

VIA E-MAIL

February 11, 2026

Honolulu Police Commission
Laurie Foster, Chair
policecommission@honolulu.gov

Re: Contested Case Hearing Procedure

Dear Chair and Commission Members:

After observing the Honolulu Police Commission's contested case hearing on January 7, 2026, Public First Law Center – a nonprofit organization dedicated to government transparency – respectfully offers the following comments on the hearing procedure. We commend the Commission for upholding the public's constitutional right to observe the contested case proceeding. But the process could be better.

A. Contested Case Proceedings Are Presumptively Open

As the Commission acknowledged on January 7, contested case proceedings are presumptively open, but it was not clear that the Commission appreciated what that means and how it is different from the Sunshine Law. Contested case hearings must be conducted openly in a manner similar to court proceedings because the Hawai'i Constitution and First Amendment of the U.S. Constitution provide a qualified right of public access. *Freitas v. Admin. Dir. of the Courts*, 104 Hawai'i 483, 92 P.3d 993 (2004), cited in HPC Rule 11-4(e). As with court proceedings – but different from the Sunshine Law – the Commission's internal deliberations may occur outside the presence of the public and the parties. But if anyone wishes to close the contested case hearing to the public, *certain prerequisites must be met*.

As a matter of process, unlike executive sessions under the Sunshine Law, before closure, "(1) those excluded from the proceeding must be afforded a reasonable opportunity to state their objections; and (2) the reasons supporting closure must be articulated in findings." *Oahu Public'ns, Inc. v. Ahn*, 133 Hawai'i 482, 498, 331 P.3d 460, 476 (2014), cited in HPC Rule 11-4(e). Substantively, the Commission must find: "(1) the closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Id.*



There is a “strong constitutional presumption” of public access. *Grube v. Trader*, 142 Hawai‘i 412, 421, 420 P.3d 343, 352 (2018). Thus, “[i]t is the burden of the party seeking closure . . . to present facts supporting closure and to demonstrate that available alternatives will not protect his rights.” *Oregonian Publ’g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1467 (9th Cir. 1990). In other words, the default for contested case proceedings is open access unless the officer meets the high burden to justify closure.

[These safeguards] are not mere punctilios, to be observed when convenient. They provide the essential, indeed only, means by which the public’s voice can be heard. All too often, parties to the litigation are either indifferent or antipathetic to disclosure requests. This is to be expected: it is not their charge to represent the rights of others. However, balancing interests cannot be performed in a vacuum. Thus, providing the public notice and an opportunity to be heard ensures that the trial court will have a true opportunity to weigh the legitimate concerns of all those affected by a closure decision. Similarly, entry of specific findings allows fair assessment of the trial judge’s reasoning by the public and the appellate courts, enhancing trust in the judicial process and minimizing fear that justice is being administered clandestinely.

Phoenix Newspapers, Inc. v. U.S. Dist. Ct., 156 F.3d 940, 951 (9th Cir. 1998); *accord Ahn*, 133 Hawai‘i at 498, 331 P.3d at 476.

1. Advance Notice of Closure Requests

The Commission must provide *advance* notice that closure is requested. *Grube*, 142 Hawai‘i at 423, 420 P.3d at 354 (“motions requesting closure must be docketed a reasonable time before they are acted upon.”). Notice of the request for closure must be provided to individuals interested in the proceeding – *e.g.*, individuals who have requested advance notice of Commission agendas under HRS § 92-7(e). *Ahn*, 133 Hawai‘i at 497 & n.19, 331 P.3d at 475 & n.19. And members of the public must have a “meaningful opportunity to object.” *Grube*, 142 Hawai‘i at 424, 420 P.3d at 355. The Commission cannot wait until the hearing itself to ask whether there is a request for closure. *United States v. Biagon*, 510 F.3d 844, 848 (9th Cir. 2007) (oral motion for closure at hearing is insufficient notice).

Here, in advance of the January 7 contested case proceeding, the Commission did not ask whether anyone (*e.g.*, the officer) sought closure of the proceeding. By waiting until the hearing, the Commission denied the public a meaningful opportunity to consider the basis for purported closure and object as appropriate.

We would encourage the Commission to conform its procedures to HPC Rule 11-4(e). Specifically, when the Commission informs the officer of the right to a contested case hearing (HPC Rule 11-2(b)), the Commission should explain that the officer may request a closed hearing by submitting specific facts that establish the three substantive findings necessary for closure. The notice should require that any request for closure be submitted at the time the officer requests the hearing pursuant to HPC Rule 11-2(c). The Commission could then circulate the closure request with the officer's justification to members of the public as an attachment to the Commission's meeting agenda.

