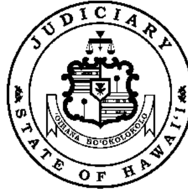

The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair

Wednesday, February 20, 2019 10:00 AM
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY
by
Susan Pang Gochros
Chief Staff Attorney and Director
Intergovernmental and Community Relations Department

Bill No. and Title: Senate Bill No. 1453, Relating to the Uniform Information Practices Act.

Purpose: Includes the nonadministrative functions of the courts of the State within the definition of "agency" under the Uniform Information Practices Act (Modified), (UIPA), chapter 92F, Hawai'i Revised Statutes (HRS).

Judiciary's Position:

The Judiciary respectfully, but strongly, opposes this bill that seeks to repeal the exemption for records of "the nonadministrative functions of the courts of this State" from the UIPA.

The Judiciary fully supports measures that promote public interest and scrutiny and the stated purpose of UIPA, set forth in HRS § 92F-2 ("Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest."). However, UIPA requirements governing records relating to the Judiciary's administrative functions are, and should remain, separate and distinct from Hawai'i Supreme Court-promulgated rules applicable to records of the nonadministrative functions of the courts, i.e., court records and documents. This delineation has existed for the past 30 years, since the UIPA was first enacted, and there appears no reason to doubt that this is, and remains, a viable distinction given the inherent authority and constitutionally-endowed rulemaking authority of the Hawai'i Supreme Court.

Thus, for the reasons set forth below, the Judiciary opposes this bill.

The Reasons that the Legislature Exempted the Nonadministrative Functions of the Judiciary From the UIPA Upon Its Enactment Remain Valid Today

Since the inception of the UIPA, the nonadministrative functions of the Judiciary were excluded from being part of an "agency" subject to the UIPA. Haw. Rev. Stat. Section 92F-3 (2012). Administrative functions have been deemed to exclude matters involved in the adoption of rules of court that directly control the conduct of litigation or that set the parameters of the adjudicative process and regulate interactions between litigants and the courts. Thus, matters such as judicial assignments and scheduling constitute administrative functions subject to UIPA. By contrast, nonadministrative records of the court – the subject of this bill – are those records that are provided to or developed by the court incident to the adjudication of legal matters before the court.

In distinguishing between administrative and nonadministrative functions of the court, the Hawai‘i Legislature, in drafting the UIPA, was guided by the recommendations of the Governor's Committee of Public Records and Privacy. (*See* S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess. Haw. S.J. 1093, 1095 (1988).) The Governor's Committee Reports details a comprehensive discussion of the reasons for exclusion of Judiciary records. The Report states that "the application of . . . [the UIPA] to the Judiciary should effect (sic) primarily administrative records." Governor's Committee Report, Volume 1, 94-5 (1987). The primary reason for excluding records of the Judiciary was the recognition that UIPA confers a right to correct and amend factual errors, misrepresentations and misleading entries contained in personal records. The Governor's Committee noted that:

> In the context of a judicial case, the record is established through a series of proceedings and filings. The total record provides the views of all parties, and once all appeals are exhausted, the record is complete. The notion of correcting the record through an additional process simply does not apply in specific judicial proceedings.
>
> Governor's Committee Report, Vol. 1, 95 (1987).

As the Office of Information Practices (OIP) noted in OIP Op. Ltr. No. 02-10, pg. 6: "[B]y excluding the Judiciary's non-administrative records from the UIPA, conflict with judicial procedures is avoided. It is essential for appeals courts to not be required to correct adjudicative records, because appeals courts "cannot consider matters outside the record which could not have been considered by the trial court at the time its judgment was rendered." (Case citation omitted.)

The Hawai‘i’ Court Records Rules Effectively Balance Open Government with Individuals’ Privacy Interests

The Hawai‘i State Constitution confers upon the Supreme Court the power to “promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law.” (Hawai‘i Constitution, Article VI, Section 7). Pursuant to that constitutional authority, the Supreme Court promulgated the Hawai‘i Court Records Rules in 2010.

