

DAVID Y. IGE  
GOVERNOR



THOMAS WILLIAMS  
EXECUTIVE DIRECTOR

KANOE MARGOL  
DEPUTY EXECUTIVE DIRECTOR

**STATE OF HAWAII**  
**EMPLOYEES' RETIREMENT SYSTEM**

**TESTIMONY BY THOMAS WILLIAMS**  
**EXECUTIVE DIRECTOR, EMPLOYEES' RETIREMENT SYSTEM**  
**STATE OF HAWAII**

**TO THE SENATE COMMITTEE ON GOVERNMENT REFORM**

**ON**

**HOUSE BILL NO. 2303**

**February 11, 2022**

**9:30 A.M.**

**Conference Room 309, via Videoconference**

**RELATING TO THE UNIFORM INFORMATION PRACTICES ACT.**

Chair McKelvey, Vice Chair Wildberger, and Members of the Committee,

H.B. 2303 proposes that certain deliberative and pre-decisional materials that are a direct part of a government agency's internal decision-making process are not subject to disclosure if the disclosure of such materials would impair the agency's ability to make sound and fair decisions, but only to the extent that the impairment outweighs public interest in disclosure. The ERS staff would like to provide comments in support of H.B. 2303.

H.B. 2303 would reinstate the deliberative process privilege in UIP matters, with a balancing test of the government's interest in confidentiality vs. the public interest in disclosure. It would apply to requests for 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.



**Employees' Retirement System**  
of the State of Hawaii

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The policy underlying the deliberative process privilege has been described as follows:

The privilege has a number of purposes: it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

*Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980). "Disclosure of these documents would potentially chill the necessary discourse which must occur for the government to make well educated and rational decisions". *Aland v. Mead*, 2014 WY 83, ¶ 69, 327 P.3d 752, 771 (Wyo. 2014).

The ERS agrees with the dissent in *Peer News LLC v. City & Cty. of Honolulu*, 143 Hawaii 472 (2018) ("*Peer News*"), that the deliberative process privilege should be recognized.

(1) The dissent states that it appears that the legislative history underlying the UIPA does not actually indicate that the legislature clearly intended to omit the deliberative process privilege from the UIPA. *Peer News*, 143 Hawaii at 498.

(2) The dissent proposes a test that would "balance the government's interest in confidentiality with the public's interest in disclosure." *Peer News*, 143 Hawaii at 490.

As proposed in H.B. 2303, the legislature should codify the deliberative process privilege and adopt a balancing test. See *Chester Water Auth. v. Pennsylvania Dep't of Cmty. & Econ. Dev.*, 249 A.3d 1106, 1113 (Pa. 2021) (stating that "a balancing of the aim to promote the free exchange of deliberative communications against the Law's overarching policy of openness is required. It is the General Assembly's prerogative, however, to conduct the necessary balancing.")

Other states have codified the deliberative process privilege in their public records statutes. See, e.g., Pennsylvania, 65 Pa. Stat. Ann. § 67.708 ("internal, predecisional deliberations of an agency ... or any research, memos or other documents used in the predecisional deliberations"); Michigan, Mich. Comp. Laws Ann. § 15.243(m) ("Communications and notes within a public body or between public bodies of an advisory nature ..."); Washington, Wash. Rev. Code Ann. § 42.56.280 ("Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended ..."); South Dakota, S.D. Codified Laws § 1-27-1.7 ("Drafts, notes, recommendations, and memoranda in which opinions are expressed or policies formulated or recommended ...").

Courts in other states have recognized competing public and governmental interests and have applied a balancing test in applying the deliberative process privilege. See *Griswold v. Homer City Council*, 428 P.3d 180, 186 (Alaska 2018) ("Public officials may

assert this privilege and withhold documents when public disclosure would deter the open exchange of opinions and recommendations between government officials. ... [T]he court balances the public's interest in disclosure against the agency's interest in confidentiality"); *Bukowski v. City of Detroit*, 478 Mich. 268, 275, 732 N.W.2d 75, 79 (2007) ("the trial court must engage in the balancing test and determine if the public interest in encouraging frank communication clearly outweighs the public interest in disclosure"). See also *City of Colorado Springs v. White*, 967 P.2d 1042, 1054 (Colo. 1998) (cited by Dissent in *Peer News*).

