

OFFICE OF INFORMATION PRACTICES

STATE OF HAWAII
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To: Senate Committee on Government Operations

From: Cheryl Kakazu Park, Director

Date: February 2, 2023, 3:15 p.m.
State Capitol, Conference Room 225

Re: Testimony on S.B. No. 720
Relating to Government Records

Thank you for the opportunity to submit testimony on this bill, which would add an exception to mandatory disclosure of government records for deliberative and pre-decisional internal records concerning an agency decision that has not yet been made, would require agencies to report their use of the exception through FY 2027, and would require the Office of Information Practices (OIP) to convene a working group to examine agency use of the exception and report back to the Legislature before the 2029 legislative session. **OIP strongly supports this bill, which represents the consensus recommendation of the working group convened pursuant to S.C.R. 192 of 2022.**

S.C.R. 192 requested that OIP “convene a working group 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[.]” The working group (WG) was asked to “gather and consider information from interested and affected parties as well as examine the law and practices in Hawai’i and other jurisdictions, with the goal of developing

recommendations to address government's need for and the public's concern about deliberative and pre-decisional agency processes and records in decision-making[.]”

Pursuant to SCR 192, OIP convened the WG with the following members:

Judge (retired) Karl Sakamoto, Facilitator
Brian Black, Executive Director, Civil Beat Law Center
Lance Collins, Law Office of Lance D. Collins, representing Common Cause
Kaliko'onālani Fernandes, Deputy Solicitor General,
Department of the Attorney General
Douglas Meller, representing League of Women Voters
Carrie Okinaga, General Counsel, University of Hawai'i
Duane Pang, Deputy Corporation Counsel, City and County of Honolulu

The WG worked diligently and collaboratively during the 2022 interim period 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 agencies' ability to fully consider and make sound and informed decisions. The WG's initial draft proposal was presented to the public for comment and the WG held a public meeting via Zoom on October 4, 2022, to obtain public testimony. The WG took the public testimony into account in arriving at its final recommended proposal, on which all but one member of the WG reached consensus. The WG's final report with exhibits is available online at <https://oip.hawaii.gov/wp-content/uploads/2022/12/Final-Reports-with-Exhibits.pdf>, and information about its work including meeting minutes, draft proposals, and public testimony is available on OIP's website at <https://oip.hawaii.gov/scr-192-working-group/>.

The proposed new UIPA exception would give government agencies discretion on whether to disclose deliberative and pre-decisional government inter-

agency or intra-agency records **prior to** a government decision not directly requiring public participation. This would include records reflecting an agency's internal discussions and thought process on the decision that has not yet been made, that are circulated within an agency or even between agencies, but not originating from or shared with someone outside government. And because the public wants to understand why government decisions were made or whether government decisions were capricious, the new exception provides that **once a decision has been made or the decision-making process has been abandoned, and unless other exceptions to disclosure apply, the UIPA should require disclosure of deliberative or pre-decisional government records relevant to that decision.**

In response to public concern that an agency could claim its decision-making is ongoing for an indefinite length of time during which it could deny public access to records relevant to an issue, the proposal specifies that the records must concern "an agency decision about a government action" and includes a rebuttable presumption that decision-making has been abandoned if three or more years have gone by since an earlier request for the same record(s) was denied on the basis that the decision-making process was still ongoing. As set out in the WG's final report, **factors relevant to determining whether a decision-making process has been abandoned could include, but are not limited to:**

- evidence of recent discussions, memoranda, notes, or other records indicating that agency staff are still actively working on the issue;
- internal or external statements by agency leadership or similar indications that consideration of the issue either remains a high priority or, to the contrary, has been halted or greatly deprioritized;

- the existence of a deadline or legal mandate for a final decision that has not yet been made;
- evidence that the matter remains under review or pending approval by another entity; and
- other evidence that the agency is proceeding as though the issue remains undetermined with a decision forthcoming or, to the contrary, proceeding as though a decision has already been made notwithstanding the lack of an official announcement or approval.

