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Attorneys for Plaintiff Public First Law Center

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PUBLIC FIRST LAW CENTER,

Plaintiff,

vs.

DEFENDER COUNCIL; JON N.
IKENAGA; and AGRIBUSINESS
DEVELOPMENT CORPORATION
BOARD OF DIRECTORS,

Defendants.

CIVIL NO. 1CCV-24-0000050
(Other Civil Action)

MOTION FOR PARTIAL SUMMARY
JUDGMENT ON COUNTS X - XIV;
MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT;
DECLARATION OF COUNSEL;
EXHIBITS "22" - "30"; NOTICE OF
HEARING; and CERTIFICATE OF
SERVICE

JUDGE: Honorable Jordon J. Kimura
TRIAL DATE: None

HEARING MOTION
HEARING DATE: May 9, 2025
HEARING TIME: 10:30 a.m.

MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS X - XIV

Pursuant to Rules 56 and 57 of the Hawai'i Rules of Civil Procedure, and based on the accompanying submissions and the pleadings filed in this action, Plaintiff Public First Law Center (Public First) moves for partial summary judgment against Defendant

Agribusiness Development Corporation Board of Directors (ADC Board) on its Hawai'i Revised Statutes (HRS) chapter 92 (Sunshine Law) declaratory relief claims.¹

In so moving, Public First incorporates by reference its motion for partial summary judgment filed October 23, 2024 (First ADC Motion) and supporting pleadings – *see* Dkt. 64, 65, 66, 67, and 84 – and submits additional evidence obtained through discovery.

As a matter of law, Public First is entitled to judgment in its favor on Counts X - XIV of the Complaint filed January 10, 2024 (Complaint). Dkt. 1 at 28-35 ¶¶ 210–60 and 36-38 ¶¶ F, K. Accordingly, Public First respectfully requests that the Court enter an order declaring that:

- (a) ADC violated the Sunshine Law by:
 - (1) Forming unauthorized committees of three members to evaluate the ADC Executive Director’s annual performance, in violation of HRS §§ 92-2.5 and -3 (**Count X**);
 - (2) Evaluating the Executive Director’s performance for fiscal years 2020-2021 and 2021-2022 entirely in executive session, in violation of HRS §§ 92-3, -4, and -5 (**Count XI**);
 - (3) Deliberating on the Hiring PIG’s recommendations, interviewing candidates, evaluating candidate qualifications and fitness, discussing the ADC Executive Director’s salary, and selecting the next ADC Executive Director entirely in executive session on July 20 and August 8, in violation of HRS §§ 92-3, -4, and -5 (**Count XII**);
 - (4) Failing to dissolve the Hiring PIG after it presented a report to the ADC Board, deliberating and taking action on the Hiring PIG’s report at the same meeting at which the report was presented to the ADC Board, in violation of HRS §§ 92-2.5 and -3 (**Count XIII**); and
- (b) OIP Opinion Letter No. F24-03 is “palpably erroneous” to the extent it held the ADC Board properly conducted an executive session on August 8, 2023 (**Count XIV**).

DATED: Honolulu, Hawai'i, March 25, 2025

/s/ Benjamin M. Creps
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¹ Public First reserves its requests for injunctive and other relief.

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MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT

Table of Contents

I. Legal Standards.....	3
A. Summary Judgment	3
B. Sunshine Law	4
C. Presumptions.....	5
II. Undisputed Facts	5
A. The ADC Executive Director runs a “public agency on steroids” and has substantial discretionary authority over public monies, land, and policy.....	5
B. The activity of the ADC Board and performance of its Executive Director are matters of public concern.	6
C. The ADC Board used committees to evaluate Executive Director Nakatani outside of public meetings and discussed the evaluations in executive session.	7
D. The ADC Board hired a new Executive Director through a secretive process.....	9
III. Argument.....	10
A. Count XI & Count XII: The ADC Board’s personnel-privacy executive sessions violated the Sunshine Law.	10
i. Board discussion of personnel matters is presumptively open.	10
ii. Not all privacy concerns justify closed meetings.....	11
iii. Closed sessions must be strictly limited to discussions “directly related” to protected information.	12
iv. The ADC Board erroneously invoked the personnel-privacy exemption on the sole basis that it was evaluating or hiring a government official.	12
v. The ADC Board exceeded the scope of any permissible exemption.....	14
B. Count XIV: OIP Opinion Letter No. F24-03 is palpably erroneous.....	16
C. Count X & Count XIII: The ADC Board improperly used committees and the Hiring PIG to hide its conduct.....	18
CONCLUSION.....	20

Table of Authorities

Cases

<i>Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City & County of Honolulu (CLBC),</i> 144 Hawai`i 466, 445 P.3d 47 (2019)	passim
<i>In re Pioneer Mill Co.</i> , 53 Haw. 496, 497 P.2d 549 (1972).....	6
<i>Kamaka v. Goodsill Anderson Quinn & Stifel</i> , 117 Hawai`i 92, 176 P.3d 91 (2008).....	3
<i>Keliipuleole v. Wilson</i> , 85 Hawai`i 217, 941 P.2d 300 (1997).....	17
<i>Peer News LLC v. City & Cty. of Honolulu</i> , 143 Hawai`i 472, 431 P.3d 1245 (2018).....	16
<i>SHOPO v. City & County of Honolulu</i> , 149 Hawai`i 492, 494 P.3d 1225 (2021)	11
<i>SHOPO v. SPJ</i> , 83 Hawai`i 378, 927 P.2d 386 (1996)	11
<i>Thomas v. Kidani</i> , 126 Hawai`i 125, 267 P.3d 1230 (2011).....	3

Statutes

2022 Haw. Sess. Laws Act 219	7
HRS § 92-1	1, 4, 14, 20
HRS § 92-3.....	4, 18
HRS § 92-4.....	16
HRS § 92-12.....	16
HRS § 92F-14.....	17
HRS § 163D-3.....	5, 6
HRS § 163D-4.....	6
HRS § 163D-6.....	5
HRS §163D-16.....	5

Other Authorities

OIP Op. No. 03-07	18
OIP Op. No. 06-02.....	18, 19
OIP Op. No. 06-07	17
OIP Op. No. 23-01	19
OIP Op. No. F24-03.....	2, 10

Rules

HRCP 56.....	3, 4
HRE 201.....	6
HRE 304.....	5
HRE Rule 901.....	2

Under the Sunshine Law, ADC Board meetings must be open by *default*. Closed sessions must be narrow and purposeful. *E.g.*, HRS § 92-1(2), (3) (“provisions requiring open meetings shall be liberally construed” and those “providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings”). Thus, every time it closes its doors to the public, the *ADC Board* must prove that it did so in compliance with the strict limitations of the Sunshine Law. It cannot do so here.

