

I deeply respect the hard work that went into the crafting of the proposed language that our Working Group is presenting together with its final report. For the following reasons, however, as the designated representative of Common Cause Hawai'i on the Working Group, I must respectfully dissent.

## I. Lack of Need

It has been claimed repeatedly that without the deliberative process privilege, the work of agencies will be significantly impaired. It has been four years since *Peer News LLC v. City and County of Honolulu*, 143 Hawai'i 472 (2018) was decided. That decision invalidated OIP's palpably erroneous creation of the "deliberative process privilege". No empirical evidence has been presented, to date, to demonstrate or support the claim that agencies' decision-making have been or are being impaired. There has been no need demonstrated by the experience of the last four years.

Rather, looking at government testimony in support of measures in recent legislative sessions urging the legislature to adopt a deliberative process privilege, agencies advocating for the adoption of the privilege speculate that a government employee, at some future time, will not feel comfortable freely sharing their opinion about matters pending before a supervisor and that will somehow impair agency decision-making.

First, information available to decision makers is always constrained in a variety of ways. There may be persons outside of government service who, if granted complete confidentiality, may be more willing to share their opinions. Without a privilege allowing that, it would follow that agency decision-making might be impaired. Authorship imposes upon every author certain contextual restraints in the making and distribution of their statements. This imposition is not limited to government employees and an exemption from the open records law for government employees will not change that. It will only secret away or obscure the influence of some individuals on the decision making of others.

Second, there is no empirical evidence to support the theory since the privilege was invalidated four years ago and agency decision-making has not been demonstrably impaired.

## II. The Exception to Swallow the Rule

As noted by the U.S. Congress, "Some have taken to calling it the 'withhold it because you want to' exemption ... The deliberative process privilege is the most used privilege and the source of the most concern regarding overuse." H.R. Rep. No. 114-391 at 10. For that reason, Congress has amended the Freedom of Information Act to limit its use.

The reason for this tendency toward abuse is the natural consequence of the concept behind the "deliberative process privilege". Virtually all activities of an agency other than a final decision, that executive agencies make, can be and have been characterized as part of the deliberative process and subject to the invalidated privilege.

## III. Policy Reasons Supporting Similar Privileges Do Not Apply in Proposed Context

There is a long recognized privilege at common law and within constitutional law protecting confidential communications among judges and their staff in the performance of their judicial duties as well as protecting drafts of opinions or orders of a judge. Confidentiality in this context is essential to the personal independence of the judge and to the integrity of a functioning independent judiciary. To allow otherwise would strike at the heart of judicial independence -- whether being compelled to testify before the other branches of government or having the how and

why of how a judge reached their decision publicly available.

Similarly, the courts have long recognized an executive privilege against disclosure of confidential communications regarding military and diplomatic secrets on the basis that such disclosure would impair the national security.

The policy reasons for judicial privilege are entirely absent in the context of executive branch employees. There is no constitutional or other basis to confer on executive branch employees the protection of judicial independence. To the contrary, the executive branch is the political branch of government and must rely for its mandate on public support. To moderate the role of popular sovereignty in the execution of laws, the people of Hawai'i have adopted as a matter of constitutional policy both the merit principle in selection and retention of most employees in the civil service as well as the right of public employees to organize for collective bargaining. Rather than judicial independence in executive decision-making, the people of Hawai'i have instead moderated their own influence on public employees by adopting the merit principle and collective bargaining but not otherwise.

There is equally no justification to confer on every public employees the protections afforded military or diplomatic secrets. The kinds of documents withheld under the invalidated deliberative process privilege such as budget requests, agency recommendations on publicly discussed permit applications, reports on agency performance or consultant reports certainly share none of the characteristics of military or diplomatic secrets that justify their secrecy.

#### IV. Exemption from the Sunshine Law

There must be a compelling reason to grant a board or commission an exemption from the Sunshine Law.

The stated reasons to exempt the proposed future working group from Part I, Chapter 92, HRS, are not well-founded. There is no general justification for why the future working group, which would fall within the definition of "board" in HRS § 92-2, ought to be exempt from the Sunshine Law.

In two key ways, a statutorily established working group would be different from this Working Group that by operation of law is not subject to the Sunshine Law. First, the future working group would have a whole year to conduct its work with much of the information to be considered already generated and previously available. Second, that working group's decision-making would occur by majority vote, and not by "consensus". HRS § 92-15 The work of the future working group is no different than any other constitutionally or statutorily created board or commission charged with determining a highly contentious policy preference in a limited amount of time. It has not been established what characteristic of this future working group warrants an exception to the rule that applies to all other boards and commissions.

#### IV. Conclusion

For the foregoing reasons, on behalf of Common Cause Hawai'i, I respectfully dissent. I have also taken no part in the portion of the report regarding the funding and staffing requests for the Office of Information Practices and take no position as to that part.