The proposal recognizes that major decisions and changes often take much longer than three years to be concluded, but that the public is also entitled to know that work is ongoing and the new exception is not being used as a pretext to block access to records. **The addition of a three-year window starting when a request is denied, after which there will be a rebuttable presumption that the decision-making pertaining to the requested records has been abandoned, is expressly not intended to force government officials to make a decision within three years.** Rather, it sets a timeframe after which, to meet its burden to establish that the exception to disclosure applies, the agency may reasonably be expected to provide a heightened showing that it is still working toward a decision, and ideally an explanation of why the decision-making process remains ongoing.

The proposal is intended to encourage frank discussion among an agency's employees about the benefits or detriments, and possible implications, of a proposed course of action, including input from supporters and detractors (including possible whistleblowers). The proposal also is intended to assuage the concerns of employees lacking discretionary or decision-making authority that they may receive unwanted publicity based on their personal

contributions to discussion of a controversial issue. To address these concerns, the proposal provides that **even after a decision has been made, an agency may still redact the name, title, and other directly identifying information of an official or employee who lacks discretionary authority, did not make the decision, and is not under investigation for or engaged in wrongdoing or criminal conduct related to the decision.**

This provision allows only directly identifying information to be redacted. **After directly identifying information has been redacted, substantive statements must be disclosed, unless other exceptions apply.** Further, the provision does not allow redaction of identifying information for an employee engaged in or under investigation for wrongdoing or criminal conduct related to the decision. **The proposal recognizes that the public may have an elevated interest in knowing what comments or suggestions came from an employee implicated in wrongdoing or criminal conduct, to see how that person's contributions may have influenced decision-making.** The term wrongdoing is not intended to encompass minor infractions an employee might be written up for, such as tardiness, or to require OIP or a court to make a definite determination that criminal conduct or wrongdoing has actually occurred. Rather, the provision is intended to apply where the agency is aware of an ongoing investigation, or a previous finding, of either criminal conduct or more serious noncriminal misconduct related to the decision as informed by prior court and OIP opinions regarding the public interest in misconduct information.

The proposal is intended to incorporate relevant existing laws, court rulings, and precedents concerning disclosure of government records. Because the proposed new exception to disclosure builds on some concepts from the now defunct DPP as developed by OIP and comparable federal case law,

the proposal is intended to incorporate relevant court rulings and OIP precedents applying those concepts unless they are inconsistent with the language in the proposal itself. This includes how to determine when records are deliberative and pre-decisional, and when an agency’s decision-making process has been abandoned. OIP’s interpretation of cases relating to pending investigations may also be relevant to the new deliberative process exception as it applies to ongoing decision-making.

The proposal also distinguishes between collaborative government decisions that directly require public participation (e.g., board meetings and public hearings) and government decisions without a specific public participation requirement (e.g., decisions by a single executive or department head). The WG acknowledged that public participation is not required for all government decisions. But in a situation where public participation is required by law or is being solicited—such as during public meetings of boards subject to the Sunshine Law—the timely disclosure of relevant government records is necessary for meaningful public participation. **For timely disclosure to occur, the Sunshine Law and UIPA must continue to require disclosure of any deliberative or pre-decisional government record distributed or discussed at any government meeting or hearing that the public has the right to attend. The proposal does this by specifically providing that the new exception shall not apply to a “board packet” of materials being reviewed by a board prior to a Sunshine Law meeting.**

Because government should not selectively decide which members of the public can participate in government decisions, the UIPA generally should continue to require disclosure of any deliberative or pre-decisional government record when the **exception has been waived by a prior disclosure.** Court and

OIP opinions have addressed the concept of waiver by prior disclosure with respect to the UIPA's existing exceptions, and the waiver concept would similarly apply for this exception. The doctrine may not apply where, for instance, a disclosure was to a person who is effectively an "insider" for the purpose of the decision, such as a contractor hired by an agency to research an issue, or when it cannot be factually established that the agency has actually made a prior disclosure of the record in question. However, it would be expected to apply to require disclosure where an agency has disclosed a record to one journalist, but seeks to deny it to another, or has disclosed it to a lobbyist, but seeks to deny it to a public activist. Similarly, the proposal will continue to treat the UIPA's exceptions as not being mutually exclusive, consistent with how courts and OIP have treated them.

