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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

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 I - VIII; MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; DECLARATION OF COUNSEL; EXHIBITS "29" – "34"; 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 I - VIII

Pursuant to Rules 56 and 57 of the Hawai`i Rules of Civil Procedure, and based on the accompanying memorandum, declaration, exhibits, and the pleadings filed in this action, Plaintiff Public First Law Center (Public First) moves for partial summary

judgment against Defendant Defender Council (Council) 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 Council Motion) and supporting pleadings—*see* Dkt. 60, 61, and 82—and submits additional evidence obtained through discovery.

As a matter of law, Public First is entitled to declaratory relief in its favor on Counts I – VIII of the Complaint filed January 10, 2024 (Complaint). Dkt. 1 at 35–36, ¶A. Accordingly, Public First respectfully requests that the Court enter an order declaring that the Council violated the Sunshine Law by:

(1) Amending the June 16, 2023 agenda in violation of HRS §§ 92-7 (**Count I**);

(2) Meeting in executive session on June 16 and August 4, 2023, to discuss and decide the general selection process for the State Public Defender in violation of HRS §§ 92-3, -4, and -5 (**Count II** & **Count III**);

(3) Meeting in executive session on October 4, 2023, to interview and discuss candidates for State Public Defender in violation of HRS §§ 92-3, -4, and -5 (**Count IV**);

(4) Meeting in executive session on November 2, 2023, to deliberate on and select the State Public Defender in violation of HRS §§ 92-3, -4, and -5 (**Count V**);

(5) Failing to record legally sufficient regular session minutes for meetings held June 16, August 4, October 4, and November 2, 2023 (**Count VI**) and executive session minutes for meetings held October 4 and November 2 (**Count VII**), in violation of HRS § 92-9; and

(6) Failing to take public testimony concerning its amended agenda on June 16 and limiting public testimony to the beginning of the Council's meeting on June 16, August 4, October 4, and November 2, 2023 in violation of HRS § 92-3 (**Count VIII**).

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

/s/ Benjamin M. Creps
ROBERT BRIAN BLACK
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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

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Rules

Under the Sunshine Law, Council 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 *Council* must prove that it did so in compliance with the strict limitations of the Sunshine Law. It cannot do so here.

Throughout 2023, the Council held closed-door sessions to set the application process, screen and interview candidates, and ultimately select the State Public Defender. The Council relied on the "personnel-privacy exemption" under HRS § 92-5(a)(2) to justify this excessive secrecy.[1] 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 Council failed to do that required analysis. And hiring the State Public Defender is not—as a matter of law—a matter categorically protected by the constitutional right of privacy that would justify hiding all discussion and deliberation from the public.

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[1] 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.

Even where a portion of a personnel discussion may concern a legitimate matter of privacy—which the Council 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 Council must rigorously adhere to its open meeting obligations. The alternative—as occurred here—is that vague notions of privacy shut the public entirely out, contrary to the Sunshine Law.

In response to evidentiary concerns raised by the Court's order denying the First Council Motion, in part, Public First submits written discovery responses from the Council authenticating all agenda and minutes attached to the First Council Motion and admitting key facts.[2] Declaration of Benjamin M. Creps, dated March 25, 2025 (Creps Decl.), ¶ 3. Public First further submits candidate applications, interview questions, and ranking sheets. This evidence bolsters the undisputed record presented by the First Council Motion.

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

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 Council or cannot be genuinely disputed. Public First asks this Court to enter an order declaring that the Council violated the Sunshine Law as outlined below.[3]

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[2] *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).

[3] Jon N. Ikenaga is named in this action solely due to the requested injunctive relief to void his selection as State Public Defender, based on the Council's many Sunshine Law violations. *See* HRS § 92-11; *CBLC*, 144 Hawai`i at 485, 445 P.3d at 66 (requiring joinder of the subject of a section 92-11 invalidation request). This motion does not concern Public First's requests for injunctive relief.

I. Legal Standards

A. Summary Judgment

Judgment "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); *accord 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, 1045-46 (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.*

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). 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 1045-46.

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 State Public Defender is a High-level Government Official, the Selection of Which is a Matter of Public Concern.

