# Report to Legislature of SCR 192 Working Group

## I. Background of the Working Group

For nearly three decades, OIP had recognized a "deliberative process privilege" (DPP) allowing agencies, with various constraints, to withhold deliberative and predecisional records under the exception to mandatory disclosure under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), for records whose disclosure would frustrate a legitimate government function. The Hawaii Supreme Court's 2018 decision in Peer News LLC, dba Civil Beat v. City and County of Honolulu, changed the treatment of such records when it found that OIP's recognition of a deliberative process privilege was an erroneous interpretation of the UIPA. As the law currently stands, an agency's desire to shield its internal discussions and deliberations to allow it to fully consider and make sound decisions does not provide a basis for withholding records under the UIPA, and the UIPA thus offers no protection against disclosure for deliberative and predecisional records, except insofar as those records may fall under a UIPA exception for some other reason.

Senate Concurrent Resolution 192 (SCR 192) (Exhibit A) was adopted by both chambers of the Legislature during the 2022 session and it requested that the State Office of Information Practices (OIP) "convene a working group to develop recommendations for a new UIPA statutory exception and other recommendations for deliberative and pre-decisional agency records to reasonably balance the public's interest in disclosure and the agency's ability to fully consider and make sound and informed decisions[.]" The working group (WG) was asked to "gather and consider information from interested and affected parties as well as examine the law and practices in Hawaii and other jurisdictions, with the goal of developing recommendations to address government's need for and the public's concern about deliberative and pre-decisional agency processes and records in decision-making[.]"

Pursuant to SCR 192, OIP convened the WG with the following members:

Judge (retired) Karl Sakamoto, Facilitator
Brian Black, Executive Director, Civil Beat Law Center
Lance Collins, Law Office of Lance D. Collins, representing Common Cause
Kalikoʻonālani Fernandes, Deputy Solicitor General,
Department of the Attorney General
Douglas Meller, representing League of Women Voters

Carrie Okinaga, General Counsel, University of Hawaii
Duane Pang, Deputy Corporation Counsel, City and County of Honolulu

The WG worked diligently and collaboratively during the 2022 interim period to develop recommendations for a new UIPA statutory exception and other recommendations for deliberative and pre-decisional agency records to reasonably balance the public's interest in disclosure and agencies' ability to fully consider and make sound and informed decisions. The WG met a total of seven times as a large group, with multiple smaller group meetings as well. Because the WG was formed pursuant to a legislative resolution, not a statute or session law, it was not subject to part I of chapter 92, the Sunshine Law. However, the WG's initial draft proposal (Exhibit B) was presented to the public for comment via the State Calendar and OIP's website, and the WG held and recorded a public meeting via Zoom on October 4, 2022 to obtain public testimony. The WG took the public testimony into account in arriving at its final recommended proposal (Exhibit C).

## II. Work Prior to Public Meeting

After the first meeting on July 15, 2022, the WG drafted a Statement of Common Purpose. A member from the group representing public interest groups was paired with a member from the group representing government agencies subject to the UIPA, and each of the three pairs was charged with producing an original proposal. In addition, members were provided research conducted by Mr. Black regarding legislative solutions in other jurisdictions, and research by OIP of prior OIP opinions and examples regarding the deliberative process privilege in Hawaii. These, together with a copy of SCR 192, draft legislation, minutes of WG meetings, and other records of the WG's work are available on OIP's website at https://oip.hawaii.gov/scr-192-working-group/. A video of the public meeting held on October 4, 2022, is also available on that site, along with the written testimony the WG received, which is attached as Exhibit D. The written minutes of the WG's six non-public meetings held between July 1 through December 8, 2022 are attached as Exhibits E-J.