The Hawai‘i Court Records Rules grant the public access to court records while also protecting the privacy interests of the people whose information may be subject to disclosure. Rule 10 of the Hawai‘i Court Records Rules, provides:

> Except as otherwise provided by statute, rule, or order, court and ADLRO (Administrative Driver‘s License Revocation Office) records shall be accessible during regular business hours, subject to priority use by the court, court staff, ADLRO and ADLRO staff. Closed and archived records shall be accessible within a reasonable time after a request is made. . . .

The Hawai‘i Court Records Rules were promulgated after years of discussion and consultation with and training for litigants, judges, and court users. Because the Rules presented a departure from past practice, the implementation date of the Rules was postponed twice to ensure that all stakeholders understood how the rules would be applied to court records.

The Rules also provide needed guidance to Hawai‘i Judiciary staff. Requests to inspect or obtain court records are made pursuant to these rules. Unless these rules are rescinded, the inclusion of nonadministrative court functions under the UIPA will undoubtedly create confusion for court users and court staff alike, as both the UIPA and the Hawai‘i Court Records Rules conceivably would simultaneously control access to court records.

UIPA Disclosure Exceptions Could Make Access to Court Records More Restrictive

The Hawai‘i Court Records Rules provide relatively few possibilities for deeming a court document confidential. Rule 9 specifies precisely which information is not provided under the Hawai‘i Court Records Rules and that information is generally limited to financial account information and personal information (e.g., social security numbers, dates of birth (except for traffic citations), names of minor children, bank or investment account numbers, medical and health records, and social service reports. (See Rule 2.19, Hawai‘i Court Records Rules)

Again, the Judiciary agrees that to the greatest extent possible, court documents (and proceedings) must be open to the public. However, through court rules, the Judiciary is presently achieving this goal. There is a real possibility for confusion to abound if nonadministrative functions of the court are subject to the UIPA. For example, in 1993, OIP opined that records containing a bar examinee's scores, answers and corrected answers are records relating to the nonadministrative functions of the Hawaiʻi Supreme Court and that access to those records is thus governed by court rule and not UIPA. If this bill is enacted, would such records now be governed by UIPA? And, if so, what would be the result?

This bill would, at best, create confusion as to competing rules and statutes, and at worst, undermine and limit the availability of nonadministrative court records to the public.

Requiring Disclosure of Draft Appellate Opinions and Correspondence Relating to Court Opinions Strikes at the Core of the Adjudicative Process

The Hawaiʻi Supreme Court, like other courts, invites the public to its court proceedings. In fact, it has set up a Courts in the Community Program to enable the public to better see and understand our judicial process at work. The Hawaiʻi Judiciary has also ensured that court records are as accessible as possible to the public through online court records programs such as Hoʻohiki and E-kokua.

Another aspect of our appellate courts' routine work is disseminating among justices and their staff, pre-decisional drafts and correspondence, developed and communicated for the purpose of final decision-making. This procedure is essential to the adjudicatory process. If nonadministrative court documents become subject to the UIPA, these drafts and written communications between justices, law clerks and other staff could be subject to disclosure. This could create a chilling effect that would substantially inhibit the flow of communication, and could adversely impact the very decision-making process that is imperative to well-conceived and appropriately vetted court opinions. Impeding that fundamental process would undermine the adjudicatory process that lays at the core of our judicial system.

Exempting the Judiciary's Nonadministrative Records from the UIPA is Consistent with Federal Law and Other States' Freedom of Information Laws

The federal Freedom of Information Act (FOIA), which establishes the public's right to access federal agency records, excludes "the courts of the United States" from the definition of "agency." 5 U.S.C 551(1)(B).

Further, other states' laws also distinguish between a judiciary's administrative functions and its nonadministrative functions, and establish separate access requirements for each. For

instance, Arkansas, California, Florida, Georgia, Louisiana, Michigan, Nevada, and New York exclude court records from their respective freedom of information laws.

Conclusion:

The Hawaiʻi State Judiciary both appreciates and shares the Legislature's goal as articulated in HRS § 92F-2 (2012): "Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest."