Starting in 2022, the ADC Board held closed-door sessions to evaluate the annual performance of then-Executive Director James Nakatani. The ADC Board later held closed-door sessions to hire his successor.

The ADC Board relied on the “personnel-privacy exemption” under HRS § 92-5(a)(2) to justify this excessive secrecy.² But it did so under a construction that collapsed the exemption’s two prongs into one – simply whether the discussion concerned a personnel matter. The Hawai`i Supreme Court *rejected* that very construction in 2019.

Personnel discussions are appropriate for executive session *only* where “matters affecting privacy will be involved.” *Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City & County of Honolulu (CBLC)*, 144 Hawai`i 466, 479, 445 P.3d 47, 60 (2019). Those privacy interests must meet the constitutional standard, not the privacy standard under the Uniform Information Practices Act (UIPA). *Id.* at 480-81, 445 P.3d at 61-62. Boards must engage in a case-specific privacy analysis that considers a multitude of factors. *Id.* The ADC Board failed to do that required analysis, and evaluating or hiring the ADC Executive Director is not – as a matter of law – a matter categorically protected by the

² HRS § 92-5(a)(2) provides:

A board may hold a meeting closed to the public pursuant to section 92-4 for one or more of the following purposes:

...

(2) To consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held.

constitutional right of privacy that would justify hiding all discussion and deliberation from the public.

Even where a portion of a personnel discussion may concern a legitimate matter of privacy – which the ADC Board has yet to offer any evidence of – only the portion that “directly relates” to that privacy concern may be held in closed session. *Id.* at 478-79, 445 P.3d at 59-60. The remainder “should presumptively be discussed in an open meeting.” *Id.* The ADC Board must rigorously adhere to its open meeting obligations. The alternative – as occurred here – is that vague speculation about what *might* be discussed shuts the public entirely out, contrary to the Sunshine Law.

Notwithstanding the Hawai`i Supreme Court’s explanation of the relevant standards in *CBLC* – rejecting the UIPA privacy standard – the Office of Information Practices (OIP) held that a secret hiring process was permitted for any government position because candidates for government employment have a blanket statutory (not constitutional) privacy interest under UIPA. OIP Op. No. F24-03 at 22-23. OIP’s erroneous analysis effectively reduced the personnel-privacy exemption to a single prong because every “hire” involves candidates for government employment. The opinion thus relied on the wrong standard, erased the case-by-case privacy analysis required under *CBLC*, and is “palpably erroneous.”

Summary judgment is warranted on all declaratory claims. The law is clear. The material facts are matters of public record and have either been admitted by the ADC Board or cannot be genuinely disputed. In response to evidentiary concerns raised by the Court’s order denying the First ADC Motion, Public First submits written admissions from the ADC Board authenticating the meeting minutes attached to the First ADC Motion and admitting key facts.³ Declaration of Benjamin M. Creps, dated March 25, 2025 (Creps Decl.), ¶ 3. Public First further submits executive session minutes and other material produced by the ADC Board through discovery. This evidence bolsters the undisputed record presented by the First ADC Motion.

³ *Cf.* Hawai`i Rules of Evidence (HRE) Rule 901(b)(7) (authenticating public reports); HRS §§ 92-7(b), -9(b) (specifying boards must post meeting agendas and minutes on the Internet); Dkt. 65 at 1, 3-4 (averring public records retrieved from official sources).

Because the *presumption* is openness, Public First need only show that the ADC Board discussed a presumptively open topic – here, personnel matters – in a closed session. The undisputed evidence is that ADC Board did so. Now it has the burden to prove that its closure of the presumptively open meeting was proper. The ADC Board cannot meet that burden.

Public First thus asks this Court to enter an order declaring that: (1) the ADC Board violated the Sunshine Law as outlined below; and (2) OIP Opinion Letter No. F24-03 is palpably erroneous to the extent it held that the ADC Board properly conducted an executive session on August 8, 2023.

I. Legal Standards

A. Summary Judgment

The judgment sought “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” HRCP 56(c); *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Hawai`i 92, 104, 176 P.3d 91, 103 (2008).

The evidentiary standard required of a moving party in meeting its burden on summary judgment depends on whether it will have the burden of proof on the issue at trial. *Exotics Hawaii v. E.I. Du Pont de Nemours*, 116 Hawai`i 277, 301-02, 172 P.3d 1021, 1046 (2007). When the non-moving party has the burden of proof at trial, summary judgment is proper on a showing that the non-moving party cannot meet its burden. *Thomas v. Kidani*, 126 Hawai`i 125, 130, 267 P.3d 1230, 1235 (2011).

“Generally, the defendant has the burden of proof on all affirmative defenses, which includes the burden of proving facts which are essential to the asserted defense.” *U.S. Bank Nat’l Ass’n v. Castro*, 131 Hawai`i 28, 41, 313 P.3d 717, 730 (2013). “The plaintiff is only obligated to disprove an affirmative defense on a motion for summary judgment when the defense produces material in support of an affirmative defense.” *Id.*; *accord O’Grady v. State*, 140 Hawai`i 36, 54, 398 P.3d 625, 643 (2017) (exceptions in remedial statutes are defenses because “the State is in the best position to provide

relevant evidence with regard to its decision-making, and a rule that requires the plaintiff to prove the absence of any policy consideration would not be practicable”).

