

SCR 192 Working Group Minutes

Tuesday, August 9, 2022, Noon

700 Bishop Street, Suite 1707

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

Jennifer Brooks, Staff Attorney, OIP

Lori Kato, Staff Attorney, OIP

I. Approval of minutes of July 15, 2022

The working group (WG) discussed the changes suggested by members and the comment by Ms. Okinaga to the revised draft minutes that had initially been sent to the group by Ms. Park on August 5, 2022. In response to Ms. Okinaga's comment, Ms. Park stated that OIP would be willing to post on its website the database that the WG decided to make readily available to the public, and this would not affect what OIP decides to post on the rest of its website. Ms. Okinaga moved to approve the minutes with the suggested changes and without her comment, and Mr. Pang seconded. Vote was taken and meeting minutes were unanimously approved, as amended.

II. Review of ground rules

The ground rules that were stated in the approved minutes were also approved by the WG.

III. Statement of Objectives

From proposals submitted by WG members Meller, Pang and Black, Ms. Okinaga drafted the Statement of Common Purpose and Objectives (Objectives) after the meeting on

July 15, 2022, which were emailed to the WG. The WG agreed that it did not need to further discuss the Objectives at this time.

IV. Members' proposals and possible recommendations

- A. Ms. Park thanked the group for their hard work and providing proposals in advance. (See three attached proposals)
- B. Mr. Meller and Ms. Okinaga gave a summary presentation of their joint proposal and statutory amendments (MO Proposal).

Mr. Meller explained that the MO Proposals differentiated between collaborative government decisions that involve public participation (e.g., board meetings and public hearings) and government decisions without public participation (e.g., decisions by a single executive or department head). Mr. Meller stated there are times when public participation is required by law and there are times when you want to solicit public participation, but public participation should not be required in all government decisions.

MO Proposal 4 is that other MO proposals are *subject to existing constitutional, statutory, or formal written legislative or judicial, requirements and exceptions concerning disclosure of government records.*

Because timely disclosure of relevant government records is necessary for meaningful public participation prior to government decisions, MO Proposal 5 requires disclosure of any deliberative or pre-decisional government record distributed or discussed at any government meeting or hearing that the public has the right to attend.

Because government should not selectively decide which members of the public can participate in government decisions, MO Proposal 6 requires disclosure of any deliberative or pre-decisional government record that was previously disclosed to any member of the public.

Although the disclosure of deliberative or pre-decisional records prior to decisions in effect solicits public comments, it may be counterproductive to solicit public comments prior to government decisions that do not involve public participation. That's why only MO Proposal 6 requires disclosure of deliberative or pre-decisional government records prior to government decisions that do not involve public participation.

Because the public wants to understand why government decisions were made, or learn if government decisions were capricious, MO Proposal 7 requires post-decision disclosure of deliberative or pre-decisional government records relevant to government decisions.

Ms. Okinaga stated that Proposal 1 was an effort to codify footnote 15 in the Peer News decision and briefly explained some of the other proposals. Proposal 2 recognized the WG's objective to develop a deliberative process for government records (DPGR). Proposal 3 states that DPGR should be narrowly defined. Proposal 4 recognizes that the DPGR provisions should not supersede constitutional, statutory, or formal written legislative or judicial requirements and exceptions concerning disclosure. Proposal 6 recognizes the UIPA's presumption of disclosure of any DPGR previously disclosed to the public.

With respect to Proposal 8, OIP had provided a copy of HRS section 92F-19 for the WG to review. Ms. Brooks reiterated OIP's concerns that were previously sent to the group in OIP's comments. Ms. Brooks also gave an overview of the law under chapter 92F, HRS, and explained that the provisions of 92F-19, HRS, provides when an agency can share non-public information with another agency without waiving objections to disclosure. She also stated that it was not necessary to specifically state that other exceptions may still apply only in the one DPGR exception under section 92F-13, as it could have the unintended consequence of limiting the applicability of multiple exceptions for the other section 92F-13 exceptions that do not so specify.

Proposal 9 states, "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." Mr. Meller explained that this proposal was intended to encourage agencies to correct their processes without fear of making internal discussions public.

