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Attorneys for Movant
PUBLIC FIRST LAW CENTER

Electronically Filed
FIRST CIRCUIT
1CCV-24-0000050
23-OCT-2024
11:49 AM
Dkt. 61 DEC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PUBLIC FIRST LAW CENTER,

Plaintiff,

vs.

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

Defendants.

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

DECLARATION OF COUNSEL;
EXHIBITS "1" - "28"

DECLARATION OF COUNSEL

1. I, Benjamin M. Creps, am an attorney for Movant Public First Law Center (Public First) and submit this declaration based on personal knowledge, except as otherwise provided.

2. Attached as **Exhibit 1** is a true and correct copy of a printout of the Office of the Public Defender's (OPD) "Contact Us" webpage that I obtained online at <https://publicdefender.hawaii.gov/contact-us/>.

3. Attached as **Exhibit 2** is a true and correct copy of a printout of OPD's "About Us - Statement of Purpose" webpage that I obtained online at <https://publicdefender.hawaii.gov/about/statement-of-purpose-2/>.



4. Attached as **Exhibit 3** is a true and correct copy of a printout of OPD's "About Us - Background" webpage that I obtained online at <https://publicdefender.hawaii.gov/about/background/>.

5. Attached as **Exhibit 4** is a true a correct *excerpted* copy of the Department of Budget and Finance's FY 2025 Supplemental Budget that is available in full at <https://budget.hawaii.gov/wp-content/uploads/2023/12/12.-Department-of-Budget-and-Finance-FY-25-SUPP.7H0.pdf>.

6. Attached as **Exhibit 5** is a true and correct copy of email correspondence from October 25 - 26, 2023 between myself and legal counsel for Defendant Defender Council (Council), maintained by our office in the normal course of business.

7. Attached as **Exhibit 6** is a true and correct *excerpted* copy of the Hawai'i Judiciary's 2023 Annual Report Statistical Supplement that is available in full at <https://www.courts.state.hi.us/wp-content/uploads/2024/01/RPT-StatsRpt2023-FINAL.pdf>.

8. Attached as **Exhibit 7** is a true and correct copy of written testimony before the Hawai'i Senate Committee on Judiciary on February 21, 2024 on House Bill No. 1608 H.D. 2 that I obtained from the Legislature's website.

9. Attached as **Exhibit 8** is true and correct copy of the following news articles that I obtained online:

- a. Tiffany DeMasters, *Staffing shortages leading Big Island public defenders to withdraw from cases*, Big Island Now (April 29, 2023); and
- b. Kevin Dayton, *Short-Handed Kona Public Defender's Office Won't Accept New Drunken Driving Cases*, Honolulu Civil Beat (July 10, 2024).

10. Attached as **Exhibit 9** is a true and correct copy of Senate Standing Committee Report No. 3177 (2024), available at: https://www.capitol.hawaii.gov/sessions/session2024/CommReports/HB1608_SD1_SSCR3177_.pdf.

11. Attached as **Exhibit 10** is a true and correct copy of the Council's June 16, 2023 agenda that I obtained from the State calendar.

12. Attached as **Exhibit 11** is a true and correct copy of the regular session minutes of the Council's June 16 meeting that I obtained from the Council's website.

13. The Council did not publish its June 16 regular session minutes within 40 days of the meeting. I know this because I checked the Council's website on and before October 24, 2023.

14. Attached as **Exhibit 12** is a true and correct copy of the Council's August 4, 2023 agenda that I obtained from the State calendar.

15. Attached as **Exhibit 13** is a true and correct copy of the regular session minutes of the Council's August 4 meeting that I obtained from the Council's website.

16. The Council did not publish its August 4 regular session minutes within 40 days of the meeting. I know this because I checked the Council's website on and before October 24, 2023.

17. Attached as **Exhibit 14** is a true and correct copy of the executive session minutes of the Council's August 4 meeting that I obtained via public records request.

18. Attached as **Exhibit 15** is a true and correct copy of the Council's October 4, 2023 agenda that I obtained from the State calendar.

19. Attached as **Exhibit 16** is a true and correct copy of the executive session minutes of the Council's October 4 meeting that I obtained via public records request.

20. To-date, the Council has not published any *regular* session minutes for its October 4, 2023 meeting. I know this because I periodically check the Council's website, most recently on October 18, 2024.

21. Attached as **Exhibit 17** is a true and correct copy of the Council's November 2, 2023 agenda that I obtained from the State calendar.

22. Attached as **Exhibit 18** is a true and correct copy of the regular session minutes of the Council's November 2 meeting that I obtained from the Council's website.

23. Attached as **Exhibit 19** is a true and correct copy of the executive session minutes of the Council's November 2 meeting that I obtained via public records request.

24. Attached as **Exhibit 20** is a true and correct copy of the Council's "selection statement" that I obtained from the Council's website.

25. Attached as **Exhibit 21** is a true and correct copy of the regular session minutes of the Council's January 26, 2024 meeting that I obtained from the Council's website.

26. On January 26, 2024, the Council voted to add the "selection statement" as a supplement to its November 2 minutes. Ex. 21 at 3.

27. Attached as **Exhibit 22** is a true and correct copy of email correspondence between our office and the Council between September 2020 – November 2020, without attachments, maintained by our office in the normal course of business.

28. As of October 24, 2023, Council had no minutes posted online.

29. Attached as **Exhibit 23** is a letter dated October 24, 2023, from our office to the Council and maintained by our office in the normal course of business. I sent this letter to the Council and the Attorney General's Office by email on October 24.

30. After receiving the October 24 letter, Council (through its attorney) represented to me that the delinquent minutes had been published. Ex. 5 at 2. I confirmed this shortly thereafter by accessing the published minutes online, which date back to October 28, 2022.

31. Attached as **Exhibit 24** is a true and correct copy of the Office of Information Practices' (OIP) S Memo 19-04, obtained via public records request and maintained by our office in the normal course of business.

32. Attached as **Exhibit 25** is a true and correct copy of OIP S Memo 15-07, obtained via public records request and maintained by our office in the normal course of business.

33. Attached as **Exhibit 26** is a true and correct copy of OIP S Memo 12-07, obtained via public records request and maintained by our office in the normal course of business.

34. Attached as **Exhibit 27** is a true and correct copy of OIP U Memo 24-05, obtained via public records request and maintained by our office in the normal course of business.

35. Attached as **Exhibit 28** is a true and correct copy of OIP U Memo 23-07, obtained via public records request and maintained by our office in the normal course of business.

I declare under penalty of law that the foregoing is true and correct to the best of my knowledge.

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

/s/ Benjamin M. Creps
BENJAMIN M. CREPS

Exhibit "1"



State of Hawaii
Office of the Public Defender

[Home](#) » [Contact Us](#)

CONTACT US

The Office of the Public Defender maintains branch offices in each of the four judicial circuits including two offices on the Big Island. Each office is responsible for providing legal services to all qualified persons in all courts of the respective circuit or geographic area and before the Hawai'i Paroling Authority. The Appellate branch of the Honolulu office handles appellate cases generated by all of the office branches and cases where the office has been appointed as substitute counsel for appeal. The main office, in Honolulu, handles all administrative and fiscal matters for all branches statewide.

Hours of Operation

7:45 a.m. to 4:30 p.m. Monday – Friday. Closed on State Holidays.

[Oahu Office](#)

[Hilo Office](#)

[Kona Office](#)

[Kauai Office](#)

[Maui Office](#)

[Molokai Office](#)

Exhibit "2"



State of Hawaii
Office of the Public Defender

[Home](#) » [About Us](#) » Statement of Purpose

STATEMENT OF PURPOSE



The purpose of the Office of the Public Defender 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, consistent with applicable laws, court rules, and rules of professional responsibility. Pursuant to this objective, the primary function of the Office of the Public Defender is to provide the assistance of effective counsel in all criminal and related proceedings.

Under § 802-1, Hawai'i Revised Statutes: *[a]ny indigent person who is (1) arrested for, charged with or convicted of an offense or offenses punishable by confinement in jail or prison or for which such person may be or is subject to the provisions of Chapter 571; or (2) threatened by confinement, against the indigent person's will, in any psychiatric or other mental institution or facility; or (3) the subject of a petition for involuntary outpatient treatment under Chapter 334 shall be entitled to be represented by a public defender. If, however, conflicting interests exist, or if the interests of justice require, the court may appoint other counsel.*

Exhibit "3"



State of Hawaii
Office of the Public Defender

[Home](#) » [About Us](#) » Background

BACKGROUND

§ 802-9. Defender council

The governor shall appoint a defender council consisting of five members, who shall serve at the governor's pleasure. There shall be at least one member from each of the counties of the State. The chairperson of the council shall be selected by its members. Each member shall serve without pay and shall be reimbursed for necessary expenses incurred while attending meetings and while in the discharge of the member's responsibilities. The council shall be the governing body of the office of the state public defender.

§ 802-11. Appointment of state public defender

The state public defender shall be appointed by the defender council without regard to chapters 76 and 89. The state public defender's appointment shall be for a term of four years except as otherwise provided herein, and until the state public defender's successor is appointed and qualified. The state public defender shall be qualified to practice law before the supreme court of this State. Effective July 1, 2005, the state public defender shall be paid a salary set at eighty-seven per cent of the attorney general. The state public defender shall devote full time to the performance of the state public defender's duties and shall not engage in the general practice of law.

§ 802-12. Organization of office; assistance

Subject to the approval of the defender council, the state public defender may employ assistant state public defenders and other employees, including investigators, as may be necessary to discharge the function of the office. Assistant state public defenders shall be qualified to practice before the supreme court of this State. Assistant state public defenders shall be appointed without regard to chapter 76 and shall serve at the pleasure of the state public defender. All other employees may be appointed in accordance with chapter 76. An assistant state public defender may be employed on a part-time basis, and when so employed, the assistant public defender may engage in the general practice of law, other than in the practice of criminal law.