Requiring disclosure of all discussions and perspectives during a deliberative process would inhibit free discussion within government agencies, including alternative views. The balancing test is a reasonable alternative to unfettered disclosure and would weigh the interests of the government and the public.

The ERS staff believes that the ERS Board of Trustees would strongly support H.B. 2303 and encourage its passage.

Thank you for this opportunity to testify.



# UNIVERSITY OF HAWAII SYSTEM

## Legislative Testimony

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Testimony Presented Before the  
House Committee on Government Reform  
February 11, 2022 at 9:30 a.m.

by  
Carrie Okinaga  
Vice President for Legal Affairs/UGC  
University of Hawai'i System

HB 2303 – RELATING TO THE UNIFORM INFORMATION PRACTICES ACT

Chair McKelvey, Vice Chair Wildberger, and members of the committee:

Thank you for the opportunity to present testimony today.

The University of Hawai'i (University) supports HB 2303, which among other things, specifies that certain deliberative and pre-decisional materials that are a direct part of a government agency's internal decision-making process are not subject to disclosure if the disclosure of such materials would impair the agency's ability to make sound and fair decisions, but only to the extent that the impairment outweighs public interest in disclosure.

The University supports this bill because it strikes an appropriate and needed balance between the public's interest in disclosure, and the public's need for government entities to be able to deliberate towards well-informed, stress-tested, and thoughtful decisions.

Thank you for this opportunity to testify.

DAVID Y. IGE  
GOVERNOR



CRAIG K. HIRAI  
DIRECTOR

GLORIA CHANG  
DEPUTY DIRECTOR

EMPLOYEES' RETIREMENT SYSTEM  
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND  
OFFICE OF THE PUBLIC DEFENDER

**STATE OF HAWAII  
DEPARTMENT OF BUDGET AND FINANCE**

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ADMINISTRATIVE AND RESEARCH OFFICE  
BUDGET, PROGRAM PLANNING AND  
MANAGEMENT DIVISION  
FINANCIAL ADMINISTRATION DIVISION  
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

**WRITTEN ONLY**  
TESTIMONY BY CRAIG K. HIRAI  
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE  
TO THE HOUSE COMMITTEE ON GOVERNMENT REFORM  
ON  
HOUSE BILL NO. 2303

**February 11, 2022  
9:30 a.m.  
Room 309 and Videoconference**

**RELATING TO THE UNIFORM INFORMATION PRACTICES ACT**

The Department of Budget and Finance (B&F) supports House Bill (H.B.) No. 2303. This measure amends Section 92F-13, HRS, to except drafts, internal memoranda and correspondence, and certain other deliberative and pre-decisional materials produced by government agencies from disclosure requirements under the Uniform Information Practices Act if such disclosure would impair the government agency's ability to make sound and fair decisions to an extent that outweighs the public interest in disclosure of government records.

This measure effectively balances the competing public interests of promoting effective decision-making processes by government agencies, and the availability of government records for review by all. The deliberative process privilege proposed in H.B. No. 2303 is appropriately limited to only the extent necessary to protect an agency's ability to come to a fair decision.

Thank you for the opportunity to provide testimony in support of this bill.

# OFFICE OF INFORMATION PRACTICES

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To: House Committee on Government Reform

From: Cheryl Kakazu Park, Director

Date: February 11, 2022, 9:30 a.m.  
State Capitol, Conference Room 309 and Via Videoconference

Re: Testimony on H.B. No. 2303  
Relating to the Uniform Information Practices Act

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Thank you for the opportunity to submit testimony on this bill, which would clarify the Legislature's intent to allow agencies to withhold certain deliberative and pre-decisional records where the potential impairment of the agency's ability to make sound and fair decisions outweighs the public interest in disclosure. The Office of Information Practices (OIP) leaves the question of the Legislature's intent to the Legislature to determine, but offers comments on the history of the "deliberative process privilege" that formerly allowed agencies to withhold such materials from public disclosure under the Uniform Information Practices Act, chapter 92F, HRS (UIPA) and the effect that restoration of a form of that privilege would have on agencies' ability to freely and frankly discuss options in the course of making decisions and on public access to deliberative materials.