The proposal also amends the definition of a government record to exclude "truly preliminary records" that have not been circulated. Thus, a rough draft whose author has not yet shared it with anyone else for review, or an employee's personal notes that have not been forwarded to others for their use or comment, would fall within the exclusion and not be considered a "government record" subject to disclosure under the UIPA. Similarly, notes kept on an agency's computer system that is technically accessible by its information technology staff, but saved in a personal folder not intended for sharing, would not be considered to have been "circulated" by the author. **Conversely, a draft or set of notes that has been actively shared by the author becomes a "government record" that must be disclosed upon request unless an exception to disclosure applies.**

In response to public concern that the exception could be abused or over-used by agencies, **the WG added a requirement for agencies to report their use of the exception to OIP**, including the text of the request and the

agency's notice to the requester. This requirement runs from July 1, 2023 (the proposal's effective date) through June 30, 2027. **The proposal also requires OIP to convene a new working group** by the beginning of 2028 to examine agencies' use of the new exception and report back to the 2029 Legislature on whether the exception should be retained and any recommended amendments to it.

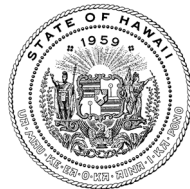
The proposal as submitted by the WG called for the new working group to be exempt from part I of chapter 92, the Sunshine Law, but that clause was left out of the bill as introduced. OIP does not generally support Sunshine Law exemptions for working groups created by session law and statute. OIP notes, however, that the WG that created the proposal, which itself was not subject to the Sunshine Law because it was created by concurrent resolution rather than session law, consisted almost entirely of lawyers and its discussions were as much about specific wording and details of related laws and how this proposal would interact with those laws as about underlying policy decisions. Even with seven nonpublic meetings running several hours each, the members found it necessary to also work through smaller group meetings and use email to circulate and review proposals and suggest edits, which would not be permitted for a board subject to the Sunshine Law. WG members also were or are on opposing sides of some UIPA-related court cases, and the ability to hold nonpublic meetings helped address their concerns that statements made in the course of the group's work not be used against their clients in related litigation. Thus, the current WG's non-Sunshine Law status was instrumental in allowing it to arrive at a consensus in the limited time to provide this report to the 2023 Legislature. Although the future working group will theoretically have approximately a year from when the final agency reports on use of the exception are compiled to do its work, the future working group's members are likely to be fully

occupied with the legislative session and post-session work for about six months of that time, thus similarly leaving the future group with only half a year to complete its work. Accordingly, **the Legislature may find that these considerations and time constraints provide sufficient reason to create a Sunshine Law exemption for the proposed new working group. To conform this measure to the WG proposal that OIP understands this bill was intended to reflect, it should be amended to restore the proposed exemption by adding the following sentence to bill page 4 line 17, immediately after the word “convener.”**

The working group shall be exempt from part I of chapter 92.

In summary, OIP supports this consensus proposal developed by the WG and agreed to by all members except Mr. Collins, whose dissent was attached to WG’s final report. OIP asks this Committee to pass it out the bill with the amendment above to conform it to the WG proposal. Thank you for considering OIP’s testimony.

JOSH GREEN, M.D.
GOVERNOR



LUIS P. SALAVERIA
DIRECTOR

SABRINA NASIR
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
Ka 'Oihana Mālama Mo'ohelu a Kālā
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ADMINISTRATIVE AND RESEARCH OFFICE
BUDGET, PROGRAM PLANNING AND MANAGEMENT DIVISION
FINANCIAL ADMINISTRATION DIVISION
OFFICE OF FEDERAL AWARDS MANAGEMENT

WRITTEN ONLY
TESTIMONY BY LUIS P. SALAVERIA
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
TO THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS
ON
SENATE BILL NO. 720

February 2, 2023
3:15 p.m.
Room 225 and Videoconference

RELATING TO GOVERNMENT RECORDS

The Department of Budget and Finance (B&F) supports this bill.

