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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 - IX; MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT; DECLARATION OF COUNSEL; EXHIBITS "1" – "28"; NOTICE OF HEARING; and CERTIFICATE OF SERVICE

JUDGE: Honorable Jordon J. Kimura
TRIAL DATE: None

HEARING MOTION
HEARING DATE: November 25, 2024
HEARING TIME: 9:00 a.m.

MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS I - IX

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.

As a matter of law, Public First is entitled to declaratory relief in its favor on Counts I – IX of the Complaint filed January 10, 2024 (Complaint). *See* 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;

(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**); and

(7) Failing to timely post minutes of all of its meetings until October 24, 2023, in violation of HRS § 92-9 (**Count IX**).[1]

DATED: Honolulu, Hawai`i, October 23, 2024

/s/ Benjamin M. Creps
ROBERT BRIAN BLACK
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Attorneys for Plaintiff Public First Law Center

[1] Public First reserves its requests for injunctive and other relief. By separate motion, Public First moves for partial summary judgment on its declaratory claims against Defendant Agribusiness Development Corporation.

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Under the Sunshine Law, meetings of Defendant Defender Council (Council) must be open *by default*. Closed sessions must be narrow and purposeful. *E.g.*, Hawai`i Revised Statutes (HRS) § 92-1(2), (3) ("The provisions requiring open meetings shall be liberally construed" and "The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.").

This case concerns the Council's series of closed-door sessions in 2023 to set the application process, screen and interview candidates, and ultimately select the State Public Defender. By excluding the public, the Council deprived interested stakeholders and the general community of the opportunity to meaningfully observe and participate in the appointment of the State Public Defender—a high-level government official who has substantial discretionary authority over public monies and policy and the critical responsibility of affording constitutionally-required indigent defense across Hawai`i.

The Council justified this excessive secrecy using the personnel-privacy exemption because the meetings concerned hiring a government official. HRS § 92-5(a)(2).[1] But the Council ignored the necessary condition that closure is permitted in such personnel-related meetings 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).

As the supreme court held, only discussions of personnel matters that "directly relate" to a *constitutionally protected* privacy interest justify a closed session. *Id.* at 478-79, 445 P.3d at 58-60. Otherwise, "**personnel matters should presumptively be discussed in an open meeting**." *Id.* (emphasis added).

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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.

Summary judgment is warranted. The material facts are matters of public record and cannot be genuinely disputed. The relevant law is clear. Accordingly, Public First asks this Court to enter an order declaring that the Council violated the Sunshine Law in the various ways outlined below.[2]

I. Legal Standards

A. Summary Judgment

"Summary judgment is appropriate 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 judgment as a matter of law." *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Hawai`i 92, 104, 176 P.3d 91, 103 (2008). 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).

B. Sunshine Law

It is the intent of the Sunshine Law to "protect 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.*

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[2] Although Public First does not assert any declaratory claims against Defendant Jon N. Ikenaga, he is named in this action due to the request to void his selection as State Public Defender based on the many Sunshine Law violations committed by the Council in selecting him. HRS § 92-11 (actions taken in violation of section 92-3 and 92-7 are voidable); *CBLC*, 144 Hawai`i at 485, 445 P.3d at 66 (requiring joinder of the subject of a section 92-11 invalidation request).

"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.*

II. Undisputed Facts

A. The State Public Defender is a High-level Government Official Who Manages a Constitutionally Significant Public Office and Has Substantial Discretionary Authority Over Public Monies and Policy.

Established in the early 1970s, the Office of the State Public Defender (OPD) is tasked with providing constitutionally-required indigent criminal legal defense in all State courts in Hawai`i where a charged offense carries the possibility of incarceration.[3] Dkt. 1 at 4 ¶ 14; Dkt. 23 at 5 ¶ 14.[4] It maintains "branch offices in each of the four judicial circuits including two offices on the Big Island." Decl. of Benjamin M. Creps, dated October 23, 2024 (Creps Decl.), Ex. 1.

According to OPD, its purpose is to "safeguard individual rights in all criminal and related matters, from arrest or threat of confinement through all stages of the criminal proceedings including appeal and parole board matters, if any[.]" *Id.* Ex. 2. OPD describes itself as the "the largest criminal defense organization" in the State. *Id.* Ex. 3. OPD has a staff of approximately 130 individuals and an annual budget of about $13 million for fiscal year 2025. *Id.* Ex. 4 at 5 (page 276 in original pagination); Dkt. 1 at 4 ¶ 14; Dkt. 23 at 5 ¶ 14 (admission concerning number of employees).