Both the U.S. and Hawai`i Constitutions afford every criminal defendant the right to counsel where a charged offense carries the possibility of incarceration. *E.g.*,

Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). The Office of the State Public Defender (OPD) is tasked with providing that right in the State.[4] Dkt. 1 at 4 ¶ 14; Dkt. 23 at 5 ¶ 14; Dkt. 61 at 6 (Ex. 1) (OPD maintains "branch offices in each of the four judicial circuits including two offices on the Big Island.").[5] It is "the largest criminal defense organization" in the State, Dkt. 61 at 10 (Ex. 3), and has an annual budget of around $13 million for fiscal year 2025. *Id.* at 17 (Ex. 4).

The Council selects and oversees the State Public Defender, who serves a term of four years. HRS § 802-9; HRS § 802-11. The State Public Defender must devote his or her full time to the duties of OPD, has a salary set by statute, and appoints deputy public defenders. HRS § 802-11; HRS § 802-12. The State Public Defender is a high-level government official with substantial discretionary authority over public monies and policy. Dkt. 60 at 9-11; *accord* Dkt. 61 at 20 (Ex. 5) (Council: "the position of the Public Defender is a high-level position. . . .").

According to OPD, it "would be virtually impossible for the vast majority of cases to move through the criminal justice system if the OPD is understaffed for extended periods of time." Dkt. 61 at 31 (Ex. 7).

B. The Council Met in Closed Sessions to Select a New State Public Defender.

Between June and November 2023, the Council held four meetings related to its selection of a new State Public Defender. The Council discussed the hiring process, interviewed candidates, and selected the State Public Defender—all behind closed doors.

At its **June 16** meeting, the Council solicited testimony from the public only during a designated "Public Testimony" period at the beginning of the meeting. Dkt. 61 at 65 (Ex. 10), 67-70 (Ex. 11); Creps Decl. Ex. 29 at 6 (No. 6) (admitting "it did not provide interested persons with additional opportunities to present testimony

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[4] HRS chapter 802 codifies the constitutional obligations. *See State v. Mickle*, 56 Haw. 23, 525 P.2d 1108 (1974) (providing guidance for determining eligibility based on indigency).

[5] Pinpoint citations to "Dkt." entries refer to the corresponding PDF pagination.

regarding any agenda item and/or motion" after the beginning of the meeting). The Council then moved into executive session. Dkt. 61 at 69 (Ex. 11). The Council admits it discussed the selection process in this executive session: "it [the selection process] came up because one of the participants in the Executive Session portion of the meeting remembered that the State Public Defender's appointment was expiring in January 2024." Creps Decl. Ex. 29 at 6-7 (No. 7), Ex. 30 at 4-5 (No. 2) (same).

When the Council reconvened in open session, it voted to add a discussion about the "selection process to appoint and hire Public Defender position." Dkt. 61 at 67-70 (Ex. 11); Creps Decl. Ex. 29 at 4-5 (No. 1, 2, 5) (Council admitting it amended agenda at the meeting; added to the agenda a "formal oral expression" of the unagendized discussion item; and "did not provide interested persons with an opportunity to present testimony" before its "proposed motion to amend the agenda"). The Council then approved a detailed selection process specifying deadlines and creating a working group without opportunity for public comment or deliberation in public. Dkt. 61 at 69 (Ex. 11).

At its **August 4** meeting, the Council again solicited testimony from the public only during a designated "Public Testimony" period and affirmatively closed testimony after that period. *Id*. at 73 (Ex. 12), 77-78 (Ex. 13); Creps Decl. Ex. 29 at 8 (No. 10) (admitting Council "did not provide interested persons with an opportunity to present testimony" after the beginning of the meeting). It later voted to enter executive session and deliberated on the selection process for the State Public Defender during the closed session. Dkt. 61 at 77-78 (Ex. 13), 80 (Ex. 14); Creps Decl. Ex. 29 at 8-9 (No. 11) (admitting Council discussed in executive session the selection process—due dates, wording of position announcement, and process for receiving public comment), Ex. 30 at 5-6 (No. 3).