Senate Bill (S.B.) No. 720 is the output of the work of the Senate Concurrent Resolution 192 (2022) Working Group, which was charged with “conven[ing] a working group to develop recommendations for a new Uniform Information Practices Act 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[.]”

B&F believes S.B. No. 720 does in fact find a sound balance between the public’s interest in both the disclosure of government records and in encouraging sound governmental decision making by allowing government agency staff to engage in frank preliminary discussions about the pros and cons of various courses of actions before decisions are made. The reporting requirements set forth in the bill will allow the Office of Information Practices to assess any uses of the proposed exception and recommend additional amendments, if necessary.

Thank you for your consideration of our comments.

JOSH GREEN M.D.
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 OPERATIONS

ON

SENATE BILL NO. 720

February 2, 2023

3:15 P.M.

Conference Room 225, via Videoconference

RELATING TO GOVERNMENT RECORDS.

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

S.B. 720 would add an exception to mandatory disclosure of government records for deliberative and pre-decisional government inter-agency or intra-agency records concerning an agency decision about a government action. It also would require agencies to report their use of the exception to the Office of Information Practices for four years starting July 1, 2023. The ERS staff is providing comments on S.B. 720.

S.B. 720 would exempt inter-agency or intra-agency deliberative and pre-decisional government records up until the final decision to which the government records relate has been made or until deliberation of the matter has been abandoned.

The ERS believes these pre-deliberative and pre-decisional making documents should be protected.

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



Employees' Retirement System
of the State of Hawaii

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. Dept 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 also believes that the requirement to administer these documents and track and report exceptions to document requests would be administratively burdensome.

Thank you for this opportunity to testify on S.B. 720.



UNIVERSITY OF HAWAII SYSTEM

‘ŌNAEHANA KULANUI O HAWAII

Legislative Testimony

Hō'ike Mana'o I Mua O Ka 'Aha'ōlelo

Testimony Presented Before the
Senate Committee on Government Operations
Thursday, February 2, 2023, at 3:15 p.m.

by

Kalbert K. Young, Vice President for Budget & Finance/Chief Financial Officer
and

Carrie K.S. Okinaga, Vice President for Legal Affairs and University General Counsel
University of Hawai'i System

SB 720 – RELATING TO GOVERNMENT RECORDS

Chair McKelvey, Vice Chair Gabbard, and Members of the Committee:

Thank you for the opportunity to testify on this measure. The University of Hawai'i strongly supports SB 720.

Pursuant to [SCR 192 \(2022\)](#), the Working Group to Develop Recommendations for the Treatment of Deliberative and Pre-Decisional Agency Records (“Working Group”) has worked diligently and collaboratively to develop recommendations for a new Uniform Information Practices Act (UIPA), codified as Chapter 92F of the Hawai'i Revised Statutes (HRS Chapter 92F) statutory exception and other recommendations to reasonably balance the public's interest in disclosure and agencies' ability to fully consider and make sound and informed decisions. This work was necessitated by the ruling of the Hawaii Supreme Court in its 2018 Peer News LLC, dba Civil Beat v. City and County of Honolulu (“CBLC”) decision (3-2), which struck down the deliberative process privilege [despite thirty-plus years of its existence in Office of Information Practices \(OIP\) opinions and practice](#), as well its longstanding and current recognition in federal law under the Freedom of Information Act. The process followed by the Working Group involved months of research, writing, debate and discussion, a public meeting in October 2022 at which interested stakeholders offered comments on an earlier draft proposal, revisions made by the Working Group to account for those comments, and then a [final report and recommendations](#) being issued.

SB 720 is the outcome of that work, and represents a reasoned compromise, forged between and amongst experienced practitioners representing media, government and the public interest, as well as OIP, the agency charged with enforcement of open records (and open meetings). SB 720 amends the UIPA by specifically codifying the deliberative process privilege in HRS Chapter 92F, the absence of which the CBLC decision noted. As proposed, SB 720 greatly minimizes likelihood for abuse of the privilege by both agencies and requesting parties.