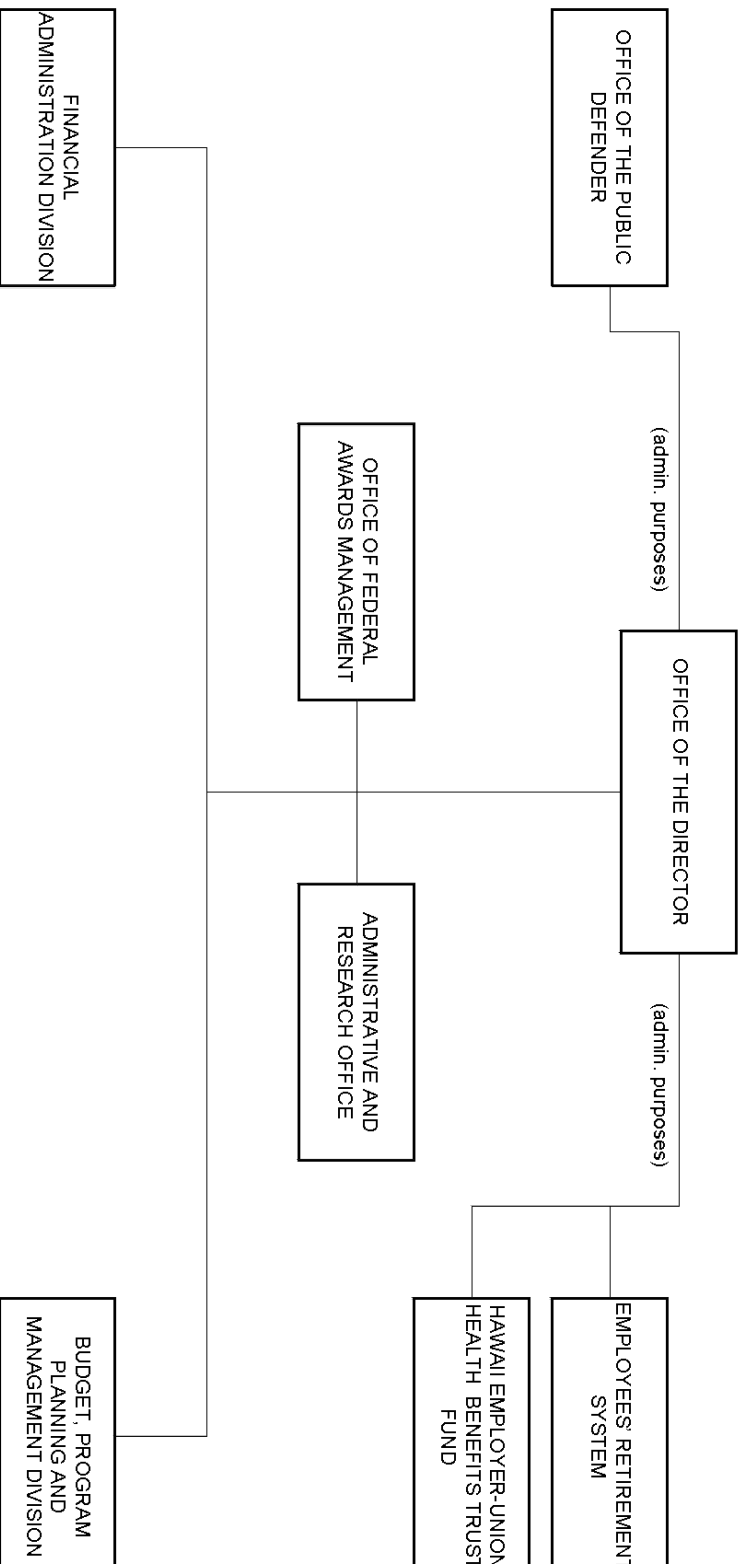
The Office of the Public Defender is the largest criminal defense organization in the State of Hawai'i.

Exhibit "4"



Department of Budget and Finance

STATE OF HAWAII
DEPARTMENT OF BUDGET AND
FINANCE
ORGANIZATION CHART



DEPARTMENT OF BUDGET AND FINANCE

Department Summary

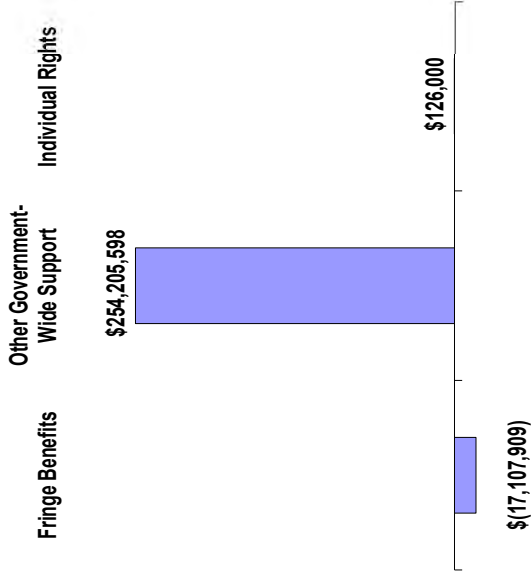
Mission Statement

To enhance long-term productivity and efficiency in government operations by providing quality budget and financial services that prudently allocate and effectively manage available resources.

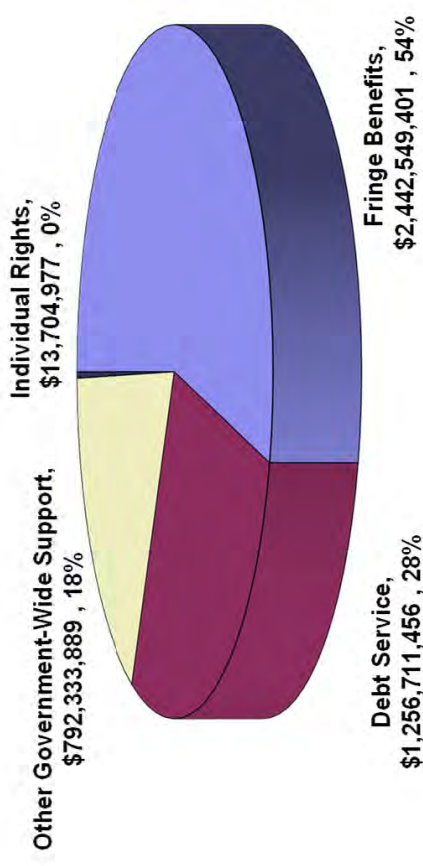
Department Goals

Improve the executive resource allocation process through the following: planning, analysis and recommendation on all phases of program scope and funding; maximizing the value, investment, and use of State funds through planning, policy development, timely scheduling of State bond financing and establishment of appropriate cash management controls and procedures; administering retirement and survivor benefits for State and County members and prudently managing the return on investments; administering health and life insurance benefits for eligible active and retired State and County public employees and their dependents by providing quality services and complying with federal and State legal requirements; and safeguarding the rights of indigent individuals in need of assistance in criminal and related cases by providing statutorily entitled and effective legal representation.

FY 2025 Supplemental Operating Budget Adjustments by Major Program



FY 2025 Supplemental Operating Budget



DEPARTMENT OF BUDGET AND FINANCE MAJOR FUNCTIONS

- Administers the multi-year program and financial plan and executive budget, management improvement, and financial management programs of the State under the general direction of the Governor.
- Coordinates State budget services and prepares the Governor's budget for submission to the legislature; administers the financial affairs of the State.
- Plans, directs, and coordinates the State's investments and financing programs.
- Directs and coordinates a statewide retirement benefits program for State and county government employees.
- Administers health and life insurance benefits for eligible State and county active and retired public employees and dependents.
- Provides comprehensive legal and related services to persons who are financially unable to obtain legal and related services.

MAJOR PROGRAM AREAS

The Department of Budget and Finance has programs in the following major program areas:

Government-Wide Support

BUF 101	Departmental Administration and Budget Division
BUF 102	Collective Bargaining – Statewide
BUF 103	Vacation Payout – Statewide
BUF 115	Financial Administration
BUF 141	Employees' Retirement System
BUF 143	Hawaii Employer–Union Trust Fund
BUF 721	Debt Service Payments – State
BUF 741	Retirement Benefits Payments – State
BUF 761	Health Premium Payments – State
BUF 762	Health Premium Payments – ARC

Formal Education

BUF 725	Debt Service Payments – DOE
BUF 728	Debt Service Payments – UH
BUF 745	Retirement Benefits Payments – DOE
BUF 748	Retirement Benefits Payments – UH
BUF 765	Health Premium Payments – DOE
BUF 768	Health Premium Payments – UH

Individual Rights

BUF 151	Office of the Public Defender
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PROGRAM ID:
PROGRAM STRUCTURE NO:
PROGRAM TITLE:

BUF-151
100301
OFFICE OF THE PUBLIC DEFENDER

**EXECUTIVE SUPPLEMENTAL BUDGET
(IN DOLLARS)**

REPORT: S61-A

PROGRAM COSTS	FY 2024			FY 2025			BIENNIUM TOTALS		PERCENT CHANGE	
	CURRENT APPRN	ADJUSTMENT	RECOMMEND APPRN	CURRENT APPRN	ADJUSTMENT	RECOMMEND APPRN	CURRENT BIENNIUM	RECOMMEND BIENNIUM		
OPERATING	133,50*	**	133,50*	133,50*	**	133,50*	*	**	*	
PERSONAL SERVICES	12,395,092		12,395,092	12,833,287		12,833,287	25,228,379		25,228,379	
OTH CURRENT EXPENSES	745,690		745,690	745,690		871,690	1,491,380		1,617,380	
TOTAL OPERATING COST	13,140,782		13,140,782	13,578,977		13,704,977	26,719,759		26,845,759	0.47
BY MEANS OF FINANCING										
GENERAL FUND	133,50*	**	133,50*	133,50*	**	133,50*	*	**	*	
TOTAL PERM POSITIONS	13,140,782		13,140,782	13,578,977		13,704,977	26,719,759		26,845,759	
TOTAL TEMP POSITIONS										
TOTAL PROGRAM COST	133,50*	**	133,50*	133,50*	**	133,50*	*	**	*	
	13,140,782		13,140,782	13,578,977		13,704,977	26,719,759		26,845,759	0.47

Narrative for Supplemental Budget Requests

FY 2025

Program ID: BUF 151

Program Structure Level: 10 03 01

Program Title: OFFICE OF THE PUBLIC DEFENDER

A. Program Objective

To safeguard the rights of individuals by providing statutorily entitled and effective legal representation in criminal, mental commitment, and family cases in compliance with the Hawaii Rules of Professional Conduct. Prudently manage deputy public defender and support services resources and caseloads and maintain a quality training program for deputy defender staff.