When a motion for summary judgment is properly supported, “an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.” HRCP 56(e). “In other words, a party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor is he or she entitled to a trial on the basis of a hope that he can produce some evidence at that time.” *Exotics Hawaii*, 116 Hawai`i at 301-02, 172 P.3d at 1046.

B. Sunshine Law

The Sunshine Law “protect[s] the people’s right to know.” HRS § 92-1. The Legislature recognized that government boards serve the people of Hawai`i, and “[o]pening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.” *Id.* Thus, “it is the policy of this State that the formation and conduct of public policy – the discussions, deliberations, decisions, and action of governmental agencies – shall be conducted as openly as possible.” *Id.* To implement this policy, “[t]he provisions requiring open meetings shall be liberally construed,” and those “providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.” *Id.*

“Every meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting unless otherwise provided in the state constitution or as closed pursuant to sections 92-4 and 92-5[.]” HRS § 92-3. “Boards should keep in mind the Sunshine Law’s policy of openness and should not enter executive meetings unless necessary.” *CBLC*, 144 Hawai`i at 477, 445 P.3d at 58. “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.’” *Id.*

C. Presumptions

The Sunshine Law establishes “the presumption that all government board meetings will be open to the public.” *CBLC*, 144 Hawai`i at 476, 445 P.3d at 57.

“A presumption established to implement a public policy other than, or in addition to, facilitating the determination of the particular action in which the presumption is applied imposes on the party against whom it is directed the burden of proof.” HRE 304(a).

“The effect of a presumption imposing the burden of proof is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced sufficient to convince the trier of fact of the nonexistence of the presumed fact.” HRE 304(b).

II. Undisputed Facts

A. The ADC Executive Director runs a “public agency on steroids” and has substantial discretionary authority over public monies, land, and policy.

The ADC has unique powers, engages in extensive public land acquisition and management activities, and receives significant amounts of public funding. Dkt. 64 at 9-12.⁴ It has been described as a “public agency on steroids” with “extraordinary powers” and “exemptions unique in Hawai`i state government that afford the corporation unrivaled flexibility.” Dkt. 65 at 24, 45 (Ex. 1). The Legislature granted ADC “extraordinary powers” and “exemptions unique in Hawai`i state government that afford the corporation unrivaled flexibility.” *Id.* at 24, 45. Those “powers allow ADC to operate more like a business than a state agency.” *Id.*

The ADC is also exempt from significant oversight and regulatory regimes, like “public land trust regulations,” which allows ADC to avoid “public auctions for property dispositions.” *Id.* at 24; *see also*, HRS §§ 163D-6(b)(3), 163D-16(a). And it is exempt “from Public Utilities Commission regulations” and “civil service laws.” Dkt. 65 at 24 (Ex. 1); *e.g.*, HRS §§ 163D-3(d), (h), 163D-6(b).

⁴ All pinpoint citations to “Dkt.” entries refer to the corresponding PDF pagination.

The ADC manages and controls thousands of acres of State land. Dkt. 1 at 9 ¶¶ 61-63; Dkt. 23 at 12 ¶¶ 61-63; HRS § 163D-4 (powers); Dkt. 65 at 20 (Ex. 1); Thomas Heaton, *Hawai`i's Ag Corp. is Putting Up Remainder of its Land for Lease*, Honolulu Civil Beat (Oct. 6, 2023) (22,000-acre statewide portfolio).⁵

Its staff and operations are funded by taxpayers. Dkt. 1 at 9 ¶¶ 61-63; Dkt. 23 at 12 ¶¶ 61-63; Stewart Yerton, *Auditor: State Agriculture Agency is Failing to Fulfill Mission*, Honolulu Civil Beat, Jan. 14, 2021 (“In recent years, the Legislature has appropriated more than a quarter of \$1 billion to the ADC.”); Teresa Dawson, *Agribusiness Agency Explains Reasons Behind Slow Progress in Utilizing Lands*, Env’t Haw., Mar. 2021 (\$81,737,925 to acquire 3,752 acres).

The ADC Executive Director is responsible for the “day-to-day operations” of the ADC and tasked with executing board policies, supervising staff, and administering “the corporation’s programs, projects, and affairs.” Dkt. 66 at 37-38 (Ex. 13); *accord id.* at 127-128 (Ex. 19); *see also* Creps Decl. Ex. 22 at 27-28 (No. 56-57) (authenticating job posting and admitting it accurately reflects the general duties of the ADC Executive Director). The ADC Executive Director has the authority to, among other things, approve “transactions involving purchasing, property management, budgeting, accounting, travel, insurance claims, and the issuance of manuals of administrative procedure[.]” Dkt. 66 at 127 (Ex. 19).

The ADC Board sets the ADC Executive Director’s salary and is required by statute to review the ADC Executive Director’s performance at least annually “based on annual goals, performance measures, and other relevant criteria.” HRS § 163D-3(d), (f); *accord* Dkt. 1 at 10 ¶¶ 64, 68; Dkt. 23 at 12-13 ¶¶ 64, 68.

B. The activity of the ADC Board and performance of its Executive Director are matters of public concern.

ADC’s work is a matter of significant public concern.

⁵ This Court may take judicial notice of basic facts reported by newspapers. HRE 201(b); *In re Pioneer Mill Co.*, 53 Haw. 496, 497 n.1, 497 P.2d 549, 551 n.1 (1972). All cited news articles are available at Dkt. 65 at 64-109 (Ex. 2).

In January 2021, the State Auditor released an Audit of ADC pursuant to Act 28 (2019) (Audit). The Audit concluded that ADC had made no real progress toward its central purpose: “ADC has done little – if anything – to facilitate the development of agricultural enterprises to replace the economic loss created by the demise of the sugar and pineapple industries.” Dkt. 65 at 14, 45 (Ex. 1). The State Auditor “found an organization unaware of its statutory purpose” that operated “with little direction from or involvement by its Board of Directors.” *Id.*; *see also id.* at 38-45 (“ADC Board’s lack of oversight allows the Executive Director to operate with little to no accountability.”).

