

SCR 192 Working Group Minutes
Thursday, December 8, 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'ona'lani Fernandes, Deputy Solicitor General, Department of the Attorney General (AG) (via Zoom)
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

The meeting was convened by Ms. Park at 12:15 p.m.

I. Approval of November 1, 2022 minutes

The attached minutes of November 1, 2022 were approved and will be posted on the SCR 192 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 and Collins' dissent

Ms. Park began this portion of the meeting by thanking the members of the working group (WG) for their diligence, hard work, and long hours in trying in good faith to reach consensus pursuant to SCR 192's direction "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." She read from SCR 192 the Legislature's expressed belief that "in order to reach sound decisions on the various questions that come before them, agencies in some instances need their employees and officers to fully and frankly discuss proposed policies or tentative decisions at an internal level, outside the glare of publicity, and with the freedom to

express views or editorial changes that may not be incorporated into the final decision.” She also summarized the WG’s Statement of Common Purpose and Objectives developed at its initial meeting and went on to review the work the WG had done from July 2022 to the present.

After this introductory review of the group’s work, the WG discussed the attached draft report and legislation, along with the attached dissenting report sent by Mr. Collins the prior evening.

In response to requests for clarification from various members, Mr. Collins stated that the Common Cause board had reviewed the draft report and it is the organization’s position that they object to the proposed legislation that would establish a deliberative process exception and to excluding the proposed future working group from the Sunshine Law. He also stated that pursuant to the advice he received from the Judicial Council, his role as a judge precluded him from participating in the portion of the report regarding OIP’s funding and staffing requests and thus he takes no position on that issue, and he wanted his last sentence in his dissent to be added to the WG’s final report.

Ms. Park asked if a consensus with one dissent was acceptable to members. The WG thereafter engaged in lengthy discussions about whether the final report reflected the group’s “consensus” and whether it should include Mr. Collins’s dissent as an attachment to the final report or instead be on the SCR website and attached to these minutes. Mr. Pang did not want the WG to submit two or more separate reports written by different members each expressing their own organization’s concerns and stated that one report can note that Mr. Collins, like another group members, did not want to change the law as it exists. Mr. Collins said he didn’t want this group’s report to be like the situation with a 1990s working group where the minority was not able to express its view in the report or do an official minority report, so there ended up being an unofficial minority report circulating separately, and he noted that the definition of “consensus” means general agreement. Ms. Okinaga said she had agreed to the WG’s consensus legislative proposal because she thought Mr. Collins had also agreed to it; if the WG does not have a consensus on the legislative proposal, then maybe she too would like to express her concerns in a separate report. Mr. Meller noted that all members of the WG, except one, did not oppose the legislative proposal and the report could say so. Mr. Black stated that if most of the WG agrees that it’s worthwhile to move on, then it should. Ms. Okinaga said it sounds like no matter what, the WG will have a consensus proposal with a dissent, not a unanimous consensus.

After further discussion about how to amend the report to accommodate Mr. Collins’s dissent, Ms. Okinaga stated that she felt strongly that the report should be in the form of a consensus report, with Mr. Collins’s dissent separately attached to the report, since her understanding was that he was unwilling to sign off on the WG’s legislative proposal

no matter what changes were made to the report. Mr. Black reminded the group that certain members were representatives and that the group agreed at the outset that those members would need to obtain approval from others before final approval. Mr. Collins confirmed that he would not have authority to sign off on the WG legislative proposal, even if the Sunshine Law exemption for the future WG was removed from it, because Common Cause objected to changing the UIPA to recognize a deliberative process exception. The remaining WG members then agreed that the report would have to take the form of a consensus report by five WG members and a separate dissent by Mr. Collins as an attachment to the report. Ms. Okinaga stated that OIP is a WG member according to SCR 192. Ms. Park said that OIP's role has been as the convener.

The WG reviewed page by page the attached draft report to discuss all the comments and changes reflected in it. The WG's consensus on the wording of the report is reflected in the final language of the report itself, so is not set out in detail in these minutes. However, topics discussed included:

- Hyphenating “pre-decisional” to be consistent with SCR 192
- Changing the wording to focus on what the consensus proposal will do rather than on the WG itself
- Specifying that the wrongdoing or criminal conduct of employees whose names cannot be redacted must be “related to the decision”
- Adding “after redaction of directly identifying information” to the beginning of a sentence that substantive statements cannot be redacted
- Specifying that the wrongdoing provision applies when an agency is aware of an ongoing investigation or previous finding of wrongdoing
- Eliminating duplicative language
- Refining the discussion of waiver by a prior disclosure and suggesting addition of an example in editing
- Clarifying that disclosure is required after either a decision has been made or decision-making has been abandoned
- Refining the discussion of the rebuttable presumption of abandonment after three years
- Refining the discussion of interaction between the reporting dates for agency use of the new exception and the proposal’s effective date
- Clarifying the intent of a section by adding “Where No Consensus Was Reached” to the heading for “Additional Items Considered”
- Using language previously recommended by Ms. Okinaga with OIP’s modifications in place of the report’s language regarding some WG members’ support of OIP’s pursuit of its own proposals.

Additionally, the WG agreed to revise the legislative proposal as follows:

- Added “related to the decision” to the proviso regarding the wrongdoing or criminal conduct to be considered if directly identifying information such as names are to be redacted, so that section 92F-13(6) will state in relevant part, “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 related to the decision”
- Added an effective date of July 1, 2023.

After the WG concluded its detailed review of the draft report, it was agreed that an in-person meeting will not be needed to finalize and approve the report as two members will be leaving on international trips soon and will have intermittent or no internet connection. Therefore, Mr. Black offered to do the initial edit of the draft report by the next day (December 9) to have it focus on what the consensus proposal will do rather than on the WG itself, as he had requested. OIP will email the final versions of the report and proposed legislation for the WG’s review and approval by next Tuesday (December 13). The WG’s scheduled date for submission to the Legislature is December 16, 2022.

The meeting was adjourned at 2:38 p.m.