B. Description of Request

Request to add \$126,000 in general funds to upgrade/replace the Office of the Public Defender's (OPD) current database system with a proprietary case and document management system.

C. Reasons for Request

The OPD seeks to replace its current antiquated database system with a proprietary case and document management system to optimize workflow, database querying, document tracking, and data collection and analysis. Currently, each branch location (Oahu, Maui, Kona, Hilo, Kauai), and in some cases each division within each branch (Circuit Court, District Court, Family Court, and Appellate Court), stores its data in its own separate database; however, none of the databases are connected to each other. An upgraded system would be cloud-based and accessible to all OPD offices and staff, provide statistics by case type or client demographics, and allow for highly configurable records storage options and efficient retrieval of client and case information, as well as their pertinent documents.

D. Significant Changes to Measures of Effectiveness and Program Size

None.

Exhibit "5"

From: Ben Creps ben@civilbeatlawcenter.org 
Subject: Re: Selection Process for the Next Public Defender
Date: October 26, 2023 at 11:07 AM
To: Nishiyama, Randall S Randall.S.Nishiyama@hawaii.gov
Cc: crystal@glendonponce.com, ginagormleylaw@gmail.com, lawofficeofstantonoshiro@gmail.com, Tabe, James S james.s.tabe@hawaii.gov, Hayakawa, Lee S lee.s.hayakawa@hawaii.gov, Tobosa, Chaston J chaston.j.tobosa@hawaii.gov, Day, David D david.d.day@hawaii.gov, R. Brian Black brian@civilbeatlawcenter.org

Thank you for the response, Randall.

I respectfully urge the Council to consider the plain language of HRS § 92-5(a)(2) and the directly on-point instruction from the Hawaii Supreme Court's about the limited application of the subject exemption. Those authorities do not support the Council's closed door process outlined below. I thus ask that the Council reconsider its decision to complete the hiring of a new Public Defender behind closed doors.

Chapter 92 establishes a presumption that all government board meetings are open to the public. *E.g.*, HRS § 92-1. While there are indeed exceptions to this default rule, those exceptions must be narrowly construed; the chapter must be liberally construed in favor of openness. *Id.* HRS § 92-5(a)(2) provides one such exception. It authorizes executive sessions "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." (Emphasis added). Thus, from its plain text, § 92-5(a)(2) is *not* a blanket exception simply because the board is hiring someone. The Hawaii Supreme Court confirmed this plain language reading of HRS § 92-5(a)(2) in *Civil Beat Law Ctr. for the Public Interest v. City & County of Honolulu (CBLC)*, 144 Hawai'i 466, 480-82, 445 P.3d 47, 61-63 (2019). It is a qualified exemption, the court held, limited to personnel matters "where consideration of matters affecting privacy will be involved." *Id.*

There is no legitimate privacy interest to protect here. We would encourage the Council to closely consider the narrow scope of the privacy interests that the Hawaii Supreme Court recognized in this context. There is simply no need for the Council to deliberate entirely in secret.

Please also consider that chapter 92 *does not require* closed meetings where an exception might apply: "Because the decision to close a meeting is discretionary, board members should thoughtfully weigh the interests at stake before voting. . . . 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." *CBLC* at 477, 445 P.3d at 58; accord OIP Op. No. 03-07, at 7 ("Boards should keep in mind the Sunshine Law's policy of openness and should not enter executive meetings unless necessary").

The Council exists almost entirely to pick the Public Defender. That process should be open. This is a fantastic opportunity for the Council and the applicants for this important public position to defend the public's rights under the Sunshine Law.

Thank you all for your consideration.

Ben

Benjamin M. Creps
Staff Attorney
(808) 380-3576

On Oct 25, 2023, at 5:16 PM, Nishiyama, Randall S <Randall.S.Nishiyama@hawaii.gov> wrote:

Thank you for speaking with me about Civil Beat's concerns regarding the selection process for the next Public Defender.

For your information, Ms. Crystal Glendon is the Chair of the Defender Council. Mr. Craig De Costa's term on the Defender Council expired on 6/30/2023.

You indicated that Civil Beat's position is that hiring discussions for high-level positions should be held in an open session of a board meeting.

We agree that the position of the Public Defender is a high-level position, but given the nature of the applicants (three of the four candidates are currently members of the Office of the Public Defender) and their backgrounds, we believe that it would be appropriate to hold the selection discussions in an executive session. We believe that each position is different, and that each board will have to make its own determination on whether to hold a hiring selection in an open session or in an executive session.

The selection process that the Defender Council intends to use at its 11/2/2003 meeting is as follows:

1. Possible selection of the Public Defender
After public testimony regarding the candidates for the position of Public Defender, the Defender Council will go into executive session because this is a personnel matter to review and make a possible selection of the Public Defender.
2. If the Defender Council selects the Public Defender, they will go back into open session and will make an announcement regarding the applicant selected and the Defender Council's reasons for the selection.

As for your request for copies of the executive session minutes for the meetings held on 8/4/2003 and 10/4/2003 concerning the selection of a new Public Defender, these executive session minutes will be provided to you after the selection of the Public Defender has been made, announced, and the minutes have been prepared.

James Tabe, the current Public Defender, informs me that the minutes that were delinquent in posting on the Office of the Public Defender's website have now been posted.

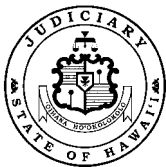
Please call me at 808-586-1267 if you have any questions regarding this matter.

Randall

Randall S. Nishiyama
Deputy Attorney General
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813
Telephone: 808-586-1267

Confidentiality Notice: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and/or privileged information. Any review, use, disclosure, or distribution by unintended recipients is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

Exhibit "6"



Office of the Administrative Director of the Courts – THE JUDICIARY • STATE OF HAWAII
417 SOUTH KING STREET • ALI'ĪOLANI HALE • HONOLULU, HAWAII 96813 • TELEPHONE (808) 539-4900 • FAX (808) 539-4855

Rodney A. Maile
ADMINISTRATIVE DIRECTOR

Daylin-Rose Heather
DEPUTY ADMINISTRATIVE DIRECTOR

January 23, 2024

The Honorable Ronald D. Kouchi
President of the Senate
State Capitol, Room 409
Honolulu, HI 96813

The Honorable Scott K. Saiki
Speaker of the House of Representatives
State Capitol, Room 431
Honolulu, HI 96813

Dear President Kouchi and Speaker Saiki:

Pursuant to Section 601-3, Hawaii's Revised Statutes, the Judiciary is transmitting a copy of the *Judiciary's 2023 Annual Report Statistical Supplement*.

In accordance with Section 93-16, Hawaii's Revised Statutes, we are also transmitting a copy of this report to the Legislative Reference Bureau Library.

The public may view an electronic copy of this report on the Judiciary's website at the following link: https://www.courts.state.hi.us/news_and_reports/reports/reports.

Should you have any questions regarding this report, please feel free to contact Karen Takahashi of the Judiciary's Legislative Coordinating Office at 539-4896, or via e-mail at Karen.T.Takahashi@courts.hawaii.gov.

Sincerely,

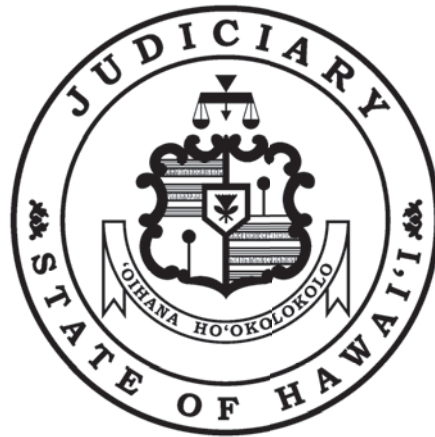
A handwritten signature in blue ink that reads "Rodney A. Maile".

Rodney A. Maile
Administrative Director of the Courts

Enclosure

c: Legislative Reference Bureau Library

The Judiciary State of Hawai‘i



2023
Annual Report
Statistical Supplement

*To the Honorable
Members of
the Thirty-Second
Legislature
and the Public:*

In accordance with Section 601-3 of the Hawai'i Revised Statutes, the State of Hawai'i Judiciary transmits this Statistical Supplement of its 2023 Annual Report covering the period of July 1, 2022, to June 30, 2023.

The Statistical Supplement, compiled by the Judiciary's Planning and Program Evaluation Division, is the result of input from all areas of the court system. Besides providing information to the public, the statistics serve as a foundation for the courts' immediate and future planning efforts.

Sincerely,

A handwritten signature in black ink that reads "Mark E. Recktenwald". The signature is written in a cursive, slightly slanted style.

