

MAR 11 2022

SENATE CONCURRENT RESOLUTION

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.

1 WHEREAS, the 1988 Legislature recognized, when enacting the
2 Uniform Information Practices Act (Modified), chapter 92F,
3 Hawaii Revised Statutes (UIPA), that there would be gray areas
4 and unanticipated cases arising in the implementation of the
5 UIPA that should be left to the Office of Information Practices
6 (OIP) and courts to balance competing interests to determine
7 whether disclosure would be required, and the UIPA's exceptions
8 were crafted to allow for the development of such a common law;
9 and

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11 WHEREAS, federal courts created the deliberative process
12 privilege (DPP) in the 1950s to encourage and allow for frank
13 and candid agency deliberations as a means to promote more
14 effective government decision-making; and

15
16 WHEREAS, based on the federal Freedom of Information Act
17 (FOIA), relevant state and federal caselaw, and the UIPA's own
18 legislative history, for nearly 30 years, the OIP recognized the
19 DPP as a form of the UIPA's exception to disclosure for records
20 whose disclosure would frustrate a legitimate government
21 function, section 92F-13(3), Hawaii Revised Statutes; and

22
23 WHEREAS, the federal DPP has been the subject of
24 significant criticism for abuse by agencies and consequent
25 efforts by Congress to identify "language that will ensure that
26 the executive agencies administering FOIA will strike the
27 appropriate balance between privacy that is absolutely necessary
28 for candid conversations in the development of effective public
29 policy and transparency that is necessary and expected in a
30 government by the people and for the people"; and
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1 WHEREAS, other jurisdictions across the country utilize a
2 wide spectrum of approaches to transparency for agency
3 deliberations; and
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5 WHEREAS, this body believes that in order to reach sound
6 decisions on the various questions that come before them,
7 agencies in some instances need their employees and officers to
8 fully and frankly discuss proposed policies or tentative
9 decisions at an internal level, outside the glare of publicity,
10 and with the freedom to express views or editorial changes that
11 may not be incorporated into the final decision; and
12

13 WHEREAS, this body would like interested stakeholders to
14 consider whether there is consensus on the appropriate balance
15 between transparency and deliberative process for effective
16 agency decision-making in Hawaii, and to recommend a new
17 statutory standard that balances the various agency and public
18 interests; now, therefore,
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20 BE IT RESOLVED by the Senate of the Thirty-first
21 Legislature of the State of Hawaii, Regular Session of 2022, the
22 House of Representatives concurring, that the Office of
23 Information Practices is requested to convene a working group to
24 develop a consensus on language for a new UIPA exception for
25 agency records that are deliberative and pre-decisional which
26 reasonably balances the public's interest in disclosure against
27 the potential harm to the agency's ability to fully consider and
28 make sound and informed decisions; and
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30 BE IT FURTHER RESOLVED that the working group is requested
31 to gather and consider information from interested and affected
32 parties as well as examine the law and practices in Hawaii and
33 in the application of similar exceptions in other jurisdictions,
34 with the goal of developing a consensus on language for the new
35 UIPA exception; and
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37 BE IT FURTHER RESOLVED that the working group is requested
38 to include seven members consisting of three individuals
39 representing public interest groups; three individuals
40 representing government agencies subject to the UIPA; and the
41 Director of the Office of Information Practices or the



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1 Director's designee, who shall appoint the members and serve as
2 the working group convener; and

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4 BE IT FURTHER RESOLVED that the Director of the Office of
5 Information Practices is requested to report the findings and
6 any recommendations of the working group to the Legislature no
7 later than twenty days prior to the convening of the Regular
8 Session of 2023; and

9
10 BE IT FURTHER RESOLVED that certified copies of this
11 Concurrent Resolution be transmitted to the Governor, Director
12 of the Office of Information Practices, Executive Director for
13 the Civil Beat Law Center for the Public Interest, President of
14 the League of Women Voters of Hawaii, and the Executive Director
15 of Common Cause Hawaii.

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18 OFFERED BY: _____