It is notable that HRS Chapter 92F largely excludes the [Legislature \(HRS §92F-13\(5\)\)](#) and the [Judiciary \(except for administrative functions, as set forth in the definition of “agency” in HRS §92F-3\)](#) from the mandatory disclosure of government records. To be able to make the best decisions possible, executive decisionmakers also should have the ability when appropriate to fully consider the input of agency personnel when making decisions without undue and improper interference during the decisionmaking process, whether the decision is about procurement, budgets or changes to laws and rules. Once a decision has been made or decisionmaking has been abandoned, however, SB 720 ensures that at least for the executive branch, disclosure is required of deliberative or pre-decisional government records relevant to that decision unless another exception applies. The bill further requires government agencies to report their use of the exception to OIP and requires OIP to convene a working group to examine agency use of the exception and report to the Legislature prior to the Regular Session of 2029.

For these reasons, the University of Hawai'i strongly supports SB 720. Thank you for the opportunity to testify.

BOARD OF WATER SUPPLY

CITY AND COUNTY OF HONOLULU
630 SOUTH BERETANIA STREET
HONOLULU, HI 96843
www.boardofwatersupply.com



February 2, 2023

RICK BLANGIARDI, MAYOR

BRYAN P. ANDAYA, Chair
KAPUA SPROAT, Vice Chair
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DAWN B. SZEWCZYK, P.E., Ex-Officio
EDWIN H. SNIFFEN, Ex-Officio

ERNEST Y. W. LAU, P.E.
Manager and Chief Engineer

ERWIN M. KAWATA
Deputy Manager

The Honorable Angus L. K. McKelvey, Chair
and Members
Committee on Government Operations
State Senate
Hawaii State Capitol
Honolulu, Hawaii 96813

Dear Chair McKelvey and Members:

Subject: Senate Bill 720: Relating to Government Records

The Honolulu Board of Water Supply (BWS) is in strong support of Senate Bill (SB) 720, which seeks to amend the definition of "government record", as provided in Section 92F-13, Hawaii Revised Statutes, to address inter-agency and intra-agency deliberative and pre-decisional government records. SB 720 also recognizes that government decisions makers should be able to seek recommendations and advisory opinions and to fully deliberate, while also requiring the full disclosure of these records once the government's decision is completed or such action is abandoned.

BWS supports SB720 and the recommendations of the Working Group for the new statutory exception for deliberative and pre-decisional agency records, and believes that SB720 strikes a reasonable balance between the public's interest in disclosure and the agency's ability to fully consider and make sound and informed decisions.

Thank you for the opportunity to provide testimony in strong support of SB720.

Very truly yours,

ERNEST Y. W. LAU, P.E.
Manager and Chief Engineer



The Committee on Government Operations
February 2, 2023, 3:15 PM
Room 225 & Videoconference

RE: **SB 720, Relating to Government Records**

Attention: Chair Angus McKelvey, Vice Chair Mike Gabbard and Members of the
Committee

The University of Hawaii Professional Assembly (UHPA) appreciates the opportunity to testify in **support of SB 720**, Relating to Government Records.

SB 720 amends the Uniform Information Practices Act (UIPA) to provide an exception to the mandatory disclosure of government records for deliberative and pre-decisional inter-agency or intra-agency records concerning an agency decision about a government action. This bill enables agencies to properly analyze and evaluate an agency decision on a government action without undue and improper interference, and minimizes the likelihood for abuse of the privilege by both agencies and requesting parties.

Respectfully submitted,

Christian L. Fern
Executive Director
University of Hawaii Professional Assembly



SENATE COMMITTEE ON GOVERNMENT OPERATIONS
Thursday, February 2, 2023, 3:15 pm Hearing, State Capitol Room 225 &
Videoconference

SB 720,
Relating to Government Records

COMMENTS

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

Chair McKelvey, Vice Chair Gabbard, and Committee Members:

The League of Women Voters of Hawaii has the following comments.