As reflected in the purpose clause of this bill, for nearly 30 years the Office of Information Practices recognized the "deliberative process privilege" as a form of the UIPA's exception to disclosure for records whose disclosure would frustrate a legitimate government function, section 92F-13(3), HRS. In 2018, though, the Hawaii Supreme Court overturned that interpretation in a close 3-2

decision in Peer News LLC v. City and County of Honolulu, 143 Haw. 472, 431 P.3d 1245 (2018). In the three years since then, agencies have generally been required to disclose draft reports or other documents, internal memoranda discussing proposed agency policies and prospective decisions, and similar deliberative materials, unless a different exception to disclosure applies.

Interestingly, the majority and dissenting opinions in Peer News both relied upon the “plain language” of the UIPA and its legislative history, yet reached entirely opposite conclusions. OIP has extensively analyzed both opinions in a [March 2020 Hawaii Bar Journal article](#) as well as its [online analysis](#) including an [attachment of supporting documents](#), which are posted on the Opinions page of OIP’s website at <https://oip.hawaii.gov/laws-rules-opinions/opinions/>. These documents examine key legislative history that was not presented to or considered by the Hawaii Supreme Court in the Peer News case. **The missing legislative history would have made clear that the Legislature that adopted the UIPA in 1988 intended to leave it to OIP and the courts to balance competing interests to determine whether disclosure would be required in grey areas and unanticipated cases, which is what this bill would do.**

The current Legislature has the opportunity to return to the original intent of the UIPA by adopting this bill. **The effect of this bill would be to restore agencies’ ability to withhold some deliberative material, but only when the impairment to the agency’s ability to reach sound and fair decisions outweighs the public interest in disclosure.** Thus, while this proposal would represent a limitation of public access to agencies’ internal deliberative records, it would also benefit agencies by allowing them to avoid opening up their internal deliberations on prospective decisions when doing so would harm the agency’s ability to make good decisions more than it would benefit

the public access interest. OIP believes this approach represents a reasonable balance between agencies' ability to have some room to fully and frankly discuss proposed policies or tentative decisions outside the glare of publicity, and the public's ability to have access to such materials when the public interest is equal to or stronger than the potential harm to the agency. Ultimately, it is for this Legislature to say whether the balanced approach set forth in this proposal better represents its intent than the 2018 Hawaii Supreme Court decision eliminating the ability for an agency to argue that disclosure of requested records would frustrate its ability to reach sound and fair decisions.

Thank you for considering OIP's testimony.



THE CIVIL BEAT  
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House Committee on Government Reform  
Honorable Angus L.K. McKelvey, Chair  
Honorable Tina Wildberger, Vice Chair

**RE: Testimony Opposing H.B. 2303, Relating to Uniform Information Practices Act**  
Hearing: February 11, 2022 at 9:30 a.m.

Dear Chair and Members of the Committee:

My name is Brian Black. I am the Executive Director of the Civil Beat Law Center for the Public Interest, a nonprofit organization whose primary mission concerns solutions that promote governmental transparency. Thank you for the opportunity to submit testimony **opposing H.B. 2303**.

According to Congress, in reference to the deliberative process privilege: “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. Congress has been steadily working to scale back the existence of the deliberative process privilege under the federal Freedom of Information Act. It is the height of government secrecy for the Legislature to consider enacting an exception to public records that is universally reviled by the public in every other jurisdiction in the United States where it exists.<sup>1</sup>

The privilege is so abused in other jurisdictions because, except final reports, virtually everything that government agencies do is deliberative and thus subject to the privilege. Records that Hawai`i agencies previously withheld under the deliberative process privilege included: departmental budget requests; agency recommendations regarding publicly discussed permit applications; DOTAX forecasts regarding general fund tax revenues; audit recommendations; evaluations of overall agency performance; formal inter-departmental comments on the proposed sale of park land; consultant reports; and revenue estimates regarding proposed legislation.