At meetings on August 9, August 25, and September 12, 2022, as well as in smaller group meetings, members discussed their concerns and experiences dealing with the UIPA, and the advantages, disadvantages, and merits of the proposals presented by the members. At the meeting on September 12, time was of the essence in developing a proposal for public comments

in October when a public meeting was scheduled. While there was insufficient time on September 12 to reach resolution on two other matters (reducing times for dispute resolution and incentivizing after-action reviews), members agreed to solicit public comment on a draft proposal (Exhibit B) providing the following statutory amendments to HRS Chapter 92F: (1) revising the definition of "government records" in HRS Section 92F-3 to expressly exclude uncirculated drafts and notes consistent with the language from footnote 15 in the Hawaii Supreme Court's 2018 decision in Peer News LLC, dba Civil Beat v. City and County of Honolulu, and (2) adding to HRS Section 92F-13 a new UIPA statutory exception with limited protection for deliberative process materials while the decisionmaking process remains ongoing.

In the course of its discussions, the WG agreed that the UIPA should be amended to give government agencies discretion whether to disclose deliberative and predecisional government records prior to government decisions that do not involve public participation. But because the public wants to understand why government decisions were made or whether government decisions were capricious, the WG agreed that once a decision has been made, the UIPA should require disclosure of deliberative or pre-decisional government records relevant to that decision.

The WG sought to encourage frank discussion among an agency's employees about the benefits or detriments, and possible implications, of a proposed course of action. One member observed that other areas of the law, notably labor relations, recognize the importance of allowing a high-level employee to receive input in confidence from a "confidential employee" such as the high-level employee's secretary. The WG also sought to assuage the concerns of lower-level employees that they may receive unwanted publicity based on their personal contributions to discussion of a controversial issue. To address these concerns, the WG agreed that even after a decision has been made, an agency may still redact the name, title, and other directly identifying information of an 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.

This provision allows only directly identifying information to be redacted; substantive statements cannot be redacted. Further, it does not apply to an employee engaged in or under investigation for wrongdoing or criminal conduct. The WG agreed that the public has an elevated interest in knowing what comments or suggestions came from an employee implicated in wrongdoing or criminal conduct, to see whether that person's contributions may have reflected

an ulterior motive related to that wrongdoing or criminal conduct. The WG did not intend the term wrongdoing to encompass minor infractions an employee might be written up for such as tardiness, or to require OIP or a court to make a definite determination that criminal conduct or wrongdoing has actually occurred. Rather, the provision is intended to apply where there is an ongoing investigation, a previous finding, or at least strong evidence of more serious misconduct or criminal conduct of the sort that could provide cause for suspension or termination and that prior court and OIP opinions have recognized as raising the public interest in misconduct information.

The WG agreed that its proposal was intended to incorporate existing laws, court rulings, and precedents concerning disclosure of government records, including those applying relevant concepts from the now-defunct deliberative process privilege as OIP formerly recognized it. Such concepts include how to determine when records are deliberative and pre-decisional, and when an agency's decisionmaking process has been abandoned. OIP's interpretation of cases relating to pending investigations may also be relevant to the new deliberative process exception as it applies to ongoing decisionmaking.

The WG also distinguished 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). The WG agreed that public participation is not required for all government decisions. But in a situation where public participation is required by law or is being solicited—such as during public meetings of boards subject to the Sunshine Law—the timely disclosure of relevant government records is necessary for meaningful public participation. For this reason, the WG agreed that the Sunshine Law and UIPA should continue to require 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. The proposal does this by specifically providing that the new exception shall not apply to a "board packet" of materials being reviewed by a board prior to a Sunshine Law meeting.

Because government should not selectively decide which members of the public can participate in government decisions, the WG agreed that the UIPA should continue to require disclosure of any deliberative or pre-decisional government record that was previously disclosed to any member of the public. The WG found it unnecessary to specifically add language to the

proposal reflecting this, since the UIPA, as interpreted by courts and OIP, already recognizes that an agency waives its ability to withhold records from one member of the public when it has previously disclosed the same records to another. Similarly, the WG considered but rejected language specifying that the new exception and the existing exceptions are not mutually exclusive, because nothing in the UIPA currently suggests its exceptions are mutually exclusive and courts and OIP have not previously treated them as such.