Following the August 4 meeting, the Council solicited applications for the State Public Defender. *Id*. at 99 (Ex. 20). The Council publicly identified candidates on September 13. *Id*. It received roughly 90 comments on the candidates from OPD employees and members of the public. *Id.*

At its **October 4** meeting, the Council met in-person at the office of the Council's chair. Dkt. 61 at 82 (Ex. 15). Unlike other Council agendas, nothing on the October 4 agenda provided instruction for members of the public who wished to testify. *Id.*; *compare, e.g.*, *id.* at 72–74 (Ex. 12). At the meeting, the Council interviewed four State Public Defender candidates—Craig Nagamine, Darcia Forester, Defendant Ikenaga, and Eric Neimeyer—in executive session. Dkt. 61 at 84-85 (Ex. 16); Creps Decl. Ex. 29 at 9-11 (admitting executive session candidate interviews and discussions about candidate qualifications and "vision" for the office) (No. 14, 15, 16, 17, 18, 19), Ex. 32 at *passim* (identifying interview questions). The Council interviewed each candidate for about an hour. Dkt. 61 at 84-85.

The Council's October 4 executive session minutes are cryptic and follow the same basic outline, exemplified below:

> Interview with Jon Ikenaga held at 1:08 pm
>
> Informed Mr. Ikenaga of the process for the interviews; each candidate will be asked the same standard questions, then each candidate will be asked questions specific to them based on the public comments submitted between 9/13/23 and 9/22/23.
>
> Mr. Ikenaga summarized his vision for the office, anticipated administration/leaders.
>
> Council asked questions re: public comments.
>
> Mr. Ikenaga responded.
>
> Mr. Ikenaga given the opportunity to submit any further responses to the Council via email within one week.
>
> Ended at 2:30 pm

Id. at 85. Following these interviews, the Council discussed the candidates in executive session. *Id.*; *see also* Creps Decl. Ex. 29 at 9-11. The post-interview discussion of the candidates lasted forty minutes, for which the minutes provide in full: "Discussion regarding candidates held." Dkt. 61 at 85.

To-date, the Council has not released any *regular* session minutes for its October 4 meeting. Dkt. 63 at 3 ¶ 20; Creps Decl. Ex. 29 at 14 (No. 22, 23) (admitting Council did not post minutes on the Internet). Despite discovery requests, the Council did not produce any minutes or similar documents of a purported regular session. *E.g.*, Creps

Decl. Ex. 34 at 4-7 (No. 2, 4, 5) (*e.g.*, "no notes or recordings have been located.").[6] And there is no evidence that the Council provided the public an opportunity to comment on agenda items. *Accord* Creps Decl. Ex. 29 at 16 (No. 25) (admitting Council "does not believe it provided interested persons with an opportunity to present testimony on any agenda item at any point").

At its **November 2** meeting, the Council solicited testimony from the public only during a designated "Public Testimony" period at the beginning of the meeting. Dkt. 61 at 88 (Ex. 17), 92 (Ex. 18). The Council then entered executive session and discussed the State Public Defender candidates. *Id*. at 93 (Ex. 18), 97 (Ex. 19); Creps Decl. Ex. 29 at 17-18 (No. 27, 28, 29, 30, 31, 32) (admitting Council discussed the candidates' qualifications and management plans, and the member's candidate preference in executive session), Ex. 30 at 7 (No. 5) ("During the executive session," the Council "discussed the strengths and weaknesses of each applicant, their vision, their interviews, and their answer to the 'homework' question."). When the Council reconvened in open session, the Council's chair summarized the selection process generally. Dkt. 61 at 93-94 (Ex. 18), 99-101 (Ex. 20); *see also id.* at 105 (Ex. 21). The Council then voted to appoint Defendant Ikenaga without any public discussion regarding the specific candidates. *Id.* at 94 (Ex. 18).

On November 15, 2023, the Council disclosed to Public First via public records request the application materials submitted by the candidates for State Public Defender, and materials used by the Council to interview and evaluate the candidates. Creps Decl. ¶¶ 4-8 & Ex. 31-33.

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[6] The Council refuses to admit that it does not have minutes, instead claiming that it knows "what was said and done." Creps Decl. Ex. 29 at 15 (No. 23). In the end, the Council's failure to produce any written record of the October 4 regular session meeting—even after discovery—is dispositive of the portion of Count VI that concerns the failure to keep legally sufficient minutes of that meeting.