Mark E. Recktenwald
Chief Justice
Hawai'i Supreme Court

Table of Contents

Courts of Appeal Tables 1-2

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Family Courts Tables 17-21

*District Courts Tables 22-26**

**Excluding traffic and parking cases*

Traffic and Parking Cases Tables 27-31

TABLE 7

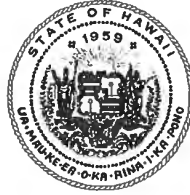
Caseload Activity, FY 2022–23, Circuit Courts Proper — All Circuits

TYPE OF ACTION	CASELOAD ACTIVITY					TYPE OF TERMINATION										
	Pending at Start	Filed	Total Caseload	Terminated	Pending at End	Dismissed	Judgment	Withdrawn	Missing	Acquitted/ Not Guilty	Guilty Plea	Finding of Guilt	No Contest Plea	Discharged/ Dismissed	Nolle Prosequi	Others
TOTAL CASES	25,539	15,019	40,558	10,214	30,344	1,741	727	3	4,753	48	800	57	615	1,062	402	495
Civil Actions	7,070	2,692	9,762	2,875	6,887	1,738	727	2	34							374
Contract	695	246	941	316	625	168	113		3							32
Motor Vehicle Tort	673	305	978	348	630	285	15		4							44
Assault & Battery	31	11	42	14	28	7	1									6
Construction Defect	37	9	46	6	40	5	1									
Medical Malpractice	131	30	161	47	114	37	2									8
Legal Malpractice	12	3	15	6	9	4			1							1
Product Liability	68	14	82	22	60	14										8
Other Non-Vehicle Tort	895	295	1,190	342	848	236	16	1	3							86
Condemnation	38	1	39	9	30	4	3									2
Environment	31	16	47	13	34	6	5									2
Foreclosure	2,854	1,075	3,929	1,141	2,788	648	408		7							78
Agreement of Sale Foreclosure																
Agency Appeal	134	115	249	56	193	17	33		2							4
Declaratory Judgment	195	62	257	73	184	43	18		2							10
Partition/Real Property	1		1		1											
Quiet Title	32	21	53	12	41	3	5		1							3
Other Civil Action	1,243	489	1,732	470	1,262	261	107	1	11							90
Probate Proceedings	2,791	1,930	4,721	1,063	3,658											
Conservatorship/ Guardianship Proceedings	1,169	238	1,407	511	896											
Conservatorship/ Guardianship	190	86	276	25	251											
Conservatorship	426	130	556	234	322											
Guardianship	553	22	575	252	323											
Trust Proceedings	377	197	574	131	443											
Miscellaneous Proceedings	1,355	6,326	7,681	2,045	5,636											106
Land Court	481	4,219	4,700	1,482	3,218											
Tax Appeal Court	318	1,266	1,584		1,584											
Mechanic's and Materialman's Lien	34	46	80	10	70											
Other Special Proceedings	522	795	1,317	553	764											106
Criminal Actions	12,777	3,636	16,413	3,589	12,824	48	800	57	615	1,062	402	15				
Murder & Non-Negligent Manslaughter	196	93	289	53	236	4	6	4	2	25	8					
Negligent Homicide	87	30	117	22	95		3		6	9	1					
Sex Offenses	259	92	351	77	274	3	13	3	8	33	11					
Robbery	473	169	642	122	520	3	39	3	16	34	15					
Assault	945	456	1,401	345	1,056	10	83	3	53	102	32	3				3
Burglary and Trespass	2,969	660	3,629	722	2,907	4	189	21	148	178	48	1				1
Larceny-Theft	1,906	477	2,383	488	1,895	3	104	3	91	127	61					
Arson	42	11	53	17	36		5		2	7	1					
Forgery and Counterfeiting	259	21	280	57	223		19			13	4					
Fraud	191	29	220	39	181		10			10	1					
Vandalism	319	99	418	111	307	3	23		17	36	17					
Weapons	347	114	461	112	349	1	14	2	18	35	20					
Prostitution	10	17	27	1	26	1										
Controlled Substances	2,888	728	3,616	799	2,817	2	154	9	145	264	70					2
Gambling	7	2	9	2	7					2						
Offenses Against Family & Children	198	76	274	71	203				6	28	15					
Disorderly Conduct	187	37	224	58	166	1	8		11	15	14					1
OVUII	207	90	297	82	215				13	14	11					
Traffic Offenses	89	32	121	22	99				2	11	2					1
Kidnapping and Custodial Interference	100	34	134	24	110	2	8	2	1	5	3					
Terroristic Threatening	607	157	764	180	584	10	38	1	34	53	21					1
TRO Violation	30	32	62	28	34		4			11	10					3
Liquor Laws		2	2	2						1						1
Extortion	7		7		7											
All Other Offenses	454	178	632	155	477	1	34	4	16	49	37					2

Termination Types for Criminal Cases: Guilty Pleas include deferred plea agreements; Others includes Change of Venue, Remand to District Court, Conditional Release, and "Others."

Exhibit "7"

JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
HAWAII PAROLING AUTHORITY
Ka 'Ākena Palola o Hawai'i
1177 Alakea Street, First Floor
Honolulu, Hawaii 96813

EDMUND "FRED" HYUN
CHAIR

GENE DEMELLO, JR.
CLAYTON H.W. HEE
MILTON H. KOTSUBO
CAROL K. MATAYOSHI
MEMBERS

COREY J. REINCKE
ACTING ADMINISTRATOR

No. _____

TESTIMONY ON HOUSE BILL 1608, HD2
RELATING TO COMPENSATION FOR COURT-APPOINTED COUNSEL

by
Edmund "Fred" Hyun, Chair
Hawaii Paroling Authority

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair

Tuesday, March 12, 2024; 10:00 a.m.
State Capitol, Conference Room 016 and via Video Conference

Chair Rhoads, Vice Chair Gabbard, and Members of the Committees:

The Hawaii Paroling Authority (HPA) stands in support of HB 1608, HD2 to appropriate funds for the Deputy Public Defender position and require that the position be assigned to the Family Court Section. The Public Defenders Office represents inmates and parolees throughout the parole process.

Thank you for the opportunity to present testimony on HB 1608, HD 2. We will be available to answer questions the committee members may have.

JON N. IKENAGA
STATE PUBLIC DEFENDER

DEFENDER COUNCIL
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817

HONOLULU OFFICE
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817

APPELLATE DIVISION
TEL. No. (808) 586-2080

DISTRICT COURT DIVISION
TEL. No. (808) 586-2100

FAMILY COURT DIVISION
TEL. No. (808) 586-2300

FELONY DIVISION
TEL. No. (808) 586-2200

FACSIMILE
(808) 586-2222



STATE OF HAWAII
OFFICE OF THE PUBLIC DEFENDER

HAYLEY Y.C. CHENG
ASSISTANT PUBLIC DEFENDER

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SUITE 201
HILO, HAWAII 96720
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MAUI OFFICE
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TEL. No. (808) 984-5018
FAX No. (808) 984-5022

February 21, 2024

**TESTIMONY OF THE OFFICE OF THE PUBLIC DEFENDER STATE OF HAWAII
TO THE COMMITTEE ON JUDICIARY**

**HB 1608, HD2: RELATING TO THE OFFICE THE PUBLIC DEFENDER
March 12, 2024 at 10:00 a.m.**

**Chair Karl Rhoads
Vice Chair Mike Gabbard
Honorable Committee Members**

The Office of the Public Defender (OPD) supports this bill.¹

Effective July 1, 2021, due to budget cuts resulting from the COVID-19 pandemic, the Legislature defunded six positions at the OPD – PN 100689 (PD Investigator – Kauai Branch), PN 107819 (DPD III – Oahu Branch), PN 101672 (Deputy Public Defender (DPD) III – Hilo Branch), PN 102108 (DPD I – Oahu Branch), PN 100603 (Office Assistant I – Oahu Branch) and PN 101700 (Office Assistant I – Oahu Branch). This bill seeks to fund/restore an unspecified number of DPD positions. Consistent with the original version of this bill, we are asking that the funding be for four DPD positions.

The mission of the OPD is to provide legal representation for indigent defendants charged in state court with offenses involving the possibility of incarceration. Both the U.S. and Hawai'i Constitutions require that every criminal defendant be afforded the right to counsel. Hawai'i Revised Statutes, Chapter 802, establishes that the OPD provide the right to counsel to indigent defendants. Thus, the services provided by the OPD are mandated both constitutionally and statutorily. It is important to note, however, that not only are criminal defendants afforded the right to counsel, but also the right to effective assistance of counsel.

For the criminal justice system to operate efficiently and in accordance with constitutional and statutory mandates, it is essential that the OPD be adequately staffed. Deputy Public Defenders

¹ To clarify, the OPD supports this bill so long as it does not adverse impact priorities identified in the Executive Supplemental Budget Request for FY2025.

(DPDs) appear daily on behalf of clients in the Circuit, District, and Family Courts of every circuit in the state. DPDs also represent indigent defendants in the Hawai'i Supreme Court and the Hawai'i Intermediate Court of Appeals. DPDs represent sentenced defendants before the Hawai'i Paroling Authority and individuals subject to involuntary hospital commitment petitions. In addition to the traditional courts, the OPD staffs specialty courts across the state such as the HOPE² program courts, drug courts, mental health courts, environmental courts, the Veteran's treatment courts and the Oahu and Maui Community Outreach Courts.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. Case overloads caused by inadequate staffing will result in defendants charged in criminal cases from obtaining assigned counsel in a timely manner which will, in turn, result in the continuances of cases, backlogs in the courts and other major problems in the justice system. But, more significantly, exceeding a maximum caseload for a DPD may result in the ineffective assistance of counsel.

The 6th Amendment Center, an organization that provides expert support to state and local policy makers to ensure that indigent defendants receive constitutionally effective legal counsel, cautions:

The role of the indigent defense system, therefore, is to ensure that the individual attorneys have access to ongoing training, are properly supervised, are provided with sufficient resources, and have enough time to effectively represent every single client. Where a defendant is represented by an attorney who lacks the time necessary to properly investigate the case, to meet with the defendant, to file pretrial motions, to study the prosecution's plea offer, etc. – essentially, where the attorney is forced to triage services in favor of one client over another – then both the system and the attorney are in breach of their ethical and constitutional obligations to that defendant.^[4]

Put another way, the National Association of Criminal Defense Lawyers (NACDL) also cautioned:

² “HOPE” is an acronym for “Hawai'i's Opportunity Probation with Enforcement,” a high-intensity supervision program to reduce probation violations by drug offenders and others at high risk of recidivism.

