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To: Senate Committee on Government Operations

From: Carlotta Amerino, Director

Date: January 28, 2025, 3:00 p.m.
State Capitol, Conference Room 225

Re: Testimony on S.B. No. 381
Relating to Public Agency Meetings

Thank you for the opportunity to submit testimony on this bill, which would add a new section to the Sunshine Law, part I of chapter 92, HRS, requiring a board hiring a division head to adopt a process and timeline for the hiring in an open meeting and then follow it; and would bar a board from voting in closed session to hire a division head. The Office of Information Practices (OIP) offers **comments**.

Under the Sunshine Law, boards are required to hold meetings open to the public but may enter an executive session closed to the public for one or more of the purposes set forth in section 92-5(a), HRS. One of the limited purposes for which a Sunshine Law board can hold a closed executive session is "[t]o consider the hire . . . of an officer or employee . . . where consideration of matters affecting privacy will be involved[.]" There has been an ongoing dispute, and there is ongoing litigation, over how this executive session purpose applies to a Sunshine Law board hiring for an executive director or similar leadership position. This bill would resolve some part of that dispute, and OIP leaves it for this Committee to decide whether the proposed

requirements for a Sunshine Law board's hiring process align with the Legislature's intent.

The requirement in the new section 92-__, HRS, for a board to publicly discuss its process and timeline for hiring is consistent with the Sunshine Law's current requirements. While the Sunshine Law does not actually require a board to adopt a process and timeline in advance, it is fairly typical for a board to do so and such a process-focused discussion, which by its nature does not involve specific candidates, could not be held in a closed executive session since it would not involve consideration of matters affecting privacy. The effect of the new section would thus primarily be to specifically require a board hiring a division head to always take the additional step of developing a process and timeline for the hiring, and to follow that process and timeline or formally amend it if necessary. This would all be done in an open meeting, but again, the Sunshine Law already requires an open meeting for such a discussion.

The bill's amendment to subsection 92-5(a)(2), HRS, would require a board to hold any vote on the question of hiring a candidate as a division head in open session. This open session requirement would be a change, since OIP's opinions under current law have said that such a vote can be taken in a closed executive session because of the possibility that the motion to hire could fail and the individual concerned would thus be identified as an unsuccessful candidate for government employment. See OIP Op. Ltr. No. F24-03 starting at page 24, available at oip.hawaii.gov. Although the amendment would have the effect of statutorily overruling at least one OIP opinion, OIP would welcome the Legislature's clarification of its intent if the amendment better reflects the Legislature's wishes. When considering an individual's privacy interest in the fact that he or she has applied for a government position, the fact that someone was a top candidate for a division head position, but not ultimately hired, is not highly

embarrassing information: he or she was clearly a strong candidate for the board to have taken a vote in the first place. However, it is likely that some qualified candidates would not consider applying for government positions if the fact that they applied would be known to their current employers even if they were not selected. This could put unselected candidates in an uncomfortable position where they are currently employed if it is known that they have been looking for employment elsewhere.

Finally, OIP notes that this bill does not address a board's ability to discuss and interview individual candidates, and thus apparently leaves boards able to do so in a closed executive session where individual privacy is concerned. Thank you for considering OIP's testimony.

LEAGUE OF WOMEN VOTERS® OF HAWAII

Senate Committee on Government Operations

Tuesday, January 28, 2025 3 PM Hearing in Conference Room 225 on
SB 381, Relating to Public Agency Meetings

TESTIMONY
Douglas Meller, Legislative Committee, League of Women Voters of Hawaii

Chair McKelvey, Vice Chair Gabbard, and Committee Members:

The League of Women Voters of Hawaii has the following comments on SB 381.

Rather than amending Section 92-5(a)(2), Hawaii Revised Statutes to create an "exception to an exception", the League recommends total repeal of Section 92-5(a)(2), Hawaii Revised Statutes.

Most agency decisions are made by a public official rather than by a board. In general, unless public comments are solicited, State law does not give the public the right to participate in such decisions. The primary purpose is timely government decisions.