The public took note of the Audit’s findings. *E.g.*, Dkt. 65 at 64-109 (Ex. 2). The Legislature took note, too. Dkt. 1 at 11 ¶ 77; Dkt. 23 at 15 ¶ 77; *see also* Jolanie Martinez, *Following critical audit, lawmakers to begin investigation of agribusiness agency*, Hawaii News Now (July 13, 2021). The Legislature received extensive public testimony about the Audit. *E.g.*, Dkt. 66 at 131-57 (Ex. 20).

Act 219 was the Legislature’s response to the 2021 audit and public concerns. It amended the “focus, scope, responsibilities, and powers” of the ADC, amended the “requirements and responsibilities” of the ADC Board, and statutorily-required the ADC Board to annually review the performance of the ADC Executive Director. 2022 Haw. Sess. Laws Act 219.

C. The ADC Board used committees to evaluate Executive Director Nakatani outside of public meetings and discussed the evaluations in executive session.

On **January 26, 2022**, the ADC Board assigned three members to the “Standing Administration Committee” (Standing Committee) to conduct the annual performance evaluation of the Executive Director for fiscal year 2020 - 2021. Dkt. 65 at 123 (Ex. 3); Creps Decl. Ex. 22 at 1 (No. 1) (admitting forming the committee). On **June 15**, the Standing Committee reported to the ADC Board on its progress, including notice that the composition of the committee had changed. Dkt. 65 at 136-37 (Ex. 4). The Standing Committee conducted its evaluation entirely outside of public meetings. Dkt. 65 at 136-37 (Ex. 4) (summarizing Standing Committee’s activities); Creps Decl. Ex. 22 at 1-4 (No.

2, 3, 4, 5, 6, 7) (admitting the committee met outside of public meetings; did not post advance notice; and did not record minutes of its activities).

The Standing Committee reported its findings to the full ADC Board in executive session on **August 17**. Dkt. 65 at 155 (Ex. 5); Creps Decl. Ex. 23 at ADC 59–60. The ADC Board deliberated on the evaluation over a series of executive sessions, at the **August 17, September 21, and November 2** meetings. Dkt. 65 at 166 (Ex. 6), 177-78 (Ex. 7); Creps Decl. Ex. 22 at 10 (No. 18), Ex. 23 at ADC 59–60, Ex. 24 at ADC 74–78, Ex. 25 at ADC 94–100. The ADC Board extensively discussed whether and how to approve a raise for Executive Director Nakatani. *Id.* When it completed its closed-door discussions on November 2, the ADC Board reconvened in open session and approved the “updated October 12, 2022 annual performance evaluation” without any public discussion or mention of a salary increase. Dkt. 65 at 178 (Ex. 7); *accord* Creps Decl. Ex. 25 at ADC 99 (“Ms. Seddon: We’re not going to discuss \$ [redacted] or what’s in the [Standing Committee’s] report. We’re here to approve it. That’s it, end of story. . . . Chair can tell him [Nakatani] offline in a nice way, right?”).

On **January 25, 2023**, the ADC Board established an “ad hoc” committee and appointed three members to conduct the annual performance evaluation of the Executive Director for fiscal year 2021 - 2022. Dkt. 65 at 191 (Ex. 8); Creps Decl. Ex. 22 at 5 (No. 9). The committee conducted its evaluation entirely outside of public meetings. Creps Decl. Ex. 22 at 5-9 (No. 9-16) (admitting the committee met outside of public meetings; did not post advance notice; and did not record minutes of its activities). On **March 16**, the ADC Board met in executive session to receive and discuss the ad hoc committee’s draft performance review. Dkt. 65 at 202 (Ex. 9); Dkt. 66 at 2-9 (Ex. 10); Creps Decl. Ex. 22 at 10 (No. 18), Ex. 26 at ADC 113–20.

At the next meeting, on **April 20**, the ADC Board met in executive session to deliberate on approval of the draft performance review. Dkt. 66 at 20 (Ex. 11); Creps Decl. Ex. 27 at ADC 141–42.⁶ When it reconvened in open session, the ADC Board Chair

⁶ Although the ADC Board “denie[d] that it met in executive session to discuss the annual performance of Director Nakatani on April 20, 2023”, Creps Decl. Ex. 22 at 10 (No. 18), that response contradicts its interrogatory response and the authenticated

“called for a motion to adopt the Evaluation Committees’ report and recommendation to retain the Executive Director at his present salary,” and the ADC Board approved the report and recommendation without any discussion. Dkt. 66 at 20 (Ex. 11).

D. The ADC Board hired a new Executive Director through a secretive process.

Between May and October 2023 – following the sudden death of Executive Director Nakatani on April 23 – the ADC Board held five meetings to select a new Executive Director.

On **May 30**, the ADC Board formed a permitted interaction group to develop an application process, solicit and interview candidates, rank applications, and narrow the selection to two or three candidates (Hiring PIG). Dkt. 66 at 24-27 (Ex. 12); Creps Decl. Ex. 22 at 11-12 (No. 21). On **June 15**, the Hiring PIG updated the ADC Board on the status of its hiring process. Dkt. 66 at 37-38 (Ex. 13); Creps Decl. Ex. 22 at 12-13 (No. 22-23). The ADC Board also stated its position that all personnel discussions were *presumptively closed*. Dkt. 66 at 35-36 (Ex. 13) (“If [the candidates] do not waive their right to privacy, then it would be held in executive session”).