³ The mission of the Community Outreach Court (COC) is to assist non-violent offenders charged with offenses which target the homeless community to attend court sessions and resolve their outstanding cases.

⁴ Sixth Amendment Center, “Sufficient Time to Ensure Quality Representation.” <https://6ac.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/sufficient-time-to-ensure-quality-representation-aba-principle-4/#:~:text=This%20means%20that%20the%20appointed,attorneys%20owe%20to%20their%20clients.>

The guarantees of the 6th Amendment are not met simply by providing the defendant a warm body with a bar card. An accused is in need of and is entitled to a zealous, capable advocate who can provide effective assistance consistent with prevailing professional norms. When public defense attorneys are burdened with excessive caseloads, they are unable to fulfill their ethical and constitutional responsibilities to their clients and the community.

Ineffective assistance of counsel claims pursuant to a post-conviction petition to set aside a conviction pursuant to Rule 40 of the Hawai‘i Rules of Penal Procedure or a review by an appellate court may lead to the vacating of convictions and pleas. Excessive caseloads that drive DPDs into compromising ethical situations will eventually lead to the OPD having to reject cases, forcing the courts to appoint outside counsel (i.e. court-appointed counsel) to represent indigent defendants.⁵ The cost of court-appointed counsel when aggregated will easily exceed the cost of funding the proposed positions.⁶

In a previous committee hearing, the OPD requested that this bill be amended to specify that the funding for the four DPD positions be DPD III positions (BUF151). Currently, the OPD has two vacant DPD I positions in the Oahu Branch and four vacant DPD II positions (one each in the Hilo and Kona Branches and two in the Maui Branch). The OPD has no vacant DPD III positions statewide. The OPD plans to divide the four DPD III positions among the four Neighbor

⁵ In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC), established and funded by the federal government, recommended annual maximum caseloads for public defense programs. The NAC’s recommendations have had – and continue to have – significant influence in the field of public defense respecting annual caseloads of public defenders. Specifically, the NAC recommended that annual maximum caseloads ‘of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year; not more than 200; and appeals per attorney per year: not more than 25. National Legal Aid and Defender Association, “National Advisory Commission on Criminal Justice Standards and Goals, The Defense (Black Letter), Standard 13.12 Workload of Public Defenders. <https://www.nlada.org/defender-standards/national-advisory-commission/black-letter>.

In a recent report to the Department of Budget and Finance, the OPD estimated that its attorneys exceed the national standard for felony cases by 250% and the national standard for misdemeanor cases by 444%.

⁶ H.B. No. 1913 seeks to raise the rate for rate for court-appointed attorneys in the Family Court to \$150/hour. H.B. No 1914 seeks to raise the rate for court-appointed attorneys in the criminal courts to \$150/hour. The current rate for court-appointed attorneys in the Family Court and criminal courts is \$90/hour. The hourly wage for a DPD III position is \$48.34/hour (\$100,560 salary divided by 2,080 working hours in a year).

The hourly rate for court-appointed attorneys in federal cases is \$172/hour.

Island offices. Due to the higher cost of living on the Neighbor Islands, it is easier to fill DPD III positions (\$100,560 salary) than DPD II positions (\$84,400 salary).⁷

The OPD appreciates the sponsors of this bill for recognizing the critical importance of restoring positions to our office. Thank you for the opportunity to comment on HB 1608

⁷ The salary issue is exacerbated by the fact that the OPD's "competitor" for persons seeking employment as a government criminal law attorney, the prosecutors' offices on each island, pays approximately \$15,000 to \$20,000 more than the OPD at every level.



Committee: Judiciary
Hearing Date/Time: Tuesday, March 12, 2024 at 10:00am
Place: Conference Room 016 & Videoconference
Re: **Testimony of the ACLU of Hawai'i in SUPPORT of HB1608 HD2 Relating to the Office of the Public Defender**

Dear Chair Rhoads, Vice Chair Gabbard and Members of the Committee:

The American Civil Liberties Union of Hawai'i **SUPPORTS HB1608 HD2** which appropriates funds for four deputy public defender positions within the Office of the Public Defender and requires that one of the positions be assigned to the family court section.

The U.S. Supreme Court's landmark case of *Gideon v. Wainwright*,¹ decided 60 years ago, established the fundamental right to an attorney for people accused of crimes and facing incarceration, regardless of their wealth or poverty. Since *Gideon*, the right to counsel has been expanded to include [children](#) in juvenile delinquency proceedings, [probationers](#) in probation revocation proceedings, and people charged with [misdemeanors](#). The Supreme Court has established that the right includes an obligation for lawyers to correctly advise their clients about certain [immigration consequences](#) of criminal convictions, and that the right includes effective assistance of counsel during [plea bargaining](#).

Significantly, a recent **National Public Defense Workload Study**,² examined the number of cases that public defense attorneys can reasonably handle. The NPDWS highlighted evidence that many public defense systems around the United States are overburdened. ***An overburdened public defense system inevitably jeopardizes the***

¹ <https://supreme.justia.com/cases/federal/us/372/335/>

² The [National Public Defense Workload Study](#) (NPDWS) finds that the last national workload standards, developed in 1973, are outdated and do not give attorneys enough time to provide constitutionally adequate representation to every client. These old national standards were not developed using a rigorous or reliable methodology. In contrast, the new NPDWS standards are a more effective benchmark for public defense attorneys, policymakers, and other stakeholders to use when evaluating whether a given public defense system is living up to the promise of our Constitution. https://www.rand.org/pubs/research_reports/RRA2559-1.html

constitutional rights of public defenders' clients and undermines the integrity of the justice system.

The new standards account for the increasing demands that modern technology places on criminal defense lawyers. To provide constitutionally adequate criminal defense, for example, attorneys need time in many cases to review voluminous information from body-worn cameras, cell phones, social media data, and forensic evidence.

According to Emma Anderson, deputy director of the American Civil Liberties Union's Criminal Law Reform Project, "The NPDWS study is yet another alarm indicating that we have much more work to do to make the constitutional right to counsel real for everyone." She also remarked that **"In this era of mass incarceration and overcriminalization public defenders work to challenge systemic oppression every day. Despite their essential role, public defenders are consistently undervalued. Lawmakers and decisionmakers must invest in public defense systems, while simultaneously reducing mass incarceration."**

Proposed Amendment

For these reasons, we respectfully request that you adequately staff the Office of the Public Defender and **restore the six positions that were defunded during the pandemic**: PN 100689 (PD Investigator – Kauai Branch)PN 107819 (DPD III – Oahu Branch, PN 101672 (DPD III – Hilo Branch), PN 102108 (, DPD I – Oahu Branch), PN 100603 (Office Assistant I – Oahu Branch) and PN 101700 (Office Assistant I – Oahu Branch).

Please pass **HB1608 HD2** with this proposed amendment.

Sincerely,

Carrie Ann Shirota

Policy Director

ACLU of Hawai'i

cshirota@acluhawaii.org

The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for over 50 years.

American Civil Liberties Union of Hawai'i
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gyaindl@gyattorney.com

March 11, 2024

Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Committee on Judiciary
House of Representatives, State of Hawai'i

via: <http://www.capitol.hawaii.gov>

Dear Committee leadership and members,

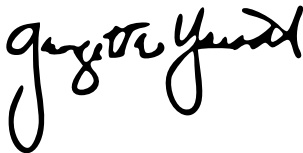
Re: **STRONG SUPPORT FOR HB1608 HD2 RELATING TO THE OFFICE OF
THE PUBLIC DEFENDER**

Hearing Date: Tuesday, March 12, 2024
Time: 10:00 a.m.
Location: Conference Room 016
State Capitol
415 South Beretania Street

I write in strong support and to express gratitude to the 17 House members that signed on to introduce this bill. As a member of the private criminal defense bar, I was shocked to learn that Act 9 (2020) resulted in the "abolition" of 6 OPD positions and I am shamed to acknowledge that this was the first time I had heard about it. I understand that the original version of the bill sought to restore 4 of the 6 positions, and that the current draft leaves that number blank. I respectfully urge members to pass this legislation and act at least to restore the 6 positions abolished in the wake of Act 9 (2020).

Thank you for your attention to this issue and attention to my letter. Mahalo.

Sincerely,



HB-1608-HD-2

Submitted on: 3/10/2024 11:07:11 AM

Testimony for JDC on 3/12/2024 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
David Pullman	Individual	Support	Written Testimony Only

Comments:

As a deputy public defender on Maui, I am supportive of any additional resources directed to our office. However, even more than expanding the number of attorneys we have, we need to increase the salaries of existing attorneys and support staff. In our office, our best attorneys are constantly being recruited by Maui County agencies that pay nearly twice what the State pays. Moreover, counties in other states, such as California, pay more than twice as much as Hawaii pays, with similar cost of living expenses. When one of our attorneys is offered such a substantial salary increase for similar work, they usually accept the much higher paid positions. This leaves us constantly needing to recruit attorneys to fill our vacancies and constantly losing our best and most experienced attorneys, relegating the defense of the accused to the least experienced attorneys in the state. Yes, we need additional attorneys, but moreso, we need to pay our attorneys commensurate with the salaries made by county-employed attorneys and public defenders in states like California.

Exhibit "8"

**News**

Staffing shortages leading Big Island public defenders to withdraw from cases

By [Tiffany DeMasters](#)

April 29, 2023 · 6:07 PM HST

** Updated April 30, 2023 · 4:30 PM*

Family and friends of Dylan and Leilani Alcain packed a District Court room in Kona on Monday to see the young couple make their initial appearance after being arrested over the weekend for an hours-long crime spree.

Dylan Alcain, cuffed at the ankles and wrists, was escorted into the courtroom first. He waved, giving a weak smile to his family as he sat on a courtroom pew. His wife Leilani followed, sitting stoically a few pews in front of him. The couple with young children are both charged with attempted murder for shooting at Hawai'i police officers. If convicted, they face life in prison.

