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.

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

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

WHEREAS, based on the federal Freedom of Information Act
(FOIA), relevant state and federal caselaw, and the UIPA's own
legislative history, for nearly 30 years, the OIP recognized the
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), Hawaii Revised Statutes; and

WHEREAS, the federal DPP has been the subject of
significant criticism for abuse by agencies and consequent
efforts by Congress to identify "language that will ensure that
the executive agencies administering FOIA will strike the
appropriate balance between privacy that is absolutely necessary
for candid conversations in the development of effective public
policy and transparency that is necessary and expected in a
government by the people and for the people"; and
WHEREAS, other jurisdictions across the country utilize a wide spectrum of approaches to transparency for agency deliberations; and

WHEREAS, this body believes that in order to reach sound decisions on the various questions that come before them, agencies in some instances need their employees and officers to fully and frankly discuss proposed policies or tentative decisions at an internal level, outside the glare of publicity, and with the freedom to express views or editorial changes that may not be incorporated into the final decision; and

WHEREAS, interested stakeholders should consider the appropriate balance between transparency and deliberative process for effective agency decision-making in Hawaii, and recommend a new statutory standard that balances the various agency and public interests; now, therefore,

BE IT RESOLVED by the Senate of the Thirty-first Legislature of the State of Hawaii, Regular Session of 2022, the House of Representatives concurring, that the Office of Information Practices is requested to 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; and

BE IT FURTHER RESOLVED that the working group is requested to gather and consider information from interested and affected parties as well as examine the law and practices in Hawaii 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; and

BE IT FURTHER RESOLVED that the working group is requested to include seven members consisting of three individuals representing public interest groups; three individuals representing government agencies subject to the UIPA; and the Director of the Office of Information Practices or the
Director's designee, who shall appoint the members and serve as
the working group convener; and

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

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