GRASSROOT
INSTITUTE OF HAWAII

Oct. 4, 2022
12 p.m.
Online, via Zoom

To: Office of Information Practices
SCR 192 Working Group

From: Grassroot Institute of Hawaii
Malia Hill, Director of Policy

RE: PROPOSED AMENDMENTS TO HRS CHAPTER 92F

Comments Only

Dear Members of the SCR192 Working Group:

The Grassroot Institute of Hawaii would like to offer its comments on the draft legislation that would incorporate a "deliberative process privilege" (DPP) into the state Uniform Information Practices Act, as well as offer a few comments on the proposed exemption in general.

We appreciate the efforts of the working group to find a compromise on this issue. It is not an easy thing 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. The Grassroot Institute submitted testimony in opposition to this exemption, but we understand the rationale behind it and support efforts to protect transparency while ensuring efficient and effective governance.

A survey of opinions issued by the state Office of Information Practices regarding the deliberative process privilege demonstrates that this exemption is ripe for misinterpretation and confusion. The OIP opinions illustrate the agency's challenges in navigating these issues and setting a standard that upholds transparency. However, the goal of any legislation that reinstates the privilege should be to set clear standards and minimize the need to appeal to the OIP.

Our primary concern with the return of the DPP is that it will be used by agencies as a tool to avoid disclosure. When crafting a law to reinstate the DPP, it is important to account for the

possibility that agencies may want to avoid disclosure for a variety of reasons. More important, as transparency is one of the ways to ensure clean government, UIPA exemptions must not become tools that can be manipulated by an individual who seeks to cover up corruption.

For that reason, we have two primary concerns with the draft legislation, which we fear does not account for the actions of an agency that is rushed, overwhelmed, or biased against disclosure.

Our first concern applies to the amendment to section 92F-3, which changes the definition of "government record" under the UIPA to exempt predecisional documents:

"Government record" shall not include writings that are truly preliminary in nature, such as personal notes and rough drafts of memorandum that have not been finalized for circulation within or among the agency.

While this amendment is an attempt to codify established court opinion on the nature of predecisional documents, we fear that this wording is too broad and could be abused. It should be noted that the Hawaii Supreme Court in *Peer News, LLC v. City & County of Honolulu* used similar wording to describe predecisional documents — with one important difference. The court noted that such "truly preliminary" writings "***may*** not qualify as government records for the purposes of an agency's disclosure obligations." The difference between "may" in the decision and "shall" in the proposed amendment is of immense significance when it comes to the implications for the UIPA.

We must remember that the law makes predecisional documents available for disclosure at a later date. This is important, as influential memoranda, studies, surveys, and opinions may shine a light on how decision-making occurred and what influences were in play during the process.

Consider, for example, an agency that must make a final report to the Legislature recommending sites for a public works project. In the course of such a decision, personal notes and draft communications are created that reflect political pressure to choose a specific site over another. This is information the public deserves to know, but under the above definition, the agency would be justified in treating them as outside the definition of "government records."

The draft amendment does attempt to make a distinction between records of importance and records that are "truly preliminary" by referencing rough drafts and personal notes, but that distinction remains vague and open to interpretation. One can imagine any number of

communications, memoranda, reports, notes, or recordings that could be thought by the agency to be "truly preliminary" but which bear significance to the public as part of the government's decision-making process.

The UIPA's effectiveness leans heavily on the meaning of "government records," and this new definition creates ambiguity as to what could be classified as "truly preliminary." What does it mean to be "finalized for circulation"? Does it mean that only final drafts qualify? What about records other than memos that bear on decision-making but don't ever make it out of the "draft" stage? What does it mean that something has been "circulated"?

What is needed is a bright-line definition that divides the "truly preliminary" from records that should be considered part of the decision-making process. Once a personal note or draft has been shared with others within the agency, it no longer qualifies as an individual's preliminary thoughts, as it has entered the sphere of an agency product. Thus, while it may at that point still be "predecisional," upon being shared, it has become a "government record."

We suggest that the amendment to Ch. 92F-3 creating an exception to the definition of "government records" be changed to provide further clarification and avoid the creation of any loopholes regarding what qualifies as "truly preliminary." We propose the following wording as a replacement:

"Government record" may not include writings that are truly preliminary in nature, such as personal notes and rough drafts of memorandum that have not been circulated or shared within, among, or outside the agency.

In addition, we suggest that the working group, and eventually the Legislature, add guidance indicating that the "truly preliminary" exception to the definition of "government record" be narrowly construed so as to encourage transparency and openness.

Our second concern touches on the amendment proposed to Ch. 92F-13:

6) Inter-agency or intra-agency deliberative and predecisional government records, other than readily segregable purely factual information, up until the final decision the deliberative government records relate to has been made or until deliberation of the matter has been abandoned; provided that once disclosure is required, the name, title, or other information that would directly identify a public official or employee may be withheld if that person lacks discretionary authority, did not make the decision, and is not under investigation for or engaged

in wrongdoing or criminal conduct. This exception does not apply to board packets as defined in section 92-7.5.

On the whole, we think this is a laudable attempt to balance disclosure and decision-making. In particular, we appreciate that the exception lapses after the decision has been made or deliberation is abandoned, as that allows for the eventual disclosure of important documents. However, we are concerned that the vague nature of this time limit could be exploited to avoid disclosure.

It is the nature of some agencies that decision-making is ongoing and may be delayed for years at a time, and yet, the public interest in that decision and the factors that go into it is very high.

For example, the Honolulu rail project has been contemplating alternative plans for its completion for many years now. Those alternative possibilities have significant budget and tax implications, and yet, under this exemption, HART could avoid disclosing information about those deliberations and alternatives for years.

The proposed legislation tries to address this by making records available once a decision or deliberation has been "abandoned." Yet, it is easy to imagine an agency arguing that an issue under deliberation has not yet been abandoned, no matter how much time has passed. The vague nature of this formulation requires something more to prevent abuse of the exception.

In order to avoid the use of the DPP to avoid disclosure where decision-making is a long or continuous process, we suggest that the language be altered to put a fixed time limit on how long the exception can apply to records when no final decision or report has been issued. We propose a limit of one year from the creation of the document, i.e. the relevant section of paragraph 6 of Ch. 92F-13 would read:

Inter-agency or intra-agency deliberative and predecisional government records, other than readily segregable purely factual information, up until the final decision the deliberative government records relate to has been made, the deliberation of the matter has been abandoned, or one year has passed since the creation of the record — whichever is earliest; [...]

In this way, we hope to preserve the public's right to access government records in a timely way and avoid abuse of the DPP. Moreover, we hope that placing a firm time limit on the extent of the privilege will increase clarity in the law and make it unnecessary for requesters or agencies to continually appeal to OIP as to whether an issue has been abandoned.

As noted above, we continue to have our doubts about the necessity of this exemption. Hawaii's experience of the UIPA without a DPP has demonstrated that the lack of such an exception has not

harmed agency decision-making. Moreover, the need to bolster public trust in the government requires a bias towards transparency.

It is our belief that an exception for government records related to decision-making runs counter to the spirit of Hawaii's UIPA law. The statement of purpose and rules of construction under the UIPA very clearly includes 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 exemption should be biased towards timely disclosure, not secrecy. However, if such an exemption is put forward, we ask that the working group make its recommendations in a way that upholds a bias for disclosure, transparency, and open government.

Thank you for the opportunity to submit our comments.

Sincerely,

Malia Hill
Director of Policy
Grassroot Institute of Hawaii