On **July 20**, the Hiring PIG again reported to the ADC Board, including a public summary that ranked anonymous candidates. Dkt. 66 at 48-49, 53-54 (Ex. 14); Creps Decl. Ex. 22 at 13-14 (No. 25). The ADC Board entered executive session to discuss and deliberate on the Hiring PIG’s full findings and recommendations. Dkt. 66 at 56-60 (Ex. 15); *accord* Creps Decl. Ex. 22 at 14-15 (No. 26, 27, 28), Ex. 28 at ADC 156-60. When it reconvened in open session, the ADC Board effectively adopted the Hiring PIG’s recommendation – to interview the top two candidates selected by the Hiring PIG at the next meeting – but announced it would formally vote on it at the next meeting. Dkt. 66 at 53-54 (Ex. 14); Creps Decl. Ex. 22 at 16-17 (No. 32) (admitting ADC Board followed the Hiring PIGs recommendation prior to voting to accept the same).

meeting minutes cited above. *Id.* Ex. 30 at 8 (No. 6). The ADC Board also did not provide any factual basis for its denial. *Compare id.* Ex. 30 at 11 (No. 9), *with* Ex. 22 at 10 (No. 18).

On **August 8**, the ADC Board approved the Hiring PIG report – without discussion or publicly identifying the two candidates – and entered executive session to interview the candidates, discuss salary, and deliberate on the selection for the ADC Executive Director. Dkt. 66 at 63-64 (Ex. 16), 67-110 (Ex. 17); *accord* Creps Decl. Ex. 22 at 17-20 (No. 33, 34, 35, 36, 37) (admitting ADC Board interviewed candidates, discussed their qualifications, and discussed how each member would vote, all in executive session), Ex. 29 at ADC 168-211. When it reconvened in open session, the ADC Board announced – without any discussion or explanation – that it had selected a specific candidate, but did not identify the person selected. Dkt. 66 at 64 (Ex. 16). On **August 17**, the ADC Board publicly identified its new Executive Director. *Id.* at 122-23 (Ex. 18).

In OIP Opinion No. F24-03, OIP held that the ADC Board’s executive session on August 8 did not violate the Sunshine Law. Dkt. 66 at 178-81 (Ex. 21).

III. Argument

A. Count XI & Count XII: The ADC Board’s personnel-privacy executive sessions violated the Sunshine Law.

It is undisputed that the ADC Board discussed board business behind closed doors. *See* HRS 92-3 (defining board business). Because the Sunshine Law presumes that board business is discussed openly, the ADC Board must show that it strictly complied with the law. It has not and cannot do so. Even if the ADC Board had evidence – it does not – that some portions of its meetings qualified for the personnel-privacy exemption, nothing justified holding the *entirety* of its discussions in secret.

i. Board discussion of personnel matters is presumptively open.

The Hawai`i Supreme Court has left no doubt that the qualifying language of HRS § 92-5(a)(2) – “where consideration of matters affecting privacy will be involved” – means what it says. *CLBC*, 144 Hawai`i 466, 479, 445 P.3d 47, 60 (“we construe the first and second clause in section 92-5(a)(2) as separate requirements.”). “The personnel-privacy exception requires the presence of legitimate privacy interests, and an ipse dixit claim to privacy in personnel discussions does not establish that the exception was properly invoked.” *CLBC*, 144 Hawai`i 466, 478-79, 445 P.3d 47, 59-60. “Even though a matter involves the personnel status of an employee, it does not

necessarily follow that a legitimate privacy interest was impacted.” *Id.* In other words, “not all personnel discussions are exempt from the open meeting requirement.” *Id.* at 479, 445 P.3d at 60. “[U]nless ‘matters affecting privacy will be involved’ in a board’s discussion, personnel matters should presumptively be discussed in an open meeting.” *Id.* (citing HRS § 92-3).

ii. Not all privacy concerns justify closed meetings.⁷

The “applicability of section 92-5(a)(2) must be determined on a case-by-case basis, as an analysis of privacy requires a specific look at the person and the information at issue.” *Id.* at 478, 445 P.3d at 59. For “matters affecting privacy” to be involved in a personnel discussion, the person at issue must have a “legitimate expectation of privacy” in the information—*i.e.*, the information must be protected by the constitutional right of privacy. *Id.* at 480-81, 445 P.3d at 61-62 (defining legitimate expectation of privacy by reference to constitutional privacy cases—*Nakano v. Matayoshi; Painting Industry v. Alm*; and *SHOPO v. SPJ*); accord *SHOPO v. City & County of Honolulu*, 149 Hawai‘i 492, 511, 494 P.3d 1225, 1244 (2021) (clarifying that *CBLC* cited *SHOPO v. SPJ* “for its constitutional principles”).⁸ “People have a legitimate expectation of privacy in ‘highly personal and intimate’ information.” *Id.* at 480, 445 P.3d at 61. Although “general conceptions of privacy may provide a useful template for a person’s reasonable expectations, these expectations will necessarily differ on a case-by-case basis, depending on the person and the topic of discussion.” *Id.* at 480-81, 445 P.3d at

⁷ For the ADC Board, Public First does not dispute the first prong of the personnel-privacy exemption—*i.e.*, that the ADC Board convened the executive sessions to consider the “hire” or “evaluation” of an employee.

⁸ Although the Sunshine Law (1975) predates the constitutional right of privacy (1978), the constitutional standard derives from the same common law privacy standards that would have been understood by the Legislature in 1975. *SHOPO v. SPJ*, 83 Hawai‘i 378, 398, 927 P.2d 386, 406 (1996) (citing Restatement standard: “if the matter publicized is of a kind that (a) would be regarded as highly offensive to a reasonable person, and (b) is not of legitimate concern to the public”). The issue is protecting “*fundamental* privacy rights” protected by the Constitution, not all potential privacy interests. *CBLC*, 144 Hawai‘i at 480 & n.10, 445 P.3d at 61 & n.10 (emphasis added).

61-62. “Some circumstances may reduce or perhaps entirely defeat the legitimacy of a person’s expectation of privacy in certain information.” *Id.* at 481, 445 P.3d at 62.

iii. Closed sessions must be strictly limited to discussions “directly related” to protected information.

