

Gabriel Lee, Chair
University of Hawai`i Board of Regents
2444 Dole Street
Bachman Hall 209
Honolulu, Hawai`i 96822

**RE: University of Hawai`i (UH) President Selection Deliberations
October 16, 2024 Meeting; Agenda Item No. IV**

Dear Chair Lee and Regents:

My name is Ben Creps. I am a staff attorney at the Public First Law Center, a Hawai`i non-profit organization focused on solutions that promote responsiveness and transparency in government.

Public First strongly urges the Board to interview and discuss the candidates for UH President in *open session*. (We take no position on the candidates.) The October 16 agenda indicates the Board intends to conduct these activities in closed session under HRS § 92-5(a)(2), the “personnel-privacy” exemption.

The plain text of HRS § 92-5(a)(2) and clear guidance from the Hawai`i Supreme Court provide that the personnel-privacy exemption is *not* a blanket open meeting exception to discuss personnel matters. It applies *only* where “where consideration of matters affecting privacy will be involved.” *Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City & County of Honolulu (CBLIC)*, 144 Hawai`i 466, 479, 445 P.3d 47, 60 (2019). This language requires the existence of a constitutionally protected privacy interest. *Id.* at 478-79, 445 P.3d at 58-60. In the absence of such an interest, “personnel matters should presumptively be discussed in an open meeting.” *Id.*

Determining whether a protected privacy interest exists, in turn, is a case-specific analysis that looks at the person at issue and topic of discussion. *Id.* at 478, 481, 445 P.3d at 59, 62. There are several non-exhaustive factors to consider. Critically, “reasonable expectations of privacy may be affected by a person’s level of discretionary and fiscal authority in government.” The Hawai`i Supreme Court expressly identified the UH President as a position with a “substantially diminished” privacy interest because it has a high degree of discretionary and fiscal authority. *Id.* at 481, 445 P.3d at 62 (citing OIP Op. No. 04-07 at 6-7).

Additionally, the decision to hold an executive session under HRS 92-5(a)(2) is not mandatory – a board can always choose to be *more* open. Boards only run afoul of the



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Sunshine Law when they are *less* open than the law requires. *E.g., CBLC, 144 Hawai`i at 477, 445 P.3d at 58* (“Because the decision to close a meeting is discretionary, board members should thoughtfully weigh the interests at stake before voting. . . . If board members misconstrue the Sunshine Law and take action based on these misconceptions, their conduct undermines the intent of the Sunshine Law and impairs the public’s ‘right to know.’”).

The UH community and general public have a legitimate interest in understanding why a particular candidate for UH President is selected. Given the clarity of the law and keen public interest, there is no good reason to hold these important discussions behind closed doors. In light of all the effort that the Regents have invested in this process, it makes little sense to jeopardize the outcome, expose UH to potential liability, and setback the incoming UH President by starting that person’s tenure under a cloud of secrecy. *See HRS §§ 92-11, -12.*

Thank you for the opportunity to testify.