Instructing an officer to request closure in advance not only conforms to the Constitution, it helps all involved. The officer should be aware of what the officer must prove to justify closure. Members of the public can provide more thoughtful responses to the officer's specific justifications for closure. And Commission members will not need to respond in real time to last-minute requests for closure nor create excuses for the officer in an attempt to justify closure – as happened at the January 7 hearing.

2. Written Findings Supporting Closure

Should the Commission determine that a contested case hearing must be closed – after finding that the substantive requirements for closure are satisfied – the Commission must enter specific findings explaining how “the public's right of access is overcome by an overriding interest and that closure is essential to preserving the overriding interest.” HPC Rule 11-4(e); *accord Civil Beat Law Ctr. for the Pub. Interest v. Kawashima*, No. SCPW-24-484, 2026 Haw. LEXIS 3 (Jan. 5, 2026) (writ of mandamus ordering public access because court failed to provide written public findings). The findings must be accessible to the public and be promptly submitted to allow meaningful review.

The Commission's reasoning cannot rely on “generalized concerns.” *Ahn*, 133 Hawai'i at 507, 331 P.3d at 485; *Grube*, 142 Hawai'i at 426, 420 P.3d at 357 (rejecting a compelling interest based on indefinite findings). “[Findings] must contain sufficient detail for a reviewing court to evaluate each of the criteria, including the strength of the interest weighing toward closure or sealing, the potential that disclosure will cause irreparable harm to that interest, and the feasibility of protecting the interest through alternate methods.” *Grube*, 142 Hawai'i at 424-25, 420 P.3d at 355-56.

By providing the constitutionally required written findings, the Commission promotes trustworthiness, deters potential abuse, and provides a fair process for all parties involved.

3. Officers Must Show a Compelling Interest That Overrides the Strong Constitutional Presumption of Openness

The officer seeking closure must prove that the substantive requirements for closure exist: (1) a compelling interest; (2) a substantial probability that that interest would be harmed; and (3) no less restrictive alternatives to closure exist. *Ahn*, 133 Hawai`i at 498, 331 P.3d at 476.

A compelling interest is an interest of “such gravity as to overcome the strong presumption in favor of openness.” *Grube*, 142 Hawai`i at 425, 420 P.3d at 356. “[S]imply preserving the comfort or official reputations of the parties is not a sufficient justification.” *Id.* And, even if the officer specifies a compelling interest, the Commission must closely examine whether public access poses a substantial probability of irreparable harm to the officer’s compelling interest. If the harm is “fleeting or readily curable through other remedial measures” or the harm is only a possibility or “reasonable likelihood,” that is not substantial probability of irreparable harm. *Id.* at 426-27, 420 P.3d at 357-58.

At the January 7 hearing, the only proffered reason for closing the contested case hearing was “pending litigation.” That is not a compelling interest. As Commissioner Magnus observed, such reasoning would justify the closure of *all* the Commission’s contested cases, which are premised on pending litigation. And even if it were compelling, in the separate context of secret law enforcement investigations, which truly can be a compelling interest, the Hawai`i Supreme Court has explained that mere recitation of “pending investigation” is insufficient to justify closure unless there is specific evidence that disclosure poses a substantial probability of irreparable harm to that investigation. *Id.*

Assuming there was a compelling interest and a substantial probability of irreparable harm, less restrictive alternatives still exist. *Id.* at 427, 420 P.3d 358. (“Even where denial of access is appropriate, it must be no greater than necessary to protect the interest justifying it.”). For example, if an officer wanted to explain non-public trial strategy – which would irreparably damage the case if disclosed – and the Commission needed the information, such evidence might occur behind closed doors, but only that evidence.¹ Closing the entire proceeding would not be justified.

¹ Given the limited scope of 52D proceedings, this hypothetical is unlikely. If the Commission is concerned about a different potential scenario, we would be willing to comment directly on such concerns.

The Commission cannot find that no less restrictive alternatives exist without explaining why other possible alternatives, such as more limited closure, would not suffice. *Id.* at 427-28, 420 P.3d at 358-59. Thus, even where there is a compelling interest, the Commission must consider and rule out alternatives before resorting to complete closure.

B. The Commission’s Authority When an Officer Refuses to Testify

During the January 7 hearing, we also noted questions about whether an officer can be compelled to testify. First, the Fifth Amendment protection against self-incrimination is not an issue when the Commission simply holds a 52D hearing. Officers may present witnesses or evidence without ever offering testimonial statements. And officers may invoke the Fifth Amendment and refuse to testify. That is no different than how criminal proceedings are handled. Invoking the Fifth Amendment does not stop the Commission from doing its job.

