

DAVID Y. IGE
GOVERNOR

JOSH GREEN M.D.
LT. GOVERNOR



ISAAC W. CHOY
DIRECTOR OF TAXATION

STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
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To: The Honorable Angus L.K. McKelvey, Chair;
The Honorable Tina Wildberger, Vice Chair;
and Members of the House Committee on Government Reform

From: Isaac W. Choy, Director
Department of Taxation

Date: Wednesday, March 30, 2022
Time: 11:00 A.M.
Place: Via Video Conference, State Capitol

Re: H.C.R. 146, Requesting the Office of Information Practices to Convene a Working Group to Develop a Recommendation for a Statutory Standard for the Treatment of Deliberative and Predecisional Agency Records

The Department of Taxation (Department) supports H.C.R. 146 and offers the following comments for your consideration.

H.C.R. 146 requests the Office of Information Practices (OIP) to form a working group and provide a recommendation for a statutory standard for the treatment of deliberative and predecisional agency records. The Department supports this concurrent resolution for several reasons.

First, the Department believes H.C.R. 146 will result in a workable alternative to the, now defunct, deliberative process privilege (DPP). The Department is required to make many administrative decisions involving complex tax laws each year. These decisions require not only tax and legal research but frank discussion among colleagues and often multiple drafts of proposed decisions. The Department will perform its best if given at least some limited confidentiality during this process. The public disclosure of all deliberative materials pertaining to a decision, while enabling the free flow of information to the public, will stifle the free flow of ideas within the Department.

Second, public disclosure of predecisional and deliberative materials, while predicated on greater public information and understanding, will actually bring ambiguity and confusion to any final decision that is published. If each and every flawed and rejected draft of the Department's decisions or determinations are made publicly available for scrutiny, then any taxpayer with any position will be able to find some version of the determination that is favorable to them. This will confuse the public's understanding of tax laws, adding ambiguity and cutting against the ideal behind the free flow of information altogether, which is greater public understanding.

Finally, having a settled statutory standard will save State resources. The Department believes that the result of the Peer News LLC v. City and County of Honolulu, 143 Haw. 472 431 P.3d 1245 (2018) case is an unclear standard going forward. The result will not be simply that all deliberative materials are disclosed. For example, the Department will still be limited by the confidentiality of taxpayer information. The lack of a DPP standard applicable to all agencies will make determinations of what is protected not only more difficult and costly to make, but also more unequal between Departments. H.C.R. 146 will address this as it is likely to lead to a new statewide statutory standard.

In conclusion, the Department believes this resolution and the working group it requests will result in a statutory proposal in the best interest of State agencies and the general public's interest in open government.

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



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Testimony Presented Before the
House Committee on Government Reform
March 30, 2022 at 11:00 a.m.

by
Carrie K. S. Okinaga
Vice President for Legal Affairs/University General Counsel
and
Kalbert K. Young
Vice President for Budget and Finance/Chief Financial Officer
University of Hawai'i System

HCR 146/HR 146 – REQUESTING THE OFFICE OF INFORMATION PRACTICES TO
CONVENE A WORKING GROUP TO DEVELOP A RECOMMENDATION FOR A
STATUTORY STANDARD FOR THE TREATMENT OF DELIBERATIVE AND
PREDECISIONAL AGENCY RECORDS

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 HCR 146/HR 146, which requests the Office of Information Practices to convene a working group to develop a consensus on language for a new UIPA exception for agency records that are deliberative and pre-decisional which reasonably balances the public's interest in disclosure against the potential harm to the agency's ability to fully consider and make sound and informed decisions.

The University supports this resolution because the working group could identify specific areas critical to efficient agency operations and aid in defining parameters for satisfying public requests for records. The working group can thereby help achieve 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. The University would be pleased to assist with, or serve on, the working group if invited.

Thank you for this opportunity to testify.

OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII
NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
TELEPHONE: 808-586-1400 FAX: 808-586-1412
EMAIL: oip@hawaii.gov

To: House Committee on Government Reform

From: Cheryl Kakazu Park, Director

Date: March 30, 2022, 11:00 a.m.
State Capitol, Conference Room 309 and Via Videoconference

Re: Testimony on H.C.R. No. 146 / H.R. No. 146
Requesting The Office of Information Practices to Convene a
Working Group to Develop a Recommendation for a Statutory
Standard for the Treatment of Deliberative and Predecisional Agency
Records

Thank you for the opportunity to submit testimony on this resolution, which asks the Office of Information Practices (OIP) to convene a working group to develop a consensus on language for a new Uniform Information Practices Act, chapter 92F, HRS (UIPA), exception for deliberative and pre-decisional records, and to report the group's findings and recommendations to the Legislature. **OIP supports this resolution** and would be happy to undertake the proposed working group.

The now-defunct "deliberative process privilege" (DPP) formerly allowed agencies to withhold many deliberative and pre-decisional materials from public disclosure under the UIPA, and in doing so, supported agencies' ability to freely and frankly discuss options in the course of making decisions and on public access to deliberative materials. The proposed working group would reflect a balance of viewpoints and would be a useful forum for working out a new exception

that would support agencies' ability to have frank internal discussions while still appropriately protecting the public interest in disclosure.

Based on the Federal Freedom of Information Act (FOIA), caselaw, and the UIPA's own legislative history, for nearly 30 years the Office of Information Practices recognized DPP 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).

When it was still recognized, the DPP did not automatically protect from disclosure all records simply because they are labeled "drafts" or because they were determined to be "predecisional and deliberative," and OIP's opinions over time had significantly limited the DPP's application. For example, the DPP could not be used to withhold purely factual portions of a report (OIP Op. Ltr. No. 90-11), or portions of a draft document that were substantially discussed at a public meeting where the DPP had been waived (OIP Op. Ltr. No. 91-22). **OIP also implicitly recognized the need to balance competing interests to avoid having the DPP swallow the UIPA's disclosure requirements** in later opinions, such as OIP Opinion Letter No. 95-24. **Even the appellant in Peer News cited this opinion and argued that "OIP also has indicated support for the deliberative process privilege as a 'qualified privilege' that requires balancing against the public interest in disclosure" and "the need to balance the public interest in disclosure falls squarely within the Legislature's intent."** Although the dissenting opinion in Peer News urged the court to explicitly adopt a balancing test, the majority rejected the DPP altogether and thus no form of DPP is currently recognized under the UIPA.

The proposed working group would be an opportunity to clarify the UIPA's treatment of deliberative and predecisional records and restore agencies' ability to withhold some deliberative material, but in a way that balances the agency's ability to reach sound and fair decisions against the public interest in disclosure. While any form of DPP 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 is happy to convene the proposed working group, representing different perspectives on this issue. OIP shares the Legislature's goal of finding 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 to be able to make fully informed decisions in the public's interest, while also allowing access to materials when the public interest is equal to or stronger than the potential harm to the agency.

Thank you for considering OIP's testimony.

DAVID Y. IGE
Governor

JOSH GREEN
Lt. Governor



PHYLLIS SHIMABUKURO-GEISER
Chairperson, Board of Agriculture

MORRIS M. ATTA
Deputy to the Chairperson

State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 South King Street
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**TESTIMONY OF PHYLLIS SHIMABUKURO-GEISER
CHAIRPERSON, BOARD OF AGRICULTURE**

BEFORE THE HOUSE COMMITTEE ON GOVERNMENT REFORM

MARCH 30, 2022

11:00 A.M.

CONFERENCE ROOM 309 & VIA VIDEOCONFERENCE

**HOUSE CONCURRENT RESOLUTION NO. 146 / HOUSE RESOLUTION NO. 146
REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A
WORKING GROUP TO DEVELOP A RECOMMENDATION FOR A STATUTORY
STANDARD FOR THE TREATMENT OF DELIBERATIVE AND PREDECISIONAL
AGENCY RECORDS.**

Chairperson McKelvey and Members of the Committees:

Thank you for the opportunity to testify on House Concurrent Resolution No. 146 and House Resolution No. 146, which request the Office of Information Practices (OIP) to convene a working group to develop a consensus on language for a new Uniform Information Practices Act, chapter 92F, HRS (UIPA), develop an exception for deliberative and pre-decisional records, and to report the group's findings and recommendations to the Legislature. The Department of Agriculture ("Department") supports this resolution, defers to OIP regarding the formation of a working group, and offers a comment.