Mr. Collins expressed his concern that if a document needs to be withheld from all people, he would not want low-level employees to have the arbitrary discretion to decide who can get the document and to share it with only certain private consultants not involved in the decision-making but not with the rest of the public.

Mr. Meller discussed Proposal 10, and asked, what happens in situations if government does not have enough money or staff to implement a decision, so a decision is not made? Should the public know why things are not happening?

C. Ms. Fernandes gave a summary presentation of her and Mr. Black's joint proposal, which was submitted to the WG prior to the meeting. Mr. Black stated that their proposal was similar to the proposals of the others in the WG, also relied upon footnote 15 from Peer News, and explained that it was analogous to how records in pending investigations are currently treated.

Ms. Brooks and Ms. Park agreed that the Fernandes-Black (FB) Proposal was clear and easier for OIP to administer, because it time-based and similar to the existing exceptions for pending investigations. Ms. Brooks commented that the FB Proposal would protect drafts even after a decision was made. Mr. Black said that it was not intended to do so.

Mr. Black explained that the provision was simply intended to incorporate footnote 15 from Peer News regarding truly preliminary drafts and was not intended to offer post-decision protection for drafts that had been circulated within an agency.

Ms. Park also noted that the FB Proposal does not foreclose other concepts that OIP has recognized in past DPP opinions, like waiver, and asked to what extent past OIP opinions would still be applicable, because OIP would be able to decide appeals much faster if it can continue to rely upon prior precedents. For example, OIP has opinions reflecting that if information is factual, it needs to be disclosed; but if the facts are so intertwined with deliberative materials, the agency doesn't need to disclose.

Ms. Brooks did not believe it is necessary for OIP to change its analysis concerning factual information and factual segregable information. She stated that the former deliberative process privilege (DPP) did not have a time element and agreed with Mr. Black that the exceptions for open investigations are analogous.

Mr. Collins asked whether the language in the FB Proposal needs to be modified to reflect federal case law regarding pre-decisional and deliberative. Ms. Brooks responded that the former DPP did not have a time element to no longer apply after the final decision, so it is not necessary to use federal case law to decide if a record is pre-decisional. Mr. Black stated that deliberative and pre-decisional information invokes prior federal law and OIP opinions. He further explained that with FOIA, DPP never goes away. But under the FB Proposal, DPP goes away after the final decision is made or abandoned.

Ms. Brooks explained that pending investigations fall under the UIPA's frustration exception for general government records as well as under the ongoing investigation exemption for personal records. Once the investigation is closed, all investigation records cannot be withheld unless another exception applies. Similarly, under the FB Proposal, once the final decision is made, DPP would no longer apply and records must be disclosed unless another exception applies.

D. Mr. Pang gave a summary presentation of his proposal, which was submitted to the WG just before the meeting, and stated that it was not much different from the FB Proposal. And like the MO Proposal, his proposal added a definition of government record that was taken from footnote 15 in the Peer News decision.

Mr. Pang stated that other exceptions may apply, such as those protecting the identity of a person. Timing of the disclosure is important, and he has not been advising his clients to withhold documents submitted to a board for a meeting where the board will be making a decision based on the documents. He also gets a lot of questions about

what to do with meeting notes and stated that proposed drafts or notes from an aide to a council member may be deliberative.

Mr. Collins stated that he had a concern as to what's included in definition of "pre-decisional" and compliance with HRS section 91-3 rulemaking requirements. He believes that any statement of agency policy, even if it is not officially adopted, should not be withheld and that compliance with the rulemaking requirements of section 91-3 is not required to adopt a policy.

Ms. Brooks suggested that a policy not signed by a director, but being used by an agency, is probably not pre-decisional.

Ms. Okinaga stated that the goal is good government and building people's faith in government. Any entity hoping to make good decisions requires the space between pre-decisional and post decisional to deliberate honestly and openly, and to encourage frank discussions where people will never have to worry that these discussions will be disclosed. Ms. Okinaga stated that there aren't enough legal counsel like Mr. Pang and herself in government to constantly advise regarding open record requests, and that the law should be clear so that line employees are able to make decisions about what needs to be disclosed.