When Dylan Alcain faced the judge, the first thing requested by deputy public defender David Saiki — the attorney assigned to represent him — was to withdraw from his case. Saiki also requested to withdraw from the case of Lelani Alcain.

The reason Saiki gave the judge in both cases: a staffing shortage at the public defenders' Kona office.

It's a scene that has been playing out all too frequently on the Big Island.

Hawai'i County Prosecuting Attorney Kelden Waltjen said he started seeing more public defenders withdrawing from cases in the past couple of months because "they didn't have the bandwidth to handle the influx of those class A felony cases."

There are 15 public defender positions on Hawai'i Island — nine in Hilo and six in Kona — and four (26%) are vacant. Two each in Hilo and Kona.

Overworked public defenders are commonplace across the United States. The vacancies only exacerbate the workloads of already overworked attorneys, causing more case withdrawals and forcing the state to fly in O'ahu-based attorneys to fill the void.

"Our attorneys are doing their best in Hilo and Kona," Hawai'i State Public Defender James Tabe said. "They're working hard and working overtime."

He also said: "We're trying our best to fill these positions."

The Office of the Public Defender provides legal services for individuals who are financially unable to obtain counsel. When a public defender withdraws from a case, the court must appoint a new attorney, who needs time to get up to speed, resulting in cases being continued.

Third Circuit Court's Chief Judge Robert D.S. Kim said judges have a pool of private attorneys they reach out to when the public defender's office withdraws. A court-appointed attorney is paid \$90 an hour.

The shortage is starting to have a domino effect.

"When public defenders are withdrawing because they can't handle the volume, it creates tremendous pressure to find attorneys," Kim said, adding some private attorneys aren't taking court-appointed cases anymore.

“We can’t let this injustice go on,” Kim said.

With the rising number of serious cases on Hawai‘i Island, Kim said the judiciary is trying to get O‘ahu private attorneys to provide representation. An attorney has yet to be found for Dylan Alcain.

According to court records, attorney James Biven was appointed to represent Leilani Alcain.

The Kona and Hilo public defenders office did not return calls regarding the shortage of attorneys, their caseloads or the status of their withdrawal from cases.

However, Tabe said attorneys are not withdrawing from all current cases saying “they’re probably picking and choosing” the cases to take on.

Because of the vacancies, no Big Island public defenders have the availability to cover the cases that appear in the South Kohala District Court in Waimea. (Because there are not enough cases to have a dedicated team at that courthouse, prosecutors and public defenders have historically split between Hilo and Kona offices).

Until positions are filled, the State Public Defenders Office will be sending an attorney to Hilo every Tuesday to allow for a Hilo public defender to be present in the Hilo court. An attorney from O‘ahu also will fly in on the first Wednesday of every month to help attorneys in the Kona office with the Waimea caseload.

Tabbe estimates public defenders on Hawai‘i Island have more than 70 felony cases each for Circuit Court cases. District Court cases, which are traffic infractions and petty misdemeanors, are much higher.

According to data from fiscal year 2021-22 reported by the Hawai‘i State Judiciary, in the 3rd Circuit Court on the Big Island, there were 6,713 criminal cases.

Hawai‘i County’s District Court also had a whopping 70,488 cases in just traffic and parking, although Tabe said most of those cases are minor infractions not being handled

by a public defender.

Attorney Matthew Sylva attested to the workload he experienced during his time as a deputy public defender in the Kona office. He started in January 2018, covering Kona's District Court. He was promoted in October 2019 to Circuit Court, where he handled cases until he quit the office to start his own firm, Akamai Law LLC, in January 2022.

Sylva said he left because of the understaffing and unmanageable, overwhelming workload: "I had 70 felony cases when I left."

A healthy caseload, according to Sylva, is about 30 felony cases. This number allows the ability for an attorney to keep up with filing motions and communicate with their clients.

"I got to a point where I felt I wasn't doing a good job and needed to quit," Sylva said. "I realized how unhealthy it was and how little support there was (in the office)."

He also was concerned because his license is on the line if there's a mistake in a case.

In many cases, the representation of the defendants suffers. Sylva said it results in people being pushed through the judicial system, many times taking plea deals.

"You have to look out for the client's best interest," but the current situation does not allow for it, Sylva said.

"You can get through everybody and check all the boxes, but do they [defendants] really know what's going on?" Sylva said. "Afterward, did they have regrets because they didn't understand what was going on at the time?"

Waltjen said attorney shortages is a reality that most every employer is having to deal with, especially in the public sector because they are competing with the private sector (which usually pays more).

Waltjen said the prosecutor's office suffered a staff shortage during the COVID-19 pandemic, but aggressively recruited with state and national advertising to fill the

vacancies. Currently, there are no job postings for prosecutors on the Hawai'i County jobs website.

“The courts, our office and public defenders, we all work in the same field and it’s important for us to be properly staffed because it’s bad for us as a whole,” First Deputy Prosecuting Attorney Stephen Frye said. “It allows us to do our job better.”

The prosecutor’s office is advocating for more funding from the county to hire five additional deputy prosecuting attorney positions. If the County Council approves the request, it would increase the department’s wage budget by \$664,000.

Frye said additional positions would allow the deputy prosecutors the opportunity to give the appropriate amount of attention to the cases that need it “and not be so overwhelmed that they can’t do the best possible job on every case they have.”

Funding is the biggest reason the public defender’s office is struggling. Kenneth Lawson, who teaches criminal law and professional ethics at the University of Hawai'i at Mānoa William S. Richardson School of Law, said the prosecution gets enough funding — and access to police departments and a variety of their investigators to help build their case.

In most cases, Lawson said, a public defender’s office has one investigator that is shared among the entire caseload.

Lawson said it is a person’s constitutional right to have competent counsel represent them in a court of law. When a public defender is overburdened with excessive caseloads, Lawson said that attorney cannot be effective.

“The state is violating constitutional rights by not providing enough funding for the office of the public defender,” said Lawson, who also is co-director of the Hawai'i Innocence Project.

Tabbe said a starting salary for a public defender is \$80,000.

Sylva couldn’t recall what his pay started at in 2019, but he said his salary in 2020 was

\$75,840. He added the state pays based on the public defender title regardless of how long they've had that title or how much they work.

The lowest salary reported for a deputy prosecutor in Hawai'i County was \$76,620.

The Office of the Public Defender is currently advertising online for a full-time Deputy Public Defender position in Kona. Tabe said they will also be posting the opening positions with the Hawai'i State Bar Association.

The help wanted ad for the public defender, posted on the job search website Indeed.com, said: "The applicant must be self-motivated and prepared to handle a heavy caseload."



Tiffany DeMasters

Tiffany DeMasters is a full-time reporter for Pacific Media Group. Tiffany worked as the cops and courts reporter for West Hawaii Today from 2017 to 2019. She also contributed stories to Ke Ola Magazine and Honolulu Civil Beat.

Tiffany can be reached at tiffany.demasters@pmghawaii.com.

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Hawai'i Island police seek runaway teenager last seen in Hilo

Gianna Oliveira, 16, was last seen on the 800 block of Kanoelehua Avenue in Hilo on Wednesday evening. Gianna Oliveira, 16, was last seen on the 800 block of Kanoelehua Avenue in Hilo on Wednesday evening.

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Every Monday · 6:00 pm - 7:00 pm
Weekly Hula





Every Tuesday · 6:00 pm - 7:00 pm
Ukulele Lessons with Kris Fuchigami



Every Tuesday · 9:00 am - 2:30 pm
Farmers Market

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Courts

Short-Handed Kona Public Defender's Office Won't Accept New Drunken Driving Cases

Former Big Island Judge Robert Kim says DUI cases are starting to back up in Kona, and he worries it could affect public safety.

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By Kevin Dayton  /
July 10, 2024

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19

The Kailua-Kona Public Defender's Office has stopped accepting new drunken driving cases and the most serious felony cases because it is short-handed, and a retired Big Island judge is warning that it could affect public safety if something isn't done.

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." The memo indicated private, court-appointed lawyers would have to handle those cases until further notice.

Former Third Circuit Chief Judge Robert Kim, who retired as a judge on July 1, said the Judiciary was scrambling late last month to try to hire private lawyers to represent a dozen people who were arrested for driving under the influence of drugs or alcohol.

"We see an immediate impact of this decision," 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."



What Honolulu Can Learn From An Empty Homes Tax In Vancouver



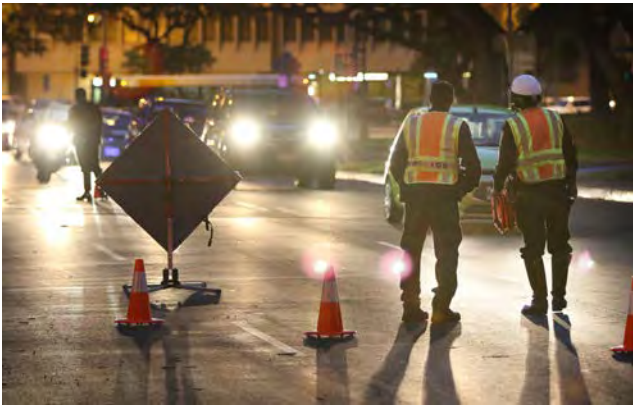
University Of Hawaii Regents Choose New President



OCTOBER

OCT
25

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Honolulu police working at a sobriety checkpoint. The Kona courts now have a “looming problem” with some drunken driving cases because there are not enough attorneys in the Public Defender’s Office to handle them all. (Cory Lum/Civil Beat/2016)

Kim said the pool of private attorneys willing and able to take court-appointed work is small in Kona, in part because the pay is too low. The court system pays lawyers only \$90 an hour to handle court-appointed work, while the going rate for private clients is \$300 an hour and up, he said.

To make matters worse, the total fees for court-appointed cases are capped by law at \$900 per case for petty misdemeanor offenses, which includes most DUI cases. That is far less than a private attorney would normally charge for such a case.

