

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 Judiciary and Hawaiian Affairs

From: Cheryl Kakazu Park, Director

Date: April 21, 2022, 1:30 p.m.
State Capitol, Conference Room 325 and Via Videoconference

Re: Testimony on S.C.R. No. 192, S.D. 1
Requesting The Office of Information Practices to Convene a
Working Group to Develop Recommendations for the Treatment of
Deliberative and Pre-Decisional 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 recommendations for the treatment of deliberative and pre-decisional records under the Uniform Information Practices Act, chapter 92F, HRS (UIPA), and to report the group's findings and recommendations to the Legislature prior to the 2023 session. **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).

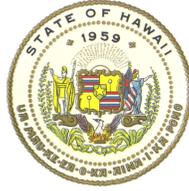
The DPP did not automatically protect from disclosure all records simply because they are labeled "drafts" or because they were determined to be "predecisional and deliberative," and OIP's opinions over time had significantly limited the DPP's application. For example, the DPP could not be used to withhold 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. Citing this opinion, the appellant in Peer News had 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 withhold their internal deliberations on prospective decisions when disclosure 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 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
JUDICIARY & HAWAIIAN AFFAIRS**

**Thursday, April 21, 2022
1:30 PM**

State Capitol, Conference Room 325, Via Videoconference

**In consideration of
SENATE CONCURRENT RESOLUTION 192, SENATE DRAFT 1
REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A
WORKING GROUP TO DEVELOP A RECOMMENDATIONS FOR THE
TREATMENT OF DELIBERATIVE AND PREDECISIONAL AGENCY RECORDS.**

Senate Concurrent Resolution 192, Senate Draft 1 requests the Office of Information Practices to convene a working group to develop recommendations for the treatment of deliberative and pre-decisional agency records. **The Department of Land and Natural Resources (Department) supports this resolution.**

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.

This resolution is a step toward re-instating this common practice, while recognizing the public interest. The make-up of the working group will ensure both agencies and good government

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

groups are heard, and acknowledges the need to balance the agencies' need to have its employees speak openly as different options are being vetted, with the public need for transparency.

Thank you for the opportunity to comment on this measure.



TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
ROSS M. HIGASHI
EDUARDO P. MANGALLAN
PATRICK H. MCCAIN
EDWIN H. SNIFFEN

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

April 21, 2022

1:30 P.M.

State Capitol, Conference Room 325/Teleconference

S.C.R 192, S.D. 1

**RELATING TO REQUESTING THE OFFICE OF INFORMATION PRACTICES TO
CONVENE A WORKING GROUP TO DEVELOP RECOMMENDATIONS FOR THE
TREATMENT OF DELIBERATIVE AND PRE-DECISIONAL AGENCY RECORDS**

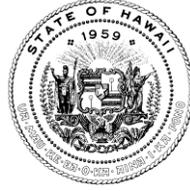
Committee on Judiciary and Hawaiian Affairs

The Department of Transportation (DOT) continues to **strongly supports** S.C.R. 192, S.D. 1, requesting the Office of Information Practices (OIP) to convene a working group to develop recommendations for the treatment of deliberative and pre-decisional agency records. The Department firmly believes this working group will discuss and provide balanced recommended standard for the treatment of the deliberative process and associated records.

The *Peer News* case called into question the ability to use the deliberative process privilege to withhold producing internal documents sought through a Uniform Information Practice Act request. However, having to turn over drafts of documents, internal memos where there are discussions relating to decisions, or other internal communications impedes the free flow of communication within the department. Open communication, critical thinking, and the flow of ideas, opinions, and recommendations are fundamental to the formation of final policies and official decisions of the DOT.

The DOT believes the OIP working group will be beneficial as it strives to find a balance between internal frank and full discussion of future policies or tentative decisions while also allowing access to records when the public interest is equal or greater than the potential impairment to our department. We request that we have representation on the working group. The DOT can share its experiences in balancing free flowing internal communication with public transparency of our policies and decisions and can likewise learn from the diverse, interested parties to be included in the group.