Mr. Collins stated that government employees are making policy choices, and that's why people are interested; with the exercise of power, how does the public get involved?

Mr. Collins left the meeting at 1:16 p.m.

The WG continued with a general discussion of all proposals in general and questions about what would be considered opinions "so personal" that identifying information can be withheld under the FB proposal. Examples or a purpose statement could be included in the bill, rather than in the statute itself.

Mr. Meller stated that he feels strongly that the waiver idea should be in the statute. He also stated that whole categories of things that should be disclosed if given to the board at a Sunshine Law meeting or administrative hearings.

Like her earlier advice against a specific reference to other exceptions still being potentially applicable in a new DPP exception under section 92F-13, Ms. Brooks advised against including a specific reference to waiver. She also stated that if materials go to the board like the board packet, there are OIP opinions about waiver, and the issue of drafts going to the board is also addressed in the Sunshine Law. Ms. Park stated that changes to the Sunshine Law can be discussed separately from the WG's proposal to address UIPA issues. Ms. Brooks and Mr. Black agreed that the Sunshine Law's board

packet provision could be amended to address public access to predecisional documents distributed to a board for consideration at a meeting.

Mr. Black stated he has problems with the internal audit language in the MO proposal because the language is so broad and everything will be withheld as a “self-initiated” agency audit, which is similar to a question that OIP raised. He also stated that after a decision is made, the public should know about it and other proposals. Ms. Okinaga stated that she and Mr. Meller both agreed upon and jointly proposed this exception to encourage government to self-assess itself and improve, like normal organizations do. Examples of when an internal audit could be very beneficial is to reflect upon and improve how an agency dealt with COVID issues; when the DOH wants to examine HIPAA compliance; if the DOT wants to examine areas needing improvement without encouraging litigation; or after incident reports by HIEMA. Mr. Black and Ms. Okinaga will continue to work on an internal audit provision.

Ms. Brooks summarized her understanding of the WG’s agreement: 1) the question of drafts for board review can be addressed in the Sunshine Law’s board packet provision; 2) there will be no audit language for now; and 3) as to the draft proposals, there will be the addition of the definition of government record with a revision to the last proviso in subsection (6) regarding “personal” opinions.

Mr. Black stated that with the addition of the government record definition, he wants to remove from the FB Proposal the first proviso stating “that after the final decision has been made or deliberation of the matter has been abandoned, disclosure of preliminary drafts and notes is not required.” He will work on revised language for the rest of the FB Proposal.

Mr. Pang stated that there is no need to add any of his proposal to the FB Proposal. The WG agreed to work off of the FB Proposal and add the definition of government record based on footnote 15 of the Peer News decision, which was found in both the MO and Pang proposals. Also, the first part of section 6 of the FB Proposal will refer to “readily

segregable and purely factual information” that cannot be withheld. Per the discussion above, the first proviso will be deleted and the second proviso will be revised.

In response to a question posed by Ms. Okinaga, Mr. Black stated that Civil Beat Law Center’s goal is to try to find an in-between path so it need not engage in legal fights.

Ms. Okinaga also asked if there is a meet and confer process, to which Ms. Park explained OIP’s current mediation process and advised against requiring one in the statute itself.

Instead of statutory amendments, Ms. Park stated that the WG’s report to the Legislature can include statements of the WG’s intent, specific examples, waiver, or the use of OIP opinions as persuasive guidance.

V. Database contents

The group did not discuss the contents of its database.

VI. Other issues

The group did not discuss any other issues.

VII. Next meeting to make recommendations for public meeting: August 26, 2022 (Friday), 11:30 a.m.

The meeting will be held in person and via Zoom. The group will discuss the WG’s recommendation for the public meeting, and what will be in the database.

Ms. Fernandes will need to leave the meeting by 1:50 p.m. To maximize the available meeting time, the August 26 meeting will convene at 11:30 a.m. and recess until Mr. Collins can join, which will hopefully be before noon.

WG Tentative Schedule:

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| 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 |

The meeting was adjourned at 2:45 p.m.