To this end, the Judiciary has embarked on numerous projects and programs designed to ensure that precise goal. However, court records accessibility is best left to court rules. Those rules must, and do, establish both a manageable process and an appropriate balance of individuals' privacy rights with the goal of transparency.

If modifications are needed to court rules, the Judiciary is open and receptive to considering them. We are not, however, aware of any discontent with, or confusion arising from, the present court rules. Moreover, we have concerns that opening the UIPA to include the records of the nonadministrative functions of the state courts will be confusing to the public, inconsistent with the very goals that both the Legislature and the Judiciary have worked so hard to achieve.

For the reasons set forth above, the Judiciary respectfully opposes this bill. Thank you for the opportunity to testify in its opposition.

LATE

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To: Senate Committee on Judiciary

From: Cheryl Kakazu Park, Director

Date: February 20, 2019, 10:00 a.m.
State Capitol, Conference Room 325

Re: Testimony on S.B. No. 1453
Relating to the Uniform Information Practices Act

Thank you for the opportunity to submit testimony on this bill, which would essentially make the judicial functions of the courts of this State subject to the Uniform Information Practices Act (UIPA), chapter 92F, HRS, by changing the definition of an "agency" subject to the UIPA to eliminate the exemption for "the nonadministrative functions of the courts of this State," which is to say the courts' judicial functions. The Office of Information Practices (OIP) provides the following **comments on this bill and suggestions for amendments.**

The Judiciary is an independent branch of government, whose mission is to administer justice in an impartial, efficient, and accessible manner in accordance with the law. In recognition of its independence, the Judiciary's judicial functions are not currently subject to the requirements of the UIPA. Only the Judiciary's non-judicial, administrative functions are subject to the UIPA, which requires disclosure of requested records unless access is restricted or closed by law. HRS § 92F-11(a).

A crucial function of the Judiciary is dispute resolution, which it renders through court rulings, orders, and opinions. If this bill is adopted, drafts of

court rulings, orders, and opinions prepared before the finalization of such decisions, as well as predecisional internal memos between judges/justices and their law clerks or staff, would arguably be open to public inspection under the Hawaii Supreme Court's recent 3-2 decision in Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (2018) (Peer News), which is explained later in our testimony. Although the Judiciary did not expressly cite to the Court's Peer News decision, it apparently agrees that this would be the result, as it stated in its testimony last week strongly opposing the identical House companion bill, HB 1478:

> **Requiring Disclosure of Draft Appellate Opinions and correspondence Relating to Court Opinions Strikes at the Core of the Adjudicative Process**
>
> . . .
>
> Another aspect of our appellate court's routine work is disseminating among justices and their staff, pre-decisional drafts and correspondence, developed and communicated for the purpose of final decision-making. This procedure is essential to the adjudicatory process. If nonadministrative court documents become subject to the UIPA, these drafts and written communications between justices, law clerks and other staff could be subject to disclosure. This could create a chilling effect that would substantially inhibit the flow of communication, and could adversely impact the very decision-making process that is imperative to well-conceived and appropriately vetted court opinions. Impeding that fundamental process would undermine the adjudicatory process that lays at the core of our judicial system.

Testimony of the Judiciary on H.B. 1478 to the House Judiciary Committee on February 12, 2019 at page 4 (bolded material in original; underlined emphasis added).

In their individual capacity, two attorneys who are board members of the American Judicature Society also opposed HB 1478 for similar reasons, stating:

> 1. **The proposed amendment would allow access to, among other things, documents related to the pre-decisional considerations of courts in adjudicating the merits of cases.** In considering and analyzing the merits of a case, the courts often consider a variety of matters, including memoranda or other documents prepared by law clerks, staff or other judges. In considering the material facts in the court record and the applicable legal authorities, it is important for a court to fully vet the parties' respective positions, to consider the pros and cons of each side, and to have the ability to frankly assess the merits of a case. Should the pre-decisional documents of a court be subject to public access, it would greatly hinder a court's ability to fully consider and render its decisions. The courts would be less likely to freely and fully communicate with staff and other judges about issues in cases, because documents containing such information would then be accessible to parties and others in ongoing cases or for use in subsequent cases. This would have a detrimental impact on the course of litigation in many cases, as parties seek to use information gained through UIPA [sic] in making future arguments and affecting the positions of the parties. In short, parties would constantly seek access to pre-decisional documents in an effect to impact cases going forward, which would be significantly disruptive to the courts and the parties in managing cases, in seeking to timely resolve litigation, and in allowing courts to make decisions solely on the merits of the cases before the court. Most importantly, the proposed revision to Hawaii Revised Statutes section 92F-3 [sic] would negatively affect the judiciary's ability to conduct full, frank and thorough analyses of all sides of the issues that come before the courts.