First Deputy Public Defender Hayley Cheng said the office’s mandate is to represent indigent defendants, but the deputy public defenders’ workloads are extremely heavy, and it is important that the office provide effective representation.



Other 4

“Because of the shortage in our office, we are making this difficult decision for the benefit of the defendants,” Cheng said.

The Kona office normally would have two public defenders assigned to cover District Court cases including DUIs, but one of those positions is vacant. That office is currently handling 400 to 500 District Court cases, she said.

The Kona office also has a vacancy for a much more experienced public defender who handles the most serious, high-level Class A felony cases, she said.

Those cases are less common in Kona, and Cheng said she was aware of only one recent case where the public defender asked for court-appointed counsel for a Class A felony because of its staff shortages. The Kona office has two other public defenders handling lower-level felonies.

It is unclear what the near-term fix might be.

Private attorneys in Kona say they are too busy to take on more court-appointed work, and say the DUI cases in particular are undesirable because they are so time-consuming, Kim said.

Cheng said the public defender's office shares Kim's concerns about the situation in

Kona, but it is difficult to fill public defender vacancies on the neighbor islands because of the cost of living.

“Clearly, our attorneys are under-resourced and underpaid,” she said. “We make significantly less than the prosecutors in all of the circuits,” and there are vacancies for public defenders across the state.

She said her office is exploring the idea of a program to provide limited license waivers to lawyers from the mainland who want to take government jobs in Hawaii to allow them to practice here, but that is not in place yet.

In the past, the state public defender’s office has flown attorneys to Kona and other islands when there were shortages, which Cheng said is a possibility. But she added that Honolulu is also shorthanded and overextended.

“It’s also a budgetary concern,” she said. “We are not capable of doing that at this time because our Oahu office also is short attorneys.”

The Legislature this year seriously considered [House Bill 1914](#), which would have increased the hourly pay for lawyers who take on court-appointed legal work from \$90 to \$150, but the bill died in the final weeks of the session.

Currently, state law places a cap on what court-appointed lawyers can be paid per case, and the cap for most drunken driving cases is only \$900. HB 1914 would have increased that cap to \$1,800 and also increased the caps for more serious offenses.

That \$90-per-hour rate has not changed in nearly 20 years, Cheng said, and she believes boosting it to \$150 would make a significant difference in the courts' ability to hire private counsel to handle cases when the public defender cannot.



Bills to restore positions in the Public Defender's Office that were cut during the pandemic died at the Legislature this year, as did a measure to increase the pay for court-appointed counsel. (Ben Angarone/Civil Beat/2024)

Cheng said her office also backed [HB 1608](#), which would have provided funding for four additional public defenders.

That measure [would have reinstated four of six public defender positions](#) that were

abolished during the pandemic, and the plan was to assign those workers to the neighbor islands. But the bill died when the Senate Ways and Means Committee declined to hear it.

Kim, who took a new job as chief administrator of the Big Island courts after retiring as a judge, cited other problems with what he sees as an under-resourced public defender's office, including the fact that the Hilo and Kona offices share a single investigator.

"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. "There has to be some level of support."

Hawaii County Prosecuting Attorney Kelden Waltjen said he does not expect to see mass dismissals of DUI cases in Kona because the time required to appoint lawyers for defendants traditionally does not count against the constitutional requirement for a speedy trial.

"What's going to happen is it's going to start to congest things," Waltjen said. "I'm really hoping that the Public Defender's office in Honolulu sees and does what they can to try to assist these guys, because I think they need help."

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About the Author



Kevin Dayton ✉

Kevin Dayton is a reporter for Civil Beat. You can reach him by email at kdayton@civilbeat.org.

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Exhibit "9"

STAND. COM. REP. NO. 3177

Honolulu, Hawaii

MAR 21 2024

RE: H.B. No. 1608
H.D. 2
S.D. 1

Honorable Ronald D. Kouchi
President of the Senate
Thirty-Second State Legislature
Regular Session of 2024
State of Hawaii

Sir:

Your Committee on Judiciary, to which was referred H.B. No. 1608, H.D. 2, entitled:

"A BILL FOR AN ACT RELATING TO THE OFFICE OF THE PUBLIC DEFENDER,"

begs leave to report as follows:

The purpose and intent of this measure is to:

- (1) Appropriate funds for an unspecified number of deputy public defender positions within the Office of the Public Defender; and
- (2) Require that one of the positions be assigned to the family court section.

Your Committee received testimony in support of this measure from the Office of the Public Defender, Hawaii Paroling Authority, ACLU of Hawai'i, and two individuals.

Your Committee finds that the Office of the Public Defender provides legal representation for indigent defendants charged in state court with offenses involving the possibility of incarceration. However, Act 9, Session Laws of Hawaii 2020, defunded and abolished several positions within the Office of the Public Defender. Your Committee further finds that if the Office



of the Public Defender 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. This measure will ensure that the Office of the Public Defender meets its constitutional and statutory requirements by restoring critically important positions to the Office.

Your Committee has amended this measure by:

- (1) Inserting an appropriation amount of \$627,300 for four deputy public defender III positions within the Office of the Public Defender;
- (2) Inserting an effective date of April 14, 2112, to encourage further discussion; and
- (3) Making a technical, nonsubstantive amendment for the purposes of clarity and consistency.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1608, H.D. 2, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 1608, H.D. 2, S.D. 1, and be referred to your Committee on Ways and Means.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary,



KARL RHOADS, Chair



Exhibit "10"

DEFENDER COUNCIL
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817



CRAIG A. DECOSTA, ESQ.
CRYSTAL K. GLENDON, ESQ.
SETSUKO R. GORMLEY, ESQ.
DAVID H. HAYAKAWA, ESQ.
STANTON C. OSHIRO, ESQ.

STATE OF HAWAII
DEFENDER COUNCIL

NOTICE OF MEETING

Defender Council Members will hold an in person and online board meeting via Zoom on Friday, June 16th, 2023, at 10:00 a.m.

TOPIC: Defender Council Meeting
TIME: June 16th, 2023, 10:00 a.m. HST

Join Zoom Meeting
<https://us02web.zoom.us/j/86408908164?pwd=M050alg4K3RBZi8yVUdRMGJxdVZFdz09>

Meeting ID: 864 0890 8164
Passcode: 378150

One tap mobile
+12532050468,,86408908164#,,, *378150# US
+12532158782,,86408908164#,,, *378150# US (Tacoma)

Dial by your location

- +1 253 205 0468 US
- +1 253 215 8782 US (Tacoma)
- +1 346 248 7799 US (Houston)
- +1 669 444 9171 US
- +1 669 900 6833 US (San Jose)
- +1 719 359 4580 US
- +1 360 209 5623 US
- +1 386 347 5053 US
- +1 507 473 4847 US
- +1 564 217 2000 US
- +1 646 931 3860 US
- +1 689 278 1000 US
- +1 929 205 6099 US (New York)
- +1 301 715 8592 US (Washington DC)
- +1 305 224 1968 US
- +1 309 205 3325 US
- +1 312 626 6799 US (Chicago)

Meeting ID: 864 0890 8164
Passcode: 378150



In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you need an auxiliary aid/service or other accommodation due to a disability, contact Chaston J. Tobosa at 808-586-2291 or chaston.j.tobosa@hawaii.gov, and Lee Hayakawa at 808-586-2208 or lee.s.hayakawa@hawaii.gov soon as possible. Requests made as early as possible will allow adequate time to fulfill your request. Upon request, this notice is available in alternate formats such as large print, Braille, or electronic copy.

Find your local number: <https://us02web.zoom.us/j/kemOgn8eIO>

The public may also attend the meeting at the Office of the Public Defender, 1130 N. Nimitz Highway, Suite A-254, Honolulu, Hawai'i, 96817, where an audiovisual connection will be provided for the public to view and participate in the meeting.

If you are having difficulty connecting to the meeting, please contact Chaston Tobosa at 808.586.2291, Kyle Kawamoto at 808.568.2187, or Lee Hayakawa at 808.586.2208.

AGENDA

1. Call to order
2. Approval of Agenda
3. Public testimony
 - a. Individuals may submit testimony in advance of the meeting via e-mail to chaston.j.tobosa@hawaii.gov and lee.s.hayakawa@hawaii.gov, or by mail addressed to Chaston J. Tobosa, Office of the Public Defender, 1130 N. Nimitz Highway, Suite A-254, Honolulu, Hawai'i, 96817. Individuals interested in signing up to provide oral testimony at the meeting may submit their name, e-mail address, and telephone number to chaston.j.tobosa@hawaii.gov and lee.s.hayakawa@hawaii.gov. Individuals may provide oral testimony at the meeting via the above-listed video conferencing link or by call the above-listed telephone number.
 - b. Testimony presented during the meeting will be limited to three minutes each.
4. Approval of minutes the regular and executive session dated January 27, 2023
5. Report by Public Defender James Tabe regarding the operations of the Office of the Public Defender.
6. Executive session pursuant to section 92-5(a)(4), Hawai'i Revised Statutes, to consult with the Council's attorney on questions and issues pertaining to the Council's powers, duties, privileges, immunities and liabilities regarding personnel complaints and the evaluation of the Office of Public Defender's supervisory personnel.
7. Discussion and action regarding the results of the survey of the Office of the Public Defender's supervisory personnel.



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8. Discussion and action regarding the formation of a permitted interaction group under section 92-2.5(a), Hawaii Revised Statutes, to address legislative matters. Potential subcommittee on potential to increase salaries for DPDs and staff.
9. Discussion and action regarding the election of officers for the Defender Council. Recommendations for candidates for next term for members of the council terms expiring in June 2023
10. Announcements
11. Adjournment

If audiovisual communication cannot be maintained with all Council Members participating in the meeting, the meeting shall be automatically recessed for up to thirty (30) minutes to allow staff to attempt to restore communication.

If audiovisual communication with all participating Council Members can be restored, the meeting will be reconvened. If, however, audiovisual communication cannot be restored, then the meeting may be reconvened with the audio-only communication using the above-listed telephone number. Any nonconfidential visual aids brought to the meeting by Council Members or as part of a scheduled presentation will be made publicly available on the Office of the Public Defender website within fifteen (15) minutes after audio-only communication is established.