Even where an exemption is implicated in a portion of board discussions, the board must immediately return to public session as soon as no exemption applies. In “no instance shall the board make a decision or deliberate toward a decision in an executive meeting on matters not *directly related* to the purposes specified in subsection (a).” HRS § 92-5(b) (emphasis added). “The legislature amended the Sunshine Law in 1985 to. . . prohibit boards from making a decision or deliberating toward a decision in an executive meeting on matters not directly related to the purposes specified’ for closing the meeting.” *CBLC*, 144 Hawai‘i at 486, 445 P.3d at 67 (emphasis in original) (cleaned up). “Directly related” is *narrower* than “reasonably related.” *Id.* Thus, even if a board has an initial basis for going into executive session, it must scrupulously adhere to the strictly construed limitations of the exemptions and return to open session for any discussion not “directly related” to an exemption. *Id.* at 487, 445 P.3d at 68 (describing the process for a court to evaluate such claims).

iv. The ADC Board erroneously invoked the personnel-privacy exemption on the sole basis that it was evaluating or hiring a government official.

Not all government officials have an expectation of privacy in personnel evaluations – especially evaluations mandated by statute after a scathing public audit of the official’s performance. Discussing such an evaluation would not be highly offensive to a reasonable person. And the evaluation and hiring process for government officials with substantial fiscal and discretionary authority, such as the ADC Executive Director, is of clear legitimate concern to the public.

The ADC Board did not have a valid basis for the executive sessions on August 17, September 21, and November 2, 2022, and March 16 and April 20, 2023 – where it discussed the post-Audit, statutorily-required, annual performance evaluation of Executive Director Nakatani. Dkt. 65 at 155 (Ex. 5), 166 (Ex. 6), 176-77 (Ex. 7), 202 (Ex. 9); Dkt. 66 at 2-9 (Ex. 10), 20 (Ex. 11); Creps Decl. Ex. 22 at 10 (No. 18), 23 at ADC 59-60,

24 at ADC 74-78, 25 at ADC 94-100, 26 at ADC 113-120, 27 at ADC 141-142, and Ex. 30 at 8 (No. 6). There is nothing highly personal and intimate about evaluating his performance.⁹ The position is not a low-paid, junior government employee with purely ministerial functions. Executive Director Nakatani ran the day-to-day operations of a “public agency on steroids” with substantial fiscal and discretionary authority over thousands of acres of public lands, millions of dollars of taxpayer funds, and the direction of the State’s agricultural policy. There was also extensive public information about his performance. *E.g.*, Dkt. 65 at 7-109 (Ex. 1-2); *CBLIC*, 144 Hawai`i at 482, 445 P.3d at 63 (“a person cannot claim a legitimate privacy interest in information that has already been made public.”). The ADC Board cannot justify a sweeping privacy concern to discuss Executive Director Nakatani’s annual performance *entirely* in closed session. *Id.*

The ADC Board similarly did not have a valid basis for the executive sessions held on July 20 and August 8, 2023, when it discussed hiring a new ADC Executive Director and interviewed candidates. Dkt. 66 at 48-49 (Ex. 14), 56-60 (Ex. 15), 63-64 (Ex. 16), 67-110 (Ex. 17); Creps Decl. Ex. 28 at ADC 156-160, and Ex. 29 at ADC 168-211. The ADC Board again cannot justify a sweeping privacy concern to discuss hiring a new ADC Executive Director *entirely* in closed session. *Id.* Instead, the ADC Board took the

⁹ The Hawai`i Supreme Court elaborated on “highly personal and intimate information” in *SHOPO v. SPJ*, quoting from the Restatement (Second) of Torts:

Every individual has some phases of his [or her] life and his [or her] activities and some facts about himself [or herself] that he [or she] does not expose to the public eye, but keeps entirely to himself [or herself] or at most reveals only to his [or her] family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man’s [or woman’s] life in his [or her] home, and some of his [or her] past history that he [or she] would rather forget. When these intimate details of his [or her] life are spread before the public gaze in a manner highly offensive to the ordinary reasonable [person], there is an actionable invasion of his [or her] privacy, unless the matter is one of legitimate public interest.

83 Hawai`i at 398, 927 P.2d at 406.

position, directly contrary to *CBLC*, that it *could not* conduct the hiring process publicly unless “the candidates waive their right to privacy.” Dkt. 66 at 35-36 (Ex. 13); *CBLC*, 144 Hawai`i at 477-78, 480, 445 P.3d at 58-59, 61 (“the Sunshine Law does not require closed meetings when an exception applies”; “Because the decision to close a meeting is discretionary, board members should thoughtfully weigh the interests at stake before voting.”; “The Sunshine Law . . . does not provide automatic exceptions, as boards have the discretion to determine whether a closed meeting must be held.”).

The public has the “right to know” what its government is up to. HRS § 92-1(1). That right extends to the government’s evaluation and hiring of high-level officials – particularly here, where the official runs a powerful, tax-payer-funded entity that purchases and manages state land and is exempt from significant regulatory oversight.

By excluding the public, the ADC Board deprived interested stakeholders and the general community of the opportunity to meaningfully observe and participate in the evaluation, and hiring, of a government official who is vested with substantial discretionary authority over public monies, land, and policy.

v. The ADC Board exceeded the scope of any permissible exemption.

In its written discovery responses, the ADC Board suggests – without evidence – that at least some portion of the closed sessions was justified because: (1) Executive Director Nakatani’s “health/medical” information “could be brought up and/or discussed during the discussion of his Annual Performance”; (2) unspecified applicants requested their names be kept private; and (3) “personal and private” information about applicants who were not state employees “could be revealed/disclosed during the discussion.” Creps Decl. Ex. 30 at 4-10 (No. 2, 3, 4, 5, 6, 7, 8). The ADC Board, however, provides no evidence or argument to suggest the *entirety* of the executive sessions “directly related to” such information. The meeting minutes certainly do not support such a claim.

