice to Requesters that deny in whole or in part record requests based on the new exception.

Ms. Park reiterated that OIP will need new resources do the additional work required by the new changes to the UIPA and had provided proposals, including one previously supported by the League of Women Voters, for the WG to consider.

Ms. Okinaga referenced her earlier email (sent on October 21), which recognized that the proposal would add to OIP's workload to operationalize the changes and she had suggested language to include in the WG's final report.

Mr. Collins left the meeting at 1:34 p.m.

As to Mr. Black's proposed changes to HRS section 92F-1, Ms. Okinaga stated that that she was not in favor of the one- or two-year time timeframe, because it often takes a longer time for government to make good decisions regarding difficult issues.

Ms. Brooks stated that 80 years from creation, records become public, so there is already a bright line under current law after which records are definitely open. The question for the group is whether they can agree on an earlier bright line for how long it takes for records being withheld based on deliberative process exception to become public regardless of whether a decision has been made.

Mr. Black stated that he wants to understand why decisions were not made.

Ms. Okinaga also stated that the addition of "one year" to the proposal is a game changer, which she cannot support. She noted that the proposed changes are intended to substantively affect timeframes for policy making and requested that the WG not affect things this way because it will not be conducive to good decision making on hard issues.

Ms. Fernandes stated that a one year timeframe felt arbitrary. Mr. Black agreed that one to two years was arbitrary, but it creates a hard stop when there is concern about what is going on with a decision.

Mr. Pang stated that when he spoke to Mr. Black about the proposal, they discussed that there is no deliberative process privilege today and he is not sure if the Legislature will move forward with a proposal without a timeframe. But he agreed that one year was a very short period and even the City's budget operates on a two-year period.

Mr. Meller noted that the State's general obligation bonds are for a three-year time period.

Mr. Black stated that getting access to predecisional records based on abandonment requires a fight because agencies will argue that the process is still ongoing, just delayed, and that giving access lets requesters see what's going on that has caused the delay.

Ms. Brooks stated that she understood Mr. Black to be suggesting you should be able to look over government's shoulder when something has been delayed, and asked the WG if they are actually trying to clarify when something has been abandoned. Ms. Brooks raised the idea of adding a presumption of abandonment after a number of years and asked the group for comments.

The group discussed the concept of adding a presumption with a time element to the proposal but did not agree to do so.

The group also discussed that final decisions cannot truly be made on certain big concepts, like climate change or homelessness, which are open-ended and ongoing discussions. Mr. Black stated that if the topic being discussed by an agency is amorphous like climate change for which a decision cannot be made, the new exception would not protect that.

Mr. Pang stated that some agencies need to come up with a 20-year plan, and that he was trying to pick a number for the proposal that will get past the Legislature.

Ms. Okinaga and Ms. Fernandes left the meeting at 2:21 p.m.

Mr. Black noted that it could take years to decide on certain issues relating to homelessness. Mr. Meller suggested tying the decision and exception to records relating to specific government actions or projects and noted that "action" and "project" are defined by federal law and cases. Mr. Black did not want to use the federal definitions, but was amenable to adding "concerning an agency decision" or "a proposed government action" to the language he proposed to amend HRS 92F-13.

Mr. Black stated that he thought the group was close to a consensus, but was not sure that Ms. Okinaga would agree to current proposal.

Ms. Park asked the group for clarification on the presumption language.

Mr. Black stated that what constitutes abandonment should be in the report to the Legislature, not the law. Mr. Black stated he would talk to Ms. Fernandes and propose language to distribute to the group.

Ms. Brooks stated that in terms of interpretation, a presumption related to time makes things easier. Ms. Park stated that she wants clear statutory language regarding a presumption.

Mr. Black stated that he does not want to add language to the law about how to overcome the presumption. He stated that he would talk to Ms. Fernandes regarding the time limit and presumption and circulate a revised proposal to the others in the group. He suggested that the group could try to reach a decision via email before the next meeting.

III. Other issues

The group did not discuss other issues.

IV. Next meeting for approval of SCR 192 Working Group's report and legislative proposals: December 8, 2022 (Thursday), noon

The next meeting will be held in person and via Zoom. If the group is able to reach a final decision on proposed recommendations in enough time before the meeting, then OIP will hopefully be able to provide a draft report for the WG to discuss and approve for submission to Legislature in December, along with proposed legislation.

WG future tentative schedule:

Dec. 8 (Thurs.), noon	Meeting to approve report and proposed legislation
Dec. 16 (Fri.)	Submit report to Legislature

The meeting was adjourned at 3:32 p.m.