## III. Public Meeting and Subsequent Revisions Made in the Final Proposal

The WG held an online public meeting on October 4, 2022, to afford all interested persons an opportunity to submit orally or in writing their views, data, concerns, and arguments regarding the draft legislation. Based on public input, the WG subsequently continued to discuss and determine additional substantive and technical revisions to the proposed statutory amendment. While the WG kept largely intact the proposal that had been presented to the public, it made technical and substantive revisions to the final proposal (Exhibit C) as discussed below.

### A. Definition of Government Record

In response to testimony that the proposed amendment to the definition of a "government record" was too limiting by referring to "writings" and did not comport with the current definition that includes information maintained by an agency in auditory, visual, electronic, or other physical form, the WG's proposed amendment to section 92F-3, HRS, replaced the reference to truly preliminary "writings" with "records" to state:

> "Government record" means information maintained by an agency in written, auditory, visual, electronic, or other physical form. <u>"Government record" shall not include truly preliminary records, such as personal notes and rough drafts of memorandum, that have not been circulated.</u>

By replacing "writings," the term "records" now refers back to the current definition of a "government record" and will include notes in the form of a voice memo or recording of dictation, not just written notes, drafts, and similar documents.

Significantly, the proposed exclusion of truly preliminary records from the definition of a government record applies only if the records have not been "circulated." In other words, a

rough draft whose author has not yet shared it with anyone else for review, or an employee's personal notes that have not been forwarded to others for their use or comment, would fall within the exclusion and thus not be considered "government records." The mere fact that the notes are kept on an agency's computer system that is technically accessible by its technical staff but are saved in a personal folder not intended for sharing would not be considered to have been "circulated" by the author. Conversely, a draft or set of notes that has been actively shared by the author becomes a "government record" that must be disclosed upon request unless an exception to disclosure applies.

### B. New Deliberative Process Exception Under HRS 92F-13 for Ongoing Decisionmaking and Rebuttable Presumption of Abandonment

As described earlier, the proposal to the public included a new deliberative process exception as section 92F-13(6), HRS, that would protect certain deliberative process materials from public disclosure while the decisionmaking process remains ongoing. Once a decision has been made, however, disclosure is required of deliberative or pre-decisional government records relevant to that decision. Limited redaction may occur of certain directly identifying information for lower-level officials or employees who lack discretionary authority, did not make the decision, and are not under investigation for or engaged in wrongdoing or criminal conduct.

In response to public concern that an agency could claim its decisionmaking was ongoing for an indefinite length of time during which it could deny public access to records relevant to the issue, the WG added a rebuttable presumption that a decisionmaking has been abandoned if three or more years have gone by since an earlier request for the same record(s) was denied on the basis that the decisionmaking process was still ongoing. Consequently, the final proposed amendment to add a sixth exception to section 92F-13, HRS, states:

> (6) Inter-agency or intra-agency deliberative and pre-decisional government records, other than readily segregable purely factual information, concerning an agency decision about a government action 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 there shall be a rebuttable presumption that a matter has been abandoned if three years have elapsed after a request for records; provided further that once disclosure is required, the name, title, 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.

The WG recognized that major decisions and changes often take much longer than three years to be concluded but that the public is also entitled to know that work is ongoing and the new exception is not being used as a pretext to block access to records. The addition of a three-year window starting when a request is denied, after which there will be a rebuttable presumption that the decisionmaking pertaining to the requested records has been abandoned, is expressly not intended to force government officials to make a decision within three years. Rather, it sets a timeframe after which, to meet its burden to establish that the exception to disclosure applies, the agency may reasonably be expected to provide evidence beyond simply asserting that it is still working toward a decision, and an explanation of why the decisionmaking process remains ongoing. Factors relevant to determining whether a decisionmaking process has been abandoned could include, but not be limited to, evidence of recent discussions, memoranda, notes, or other records indicating that agency staff are still actively working on the issue; internal or external statements by agency leadership or similar indications that consideration of the issue either remains a high priority or, to the contrary, has been halted or greatly deprioritized; the existence of a deadline or legal mandate for a final decision that has not yet been made; evidence that the matter remains under review or pending approval by another entity; and other evidence that the agency is proceeding as though the issue remains undetermined with a decision forthcoming or, to the contrary, proceeding as though a decision has already been made notwithstanding the lack of an official announcement or approval.