OIP agrees with the testimony referenced above that the disclosure of predecisional internal court documents could have a deleterious effect on the Judiciary's ability to both efficiently and fairly resolve cases, just as the disclosure of predecisional and deliberative internal agency documents of the legislative and executive branches could create the same "chilling effect that would substantially inhibit the flow of communication, and could adversely impact the very decision-making process that is imperative to well-conceived and appropriately vetted"

agency opinions. **Like the adverse effects on the courts' adjudicatory function, OIP believes that the same chilling effect would undermine the decision-making process that lays at the core of the legislative and executive branches' fundamental decision-making functions.** If, as this bill suggests, the Legislature believes that the Judiciary should be required to disclose its own internal decision-making in the same way it has found the UIPA to require for other government agencies, OIP would respectfully suggest that a more productive way to achieve this result would be for the Legislature to amend this bill to clarify the standard it believes should apply to disclosure of predecisional materials of all government agencies under the UIPA, instead of deleting the UIPA's current exemption for court files. Should this Committee wish to take that approach, OIP has attached language it could use to amend the UIPA to more clearly express the Legislature's intent.

Peer News Case

Although OIP was not a party in the case and no specific OIP opinion was challenged on appeal,[1] a closely divided Hawaii Supreme Court in a 3-2 majority opinion in Peer News overturned nearly 30 years of OIP's precedent recognizing that public disclosure of predecisional and

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[1] The case considered by the Hawaii Supreme Court was brought by Peer News, dba Civil Beat (Appellant), which challenged a decision by the City and County of Honolulu (City) and its Department of Budget and Fiscal Services (collectively, Appellees) to withhold certain internal government documents generated during the process of establishing the City's annual operating budget. Neither party sought OIP's opinion on the matter, and instead Appellant directly initiated a lawsuit that was ultimately resolved by the Court's decision. The Appellees' arguments before the Court relied heavily upon a long line of OIP opinions that had recognized the deliberative process privilege since 1989, and the Attorney General's office filed an amicus brief in support of the Appelleees' position and the deliberative process privilege. Given its long-standing cases adopting and interpreting the deliberative process privilege and the UIPA's clear instruction that courts must consider OIP's opinions and rulings as "precedent unless found to be palpably erroneous," OIP let its prior opinions speak for themselves and continued to work on reducing its formal case backlog and doing its other duties, while leaving it to the Court to ultimately decide the privilege's legal effect. HRS § 92F-15(b) (2012).

deliberative memoranda and correspondence transmitted within or between government agencies—such as staff recommendations, notes, drafts, and internal memoranda exchanging ideas, opinions, and editorial judgments before a decision or policy is finalized and made public—could impede the candid and free exchange of ideas and opinions within an agency for fear of being subject to public ridicule or criticism, and thus could frustrate agencies' decision-making function. **Besides encouraging this candid and free exchange within and among agencies, the DPP is based on the recognition that the premature disclosure of proposed policies or tentative decisions before they have been finally formulated or adopted can lead to public confusion and unnecessary divisiveness based on reasons, rationales, or proposals that were not ultimately adopted or expressly incorporated by reference into the final document.** For these and other reasons, OIP had acknowledged in one of its earliest opinions—OIP Opinion No. 89-09—and many more that followed, that the deliberative process privilege (DPP) protected from disclosure under HRS § 92F-13(3) predecisional and deliberative records that, by their nature, must be confidential in order for government to avoid the frustration of the legitimate government function of decision-making.[2]