Thank you for the opportunity to provide testimony



LATE

DAVID Y. IGE
GOVERNOR

JOSH GREEN
LT. GOVERNOR

**STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

335 MERCHANT STREET, ROOM 310
P.O. BOX 541
HONOLULU, HAWAII 96809
Phone Number: 586-2850
Fax Number: 586-2856
cca.hawaii.gov

CATHERINE P. AWAKUNI COLÓN
DIRECTOR

JO ANN M. UCHIDA TAKEUCHI
DEPUTY DIRECTOR

Testimony of the Department of Commerce and Consumer Affairs

**Before the
House Committee on Judiciary & Hawaiian Affairs
Thursday, April 21, 2022
1:30 PM
Conference Room 325 & Videoconference**

**On the following measure:
SCR 192 S.D.1 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**

WRITTEN TESTIMONY ONLY

Chair Nakashima and Members of the Committee:

My name is Catherine Awakuni Colón, and I am the Director of the Department of Commerce and Consumer Affairs (Department). The Department supports this resolution.

The purpose of this resolution is to request the Hawaii Office of Information Practices convene a working group to develop a recommendation for a statutory standard for the treatment of deliberative and predecisional agency records.

The Department must have the ability to have candid and thorough internal reviews to make informed policy decisions. Providing clarity regarding the handling of deliberative and predecisional records will greatly assist the Department in fulfilling its responsibilities.

Thank you for the opportunity to testify on this resolution.



HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
Thursday, April 21, 2022, 1:30 pm, State Capitol Room 325 & Videoconference
SCR 192, SD1

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 Nakashima 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 “top-down” post-decision government press releases.

Thank you for the opportunity to comment.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

Office: (808) 531-4000
Fax: (808) 380-3580
info@civilbeatlawcenter.org

House Committee on Judiciary & Hawaiian Affairs
Honorable Mark M. Nakashima, Chair
Honorable Scot Z. Matayoshi, Vice Chair

**RE: Testimony Commenting on S.C.R. 192 S.D. 1, Requesting the Office of
Information Practices to Convene a Working Group to Develop Recommendations
for the Treatment of Deliberative and Pre-decisional Agency Records**

Hearing: April 21, 2022 at 1:30 p.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 S.C.R. 192 S.D. 1**.

The Law Center would appreciate the opportunity to work collaboratively with government agencies toward the goal of a consensus on recommendations to address 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 S.C.R. 192 S.D. 1.

Statement Before The
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Thursday, April 21, 2022

1:30 PM

Conference Room 325 and Videoconference

in consideration of
SCR 192, SD1**REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A WORKING GROUP TO DEVELOP RECOMMENDATIONS FOR THE TREATMENT OF DELIBERATIVE AND PRE-DECISIONAL AGENCY RECORDS.**

Chair NAKASHIMA, Vice Chair MATAYOSHI, and Members of the House Judiciary & Hawaiian Affairs Committee

Common Cause Hawaii supports SCR 192, SD1, requesting the office of information practices to convene a working group to develop recommendations for the treatment of deliberative and pre-decisional 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 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 SCR 192, SD1 at page 2, lines 13-17.

Further, Common Cause Hawaii would welcome the opportunity to be part of “a working group [convened by Office of Information Practices] to develop recommendations for a new UIPA statutory exception and other recommendations for deliberative and pre—decisional agency records to reasonably balance the public's interest in disclosure and the agency’s ability to fully consider and make sound and informed decisions”. See SCR 192, SD1 at page 2, lines 21-27.

As a nonprofit interested in increasing government transparency and accountability, Common Cause Hawaii hopes to add value to a working group established by SCR 192, SD1.