A more delicate issue arises if the Commission forces an officer to testify in a 52D proceeding – either by subpoena, for example, or by imposing a presumption that the officer’s silence justifies denying the request for counsel. Again, the Commission can still fulfill its duty. Constitutional protections against self-incrimination do not prevent the Commission from weighing all the evidence – without considering the officer’s silence as a factor – to determine the 52D issue.

Even if the Commission compels the officer to testify, the Commission need not simply take the officer’s claim that disclosing the requested information would be incriminating. A person is not “exonerated from producing information necessary for the determination of a case merely because he declares that in so doing he would incriminate himself.” *Ramil v. Keller*, 68 Haw. 608, 621, 726 P.2d 254, 262 (1986).

For example, it would be questionable for an officer to assert Fifth Amendment protections when answering basic questions about their employment at HPD. What is your name? What division do you work for? Reasonable questions like these are unlikely to be incriminating. And questions may be raised about whether allegations concerning conduct relevant to a civil case – depending on the nature of the allegations – would incriminate the officer *criminally*.

Collective bargaining agreements also do not prevent the Commission from performing its statutory duties. State law tasks the Commission with performing functions identified by the Charter and determining requests for counsel by police officers. HRS

§§ 52D-1 & 52D-9; City Charter § 6-1606. A collective bargaining agreement is a “private contractual agreement” that cannot be used to avoid such statutory requirements. *E.g.*, *SHOPO v. Soc’y of Prof’l Journalists*, 83 Hawai`i 378, 405, 927 P.2d 386, 413 (1996). “[A] topic relating to conditions of employment cannot be subject to negotiated agreement if the proposal would require a public employer to fail to perform a duty imposed upon it by statute, or to perform the duty in a way contrary to the policy and purposes of the statute.” *Id.*; accord *SHOPO v. City & County of Honolulu*, 149 Hawai`i 492, 520, 494 P.3d 1225, 1253 (2021) (“compliance with the statute is ‘non-negotiable.’”). Thus, the collective bargaining agreement is not relevant to the Commission performing its statutory duty in these 52D proceedings.

At the January 7 hearing, the officer refused to testify. He had the right to assert that constitutional claim. The Commission may proceed on the evidence it has. And the Commission has options if it believes that the officer’s testimony must be compelled, which likely is not necessary in 52D proceedings. We encourage the Commission to internally clarify its understanding of Fifth Amendment protections with Corporation Counsel because the law is more limited than reflected in some of the Commission’s discussions. We would be happy to discuss this issue with Corporation Counsel if requested by the Commission.

C. The Role of Corporation Counsel

Lastly, we noted some confusion about the role of Corporation Counsel during the January 7 hearing. To the extent helpful in clarifying roles, contested case hearings – such as 52D proceedings – are adversarial in nature. Opposing parties (here, the City and the police officer) present arguments, and the Commission must accept testimony and evidence on the issue presented. *E.g.*, *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai`i 376, 380, 363 P.3d 224, 229 (2015) (“A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are subject to cross-examination. It provides a high level of procedural fairness and protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process.”).

HRS § 52D-9 expressly provides that Corporation Counsel “may make a recommendation to the police commission” regarding an officer’s request for counsel. If a deputy corporation counsel recommends granting or denying the request as part of the contested case proceeding, that recommendation must be part of the factual record because the Commission cannot rely on anything other than materials presented in the

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contested case proceeding. HRS § 91-9(h) (“No matters outside the record shall be considered by the agency in making its decision except as provided herein.”).

Moreover, the deputy corporation counsel who presents the City’s position cannot also advise the Commission regarding its decision-making duties. *White v. Bd. of Educ.*, 54 Haw. 10, 16, 501 P.2d 358, 363 (1972). The same deputy cannot act as both a representative of a party in the contested case proceeding and as the Commission’s legal adviser in deciding the contested case. The Commission is permitted to seek advice, however, from a different deputy corporation counsel. *Id.* at 16 n.7, 501 P.2d at 363 n.7 (“In cases of this nature, where the Board requires legal advice in its decision-making function, it should call in another deputy attorney general who had no part in the adversary hearing.”).

* * *

We offer these comments to assist the Commission in complying with its constitutional obligations to both the public and the officers involved. Closure of 52D proceedings should be rare if at all. Please do not hesitate to contact us to discuss these issues.

Regards,

A handwritten signature in black ink, appearing to read 'R. Brian Black', with a long horizontal flourish extending to the right.

R. Brian Black
Dévi D.S. Chung