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[3] Both the U.S. and Hawai`i Constitutions afford every criminal defendant the right to counsel in such cases. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). 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).

[4] Pinpoint citations to "Dkt." entries refer to the corresponding page of the PDF.

The State Public Defender manages OPD. The State Public Defender is selected by a five-member governing body appointed by the Governor—the Council—and serves a term of four years. HRS §§ 802-9, -11. The State Public Defender must devote his or her full time to the duties of OPD and is not permitted to engage in the general practice of law. HRS § 802-11. The State Public Defender's salary is eighty-five percent of the Attorney General's salary. *Id*. The State Public Defender appoints deputy public defenders (DPDs), with oversight by the Council. HRS § 802-12.

Thus, the State Public Defender is a high-level government official with substantial discretionary authority over public monies and policy. *Accord* Creps Decl. Ex. 5 [email correspondence] at 1 (Council's attorney: "We agree that the position of the Public Defender is a high-level position. . . .").

B. Selection of the State Public Defender is a Matter of Public Concern.

Given the breadth and nature of the services provided by OPD, and the State Public Defender's role as head of OPD, the Council's selection of the State Public Defender is a matter of public concern.

On any given day, thousands of criminal defendants are represented by OPD. *E.g.*, Creps Decl. Ex. 6 [FY 2025 Supplemental Budget] at 7, Table 7 (16,000+ criminal matters pending during FY 2022-2023). DPDs "appear daily on behalf of clients in the Circuit, District, and Family Courts of every circuit in the state" and "also represent indigent defendants in the Hawai`i Supreme Court and the Hawai`i Intermediate Court of Appeals." Creps Decl. Ex. 7 [legislative testimony] at 2-3. DPDs represent individuals before "the Hawai`i Paroling Authority and individuals subject to involuntary hospital commitment petitions." *Id*. "In addition to the traditional courts, the OPD staffs specialty courts across the state such as the HOPE program courts, drug courts, mental health courts, environmental courts, the Veteran's treatment courts and the Oahu and Maui Community Outreach Courts." *Id*.

Illustrating the critical role served by OPD, staffing shortages in recent years have raised serious questions concerning public safety and the rights of individual defendants. *E.g.*, Tiffany DeMasters, *Staffing shortages leading Big Island public defenders to withdraw from cases*, Big Island Now (April 29, 2023) (regarding the mass withdrawal

of DPDs in cases across Hawai`i Island, former Third Circuit Chief Judge Robert D. S. Kim remarked, "We can't let this injustice go on."); Kevin Dayton, *Short-Handed Kona Public Defender's Office Won't Accept New Drunken Driving Cases*, Honolulu Civil Beat (July 10, 2024) ("The Kona public defender's office notified the Judiciary on June 12 it would no longer handle new DUI cases or Class A felonies 'due to our current staffing shortage'. . . . 'We see an immediate impact of this decision,' [ret. Judge] Kim said. 'It definitely is a looming problem, and I fear for the safety of the community if we have to get to the point where these kinds of cases are dismissed'. . . . 'I think the government needs to look at the operations of the Office of the Public Defender and make sure they can do their work so we can have efficient administration of justice,' Kim said.").[5]

Lawmakers also recognize OPD's critical function in the administration of the State's criminal justice system. Introduced last session, House Bill 1608 HD2 SD1 (2024) sought to appropriate funds "to ensure [OPD] meets its constitutional and statutory requirements by restoring critically important positions to the Office." Creps Decl. Ex. 9 [S. Stand. Comm. Rep. No. 3177 (2024)] at 1-2. The Senate Committee on Judiciary found that if the OPD is understaffed "for extended periods of time, it may result in case overloads, continuances of cases, backlogs in the courts, and other major problems in the justice system." *Id.*; *see also* Creps Decl. Ex. 7 at 3 ("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.").

C. 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.

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[5] This Court may take judicial notice of facts reported by newspapers. HRE 201(b) (court may take judicial notice of facts not subject to reasonable dispute that are generally known within Hawai`i); *In re Pioneer Mill Co.*, 53 Haw. 496, 497 n.1, 497 P.2d 549, 551 n.1 (1972) (taking judicial notice based on newspaper articles submitted by the parties). The cited news articles are compiled and attached as Exhibit 8.