Even if there were a basis for a *partial* executive session, discussion not “directly related” to that basis was required to be open – but was not. *CBLC*, 144 Hawai`i at 486, 445 P.3d at 67 (“when any board discussion extends beyond the narrow confines of the specified executive meeting purpose, which purpose must be strictly construed, the

board must reconvene in a public meeting to continue the discussion.”); *see also* OIP Op. No. 05-11, at 6 (“[A] board may deliberate and decide matters in an executive meeting only to the extent necessary to execute the lawful purpose for which the executive meeting is convened. . . . A board, thus, must reconvene in an open meeting to make or deliberate toward a decision to the extent it may do so without defeating the lawful purpose for which the executive meeting may be held.”).¹⁰

Thus, even assuming the ADC Board in fact discussed Executive Director Nakatani’s medical information – which has not been supported by evidence – that would not justify discussing his actual job performance in secret. The potential existence of a sliver of legitimate privacy cannot be used as pretext for a board to hide everything from the public. *See CBLC*, 144 Hawai`i at 489, 445 P.3d at 70 (explaining that boards cannot use the presence of an attorney as a “talisman” to hide discussions; “executive sessions must be purposeful and unclouded by pretext”).

Moreover, it is the ADC Board that must determine whether a closed session is warranted under the facts and law – a candidate cannot simply demand it. *E.g., id.* at 475, 477-78, 445 P.3d at 56, 58-59 (rejecting argument that the person under discussion may insist on secrecy and explaining that the Sunshine Law does *not* require closed meetings even when an exception applies). Nor is the candidate’s request for anonymity relevant to whether information is protected by the constitutional right of privacy. *E.g., id.* at 480-82, 445 P.3d at 61-63 (outlining factors to consider). Any ADC Board argument to the contrary – similar to statements at its meetings – simply misunderstands the Sunshine Law. *See* Dkt. 66 at 35-36 (Ex. 13).

Lastly, discussing someone’s job experience – especially for a high-level government position – is not highly personal and intimate. A person does not violate the constitutional right of privacy or common law tort standards by publicly discussing

¹⁰ Thus, the supreme court in *CBLC* instructed the court on remand to “determine to what extent the Commission’s discussions and deliberations therein fell within the scope of the personnel-privacy exception. That is, the court must determine to what extent the Commission’s discussions and deliberations were ‘directly related to’ the purpose of closing the meeting pursuant to the personnel-privacy exception.” 144 Hawai`i at 485, 445 P.3d at 68.

whether someone has the qualifications to serve as the ADC Executive Director. That would be absurd. And it is irrelevant to that analysis whether the job candidate is already a government employee or not. There is no legal basis for the ADC Board's purported concerns, no factual basis proffered in discovery, and nothing that would justify spinning such vague concerns into authority for hiding *all discussion* during the hiring process.

Thus, the ADC Board violated the Sunshine Law. *CBLC*, 144 Hawai'i at 487, 491, 445 P.3d at 68, 72 ("If any portions of the meetings at issue exceeded the scope of any permissible exception, then this will indicate that the Commission did not comply with section 92-5(b)."; "deliberations conducted in violation of section 92-5(b) also violate the open meetings requirement under section 92-3"); HRS § 92-4 ("A meeting closed to the public shall be limited to matters exempted by section 92-5."); HRS § 92-5 ("In no instance shall the board make a decision or deliberate toward a decision in an executive meeting on matters not directly related to the purposes specified in subsection (a).").

B. Count XIV: OIP Opinion Letter No. F24-03 is palpably erroneous.

HRS § 92-12(d) provides, "Opinions and rulings of the office of information practices shall be admissible in an action brought under this part and shall be considered as precedent unless found to be palpably erroneous." An opinion is "palpably erroneous" if it "is irreconcilable with the plain text and legislative intent of the statute." *Peer News LLC v. City & County of Honolulu*, 143 Hawai'i 472, 485-86, 431 P.3d 1245, 1258-59 (2018).

In Opinion F24-03, OIP erroneously upheld the ADC's August 8 executive session under a sweeping heading that directly contradicted the Hawai'i Supreme Court's holding in *CBLC*: "A Board May Hold an Executive Session to Consider the Hire of an Officer or Employee." Dkt. 66 at 178 (Ex. 21). OIP improperly collapsed the personnel-privacy exemption to the single prong of whether a personnel matter would be discussed. *Id.* at 180-81. OIP reasoned that because candidates for government employment have a privacy *interest* (not a legitimate expectation of privacy) under UIPA in the application process, the entire hiring process under the Sunshine Law may

be exempt. *Id.* OIP did not limit its analysis to the ADC Executive Director and did not consider any facts specific to ADC or the ADC Executive Director. *Id.*

First, OIP's decision reads the privacy condition out of the exemption. *See Keliipuleole v. Wilson*, 85 Hawai'i 217, 221, 941 P.2d 300, 304 (1997) ("[C]ourts are bound to give effect to all parts of a statute"). Every personnel category ("hire, evaluation, dismissal, or discipline" or "charges") corresponds to a UIPA privacy interest. HRS § 92F-14(b)(2) (criminal matters), (4) (personnel matters including hire, evaluation, and discipline), (5) (employment history), (8) (evaluations). If a UIPA privacy interest were sufficient to exempt discussion from the Sunshine Law – it is not – then *CBLC*'s two-part analysis collapses into one question in every instance. *CBLC* required a case-by-case privacy analysis, not OIP's sweeping categorical holding. 144 Hawai'i at 478-79, 445 P.3d at 59-60 ("Even though a matter involves the personnel status of an employee, it does not necessarily follow that a legitimate privacy interest was impacted.").

Second, OIP relies on UIPA privacy interests and specifically its prior decision in Opinion 06-07. But the Hawai'i Supreme Court already addressed those issues. *CBLC* expressly stated that the standard for a legitimate expectation of privacy is *not* the UIPA privacy analysis. *Id.* at 480, 445 P.3d at 61 ("we do not read the UIPA's balancing test into the Sunshine Law's personnel-privacy exception."). And as to Opinion 06-07, the Hawai'i Supreme Court directly distinguished it as solely concerning the disclosure of meeting minutes under the UIPA, not the Sunshine Law personnel-privacy question. *Id.* at 490 n.18, 445 P.3d at 71 n.18 ("We do not consider these opinions palpably erroneous for referring to the UIPA, as they were limited to circumstances related to the disclosure of meeting minutes. As such, these opinions do not suggest that the UIPA's disclosure standard must be applied to determine whether an executive meeting was properly convened." (citation omitted)).