In December 2019, however, the majority consisting of three justices in Peer News held that OIP was palpably erroneous in recognizing the DPP because it was contrary to the "plain language" of the law and legislative intent at the time of the UIPA's adoption. (Majority opinion, found under Court Opinions on OIP's Opinions page at oip.hawaii.gov) Strictly construing the UIPA's express language

[2] HRS § 92F-13(3) provides exceptions to the general rule that government records must be disclosed upon request and states that Part II of the UIPA "shall not require disclosure of: . . . (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function."

in HRS § 92F-2 stating that "it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of government agencies—shall be conducted as openly as possible," the majority concluded that the DPP was contrary to the UIPA's policy as it shielded governmental decision-making from disclosure. (Majority at 16-18.) Although the majority opinion provided some hints in dicta that certain types of predecisional and deliberative draft documents may still qualify for withholding "when the government can identify a concrete connection between disclosure and frustration of a particular legitimate government function" by "clearly describ[ing] what will be frustrated by disclosure and provid[ing] more specificity about the impeded process than simply 'decision making'" (Majority at 18, n. 15), the majority clearly rejected the use of the DPP based on its reading of the legislative history. (Majority at 31.) The majority also rejected "decision-making" as a legitimate government function that could be protected by the frustration exception of HRS § 92F-13(3) because it "is such a broad and ill-defined category that it threatens to encompass nearly all government actions, which almost inevitably involve decisions of some sort" and even illegitimate actions. (Majority at 33-34.)

Reading the same law and legislative materials, however, two other justices in the dissenting opinion disagreed with the majority and took a completely opposite interpretation to conclude that OIP was not palpably erroneous in recognizing a DPP. (Dissenting opinion, found under Court Opinions on OIP's Opinions page at oip.hawaii.gov) The dissent focused on the original legislative history stating, "Rather than list specific records in the statute, as the risk of being over-or under-inclusive, your committee prefers to categorize and rely on the developing common law. The common law is ideally suited to the task of balancing competing interest [sic] in the grey areas and unanticipated cases, under the

guidance of the legislative policy." Senate Standing Committee Report No. 2580 (March 31, 1988). Rather than taking the majority's "extreme" position of altogether rejecting the DPP, the dissent suggested a "middle ground approach that would require more detailed justification by the agency asserting the privilege and require a court to **balance the government's interest in confidentiality with the public's interest in disclosure**." Dissent at 4-5 (emphasis added).

OIP's Position

Given the context in which the UIPA was passed, evidence of which was apparently not presented to or considered by the majority in rendering its Peer News opinion, **OIP believes the dissenting opinion more accurately reflects the original intent of the Legislature to leave it to OIP and the courts to develop the common law to interpret and administer the new law because there would be many grey areas and unanticipated issues to be decided as time went on, and that OIP was not palpably erroneous in recognizing a DPP for certain internal agency records.**

OIP also agrees with the majority and dissenting opinions that the DPP should not be an absolute privilege that will be automatically applied to any document that is predecisional and deliberative, and indeed its opinions have recognized several limitations on the DPP.[3] **As the dissenting**

[3] In several opinions, OIP has recognized limitations on the DPP and has agreed with cases that "appropriately balance the often competing policies underlying freedom of information laws, and those that underlie the deliberative process privilege." OIP Opinion Letter No. 95-24 at 21 (requiring disclosure of aggregate data that was largely factual in nature in a report that surveyed the effectiveness, productivity, and employee satisfaction of state agencies, while protecting from disclosure the verbatim comments of survey respondents); see also OIP Opinion Letter No. 00-01 (discussing limitations on the DPP).

opinion suggested in Peer News, the DPP could be salvaged by adding a balancing test.[4] Dissent at 31-32.