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. Creps Decl. Ex. 10 [agenda] at 2; Ex. 11 [minutes] at 1-4. It later moved into executive session for an unspecified purpose. Ex. 11 at 3. When the Council reconvened in open session, it voted to amend the June 16 agenda to add a discussion about the "selection process to appoint and hire Public Defender position." *Id*. The Council then approved a detailed selection process specifying deadlines and creating a working group without opportunity for public comment or deliberation in public. *Id*. The Council did not publish minutes within 40 days of the meeting. Creps Decl. ¶ 13.

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. Creps Decl. Ex. 12 [agenda] at 2; Ex. 13 [minutes] at 2-3. It later voted to enter executive session for an unspecified purpose and apparently deliberated on the selection process for the State Public Defender. Ex. 13 at 2-3; Ex. 14 [executive session minutes]. When the Council reconvened in open session, it announced: "The list of candidates will be made public. The public will be able to submit comments on the candidates; comments will be confidential." Ex. 13 at 3. The Council did not publish minutes within 40 days of the meeting. Creps Decl. ¶ 16.

Following the August 4 meeting, the Council solicited applications for State Public Defender. Creps Decl. Ex. 20 at 1. 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. Creps Decl. Ex. 15 [agenda]. Public testimony was not on the agenda, and 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.* Ex. 12 at 1-2. At that meeting, the Council interviewed four State Public Defender candidates—Craig Nagamine, Darcia Forester, Defendant Ikenaga, and Eric Neimeyer—in executive session. *Id.* Ex. 16 [executive session minutes] at 1 - 2. The Council interviewed each

candidate for about an hour. *Id*. The 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 2. Following these interviews, the Council discussed the candidates in executive session. *Id*. The post-interview discussion of the candidates lasted forty minutes, for which the minutes provide in full: "Discussion regarding candidates held." *Id*.

To-date, the Council has not published any *regular* session minutes for its October 4 meeting. Creps Decl. ¶ 20. There is no evidence that the Council: held any portion of the October 4 meeting open to the public; provided the public an opportunity to comment on agenda items; voted to enter executive session; or reported publicly after the executive session.

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. Creps Decl. Ex. 17 [agenda] at 2; Ex. 18 [minutes] at 2. The Council later voted to enter executive session for an unspecified purpose and apparently discussed the State Public Defender candidates. *Id*. Ex. 18 at 3; Ex. 19 [exec. sess. minutes]. When the Council reconvened in open session, the Council's chair summarized the selection process and criteria in generic terms. *Id.* Ex. 18 at 3-4; Ex. 20 ["selection statement"]; *see also* Ex. 21 [1/26/24 minutes] at 3 (Council adds selection statement post hoc). The Council then voted to appoint Defendant Ikenaga without any public discussion regarding the candidates. *Id.* Ex. 18 at 4.

III. Argument

The Council violated chapter 92 in multiple respects in the course of its hiring of the next State Public Defender. These violations, individually and cumulatively, deprived the public of the opportunity to meaningfully observe and participate in an important government process.

A. Hiring the State Public Defender Is Not a Presumptively Secret Process.

The Council claims that it properly entered executive sessions to discuss hiring the State Public Defender. It relies on the exceptions to the Sunshine Law, but utterly failed to comply with the terms of those exceptions—which are "strictly construed against closed meetings." HRS § 92-1(3).

1. Applying the Sunshine Law exceptions, board discussion of personnel matters is presumptively open.

Two exceptions may be relevant to the Council's meetings.[6] 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*. First, as to the personnel-privacy exception, the Court 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. The personnel-privacy exemption is a two-part test. *CBLC*, 144 Hawai`i 466, 79, 445 P.3d 47, 60 ("we construe the first and second clause

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[6] 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. Creps Decl. Ex. 11, 13, 18, and 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.").

in section 92-5(a)(2) as separate requirements."). The first condition is whether the discussion concerns a specified personnel matter. "To be within the scope of the exception, discussions and deliberations about personnel must relate to 'the hire, evaluation, dismissal, or discipline' of personnel, or to 'charges brought against' personnel." *Id*. The second condition is whether the discussion concerns "matters affecting privacy." 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").[7] As *CBLC* explained: "People have a legitimate expectation of privacy in 'highly personal and intimate' information."[8] 144 Hawai`i at 480, 445 P.3d at 61.