Third, OIP's analysis ignores the analysis outlined by the Hawai'i Supreme Court. *CBLC* repeatedly emphasized the need for a case-by-case determination of privacy. *Id.* at 478, 481, 445 P.3d at 59, 62 ("the applicability of section 92-5(a)(2) must be determined on a case-by-case basis, as an analysis of privacy requires a specific look at the person and the information at issue"; "these expectations will necessarily differ on a

case-by-case basis, depending on the person and the topic of discussion”; “reasonable expectations will depend on the person claiming the interest”; “reasonable expectations of privacy may be affected by a person’s level of discretionary and fiscal authority in government”). Even if a general expectation of privacy may exist for certain matters, that expectation may not be legitimate for certain people or depending on other circumstances. *Id.* at 481-82, 445 P.3d at 62-63 (“In *Nakano*, we recognized generally that people ‘have a legitimate expectation of privacy’ in information concerning their ‘personal financial affairs.’ However, we recognized that this expectation will be qualified in the presence of other factors”; “These factors, while not exhaustive, should be considered by government boards and commissions – and by reviewing courts – to determine whether a legitimate privacy interest is at stake.”).

Fourth, *CBLC* expressly held that “reasonable expectations of privacy may be affected by a person’s level of discretionary and fiscal authority in government,” citing the UH President as an example. *Id.* at 481, 445 P.3d at 62. Neither OIP nor the ADC Board made any effort to address the issue of the ADC Executive Director’s authority within government or any other factors that may affect a general conception of privacy around personnel matters – which was the sole basis for OIP’s justification. Instead, the ADC Board erroneously believed that the only question was whether the subject of the discussion waived any privacy interests.

OIP Opinion F24-03 is palpably erroneous because it is irreconcilable with the plain text and intent of HRS § 92-5(a)(2) as interpreted by the Hawai‘i Supreme Court.

C. Count X & Count XIII: The ADC Board improperly used committees and the Hiring PIG to hide its conduct.

Absent a “permitted interaction,” three board members may only discuss board business in a public meeting. HRS §§ 92-2.5(a), 92-3. Board committees also must comply with the Sunshine Law. OIP Op. No. 06-02 at 4; *accord* OIP Op. No. 03-07 at 6 (“Failure to subject meetings of the committees to the same requirements as the parent body would allow a committee to do what the parent itself is prohibited from doing.”).

The ADC Board improperly used committees to circumvent the open meetings requirements when evaluating Executive Director Nakatani. For the 2022 evaluation,

the ADC Board used the Standing Committee, but did not follow the Sunshine Law for meetings of that committee. For the 2023 evaluation, the ADC Board used an “ad hoc” committee, but still did not follow the Sunshine Law for meetings of that committee.

The ADC Board’s various groups also were not a permitted interaction group (PIG). An investigative PIG allows a small group of board members to interact on board business within the strict confines set by the Sunshine Law. HRS § 92-2.5(b)(1). To use an investigative PIG, a board must hold three separate meetings: (1) to appoint the members and define the scope of the PIG; (2) to report the PIG’s findings and recommendations; and (3) to deliberate on the PIG’s report. OIP Op. No. 23-01 at 6-8. The PIG cannot make multiple reports to the board. *Id.* at 8-9 (“will make a single report back to its board”), 16-17 (finding that PIG automatically dissolved after it provided an update to the board on its progress). The board also cannot discuss or act on the PIG’s report at the second meeting. *Id.* at 7; OIP Op. No. 06-02 at 5. And a board cannot add members to a PIG once it has started. OIP Op. No. 23-01 at 9. “Strictly following these procedures is necessary to prevent the board from circumventing the Sunshine Law’s constraints that favor open meetings.” *Id.* at 8. Here, the ADC Board’s groups all violated the law governing PIGs.

First, the Standing Committee and Hiring PIG reported back to the ADC Board on more than one occasion. Dkt. 65 at 136-37 (Ex. 4); Creps Decl. Ex. 23 at ADC 59-60, Ex. 24 at ADC 74-75) (“updated” report); Dkt. 66 at 37-38 (Ex. 13); Creps Decl. Ex. 27 at ADC 156-60) (further report).

Second, the Standing Committee added a member after it started its work. Dkt. 65 at 136-37 (Ex. 4).

Third, the Standing Committee, Ad Hoc Committee, and the Hiring PIG improperly discussed findings and recommendations in the same meeting that the PIG made its report. Dkt. 66 at 2-9 (Ex. 10), 56-60 (Ex. 15); Creps Decl. Ex. 22 at 16 (No. 31), Ex. 23 at ADC 60. The ADC Board even took action on the Hiring PIG’s report at the same meeting by scheduling interviews with the recommended candidates. Dkt. 66 at 48-49, 53-54 (Ex. 14); *see* Creps Decl. Ex. 22 at 19-20 (No. 32).

Thus, the Standing Committee, Ad Hoc Committee, and Hiring PIG violated the Sunshine Law even if the ADC Board were to claim that those groups were investigative PIGs.

CONCLUSION

Based on the foregoing, Public First respectfully asks this Court to enter (a) an order that the ADC Board violated the Sunshine Law by: (1) Forming unauthorized committees of three members to evaluate the ADC Executive Director's annual performance; (2) Evaluating the Executive Director's performance for fiscal years 2020-2021 and 2021-2022 entirely in executive session; (3) Deliberating on the Hiring PIG's recommendations, interviewing candidates, evaluating candidate qualifications and fitness, discussing the ADC Executive Director's salary, and selecting the next ADC Executive Director entirely in executive session on July 20 and August 8; (4) Failing to dissolve the Hiring PIG after it presented a report to the ADC Board; and (5) Deliberating and engaging in decision-making on the Hiring PIG's findings and recommendations at the same meeting at which the findings and recommendations were presented to the ADC Board; and (b) an order that OIP Opinion F24-03 is palpably erroneous to the extent it held that the ADC Board properly conducted an executive session on August 8, 2023.

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