III. Argument

A. Counts II–V: The Council's executive sessions violated the Sunshine Law.

It is undisputed that the Council 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 Council must show that it strictly complied with the law. It has not and cannot do so. Even if the Council had evidence—it does not—that some portions of its meetings qualified for the personnel-privacy exemption, or another exemption, nothing justified holding the *entirety* of its discussions in secret.

Two exceptions may be relevant to the Council's meetings.[7] The personnel-privacy exception to open meetings, HRS § 92-5(a)(2), provides in relevant part that a board "may" exclude the public "[t]o consider the hire . . . of an officer or employee . . ., where consideration of matters affecting privacy will be involved." The attorney-consultation exception, HRS § 92-5(a)(4), permits a closed meeting "[t]o consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." The Hawai`i Supreme Court interpreted both exceptions in *CBLC*. Neither support the Council's position of maximum secrecy.

1. 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.

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[7] The Council's failure to properly record its meetings, as discussed below, obscures what members of the Council "thoughtfully weighed" and voted for as the purported basis for its closed meetings. Dkt. 61 at 69, 77, 93, 104-05 (Ex. 11, 13, 18, 21) (merely recording that the Council voted to enter executive session); HRS § 92-4(a) ("The reason for holding such a meeting shall be publicly announced . . . and entered into the minutes of the meeting."); *see CBLC*, 144 Hawai`i at 477, 445 P.3d at 58 ("board members should thoughtfully weigh the interests at stake before voting.").

"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).

2. Not all privacy concerns justify closed meetings.

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 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.

[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).

3. Attorney consultation exception is narrower than the attorney client privilege.

The Hawai`i Supreme Court held that the attorney consultation exception is "far narrower than the attorney-client privilege." *Id.* at 489, 445 P.3d at 70. "Reviewing courts, as well as boards and commissions, should understand that an attorney is not a talisman, and consultations in executive sessions must be purposeful and unclouded by pretext." *Id*.

> At all times, the "attendance [of] the [board]'s attorneys at executive meetings must conform to [the] policy" of requiring "policy-making . . . [to] be conducted in public meetings, to the extent possible." As such, "once the [board] receives the benefit of the attorney's advice, it should discuss the courses of action in public, and vote in public, unless to do otherwise would defeat the lawful purpose of having the executive meeting."

Id. (citations omitted).

4. The Council erroneously invoked the personnel-privacy exemption on the sole basis that it was hiring a government official.

The Council did not have a valid basis for the executive sessions held on June 16 and August 4 to discuss the *general hiring process* for the next State Public Defender. Such discussions do not involve candidate-specific information that might implicate a legitimate right of privacy. *E.g. CBLC*, 144 Hawai`i at 478, 445 P.3d at 59 ("an analysis of privacy requires a specific look at the person and the information at issue"); *accord* Atty Gen. Op. No. 75-11 at 3-4 (personnel-privacy exception does not apply "where the sole purpose of the meeting is to develop employment criteria and an evaluation system applicable in the future"). Such general discussions do not even pass the first prong of the personnel-privacy exception. HRS § 92-5(a)(2) ("To consider the hire . . . of *an* officer or employee" and allowing that individual to waive privacy concerns (emphasis added)). Nor could the Council invoke the attorney-consultation exception to throw a blanket over all discussion of the hiring process, when portions of that discussion were not "directly related" to questions about the Council's powers and duties. For example, as recorded in the August 4 executive session minutes, the Council never even spoke to its counsel. Dkt. 61 at 80 (Ex. 14).

The Council similarly did not have a valid basis for the executive sessions held on October 4 and November 2—where it *interviewed candidates, evaluated their qualifications and management plans, and deliberated on its ultimate selection* of Defendant Ikenaga. Dkt. 61 at 82-97 (Ex. 15, 16, 17, 18, 19). The Council wrongly collapsed the personnel-privacy exception into a simple one-step determination that hiring per se involves matters of privacy. It did not conduct *any* privacy analysis—and could not justify a sweeping privacy concern—to close all discussion of these personnel issues in the June 16, August 4, October 4, and November 2 meetings. *Id.* at 62-97 (Ex. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19).

The Council ignored the *CBLC* privacy analysis that repeatedly emphasized the need for a case-by-case determination of privacy. 144 Hawai`i at 478, 481-482, 445 P.3d at 59, 62-63 ("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"; "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."). The Council made no effort to address the State Public Defender's authority within government or any other factors that may affect a general conception of privacy around personnel matters. Nor did it consider whether any particular information for discussion was highly personal and intimate.