The legislative proposal shown in Exhibit C of OIP's December 16, 2022 "Report to 2023 Legislature of SCR 192 Working Group" is a compromise which the Legislature will need to reconsider in 2029. Some members of the Working Group believed Hawaii government would make faster, better decisions if UIPA were amended to give agencies discretion whether to disclose agency deliberations prior to government decisions. Others members of the Working Group believed that an UIPA amendment might be misused and is not necessary.

The compromise proposal requires disclosure of deliberative government records to be discussed at meetings or hearings at which the public has the right to participate. While public participation is not required in all government decisions, timely disclosure of relevant government records is necessary for meaningful public participation prior to government decisions.

The compromise proposal requires disclosure of any deliberative government record an agency has already disclosed. Government agencies should not selectively decide which members of the public can participate in government decisions.

The compromise proposal requires disclosure of deliberative government records relevant to government decisions (or abandonment of decision-making). The public wants to understand why government decisions were made and learn if government decisions were capricious.

The compromise proposal requires that disclosure of deliberative government records include names of public officials and employees who participated in or had discretionary authority for government decisions. People responsible for government decisions should not be totally unaccountable.



Feb. 2, 2023

3:15 p.m.

VIA VIDEOCONFERENCE

Conference Room 225

To: Senate Committee on Government Operations

Senator Angus L.K. McKelvey, Chair

Senator Mike Gabbard, Vice Chair

From: Grassroot Institute of Hawaii

Joe Kent, Executive Vice President

RE: SB720 — RELATING TO GOVERNMENT RECORDS

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on [SB720](#), which would add an exception to Hawaii’s open records law for “deliberative and pre-decisional” government inter- and intra-agency records concerning an agency decision about a government action.

The Institute appreciates the effort put into this proposal by the working group tasked with examining the deliberative-process exception and drafting model legislation.

We understand that it is not an easy task to balance the competing interests of the public’s right to know with the need for a state agency to make sound and considered decisions.

During that process, the Grassroot Institute submitted comments to the working group expressing our concerns about the definition of “predecisional documents,” as well as about the need for a time limit for disclosure of documents where no decision has yet been made.

It is clear that the working group has made a laudable effort to address these issues. The three-year limit — after which a matter is considered “abandoned,” thereby opening up related documents for disclosure — is a good addition, though we suggest it be shortened by at least 18 months.

While we are cognizant of the effort that went into this proposal, we maintain that a deliberative-process exception would frustrate the intent of the state's transparency laws, which by making government deliberations and actions available to the public are meant to ensure accountability and discourage corruption.

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 our experience, we can attest to the fact that this 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 this bill seeks to carefully delineate what documents can be deemed "predecisional" and therefore withheld under the exception, the inherent conflict between the public interest in disclosure and the agency's desire to withhold, as well as the ambiguity of the "deliberative process," guarantees more challenges and disputes.

Much of the work done by government agencies is deliberative in nature and an agency that is determined to obstruct records requests is incentivized to categorize large numbers of documents as "predecisional."

Given the wording of the bill, a particularly secretive agency could even organize its activities in such a way as to classify more and more of its records as deliberative in nature.

During the working group's public comment period, every public interest group that testified spoke against the creation of this exception. Among advocacy groups, there is near-universal agreement that this exception will be employed to frustrate open records requests.

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.

Moreover, this exception is not necessary. It has not existed in Hawaii law for many years and there is no evidence that the lack of such an exception has frustrated the ability of government agencies to carry out decision making processes.

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.

It is our belief that an exception for government records related to decision-making runs counter to the spirit of Hawaii's Uniform Information Practices Act. Its statement of purpose and rules of construction very clearly include disclosure of agency deliberations and the decision-making process.

HRS Ch. 92F-2 states: "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."

To stay true to the intent of the law means that any exception should be biased towards timely disclosure, not secrecy.

Thank you for the opportunity to submit our comments.