**C. New Agency Reporting Requirement Under HRS 92F-18(c)**

No part of the following three proposed provisions were included in the proposal presented to the public at the October 4 meeting. However, in response to public concern that the exception could be abused or over-used by agencies, the WG added a new requirement for agencies to report their use of the exception as an amendment to section 92F-18(c), HRS, as follows:

(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. From July 1, 2023, through

> June 30, 2027, an agency shall report its use of HRS § 92F-13(6), including the text of the request and the agency's notice to requester. 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.

One member of the WG expressed skepticism about the usefulness of the data required to be collected and the expenditure of agency time to do so. OIP also expressed concern to the WG that having this reporting requirement begin on July 1, 2023 would be unrealistic, if the bill is passed but not signed or made effective into law until after July 1, 2023. Moreover, a July 1, 2023 effective date for the law would still not provide the multitude of State and county agencies sufficient time to learn or and begin implementing the new law. Additionally, OIP anticipates having to amend its UIPA Record Request Log form and training materials to obtain the requested data, which is gathered on a fiscal year basis from July 1 to June 30 of each fiscal year via a form and process that should not be changed mid-year. Therefore, OIP would have preferred that this reporting provision begin on July 1, 2024, after OIP and all State and county agencies have had sufficient time to learn about and implement the new reporting requirement.

**D. New Savings Clause**

The second completely new provision added to the final proposal as a proposed session law is as follows:

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

This provision makes clear that the statutory changes being made are to be applied retroactively and will not affect pre-existing rights and duties:

**E. New Working Group in 2028**

The third completely new provision added to the final proposal as a session law calls for OIP to convene a new working group by January 1, 2028, which would examine agency use of the newly created deliberative process exception and make recommendations to keep or repeal the exception to the 2029 Legislature. Unlike the current WG that was created by concurrent

resolution, the new working group would be created by an Act and will need express language to exempt it from the Sunshine Law, which is part I of HRS Chapter 92. The new provision states:

> 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 working group shall be exempt from part I of chapter 92. 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.

The objection of one member to the final proposal was specifically because of the Sunshine Law exemption for the new working group to be created. OIP, too, expressed its concern because it typically does not support a Sunshine Law exemption for a working group created by session law or statute. OIP also emphasizes that its role in the current WG has been as a neutral convener providing support rather than as a voting member, and thus the proposed exemption does not represent a position taken by OIP itself.

OIP notes, however, that the current WG consists almost entirely of lawyers and its discussions have been as much about specific wording and details of related laws and how this proposal would interact with those laws as well as underlying policy decisions. The issues on which the current WG has needed to reach consensus are sufficiently complex that even with seven nonpublic meetings running several hours each, it has been necessary for members to also work through smaller group meetings and the use of email to circulate and review proposals and suggest edits, which would not be permitted for a board subject to the Sunshine Law. WG members also have been or currently are on opposing sides of some UIPA-related court cases, and the ability to hold nonpublic meetings has helped address WG members' concerns that statements made in the course of the group's work not be used against their clients in related litigations. Thus, the current WG's non-Sunshine Law status has been instrumental in allowing it to arrive at a consensus in the allotted time to provide this report to the 2023 Legislature.

Accordingly, the Legislature may similarly find that these considerations provide sufficient reason to create a SL exemption for the proposed new working group.

## IV. Additional Items Considered

### A. Appeal Resolution Time

Some members of the WG considered and proposed ideas to address additional issues they believed were connected to the WG's assignment "to develop recommendations for a new UIPA statutory exception and other recommendations for deliberative and pre-decisional agency records to reasonably balance the public's interest in disclosure and the agency's ability to fully consider and make sound and informed decisions[.]" Although the WG did not ultimately reach consensus on these proposals, they are discussed in the WG report to fully reflect the WG's work.