Instead, to the extent it has provided any explanation, the Council previously asserted it based its decision to enter executive session on the "nature of the applicants (three of the four candidates are currently members of the Office of the Public Defender) and their backgrounds[.]" Dkt. 61 at 20 (Ex. 5). If that explanation was intended to identify confidential information, it is wrong. HRS § 92F-12(a)(14) (government agencies must—without exception—disclose employees' "education and training background [and] previous work experience"); *see CBLC*, 144 Hawai`i at 481, 445 P.3d at

62 ("Because this information must be disclosed by law, a person cannot claim a reasonable expectation of privacy in information disclosed pursuant to this law.").

In discovery responses, the Council offers only vague speculation that personal information—"contact information for the applicants who were employed by the State of Hawaii and financial information for the applicant who was not employed by the State of Hawaii"—"could" have come up in its executive session discussions on October 4 and November 2. Creps Decl. Ex. 30 at 6-7 (No. 4, 5). There is no legal basis for the Council's purported concerns, no factual basis proffered in discovery, and nothing that would justify spinning such vague speculation into authority for hiding *all discussions* during and about the hiring process. *Accord CBLC,* 144 Hawai`i 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).

Contrary to the Council's conclusory assertions, candidates for the State Public Defender do *not* have a legitimate expectation of privacy in discussion of their candidacy. Their employment history, qualifications, or management plans ("vision for the office") are not highly personal and intimate information. 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. Disclosing employment history, qualifications, or management plans would not be highly offensive to a reasonable person, and is *expected*

for those who wish to lead a publicly-funded office. A person simply does not violate the constitutional right of privacy or common law tort standards by publicly discussing whether someone has the qualifications to serve as the State Public Defender, regardless of whether the candidate is already a government employee or not. *If* that were the case, then the Council would have committed an actionable tort on November 15, 2023, when it disclosed to Public First via public records request the application materials submitted by the candidates for State Public Defender, and materials used by the Council to interview and evaluate the candidates. Creps Decl. ¶¶ 4-8 & Ex. 31, 32, 33.

The Council's overly secret evaluation and hiring of a high-level government official was inconsistent with the letter and spirit of the Sunshine Law. *CBLC*, 144 Hawai`i at 476, 445 P.3d at 57 ("Board members are required to understand the requirements of the Sunshine Law and act in good faith in accord with its spirit and purpose."); *Kanahele v. Maui County Council*, 130 Hawai`i 228, 248, 307 P.3d 1174, 1194 (2013) ("a board is at all times constrained to give effect to the spirit and purpose of the Sunshine Law.").

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 of candidates and appointment of high-level officials—particularly here, where the official runs a taxpayer-funded office that provides constitutionally-required indigent defense. By excluding the public, the Council denied interested stakeholders and the general community the opportunity to meaningfully observe and participate in the hiring of a government official vested with substantial discretionary authority over public money and policy.

5. The Council exceeded the scope of any permissible exemption.

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).

"Directly related" is *narrower* than "reasonably related." *CBLC*, 144 Hawai'i at 486, 445 P.3d at 67. So 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 to review such claims).

As noted, the Council vaguely claims—without evidence—the closed sessions were justified because unspecified personal information "could" have come up in the Council's selection process discussions, candidate interviews, and candidate evaluation discussions. The Council, however, provides no evidence or argument to suggest the *entirety* of the executive sessions "directly related to" such information. The meeting minutes do not support such a claim, nor do the Council's discovery responses.

Thus, 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. . . . [and] 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.").

Moreover, assuming the Council in fact discussed information protected by the constitutional right of privacy—which has not been supported by evidence—that would not justify discussing the selection process, interviewing candidates, or discussing their qualifications 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").

By discussing presumptively open personnel matters in closed session, the Council 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)."). Public First is entitled to declaratory relief as requested in Counts II-V.

B. Count I: The Council improperly amended the June 16 agenda.

The Sunshine Law requires boards to publish an agenda six days ahead of a meeting to provide reasonable notice of what will be discussed at the meeting and permit the public the opportunity to provide testimony. HRS § 92-7. To protect the spirit and purpose of the agenda requirement, section 92-7(d) prohibits substantive changes to the agenda less than six days before a meeting:

> No board shall change the agenda, less than six calendar days prior to the meeting, by adding items thereto without a two-thirds recorded vote of all members to which the board is entitled; *provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons*.

