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August 6, 2019

VIA EMAIL

Dr. Keli'i Akina, Trustee

Robert G. Klein, Esq.  
Klein Law Group LLLC

Re: Executive Sessions Related to Alleged Code of Conduct Violations (S APPEAL 20-1)

Dear Dr. Akina and Mr. Klein:

The Office of Information Practices (OIP) opened an appeal regarding Dr. Keli'i Akina's (Requester) request for an investigation into whether the Office of Hawaiian Affairs Board of Trustees (OHA Board) violated Part I of chapter 92, Hawaii Revised Statutes (HRS) (the Sunshine Law) in its executive sessions held on June 6 and 20, 2019. This appeal file was randomly assigned to OIP's experimental alternative appeal resolution track pursuant to H.R. 104, Regular Session of 2019, in which the Hawaii House of Representatives requested that OIP conduct an alternative appeal resolution pilot program and prepare "short, informal, unenforceable guidance" for files assigned to the alternative appeal resolution track within two weeks of receiving the agency's final response. A copy of H.R. 104 is attached to this letter.

Mr. Klein, representing the OHA Board, provided a statement of position dated July 22 and received by OIP on July 23, 2019, and OIP is now providing informal, unenforceable guidance through this letter.

In this appeal, Dr. Akina asked whether (1) the OHA Board's executive session discussions fell within an executive session purpose and were properly done in executive session, and (2) the OHA Board was entitled to go into executive session to discuss allegations concerning him even though he had requested that it be discussed in open session. Dr. Akina argued that even if the OHA Board's stated purpose for holding an executive session was to consult with its attorney pursuant to section 92-5(a)(4), that executive session purpose should be read together with the purpose set out in section 92-5(a)(2), which generally allows a closed discussion to protect an officer or employee's

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privacy but does not allow such a discussion where the individual concerned has waived his or her privacy interest in the discussion.

Regarding the first issue raised in this appeal, OIP's initial review of the relevant portions of the agendas and public meeting minutes and *in camera* review of the relevant portion of the executive session minutes did not indicate any apparent Sunshine Law violations by the OHA Board. Rather, it appears that the OHA Board followed the Sunshine Law's requirements in announcing the anticipated executive sessions and voting to hold them, and the discussion during the executive sessions fell within the both stated executive purpose of consultation with the OHA Board's counsel and the topic of discussion listed in the relevant agenda items. Thus, OIP's inclination is to find no Sunshine Law violation in the process by which the OHA Board entered executive session or in its discussion during the executive sessions.

Regarding the second issue raised in this appeal, OIP understands Dr. Akina to be arguing that if a board's discussion will involve allegations that may lead to discipline of an officer or employee, that individual has an affirmative right to prevent the board from holding the discussion in executive session no matter which executive session purpose the board has stated it is relying on. In other words, this argument assumes that section 92-5(a)(2), HRS, creates an affirmative right for an officer or employee to have such allegations discussed in open session that overrides any other executive session purposes that may apply.

Although section 92-5(a)(2) does provide that a board cannot hold an executive session to protect the privacy of an officer or employee when "the individual concerned requests an open meeting," OIP has not interpreted it to create an affirmative right to an open meeting that would override the application of the other seven executive session purposes whenever a discussion involves an officer or employee's "hire, evaluation, dismissal, or discipline." Rather, OIP has read that language as a limitation on a board's ability to justify an executive session based on protecting an individual's privacy when the individual in question prefers that the discussion be open. When a different executive session purpose applies, such as the one for consultation with the board's attorney, that other executive session purpose provides a separate basis for the board to go into executive session independent of the individual's privacy interest. Although OIP has not yet issued a formal opinion addressing this particular question, OIP's inclination is to continue to read the executive session purposes independently of each other. Thus, even if the discussions in question had directly involved allegations against an individual instead of process issues, OIP's inclination is to find that the individual against whom allegations were made did not have the right to prevent the OHA Board from holding an executive session based on a different purpose as it did here.

OIP's inclinations as stated herein are informal guidance and are not binding on the parties to this appeal. By this letter OIP notifies Dr. Akina and the OHA Board that if any party does not wish to accept this informal guidance as resolving this appeal, that party is requested to so notify OIP in writing within 20 business days of the date of this letter and OIP will issue a binding determination in accordance with its usual procedures at a future time. If OIP does not hear from you within that time, OIP will close this file.

This letter also serves as notice that OIP is not representing anyone in this matter. OIP's role herein is as a neutral third party.

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If you have any questions concerning this matter, please contact OIP.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Jennifer Z. Brooks', with a long horizontal line extending to the right.

Jennifer Z. Brooks  
Staff Attorney

JZB:za