Rather than disrupting nearly three decades of OIP's caselaw recognizing the DPP, OIP would like to continue the development of the common law with improvements based on more specific guidance from the current Legislature. OIP thus respectfully provides the **attached proposal for consideration** by this Committee in amending the current bill. **Specifically, this proposal would codify the DPP by adding a new exemption to HRS § 92F-13 that would protect from disclosure "[d]rafts, internal memoranda and correspondence, and other deliberative and pre-decisional materials which are a direct part of an agency's internal decision-making process and disclosure of which would impair the agency's ability to make sound and fair decisions, but only to the extent that such impairment outweighs the public interest in disclosure[.]" This statutory recognition of the DPP would allow agencies to continue shielding the core of their internal decision-making process, but only if it satisfies a new balancing test to ensure that deliberative and predecisional records could only be withheld on a case by case basis so long as the agency's need for confidentiality outweighed the public's interest in disclosure. As always, the burden remains on the agency to justify this exemption.** HRS § 92F-15(c). Merely claiming that a document is predecisional and deliberative would not be sufficient for the proposed exception, as the agency must also specifically show under the

[4] Indeed, as an alternative position, the Appellant in Peer News had also argued for the adoption of a balancing test when applying the DPP. Plaintiff-Appellant's Opening Brief filed May 2, 2016 at 25; Plaintiff-Appellant's Reply Brief filed August 22, 2016 at 9.

balancing test how its need for confidentiality outweighs the public's interest in disclosure.

Additionally, OIP does not believe that a technical indexing procedure, or what is commonly referred to as a "Vaughn index," should be statutorily mandated in all cases. OIP typically reviews the entire record, already generally obtains the same information on its Notice to Requester form, and OIP does not believe that burdening agencies with documenting the page by page, line by line technical minutiae required by a "Vaughn index" is necessary in most cases, particularly since the great majority of UIPA requests are not appealed to OIP or the courts. **Instead, OIP would like to reserve the need to require such a "Vaughn index" on a case by case basis when considering appeals of denials of access under the UIPA.**

If this Committee chooses to accept OIP's proposed amendment to directly address disclosure of predecisional materials instead of removing the Judiciary's UIPA exemption for its judicial functions, the Legislature can avoid engaging in a separation of powers dispute while allowing the decision-making function by all branches of State and County government—Executive, Legislative, and Judicial—to be protected in appropriate circumstances where the agency's need for confidentiality outweighs the public's interest in disclosure.[5] **OIP believes that its suggested amendment would address the Court's concerns about the DPP while continuing to respect the separation of powers between the Executive, Legislative, and Judicial branches of government and honoring the original legislative intent of the UIPA.**

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[5] If the Legislature adopts OIP's proposal and still retains the original language changing the UIPA's definition of "agency" to essentially include the Judiciary, then OIP recommends that a **severability clause be added** to the bill in the event it is challenged as being unconstitutional.

OIP’s proposed amendment to SB1453

SECTION 1. In 1988, the legislature passed the uniform information practices act (modified), chapter 92F, Hawaii Revised Statutes. The legislature declared in the uniform information practices act that "it is the policy of this State that the formation and conduct of public policy - the discussions, deliberations, decisions, and action of government agencies - shall be conducted as openly as possible."

Part II of the uniform information practices act requires state and county government agencies, including the legislature and the judiciary's administrative offices, to allow, upon request, public access to government records, unless the records qualify for one of five exceptions to disclosure found in section 92F-13, Hawaii Revised Statutes. When it passed the uniform information practices act, the legislature did not intend to list specific records that could be withheld but instead created categories of reasons for withholding records or information with the intent to rely on the common law being developed by the courts and the decisions of the newly created office of information practices.

Beginning in 1989, the office of information practices recognized that public disclosure of pre-decisional and deliberative memoranda and correspondence transmitted within or between government agencies, such as staff recommendations, notes, drafts, and internal memoranda exchanging ideas,

opinions, and editorial judgments before a decision or policy is finalized and made public, could impede the candid and free exchange of ideas and opinions within an agency for fear of being subject to public ridicule or criticism and could thus frustrate agencies' decision-making function. Moreover, the premature disclosure of proposed policies or tentative decisions before they have been finally formulated or adopted can lead to public confusion and unnecessary divisiveness based on reasons, rationales, or proposals that were not ultimately adopted or expressly incorporated by reference into the final document.

The legislature finds that the protection of internal decision-making materials is necessary to protect agencies' ability to freely and candidly share views internally and thus reach sound and fair decisions, which is consistent with the legislature's original intent in passing the uniform information practices act.