(emphasis added); *accord* OIP Op. No. 02-09 at 1, 3-5 (board cannot discuss items that are not on agenda).

"[A] board does have the limited ability to add minor items to its agenda at a meeting[.]" OIP Op. No. F16-02 at 4. An item may be added if the item "is not 'of reasonably major importance' and does not 'affect a significant number of persons.'" *Id.* Even when a board believes the *action* to be taken on an item may have a minor or inconsequential effect, it must still evaluate public interest in light of the broader context of the topic:

> The importance of an agenda item and the effect of a decision on that item cannot be measured solely by looking to the distinct issue presented for deliberation and decision at that particular meeting or the consequences of the action taken on the item viewed in isolation. Rather, the item's importance and the potential consequence of any action taken on it must be viewed relative to the larger context in which it occurs.

OIP Op. No. 06-05 at 4.

The Council violated section 92-7 by amending the June 16 agenda—during the June 16 meeting—to "add the following discussion: selection process to appoint and hire Public Defender position, as the current term expires in January 2024." Dkt. 61 at 69 (Ex. 11); OIP Op. No. 06-05 at 3-4; OIP S Memo 19-04, Dkt. 61 at 119-20 (Ex. 24); OIP S Memo 15-07, Dkt. 61 at 130-32 (Ex. 25); OIP S Memo 12-07, Dkt. 61 at 140 (Ex. 26); *see* Dkt. 60 at 20-22 (discussing OIP opinions). The Council plainly changed the agenda less than six calendar days before the meeting; the Council has conceded the point. Creps Decl. Ex. 29 at 6-7 (No. 7), Ex. 30 at 4-5 (No. 2). The selection process to appoint and hire the State Public Defender is an item of reasonably major importance for which action thereon would affect a significant number of persons.

By discussing and deciding the selection process at the June 16 meeting without providing any advance notice to the public and in violation of section 92-7, the Council deprived the public of its only opportunity to observe and testify concerning the selection process for the next State Public Defender. Public First is entitled to declaratory relief as requested in Count I.

C. Counts VI and VII: The Council failed to record legally sufficient minutes for meetings held June 16, August 4, October 4, and November 2, 2023.

The Sunshine Law requires that minutes "give a true reflection of the matters discussed at the meeting and the views of the participants" and include the "substance of all matters proposed, discussed, or decided" among other particulars. HRS § 92-9(a); OIP Op. No. F25-01 at 18 n.12 (executive session minutes inadequate, for example, to have one sentence to summarize hour-long discussion without stating "views of the participants or even who spoke"); OIP Op. No. 03-13 at 6-7 (minutes must include enough detail to allow the public to scrutinize the actions of the board); OIP U Memo 24-05, Dkt. 61 at 145, 153-54 (Ex. 27) (minutes must be sufficiently detailed to be a true reflection of the matters discussed, including substance of discussion, summary of board members' statements, and positions of non-members); OIP U Memo 23-07, Dkt. 61 at 158, 165-66 (Ex. 28) (minutes insufficient because fail to express the positions of the participants or general substance of discussion, only list of topics discussed; minutes should include conclusions reached and advice provided).

The Council violated section 92-9 by failing to record legally sufficient regular session minutes for meetings held June 16, August 4, October 4, and November 2, 2023 and executive session minutes for meetings held October 4 and November 2. First, the Council failed to provide *any* regular session minutes for the October 4 meeting. Dkt. 61 at 3 ¶ 20; Creps Decl. Ex. 29 at 14 (No. 22, 23). Second, the Council recorded deficient regular session minutes for the June 16, August 4, and November 2 meetings because the minutes fail to identify the purpose or legal basis for entering executive session. Dkt. 61 at 68 (Ex. 11), 77 (Ex. 13), 93 (Ex. 18); HRS § 92-4(a) ("The reason for holding such a meeting shall be publicly announced . . . and entered into the minutes of the meeting.").