The Department recognizes the need to balance an agency's ability to reach sound and fair decisions through candid expression of ideas with the public's interest in disclosure of government decision making and records for transparency. The proposed working group would be an effective forum for deliberating about and devising a new exception for deliberative and pre-decisional records that would reflect a reasonable balance of viewpoints of the various competing interests. While any form of exception to UIPA would represent a limitation of public access to agencies' internal deliberative



records, developing a reasonable exception would enable agencies to function effectively by having frank internal discussions and making sound decisions.

DAVID Y. IGE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committee on
GOVERNMENT REFORM**

**Wednesday, March 30, 2022
11:00 AM**

State Capitol, Conference Room 309, Via Videoconference

**In consideration of
HOUSE RESOLUTION 146/HOUSE CONCURRENT RESOLUTION 146
REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A
WORKING GROUP TO DEVELOP A RECOMMENDATION FOR A STATUTORY
STANDARD FOR THE TREATMENT OF DELIBERATIVE AND PREDECISIONAL
AGENCY RECORDS.**

House Concurrent Resolution 146/House Resolution 146 requests the Office of Information Practices to convene a working group to develop a recommendation for a statutory standard for the treatment of deliberative and pre-decisional agency records. **The Department of Land and Natural Resources (Department) supports these resolutions.**

The Department supports all efforts to reinstate the Legislature's intent in providing the deliberative process exception to the Uniform Information Practices Act.

As the Department is sure you can appreciate, in a group of people working together on an issue, there is a lot of back and forth done by email in this modern era to think things through. This is a highly beneficial group process that is particularly helpful when people work from different locations and work units.

When people are free to brainstorm, comment openly, and make suggestions, without concern that the comments will be made public, the collective thought process is much more robust.

The December 2018 Hawai'i Supreme Court decision opining that the Legislature did not intend these pre-decisional and deliberative records to be withheld from public access has in fact placed a cloud on these types of communications, very much to the detriment of good thought processes and good outcomes for the public.

Thank you for the opportunity to comment on these measures.

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Statement Before The
HOUSE COMMITTEE ON GOVERNMENT REFORM
Wednesday, March 30, 2022
11:00 AM
Via Videoconference and Conference Room 309

in consideration of
HCR 146 / HR 146

REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A WORKING GROUP TO DEVELOP A RECOMMENDATION FOR A STATUTORY STANDARD FOR THE TREATMENT OF DELIBERATIVE AND PREDECISIONAL AGENCY RECORDS.

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

Common Cause Hawaii supports HCR 146 / HR 146, requesting the office of information practices to convene a working group to develop a recommendation for a statutory standard for the treatment of deliberative and predecisional agency records.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to reforming government and strengthening our representative democracy through transparency and accountability reforms efforts that increase civic engagement and public participation in our democratic processes.

Common Cause Hawaii appreciates the convening of “interested stakeholders to consider whether there is consensus on the appropriate balance between transparency and deliberative process for effective agency decision-making in Hawaii, and to recommend a new statutory standard that balances the various agency and public interests”. See HCR 146 at page 2, lines 13-18; HR 146 at page 2, lines 10-15.

Further, Common Cause Hawaii would welcome the opportunity to be part of “a working group [convened by Office of Information Practices] to develop a consensus on language for a new UIPA exception for agency records that are deliberative and pre—decisional which reasonably balances the public's interest in disclosure against the potential harm to the agency's ability to fully consider and make sound and informed decisions”. See HCR 146 at page 2, lines 24-28; HR 146 at page 2, lines 19-24.

As a nonprofit interested in increasing government transparency and accountability, Common Cause Hawaii hopes to add value to a working group established by HCR 146 / HR 146.

Thank you for the opportunity to testify in support of HCR 146 / HR 146. If you have any questions, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii



HOUSE COMMITTEE ON GOVERNMENT REFORM

Wednesday, March 30, 2022, 11 am, State Capitol Room 309 & Videoconference
HCR 146 & HR 146

REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A WORKING GROUP TO
DEVELOP A RECOMMENDATION FOR A STATUTORY STANDARD FOR THE TREATMENT OF
DELIBERATIVE AND PREDECISIONAL AGENCY RECORDS

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

Chair McKelvey and Committee Members:

The League of Women Voters of Hawaii would appreciate the opportunity to participate in an OIP working group to make recommendations concerning public access to deliberative and pre-decisional government records. Our perspective is that early, informed, public involvement in government deliberations usually leads to better outcomes and more consensus than post-decision press releases to inform the public of top-down “Decide, Announce, Defend” government decisions.