Nothing justifies adopting a deliberative process privilege to protect such documents. To the extent that there are legitimate reasons to withhold documents, other exceptions already exist, and as the Hawai`i Supreme Court recognized, notes and drafts are still protected from disclosure. *Peer News LLC v. City & County of Honolulu*, 143 Hawai`i 472, 480 n.15, 431 P.3d 1245, 1253 n.15 (2018). Also acknowledging the concerns over disclosing the identity of specific government employees in internal discussions, the Hawai`i Supreme Court explained that the employees’ identities may be redacted “if

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<sup>1</sup> Many jurisdictions – besides Hawai`i – do not have the deliberative process privilege.

their privacy interests outweigh the public's interest in disclosure" because disclosure "may expose specific individuals to negative consequences." *Id.*

For over three years, agencies have not had authority to invoke a deliberative process privilege. The world has not fell apart. Agencies have continued to operate. Unless and until agencies can identify documents that properly should be withheld, but cannot be withheld under the UIPA exceptions absent a deliberative process privilege, this bill is unsound and regressive.

Thank you again for the opportunity to testify **opposing** H.B. 2303.

Statement Before The  
Friday, February 11, 2022  
9:30 AM  
Via Videoconference, Conference Room 309

in consideration of  
**HB 2303**

**RELATING TO THE UNIFORM INFORMATION PRACTICES ACT.**

Chair McKELVEY, Vice Chair WILDBERGER, and Members of the House Government Reform Committee

Common Cause Hawaii submits testimony in opposition to HB 2303, which (1) clarifies the legislature's intent regarding internal deliberative and pre-decisional materials of government agencies and (2) specifies that certain deliberative and pre-decisional materials that are a direct part of a government agency's internal decision-making process are not subject to disclosure if the disclosure of such materials would impair the agency's ability to make sound and fair decisions, but only to the extent that the impairment outweighs public interest in disclosure.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization focused on upholding the core values of our representative democracy through advocating for a government that is ethical, transparent, and accountable to the people of Hawaii and not special interests.

The purpose of the Uniform Information Practices Act, Hawaii Revised Statutes (HRS) Chapter 92F, is to open government processes to public scrutiny and participation, which are the only viable and reasonable methods of protecting the public's interest. HRS § 92F-2. This means interpreting narrowly the exceptions for when government records may not be disclosed. HB 2303 would expand those exceptions, which contradicts the intent of HRS Chapter 92F.

For this reason, Common Cause Hawaii is testifying in opposition to HB 2303. If you have any questions, please contact me at [sma@commoncause.org](mailto:sma@commoncause.org).

Very respectfully yours,

Sandy Ma  
Executive Director, Common Cause Hawaii

**HB-2303**

Submitted on: 2/9/2022 12:55:31 PM

Testimony for GVR on 2/11/2022 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Ray Kamikawa	Individual	Oppose	No

Comments:

Chair Nakashima and members of the GVR Committee.

I strongly oppose this bill. The Department of Taxation opposed my efforts to obtain the assumptions and bases for one of their revenue estimates on a tax bill. I asked for this information because the revenue estimates seemed very arbitrary. I had to take the Department to court and obtain an order the Department to hand over the assumptions. Indeed, the Legislature should have the benefit of these assumptions rather than bare revenue estimates for all tax bills. Otherwise there will be no way to objectively determine whether tax bill revenue estimates are based on solid data or picked out of the air. If the Department used the deliberative process privilege to deny access to the information behind their revenue estimates, who knows what other disclosures they will deny no matter how innocuous if this bill were to pass. In fact, revenue estimates should be required (and underlying assumptions disclosed) for all tax bills before the Legislature. Let's not overturn Supreme Court precedent in *Peer News* just to protect the Department of Taxation from legitimate scrutiny. Thank you.

WRITTEN TESTIMONY  
OF  
ADAM JANSEN, Ph.D.  
CITIZEN OF THE STATE OF HAWAII  
TO THE  
COMMITTEE ON  
GOVERNMENT REFORM

FEB 11, 2022, 9:30 A.M.  
VIDEOCONFERENCE, STATE CAPITOL

H.B. 2303

RELATING TO THE UNIFORM INFORMATION PRACTICES ACT

Chair McKelvey, Vice Chair Wildberger, and Members of the Committee, thank you for the opportunity to testify on H.B. 2303

As a private citizen of the State and a credentialed expert on issues dealing with records use and abuse, I oppose the wording of this bill and like to provide the following comments:

1. The intent of the Uniform Information Practices Act is clearly stated in §HRS92F-2:

“In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the legislature declares 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.”