And the Council's executive session minutes say nothing. Minutes for the October 4 executive session—during which the Council interviewed four candidates and deliberated afterward—are barely two pages. Dkt. 61 at 84-95 (Ex. 16). These minutes do not identify a single question asked or a single answer given. They do not identify any of the candidates' "vision for the office" or responses to concerns raised by public comments. And the minutes provide a four-word description of the Council's entire post-interview discussions: "Discussion regarding candidates held." *Id.* at 85. Minutes for the November 2 executive session—during which the Council conducted its candidate selection deliberations for more than an hour—barely make half of a page. *Id.* at 97 (Ex. 19). These executive session minutes do not provide any "views of the participants" and shed no light on the substance of what the board discussed behind closed doors.

Given these violations of the Sunshine Law, an interested member of the public has no chance to understand what happened at these meetings. These minutes are the official record of what criteria the Council used to select a State Public Defender; what the candidates said about themselves; the views and concerns of the individual Council members; and how the Council assessed the candidates' strengths, weaknesses, and potential fit with the OPD to arrive at a final decision. None of that is reflected in the minutes. Public First is entitled to declaratory relief as requested in Counts VI and VII.

D. Count VIII: The Council failed to properly take public testimony.

HRS § 92-3 provides that "boards shall also afford all interested persons an opportunity to present oral testimony on *any agenda item*; provided that the oral testimonies of interested persons *shall not be limited to the beginning of a board's agenda or meeting*." (emphasis added); *accord* OIP Op. No. F15-02 at 8 ("the requirement to accept testimony applies to **every** agenda item at **every** meeting, including items to be discussed in executive session at a meeting where only executive session items are on the agenda."); OIP Op. No. 01-06 at 1-2.

Directly contrary to law, the Council limited public testimony to the beginning of the Council's agenda on June 16, August 4, and November 2, 2023. Dkt. 61 at 63-78 (Ex. 10, 11, 12, 13), 87-85 (Ex. 17, 18); Creps Decl. Ex. 29 at 6, 8, 16 (No. 6, 10, 25). The Council also failed to take public testimony on the selection process for the State Public Defender at the June 16 meeting. Dkt. 61 at 69 (Ex. 11) (taking action on unagendized item without soliciting public testimony). And on October 4, there is no evidence that the Council even solicited public testimony. *Id.* at 82 (Ex. 15) (agenda for in-person meeting at the Council chair's office with nothing agendized regarding public testimony); *see* Dkt. 61 at 3 ¶ 20 (no October 4 regular session minutes); Creps Decl. Ex. 29 at 16 (No. 25) (admitting Council "does not believe it provided interested persons with an opportunity to present testimony on any agenda item at any point").

Refusing to allow public testimony goes to the heart of why the Sunshine Law exists. The Council thus violated section 92-3 by failing to afford interested persons an opportunity to present oral testimony on all agenda items at the June 16 and October 4 meetings and limiting public testimony to the beginning of the Council's agenda on June 16, August 4, and November 2. Public First is entitled to declaratory as requested in Count VIII.

CONCLUSION

Based on the foregoing, Public First respectfully asks this Court to enter an order declaring that the Council violated the Sunshine Law by:

(1) Amending the June 16, 2023 agenda in violation of HRS §§ 92-7 (**Count I**);

(2) Meeting in executive session on June 16 and August 4, 2023, to discuss and decide the general selection process for the State Public Defender in violation of HRS §§ 92-3, -4, and -5 (**Count II** & **Count III**);

(3) Meeting in executive session on October 4, 2023, to interview and discuss candidates for State Public Defender in violation of HRS §§ 92-3, -4, and -5 (**Count IV**);

(4) Meeting in executive session on November 2, 2023, to deliberate on and select the State Public Defender in violation of HRS §§ 92-3, -4, and -5 (**Count V**);

(5) Failing to record legally sufficient regular session minutes for meetings held June 16, August 4, October 4, and November 2, 2023 (**Count VI**) and executive session minutes for meetings held October 4 and November 2 (**Count VII**), in violation of HRS § 92-9; and

(6) Failing to take public testimony concerning its amended agenda on June 16 and limiting public testimony to the beginning of the Council's meeting on June 16, August 4, October 4, and November 2, 2023 in violation of HRS § 92-3 (**Count VIII**).

DATE: Honolulu, Hawai`i, March 25, 2025

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