Thank you for the opportunity to testify in support of SCR 192, SD1. If you have any questions, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii



'ĀINA HAINA COMMUNITY ASSOCIATION

c/o 'Āina Haina Library, 5246 Kalaniana'ole Highway, Honolulu, HI 96821
ainahainaassoc@gmail.com; www.ainahaina.org

Jeanne Ohta, President • Melia Lane-Kamahele, Vice-President • Art Mori, Treasurer • Kathy Takemoto, Secretary • Directors At Large: Jeff Carlson, Wayson Chow, Meymo Rego, Marie Riley

April 21, 2022

TO: Representative Mark Nakashima, Chair
Representative Scot Matayoshi, Vice Chair and
Members of the Committee on Judiciary & Hawaiian Affairs

FROM: Members of the Board of Directors of the 'Āina Haina Community Association

RE: SCR 192 SD1 REQUESTING THE OFFICE OF INFORMATION PRACTICES TO
CONVENE A WORKING FROUP TO DEVELOP RECOMMENDATIONS FOR THE
TREATMENT OF DELIBERATIVE AND PRE-DECISIONAL AGENCY RECORDS

POSITION: OPPOSED

The Board of Directors of the 'Āina Haina Community Association (AHCA) write in opposition to the appointment of a working group to draft language of a deliberative process exemption from the Uniform Information Practices Act (UIPA). Any exemption would be a slippery slope to allowing government agencies to avoid providing records when requested.

The State Supreme Court has ruled that the exemption does not exist in state law, that ruling enables and supports government transparency and open government; one way that our government leaders and agencies can start improving public confidence and trust in the government sector.

AHCA has experienced the difficulty of obtaining public records on a timely basis. A government agency claimed that applications for various types of permits are not public until a decision is made or a permit is issued. From the community's perspective, once a permit is issued, it is too late to prevent possible destruction of cultural sites, disturbance of iwi kupuna, and grading and building on land that is known to be unstable. This insistence on the deliberative process privilege opens a loophole that would allow almost any agency to claim that documents are "predecisional" and since almost all work conducted by government agencies tend to be deliberative in nature, the exemption could be used to avoid fulfilling UIPA requests.

AHCA opposes any language that would allow claims of "deliberative process" and "predecisional" as a way to shield documents from disclosure. We respectfully request that this resolution be held. Thank you for the opportunity to provide testimony.



April 21, 2022

Rep. Mark Nakashima
House Committee on Judiciary and Hawaiian Affairs
State Capitol
Honolulu, HI 96813

Chair Nakashima and Committee Members:

Re: SCR 192 SD1

We support the intent of this measure, but not the Senate Judiciary Committee's main finding. We ask you to recommend that the Civil Beat Law Center, League of Women Voters and Common Cause Hawaii 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



April 21, 2022

1:30 p.m.

VIA VIDEOCONFERENCE

Conference Room 325

To: House Committee on Judiciary and Hawaiian Affairs

Rep. Mark M. Nakashima, Chair

Rep. Scot Z. Matayoshi, Vice Chair

From: Grassroot Institute of Hawaii

Joe Kent, Executive Vice President

RE: SCR192 SD1 — REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A WORKING GROUP TO DEVELOP RECOMMENDATIONS FOR THE TREATMENT OF DELIBERATIVE AND PRE-DECISIONAL AGENCY RECORDS

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on [SCR192 SD1](#) SD1, which proposes the creation of a working group to develop recommendations for a statutory exemption to Hawaii's open records law and the treatment of deliberative and pre-decisional agency records.

The institute commends the Legislature for amending the original wording of this resolution to put a greater stress on the importance of transparency and the public interest in disclosure, but we continue to have reservations about any effort to establish a deliberative-process exemption to the state [Uniform Information Practices Act](#). While it is laudable to try to balance effective governance and transparency in the statute, in practice, this exemption would be little more than a loophole by which state agencies could evade records requests.

Any exemption that gives agencies the ability to determine for themselves what records should be protected as "deliberative" would frustrate the intent of the state's transparency laws, which are meant to ensure accountability and discourage corruption by making government deliberations and actions 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 desire of agencies 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, the deliberative exemption guarantees 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 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 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