Thank you for the opportunity to comment.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

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info@civilbeatlawcenter.org

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

RE: Testimony Commenting on H.C.R. 146, Requesting the Office of Information Practices to Convene a Working Group to Develop a Recommendation for a Statutory Standard for the Treatment of Deliberative and Predecisional Agency Records

Hearing: March 30, 2022 at 11:00 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 **commenting on H.C.R. 146**.

The Law Center would appreciate the opportunity to work collaboratively with government agencies “with the goal of developing a consensus” on public access to deliberative government records. Enacting the deliberative process privilege would be a disaster for Hawai‘i because that doctrine is excessively secretive and prone to abuse by government agencies. To the extent that there are legitimate concerns about disclosure of deliberative records, however, the Law Center is willing to explore solutions targeted at those concerns while respecting the public’s right to know how its government operates, including deliberations.

Thank you again for the opportunity to provide comments on H.C.R. 146.



March 30, 2022

11 am.

VIA VIDEOCONFERENCE

Conference Room 309

To: House Committee on Government Reform

Rep. Angus L.K. McKelvey, Chair

Rep. Tina Wildberger, Vice Chair

From: Grassroot Institute of Hawaii

Joe Kent, Executive Vice President

RE: HCR146/HR146 — REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A WORKING GROUP TO DEVELOP A RECOMMENDATION FOR A STATUTORY STANDARD FOR THE TREATMENT OF DELIBERATIVE AND PREDECISIONAL AGENCY RECORDS

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on [HCR146](#) and [HR146](#), which propose the creation of a working group to develop the language of a “deliberative process” exemption from Hawaii’s open-records law, the Uniform Information Practices Act.

We have grave reservations about any effort to establish a deliberative-process exemption to the UIPA. Our concern is that such an exemption would be little more than a loophole by which state agencies could evade records requests.

This would frustrate the intent of the state’s transparency laws, which are meant to ensure accountability and discourage corruption by making government actions and deliberations available to the public.

As a research and government watchdog organization, the Grassroot Institute is well-acquainted with the mechanisms employed by government agencies to avoid disclosure. Based on that experience, we can attest to the fact that the exception would give agencies leeway to withhold

nearly anything under the claim of “deliberative process.” Moreover, it would encourage agencies to conduct key government functions in a way that could shield them from disclosure.

Though the working group is meant to find some compromise between the duty to disclose and the agencies’ desire to withhold documents they deem “predecisional,” the inherent conflict between those interests as well as the ambiguity of the “deliberative process” guarantees more challenges and disputes. After all, most of the work done by government agencies is deliberative in nature and everything but a final decision or report can be classified as “predecisional.”

From the point of view of a government watchdog organization, a deliberative-process exemption would guarantee that requests to certain agencies will turn into endless battles over what, if anything, must be disclosed to the public.

It is not hard to imagine that some state agencies already notorious for their lack of openness will abuse the deliberative-process exemption to avoid fulfilling UIPA requests.

If government agencies are concerned about privacy or disclosures that obstruct their ability to carry out their duties, there already are exceptions in the law that would address such issues. There is nothing remarkable about the deliberative-exemption process in itself that warrants special treatment.

Given the need to restore public trust in Hawaii’s government, we believe that more transparency, not less, is the best route forward.

The Legislature is currently seeking ways to improve its own transparency and accountability to the people of Hawaii. This is no time to exempt government agencies from that same responsibility.

Under the circumstances, it would be a mistake to create a UIPA exception that would allow government agencies to hide their decision-making processes from the public.

Thank you for the opportunity to submit our comments.

Sincerely,

Joe Kent
Executive Vice President
Grassroot Institute of Hawaii



March 30, 2022

Rep. Angus McKelvey
House Government Reform Committee
State Capitol
Honolulu, HI 96813

Chair McKelvey and Committee Members:

Re: HR 146/HCR 146

We support these two measures and ask you to recommend that the Civil Beat Law Center be represented in the working group.

The issue of deliberative process is far too complex to work out in one bill during a legislative session.

Thank you for your time and attention,

Stirling Morita
President
Hawaii Chapter of the Society of Professional Journalists