On December 21, 2018, however, a majority of three justices of the Hawaii supreme court in *Peer News LLC v. city and County of Honolulu*, 143 Hawai'i 472 (2018), concluded that the legislature never intended for such pre-decisional and deliberative records to be withheld from public access under the uniform information practices act exception in section 92F-13(3), Hawaii Revised Statutes.

The legislature further finds that the dissenting opinion by two justices of the Hawaii supreme court in *Peer News LLC* provided a more accurate assessment of the legislature's intent when it established the uniform information practices act. The dissent concluded that the legislative history underlying chapter 92F, Hawaii Revised Statutes, did not actually indicate that the legislature intended to omit the deliberative process privilege. However, while the legislature believes that the government should justify why a specific document qualifies for protection and that the government's interest in confidentiality must be balanced against the public's interest in disclosure, the legislature rejects the dissent's proposal, which would require all agencies to provide an index as described in *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973), whenever an agency denies access to all or a portion of a record. Instead, the legislature will leave it to the courts and the office of information practices, which hear appeals of denials of access under the uniform information practices act, to decide if such an index is desirable on a case-by-case basis.

The legislature further intends that government records should be disclosed when the public interest in disclosure outweighs the potential impairment to the agency's ability to reach sound and fair decisions. Consequently, in applying the deliberative process privilege, the courts and the office of

information practices must balance the interests of the public and government agencies.

The purpose of this Act is to clarify the legislature's intent regarding internal deliberative and pre-decisional materials of government agencies.

SECTION 2. Section 92F-13, Hawaii Revised Statutes, is amended to read as follows:

"92F-13 Government records; exceptions to general rule. This part shall not require disclosure of:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

(2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;

(3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;

(4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; [~~and~~]

(5) Drafts, internal memoranda and correspondence, and other deliberative and pre-decisional materials which are a direct part of an agency's internal decision-making process and disclosure of which would impair the agency's ability to make sound and fair decisions, but only to the extent that such impairment outweighs the public interest in disclosure; and

(6) Inchoate and draft working papers of legislative committees, including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

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SENATE COMMITTEE ON JUDICIARY

Wednesday, February 20, 2019, 10 AM, Conference Room 016
SB 1453, Relating to the Uniform Information Practices Act
TESTIMONY
Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair Rhoads, Vice-Chair Wakai and Committee Members:

The League of Women Voters of Hawaii opposes SB 1453 which makes UIPA applicable to non-administrative functions of state courts. We also strongly oppose OIP's proposed amendments to the companion bill, HB 1478.

Adjudication and interpretation of what public laws, ordinances, and rules require is unlikely to improve if written communications between judges and their law clerks and pre-final court rulings, orders, and opinions are open to public inspection and comment. In contrast, Hawaii's Constitution, Sunshine Law, and UIPA all recognize that public policy making improves when pre-final discussions and deliberations of government agencies are conducted as openly as possible.

Thank you for the opportunity to present testimony.

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February 15, 2019

Senator Karl Rhoads, Chair of the Senate Committee on Judiciary
Senator Glenn Wakai, Vice Chair of the Senate Committee on Judiciary

Testimony in Opposition to
Senate Bill 1453 Relating to the Uniform Information Practices Act
Hearing Date: Wednesday, February 20, 2019, 10:00 a.m.

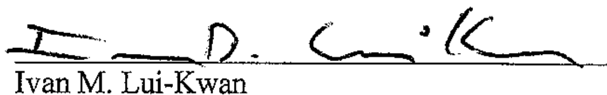
Dear Chair Rhoads, Vice Chair Wakai and Members
of the Senate Committee on Judiciary:

The undersigned John M. Tonaki and Ivan M. Lui-Kwan are board members of the American Judicature Society, but present the following testimony in opposition to Senate Bill 1453 as individuals.