Sincerely,

Joe Kent
Executive Vice President
Grassroot Institute of Hawaii

SB-720

Submitted on: 1/28/2023 3:51:42 PM

Testimony for GVO on 2/2/2023 3:15:00 PM

Submitted By	Organization	Testifier Position	Testify
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

Wast of Tax payer Money!!!



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Thirty-Second Legislature, State of Hawaii
The Senate
Committee on Government Operations

Testimony by
Hawaii Government Employees Association

February 2, 2023

S.B. 720 — RELATING TO GOVERNMENT RECORDS

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO supports the purpose and intent of S.B. 720, which amends the Uniform Information Practices Act (Modified), Chapter 92F, HRS, by codifying the deliberative process privilege and amending the definition of “government record”.

For almost three decades, the State Office of Information Practices (OIP) recognized a “deliberative process privilege” which allowed agencies, with various limitations, to withhold deliberative and pre-decisional records under the exception to mandatory disclosure under the Uniform Information Practices Act (Modified), Chapter 92F, HRS (UIPA), for records whose disclosure would frustrate a legitimate government function. The Hawaii Supreme Court’s 2018 decision in *Peer News LLC, dba Civil Beat v. City and County of Honolulu*, changed the treatment of such records. As the law currently stands, the UIPA does not offer any protection against disclosure for deliberative and pre-decisional records, unless those records fall under another UIPA exception.

Senate Concurrent Resolution 192 (SCR 192), adopted by the Legislature during the 2022 session, requested that the OIP “convene a working group 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[.]”

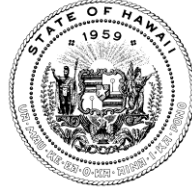
SB 720 is the product of the working group. It amends the UIPA by specifically codifying the deliberative process privilege in HRS Chapter 92F.

SB 720 also appropriately excludes truly preliminary records, such as personal notes and rough drafts of memoranda that have not been circulated, from the definition of “government record”.

Thank you for the opportunity to testify in support of S.B. 720.

Respectfully submitted,

Randy Perreira
Executive Director



LATE

JOSH GREEN, M.D.
GOVERNOR | KE KIA'AINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'AINA

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Testimony of the Department of Commerce and Consumer Affairs

Before the
Senate Committee on Government Operations
Thursday, February 2, 2023
3:15 p.m.
Conference Room 225 and Videoconference

On the following measure:
S.B. 720, RELATING TO GOVERNMENT RECORDS

Chair McKelvey and Members of the Committee:

My name is Nadine Ando, and I am the Director of the Department of Commerce and Consumer Affairs' (Department). The Department offers comments on this bill.

The purposes of this bill are to: (1) add an exception to mandatory disclosure of government records for deliberative and pre-decisional government inter-agency or intra-agency records concerning an agency decision about a government action. From July 1, 2023, through June 30, 2027, requires agencies to report their use of the exception to the Office of Information Practices; and (2) require the Office of Information Practices (OIP) to convene a working group to examine agency use of the exception and report to the Legislature prior to the Regular Session of 2029.

The Department notes that on page 1, lines 6-8, the measure states that government records do not contain "rough drafts," a term which is not further defined. The Department anticipates confusion and potential litigation over what qualifies as a

rough draft should this term remain undefined, and requests that the term be defined if this measure continues.

On page 3, lines 1-5, proposes to change the language of Hawaii Revised Statute section 92-F-13(6). This would create a statutory exception to the mandatory disclosure for deliberative and pre-decisional government records until a decision has been made, or deliberation of the matter has been abandoned. The Department notes that if deliberation of a matter has been abandoned, there is no public interest in knowing what opinions and thought were involved in the decision-making process, since no government action was taken.

Finally, the proposed language creates a rebuttable presumption that deliberation of a matter has been abandoned if three years have elapsed after a request for records. This presumption appears to be unnecessary. If an agency claims that a final decision has not been reached and deliberation of the matter has not been abandoned, and the requester appeals to the OIP, the burden would fall solely on the agency to prove its claims—regardless of the creation of a rebuttable presumption. The inclusion of the rebuttable presumption also does not shield an agency for three years from such claims or appeals.

Thank you for the opportunity to testify on this bill.