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[7] Although the Sunshine Law (1975) predates the constitutional right of privacy (1978), the standard for constitutional privacy 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 underlying 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).

[8] 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

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.* "Some circumstances may reduce or perhaps entirely defeat the legitimacy of a person's expectation of privacy in certain information." *Id.*

In response to the circuit court's holding that a board can close the doors for any personnel matter, the Hawai`i Supreme Court explained: "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." *Id.* 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." *Id.* In other words, "not all personnel discussions are exempt from the open meeting requirement." *Id.* "[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).

For the attorney-consultation exception, the Hawai`i Supreme Court held that the 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. 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."

> 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.

Id. (citations omitted).

Even where an exemption is implicated in a portion of board discussions, the board must return immediately 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).

2. The Council improperly invoked the exemptions.

As a threshold, board discussions and deliberations regarding the hiring *process* for a high-level government official 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") (emphasis added); *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"). 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. Creps Decl. Ex. 14. 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. *Id.* Ex. 10 - 14.

As to the later meetings concerning specific candidates, 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. Disclosing such information would not be highly offensive to a reasonable person. On the contrary, public disclosure is *expected* for those who wish to lead a publicly-funded office. The hiring process for the State Public Defender, a high-level government official with substantial fiscal and discretionary authority, is a legitimate concern to the public. The Council wrongly collapsed the personnel-privacy exception into a simple one-step determination that hiring per se involves matters of privacy. The Council 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. Creps Decl. Ex. 15 - 19.

The Council did not conduct *any* privacy analysis—and could not justify a sweeping privacy concern—to the extent that it invoked the personnel-privacy exemption to close the June 16, August 4, October 4, and November 2 meetings. *Id.* Ex. 10 - 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, 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").

The Hawai`i Supreme Court stated that, even if a general expectation of privacy may exist for certain matters, that expectation may not be legitimate for certain people or 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."). For example, "reasonable expectations of privacy may be affected by a person's level of discretionary and fiscal authority in government." *Id.* at 481, 445 P.3d at 62.

The Council, however, 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 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[.]". Creps Decl. Ex. 5 at 1. 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."). And a person's employment history and background—government or not—simply is not personal and intimate information that rises to the level of a constitutional invasion of privacy if disclosed. *See, e.g.,* fn. 7, 8. People share such information frequently with complete strangers on the Internet or in resumes for jobs with no reasonable expectation of privacy. The Council's justification falls flat.

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.

Even if there were a valid basis for closing the doors to handle some limited private *portion* of the meeting, the discussions not "directly related" to that basis were required to be openly held—but were 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."). Thus, the Council violated HRS §§ 92-3, 92-4, and 92-5. *Id.* 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. The Council Violated the Sunshine Law in Several Other Respects.

1. 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); *see also, e.g.*, Office of Information Practices (OIP) Op. No. 02-09 at 1, 3-5 (board cannot discuss items that are not on agenda).[9]

[9] *See also* HRS § 92-12 ("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

"[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. In Opinion 06-05, Hawai`i County Council amended its agenda to add an executive session to review legal matters related to a lawsuit over a residential development. *Id*. at 1. OIP agreed that the specific legal issues to be discussed had relatively minor consequence to the County, but still found the agenda amendment improper based on the residential development's importance viewed in the broader context. *Id*. at 3-4. Thus, a board's ability to permissibly add an item to the agenda within six calendar days of a meeting is restricted to insignificant matters that would likely not draw any public testimony. OIP reaffirmed that point in OIP S Memo 19-04, holding that the Land Use Commission violated the Sunshine Law when it discussed subpoenas related to a redistricting petition. Creps Decl. Ex. 24 at 1-2.[10] In both opinions, OIP emphasized that despite the limited significance of the actual issue to be discussed, the broader relevance of the related major land use matters required public notice.

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unless found to be palpably erroneous; provided that in an action under this section challenging an opinion or ruling of the office of information practices concerning a complaint by the plaintiff, the circuit court shall hear the challenged adverse determination de novo.").

[10] "S Memo" refers to OIP's informal Sunshine Law opinions; U Memo refers to OIP's informal Uniform Information Practices Act (UIPA) opinions. Cited informal opinions are attached as exhibits as they are not readily available online.

