
SENATE CONCURRENT RESOLUTION

REQUESTING THE OFFICE OF INFORMATION PRACTICES TO CONVENE A
WORKING GROUP TO DEVELOP RECOMMENDATIONS FOR THE TREATMENT
OF DELIBERATIVE AND PRE-DECISIONAL 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
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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
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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
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13 WHEREAS, interested stakeholders should consider the
14 appropriate balance between transparency and deliberative
15 process for effective agency decision-making in Hawaii, and
16 recommend a new statutory standard that balances the various
17 agency and public interests; now, therefore,
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19 BE IT RESOLVED by the Senate of the Thirty-first
20 Legislature of the State of Hawaii, Regular Session of 2022, the
21 House of Representatives concurring, that the Office of
22 Information Practices is requested to convene a working group to
23 develop recommendations for a new UIPA statutory exception and
24 other recommendations for deliberative and pre-decisional agency
25 records to reasonably balance the public's interest in
26 disclosure and the agency's ability to fully consider and make
27 sound and informed decisions; and
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29 BE IT FURTHER RESOLVED that the working group is requested
30 to gather and consider information from interested and affected
31 parties as well as examine the law and practices in Hawaii and
32 other jurisdictions, with the goal of developing recommendations
33 to address government's need for and the public's concern about
34 deliberative and pre-decisional agency processes and records in
35 decision-making; 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



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 recommendations of the working group to the Legislature no later
7 than twenty days prior to the convening of the Regular Session
8 of 2023; and
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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 of
13 the Civil Beat Law Center for the Public Interest, President of
14 the League of Women Voters of Hawaii, and Executive Director of
15 Common Cause Hawaii.