Some members expressed concern about the length of time typically required from when an appeal is filed with OIP to issuance of an OIP opinion resolving the appeal. In FY 2022, over 89% of inquiries to OIP were informal requests for Attorney of the Day advice (1,456) that were typically resolved within one business day. Of the remaining 11% of requests for which formal case files were opened (177), 70% (124) were resolved within the same year, including 6 of 47 appeals filed in FY 2022. Although appeals constituted less than 3% of the total formal and informal requests for OIP's assistance (1,633), appeals take the most staff time to resolve, especially when written opinions are required. Nonetheless, an appeal may be the only free way for someone challenging a denial of access to records (or a board action under the Sunshine Law) to obtain a binding determination as to whether a violation occurred. In those instances where other forms of assistance do not resolve a dispute and an appeal to OIP is necessary, the time from the filing of an appeal to OIP's resolution is typically between one to three years (excluding any litigation in court). At the same time, members recognized that OIP staff have a great deal of work and other responsibilities besides resolving appeals, such as training and legislation, and there are many reasons, such as the complexity of legal issues involved and training of new attorneys, that require OIP staff to spend significant amounts of time to draft and finalize opinions.

Members also expressed concern about the amount of time spent by agencies, including their own attorneys, in responding to and litigating UIPA record requests. Members also

recognized that every piece of legislation passed has fiscal and workload implications, and the WG's consensus proposal will add to OIP's already increasing workload and will need to be operationalized by all government agencies, including OIP.

While the WG did not reach consensus on recommendations to address the time required for resolution of appeals to OIP, members discussed an ongoing OIP initiative regarding issuing inclinations to determine whether such inclinations encouraged resolution of disputes. Although the pandemic and staff shortages precluded OIP from drawing firm conclusions from this pilot project, initial indications were apparently positive, and WG members encouraged OIP to further develop and pursue this initiative, which does not require legislative action.

The WG also supported OIP's pursuit with the Legislature of proposals to reduce the appeal resolution time by (1) increasing OIP's staffing and funding, which had been proposed in SB 3252 passed in 2022 but ultimately vetoed on other grounds by Governor Ige; and (2) amending the UIPA to give OIP the discretion to resolve disputes either through an opinion or written guidance, as had been proposed by the League of Women Voter and OIP in an amendment to HB 2037 (2022). OIP's proposals are attached in proposed legislation as Exhibit K.

### B. After-Action Reviews and Agency Self-Audits

Some members of the WG discussed the general desirability of encouraging constant improvement through agency self-audits, after-action reviews, and similar practices where agencies initiate review of actions taken and update policies and practices. The members agreed that externally forced reviews are sometimes helpful, but resulting recommendations are generally not as well-received as when organizations initiate review on their own. The members were concerned that when people fear embarrassing coverage or liability, they are less likely to participate in after-action reviews or self-audits. Although the members could not reach resolution on a separate UIPA exemption applicable to agency self-audits and after-action reviews, and in particular could not agree on specific language that would create an incentive for such internal reviews, the members did agree that agency records of self-audits and after-action reviews would fall within the proposed exception for pre-decisional and deliberative materials related to an ongoing decisionmaking process. Thus, while the result of a self-audit or after-action review would still become public upon completion, the agency's ability to redact directly

identifying information for lower-level employees will provide some protection for some employees such that participation in after-action reviews will hopefully be increased once initiated.

### C. Effective Date

The WG proposal contains no recommendation regarding its effective date.

## V. Summary

To summarize, after seven WG meetings including a public hearing on the WG's initial draft proposal, and additional small group meetings and discussions, the WG reached consensus and recommends the Legislature pass its final proposal, attached as Exhibit C. Exhibit C includes a new statutory exception to disclosure under the UIPA that the WG believes reasonably balances the public's interest in disclosure and the agency's ability to fully consider and make sound and informed decisions.

The WG discussed, but did not reach consensus on, other related UIPA issues. Nonetheless, WG members supported OIP's pursuit with the Legislature of solutions to address the concerns regarding appeal resolution time shared by OIP and the WG. OIP's own recommended legislation to enact those solutions are attached as Exhibit K.

OIP appreciates the opportunity to convene the WG and all the hard work and thoughtful discussions by the WG's members and volunteer facilitator.