These principles hold true even on a smaller scale. In OIP S Memo 15-07, OIP found that a neighborhood board violated the agenda amendment provision when it voted to amend its agenda to consider a recommendation to change the closure time at a small neighborhood park by a couple hours. *Id.* Ex. 25 at 2. While the neighborhood board reasoned that changing closure hours might only affect a few dozen park users, OIP found the item to be of reasonably major significance because of its "potential impacts on various park activities and concerns about its use." *Id.* at 4. OIP also considered that the change to closure time could potentially affect thousands of nearby residents as well as non-residents who might travel there. *Id.*

Even where the board's action lacks any legal significance, OIP has considered the public importance of the broader context. For example, in OIP S Memo 12-07, a neighborhood board passed a resolution to support controversial City Council legislation about confiscating property from homeless individuals left in public parks. *Id.* Ex. 26. OIP rejected the argument that the action was insignificant because the neighborhood board lacked any actual authority over the issue. *Id.* at 4. OIP found that the neighborhood board's action to vote to support the bill affected a significant number of people because it affected all the constituency of the district. *Id.* ("OIP generally advises that a board's constituency is highly relevant to the determination.").

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." Ex. 11 at 3. The Council plainly changed the agenda less than six calendar days before the meeting. And the selection process to appoint and hire the State Public Defender is, without doubt, an item of reasonably major importance for which action thereon would affect a significant number of persons (certainly more important than changing the hours of a neighborhood park). 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.

2. 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. 03-13 at 6-7 (minutes must include enough detail to allow the public to scrutinize the actions of the board); Creps Decl. Ex. 27 [OIP U Memo 24-05] at 2, 10-11 (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); Ex. 28 [OIP U Memo 23-07] at 2, 9-10 (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 record *any* regular session minutes for the October 4 meeting. Creps Decl. at ¶ 20. 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. *Id.* Ex. 11 at 2; Ex. 13 at 2; Ex. 18 at 3; 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. Creps Decl. 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 2. 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:

> Executive Session called to order 10:39 am
>
> Members present: Crystal Glendon, Stanton Oshiro, Gina Gormley
>
> DAG Randall Nishiyama
>
> Discussed: Selection of Public Defender
>
> Reviewed and discussed the comments/feedback that were submitted on each applicant.
>
> Discussed the strengths and weaknesses of each applicant, their vision, their interviews, and their answers to "homework" questions.
>
> Each Council Member presented their position on each applicant. Each Council Member completed their scorecards.
>
> Adjourned at 12:03 pm.

Id. 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. As a result, the public cannot assess whether the Council performed its duties in compliance with legal requirements and community expectations. Public First is entitled to declaratory relief based on the Council's Sunshine Law violations, as requested in Counts VI and VII.

3. 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. Creps Decl. Ex. 10 - 13, 17, 18. The Council also failed to take public testimony on the selection process for the State Public Defender at the June 16 meeting. *Id.* Ex. 11 at 3 (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.* Ex. 15 (agenda for in-person meeting at the Council chair's office with nothing agendized regarding public testimony); *see* Creps Decl. ¶ 20 (no October 4 regular session minutes). 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 relief based on the Council's Sunshine Law violations, as requested in Count VIII.

4. The Council failed to timely post minutes of all of its meetings until October 24, 2023.

HRS § 92-9(a) requires all boards to publish meeting minutes "on the board's website . . . within forty days after the meeting." As of October 24, 2023, however, the Council had no meetings minutes published on its website. Creps Decl. ¶ 28. Public First first notified the Council of this concern in 2020. *Id.* Ex. 22 at 1. The Council responded that it would start posting minutes within 40 days, *id.* at 6, but it never did. Public First then notified the Council again on October 24, 2023. *Id*. Ex. 23; Creps Decl. ¶ 28 – 30. The Council subsequently posted minutes going back to October 28, 2022. *Id.* Ex. 5 at 2 ("the minutes that were delinquent in posting on the Office of the Public Defender's website have now been posted"); Creps Decl. ¶ 28 - 30. The Council thus violated section 92-9. Public First is entitled to declaratory relief concerning the Council's Sunshine Law violations, as requested in Count IX.

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;

(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**); and

(7) Failing to timely post minutes of all of its meetings until October 24, 2023, in violation of HRS § 92-9 (**Count IX**).

DATE: Honolulu, Hawai`i, October 23, 2024

/s/ Benjamin M. Creps
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