When state law authorizes a board to make decisions, the board usually has the option to adopt rules which delegate decisions to public officials. But when board decisions have not been delegated, the purpose of the Sunshine Law is to allow the public to monitor board deliberations and submit oral and written comments prior to board decisions. Boards should not engage in secretive deliberations and decisions on any subject. That is why the League believes it is totally inappropriate for Section 92-5(a)(2), Hawaii Revised Statutes, to authorize boards to exclude the public from board deliberations and decisions which concern hiring, evaluation, dismissal, or disciplinary matters.

Thank you for the opportunity to submit testimony.

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PUBLIC FIRST
LAW CENTER

Senate Committee on Government Operations
Honorable Angus L.K. McKelvey, Chair
Honorable Mike Gabbard, Vice Chair

RE: Comments on S.B. 381, Relating to Public Agency Meetings
Hearing: January 28, 2025 at 3:00 p.m.

Dear Chair and Members of the Committee:

My name is Ben Creps. I am a staff attorney at the Public First Law Center, a nonprofit organization that promotes government transparency.

Thank you for the opportunity to submit testimony **with comments** on S.B. 381. This bill represents a good idea, but we have concerns about its limited scope. It would require boards and commissions to openly decide the hiring process and timeline for high-level government officials and vote openly. As written, however, this measure does not address the *heart* of the hiring process—candidate interviews and board deliberations about the candidates.

To promote public oversight and participation, S.B. 381 should be broadened to make the *entire* hiring process open. Although this is largely what existing law requires—*see, e.g.*, *Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City & Cty. of Honolulu* (CBLC), 144 Hawai`i 466, 478-480, 445 P.3d 47, 58-61 (2019)—clarifying this law in statute may promote compliance.

Under existing law, board discussions about "personnel matters"—which includes hiring high-level government employees—"should presumptively be discussed in an open meeting." *Id.* Openness is the default rule. There is a limited exception under HRS § 92-5(a)(2) for personnel discussions that "directly relate" to information that is subject to constitutional privacy protection—like a medical condition. *Id*. Government boards must engage in a case-by-case analysis of whether the information at issue is subject to constitutional protection and consider a variety of factors, including the nature of the position, level of fiscal discretion, existence of other laws requiring disclosure of the information, and the degree to which information is already public. *Id*.

Despite the plain language of HRS § 92-5(a)(2) and Hawai`i Supreme Court guidance, many boards flip presumption of openness on its head—conducting substantive portions, if not all, of the hiring process for high-level government employees behind closed doors. Our lawsuit challenging this widespread practice against two boards

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remains pending. The Board of Regents' recent secretive hiring of the next University of Hawai`i President confirms that the practice continues.

The high-level employees at issue here are agency heads. They include Police and Fire Chiefs, the UH President, and a multitude of Executive Directors. These officials exercise significant government power. They are entrusted with keeping our community safe, vibrant, and productive. And they control significant amounts of taxpayer funds. Without doubt, the public has a legitimate interest in understanding how and why boards and commissions make their high-level hiring decisions.

Maui Police Chief John Pelletier is proof that openness works in this context. He was hired in late 2021 by the Maui Police Commission in a completely open process—final candidates were interviewed openly and at the same time. (Candidates were all asked the same questions and rotated who answered first.) The Commission deliberated in public, voted to hire Mr. Pelletier, and shared why he was selected. *See, e.g.*, https://mauinow.com/2021/10/05/breaking-john-pelletier-selected-as-final-candidate-for-maui-police-chief/; https://www.mauinews.com/news/local-news/2021/11/commission-confirms-pelletier-as-new-police-chief/.

Excessive secrecy contributes to the public's distrust of government and erodes the public's right to participate in important government processes. Openness builds trust and encourages participation. If this Committee is inclined to move S.B. 381 forward, Public First respectfully asks that it be **amended** to extend the openness requirement to cover the **entire hiring process** for high-level government officials.

Thank you again for the opportunity to testify with comments on S.B. 381.