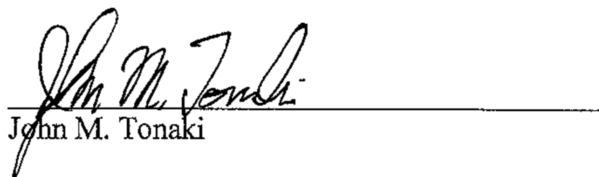
We oppose Senate Bill 1453 for the following reasons:

1. **The proposed amendment would allow access to, among other things, documents related to the pre-decisional considerations of courts in adjudicating the merits of cases.** In considering and analyzing the merits of a case, the courts often consider a variety of matters, including memoranda or other documents prepared by law clerks, staff or other judges. In considering the material facts in the court record and the applicable legal authorities, it is important for a court to fully vet the parties' respective positions, to consider the pros and cons of each side, and to have the ability to frankly assess the merits of a case. Should the pre-decisional documents of a court be subject to public access, it will greatly hinder a court's ability to fully consider and render its decisions. The courts would be less likely to freely and fully communicate with staff and other judges about issues in cases, because documents containing such information would then be accessible to parties and others in ongoing cases or for use in subsequent cases. This would have a detrimental impact on the course of litigation in many cases, as parties seek to use information gained through UIPA in making future arguments and affecting the positions of the parties. In short, parties would constantly seek access to pre-decisional documents in an effort to impact cases going forward, which would be significantly disruptive to the courts and the parties in managing cases, in seeking to timely resolve litigation, and in allowing courts to make decisions based solely on the merits of the cases before the court. Most importantly, the proposed revision to Hawaii Revised Statutes section 92F-3 would negatively affect the judiciary's ability to conduct full, frank and thorough analyses of all sides of the issues that come before the courts.

2. **The proposed amendment could also open to public access documents that are currently deemed confidential under court rules or procedures.** Another concern posed by Senate Bill 1453 is that it may have a variety of unintended consequences, such as making open to public access court documents that are currently deemed confidential given the circumstances of cases and the types of information involved. For instance, in criminal cases, reports related to a defendant's sentencing are often kept confidential to the parties involved because they contain a variety of personal information.



Ivan M. Lui-Kwan



John M. Tonaki

Testimony of Daniel Foley in opposition to SB1453, RELATING TO THE UNIFORM INFORMATION PRACTICES ACT

Dr. Mr. Chairman and members of the Judiciary Committee,

I submit this testimony in opposition to SB1453 based on my experience of 16 years as a litigator in our state courts and another 16 years as a judge on the Intermediate Court of Appeals.

There were good reasons why the definition of agency in HRS Section 92F-3 excluded the nonadministrative functions of the courts. Those reasons are still valid today.

The primary role of courts is to decide cases. This role of the courts is its nonadminisrative function. These cases are filed with the most intimate and personal matters of the parties, witnesses and others that appear in these cases. They involve sexual and child abuse, custody of children, witnesses to crimes, personal injury, commercial disputes, and every kind of injury and dispute in this state.

Allowing any member of the public to request and access case information that is not already available through public court filings and hearings would result in an invasion of the privacy of citizens, increase the costs and complexity of litigation, and create a real opportunity for mischief to interfere in the disputes of others. Although Chapter 92F attempts to balance the public's right to know what its government is doing with the privacy rights of citizens, the Chapter did not contemplate applying to and therefore does not address the unique role of the courts in deciding cases.

If Chapter 92E was revised to apply to cases before the courts, it would spawn a new era of litigation within litigation. As a case proceeded, members of the public with no standing to intervene in a case could file information requests that would need to be addressed by the parties and the judge. Whether the request was granted or denied, appeals could follow. Litigation is expensive and time consuming already. It does not need this additional layer of litigation within litigation.

This bill would have a special negative impact on appellate courts. Appellate courts consider cases in panels of three judges or five justices. This bill would allow the public access to the internal deliberations and communications between judges or justices considering an appeal, writ or original proceeding. I am not aware of any jurisdiction where this is allowed. It would certainly result in less communication between the judges and justices since all would be open to any member of the public. I do not see how this could be a desirable goal.

It is not clear to me what the true intent of SB1453 is and whether the person that asked the Senate President to introduce the bill fully considered the problems it would create. Maybe this will come out during your committee hearing.

Respectfully submitted,
Daniel Foley