2. Contained within that purpose statement is “opening up the decision making process to public scrutiny” (i.e., those processes contained in internal correspondence, staff recommendations, and opinions that this bill seeks to keep from the public) as well as

“discussions, deliberations” that are part of those functions of government that should be “conducted as openly as possible”.

3. While I personally and professional understand the intent of this bill to ensure fair and equitable deliberative processes within and between State agencies, the broad wording of this bill significantly impinges upon, and contradicts, the clearly state purpose of the UIPA.
4. As witnessed at the Federal level, the use of labeling a record ‘draft’ or ‘internal’ as a stated reason for not providing public access to the requested records provides broad opportunities for unacceptable blanket abuse of public disclosure laws in order to hide or obscure governmental misconduct.
5. Per Hawaii State General Retention Schedule 1.26, preliminary drafts of letters, memoranda, reports, worksheets, and internal notes are already legally determined to be non-permanent records that may be disposed of when not administrative useful. As such, the fact that an agency continues to maintain drafts beyond the immediate revision process placing evidential value upon those materials and moves those pieces into the definition of record from §HRS94-1.1 is “information with fixed form and content, regardless of physical form or characteristics, created or received in the course of government activity and set aside as evidence of that activity.”
6. If the Legislature agrees with that the intent of this bill, I would strongly recommend that the Legislature review and constrain the wording of what qualifies and under what conditions these important records of government business be withheld from the right of public scrutiny provided under §HRS92F-2 be reworded to be less broad in the types of records that may be withheld.
7. As all government employees work on behalf of and for the benefit of the public, the public has a right to know how their public servants are conducting business. Too often an agency

is in poor position to correctly weigh its own interests in avoiding negative publicity, criticism, and ridicule against the public's interest.

8. The burden should NOT be on the public to have to sue an agency to gain access to public records as provided under the UIPA -- a public that often does not have the financial means to even entertain initiating such a lawsuit. Rather, the onus should be on the State agency to bear the cost and effort to obtain a determination from a neutral-third party that the records being requested truly, accurately, and completely fit the "impair the agency's ability to make sound and fair decisions" exemption from public access.
9. Barring the above, at a minimum, I would strongly encourage the Legislature to put an absolutely upper limit as to how long these deliberative records can be withheld from the public. I would suggest a not-to-exceed limit of two years from date of creation – sufficient time to have either completed the deliberations or abandoned the issue. This bill should not allow agencies to shield themselves indefinitely from public scrutiny as the clearly stated purpose and intent of the law is "Opening up the government processes to public scrutiny and participation" as the "only viable and reasonable method of protecting the public's interest."

Thank you for the opportunity to submit testimony on this matter



HOUSE COMMITTEE ON GOVERNMENT REFORM  
Friday, February 11, 2022, 9:30 am, State Capitol Room 309 & Videoconference  
HB 2303

Relating to the Uniform Information Practices Act

**TESTIMONY**

Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair McKelvey and Committee Members:

The League of Women Voters of Hawaii strongly opposes HB 2303.

There is no evidence that the public benefited from denial of public access to “pre-decisional or deliberative” government records prior to the Supreme Court Peer News ruling. Moreover, there is no evidence of public harm from expanded public access to “pre-decisional or deliberative” government records after the Supreme Court Peer News ruling.

Thank you for the opportunity to submit testimony.



**HB-2303**

Submitted on: 2/10/2022 2:27:50 PM

Testimony for GVR on 2/11/2022 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Remote Testimony Requested</b>
Gerard Silva	Individual	Oppose	No

Comments:

All agencies in the Government Have to Diclose all Info. We cannot trust the Government. Just look at those 2 Senators that were cought selling there Votes bought ways on that cesspool Bill. We the people can no longer TRUST THE GOVERNMENT!!!!