If it is not possible to reconvene the meeting within thirty (30) minutes after an interruption of communication and the Defender Council has not provided reasonable notice to the public as to how the meeting will be continued at an alternative date and time, then the meeting shall be automatically terminated.

No Defender Council action shall be invalid if the Council's good faith efforts to implement remote technology for public observations and comments do not work.

If you need to request an auxiliary aid, service, or an accommodation due to a disability, please contact Chaston J. Tobosa at (808) 586-2291 or e-mail at chaston.j.tobosa@hawaii.gov, and Lee S. Hayakawa at (808) 586-2208 or e-mail at lee.s.hayakawa@hawaii.gov as soon as possible.



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Exhibit "11"

MINUTES OF THE MEETING OF THE DEFENDER COUNCIL

DATE: June 16, 2016

TIME: 10:00 a.m.

Join Zoom Meeting

<https://us02web.zoom.us/j/86408908164?pwd=M050alg4K3RBZi8yVUdRMGJxdVZFdz09>

Meeting ID: 864 0890 8164

Passcode: 378150

MEMBERS PRESENT: Craig De Costa (virtual)
Stanton Oshiro (virtual)
Crystal Glendon (in person)
Gina Gormley (virtual)
David Hayakawa (virtual)

ALSO PRESENT: Randall Nishiyama, Deputy Attorney General (virtual)
James Tabe, Public Defender (virtual)
Lee Hayakawa, Assistant Public Defender (in person)

Virtual meeting called to order at 10:04 a.m. by Chair De Costa.

Approval of Agenda

Member Oshiro moved that the agenda be approved by the members. Member Glendon seconded the motion. Motion was approved unanimously.

Public Testimony:

At 10:06 a.m., Chair De Costa solicited public testimony

No public testimony received.

Approval of Minutes of Meeting held on April 28, 2023:

Chair De Costa proposed the following corrections to the minutes of April 28, 2023 meeting:

1. The heading to be amended from "Approval of Minutes of Meeting held on January 27, 2022" to "Approval of Minutes of Meeting held on January 27, 2023."
2. The language, "At 10:10 a.m. the meeting minutes from January 27, 2023 was approved by council members Oshiro and Glendon" be amended to "At 10:10 a.m. the motion to approve the meeting minutes from January 27, 2023 was made by Member Oshiro and the motion was seconded by Member Glendon. Motion was unanimously approved."

Report by Public Defender James Tabe:

1. The Office of the Public Defender held its annual seminar last month. The seminar was held virtually; there were no glitches.

The attorneys participating in the seminar took the trial exercises very seriously.

The deputy public defenders and local private attorneys were acknowledged for leading the exercise groups and the presentation of lectures. Also acknowledged were the attorneys covering court while seminar was in session.

Attendance at seminar satisfies MCLE credits, included ethics requirement.

Darcia Forester who is in charge of seminar has scheduled a seminar committee meeting later this month to discuss the seminar and to start planning next year's seminar.

2. The office's request to upgrade the internet for Oahu, Hilo, Kona and Maui has been approved. Although the office is spending \$23,000 to increase the bandwidth, the office should see saving of \$1000 per month with the new service. Office will be saving \$1000/month

Member Hayakawa asked an update on personnel. Public Defender Tabe reported the following: Kona has two vacant attorney positions; with the resignation of Keith Shigetomi, Hilo has four vacant attorney positions; Hilo's new supervisor is Kenji Akamu; with the resignation of Alan Komagome, Steven Nichols is temporarily assigned to the felony supervisor position.

Executive session:

Chair De Costa entertained a motion to enter into executive session.

Member Oshiro moved to enter into executive session. Member Gormley seconded the motion. No discussion. Motion was unanimously approved. Council went into executive session at 10:16 a.m.

Open session reconvened:

Open session reconvened at 11:32 a.m.

Chair de Costa invited a motion to amend agenda to add the following discussion: selection process to appoint and hire Public Defender position, as the current term expires in January 2024. Member Hayakawa moved to amend agenda; Member Oshiro seconded the motion; the motion was approved unanimously.

Selection process to appoint Public Defender:

Member Hayakawa moved that the following selection process to appoint the Public Defender be implemented:

On or about June 23, a public announcement regarding the Public Defender position will be made. Applications for the position will be due July 31, 2023. The Defender Council will meet on August 4, 2023. The Council will conduct interviews of the applicants during the month of August 2023. During the executive session of the Defender Council meeting on September 1, 2023, the Council will select a list of candidates. On September 5, 2023, the Council will announce the candidates on the list and invite the public to submit confidential comments on the candidates. The deadline for public comments will be September 19, 2023. The Council will conduct a second round of interviews. The Council will vote on the selection of the Public Defender in open session during the meeting to be scheduled in November 2023.

Working group comprised of Members Glendon and Gormley is established for the purpose of the advertisement of the Public Defender.

Member Glendon seconded the motion. Motion was approved unanimously, and selection process adopted.

Working group to address legislative matters:

Defender Council previously created a working group to address legislative matters, including pay increases. The working group is comprised of Members Gormley and Glendon.

In case that there was no previous motion to create the working group, Chair De Costa asked if there was any opposition to the working group. Being no objection, the working group, the motion to create a working group to address legislative matters is adopted.

Election of Defender Council officers:

It was noted that Chair de Costa's second term expires on June 30, 2023; Chair de Costa has no intention to be a holdover. Member Oshiro's second term expires on June 30, 2023; Member Oshiro agreed to be a holdover member if there is no replacement.

Member Oshiro moved to nominate Member Glendon as Chair and Member Gormley as Vice-Chair. Member Hayakawa seconded the motion. There were no other nominations. The motion was approved unanimously.

Next meeting:

Next meeting is scheduled for Friday, August 4, 2023, at 10:00 a.m. in person and via Zoom.

Member Gormley moved to adjourn the meeting. Member Oshiro seconded the motion. No discussion. Motion unanimously approved.

Other business:

Public Defender reminded Member Gormley's term expires June 30, 2023. Member Gormley has applied for a second term.

Adjournment:

Member Gormley moved to adjourn the meeting. Member Oshiro seconded the motion. Motion unanimously approved.

Meeting was adjourned at 11:42 a.m.

Exhibit "12"

DEFENDER COUNCIL
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817



CRAIG A. DECOSTA, ESQ.
CRYSTAL K. GLENDON, ESQ.
SETSUKO R. GORMLEY, ESQ.
DAVID H. HAYAKAWA, ESQ.
STANTON C. OSHIRO, ESQ.

STATE OF HAWAII DEFENDER COUNCIL

NOTICE OF MEETING

Defender Council Members will hold an in person and online board meeting via Zoom on Friday, August 4th, 2023, at 10:00 a.m.

TOPIC: Defender Council Meeting
TIME: August 4th, 2023, 10:00 a.m. HST

Join Zoom Meeting

<https://us02web.zoom.us/j/84297143555?pwd=WFpWK253YytiVjNxN1RZTW1tUUZrZz09>

Meeting ID: 842 9714 3555
Passcode: 707487

One tap mobile

+12532158782,,84297143555#,,,,*707487# US (Tacoma)

+13462487799,,84297143555#,,,,*707487# US (Houston)

Dial by your location

- +1 253 215 8782 US (Tacoma)
- +1 346 248 7799 US (Houston)
- +1 669 444 9171 US
- +1 669 900 6833 US (San Jose)
- +1 719 359 4580 US
- +1 253 205 0468 US
- +1 309 205 3325 US
- +1 312 626 6799 US (Chicago)
- +1 360 209 5623 US
- +1 386 347 5053 US
- +1 507 473 4847 US
- +1 564 217 2000 US
- +1 646 931 3860 US
- +1 689 278 1000 US
- +1 929 205 6099 US (New York)
- +1 301 715 8592 US (Washington DC)
- +1 305 224 1968 US

Meeting ID: 842 9714 3555
Passcode: 707487

Find your local number: <https://us02web.zoom.us/u/ktVclqzTK>



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AGENDA

1. Call to order
2. Approval of Agenda
3. Public testimony
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 - b. Testimony presented during the meeting will be limited to three minutes each.
4. Approval of minutes the regular and executive session dated June 16th, 2023.
5. Report by Public Defender James Tabe regarding the operations of the Office of the Public Defender.
6. Executive session pursuant to section 92-5(a)(4), Hawaii Revised Statutes, to consult with the Council's attorney on questions and issues pertaining to the Council's powers, duties, privileges, immunities, and liabilities to conduct the following:
 - a. Personnel complaints regarding the Office of the Public Defender; and
 - b. Selection process for the Public Defender.



In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you need an auxiliary aid/service or other accommodation due to a disability, contact Chaston J. Tobosa at 808-586-2291 or chaston.j.tobosa@hawaii.gov, and Lee Hayakawa at 808-586-2208 or lee.s.hayakawa@hawaii.gov as soon as possible. Requests made as early as possible have a greater likelihood of being fulfilled. Upon request, this notice is available in alternate formats.

7. Discussion and action regarding the formation of a permitted interaction group under section 92-2.5(a), Hawaii Revised Statutes, to address legislative matters. Potential subcommittee on potential to increase salaries for DPDs and staff.
8. Discussion and action regarding the selection of the Public Defender.
9. Announcements
10. Adjournment

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Exhibit "13"

MINUTES OF THE MEETING OF THE DEFENDER COUNCIL

DATE: August 04, 2023

TIME: 10:00 a.m.

Join Zoom Meeting

<https://us02web.zoom.us/j/84297143555?pwd=WFpWK253YytiVjN1RZTW1tUUZrZz09>

Meeting ID: 842 9714 3555

Passcode: 707487

MEMBERS PRESENT: Crystal Glendon (virtual)
Stanton Oshiro (virtual)
Gina Gormley (virtual)
David Hayakawa (virtual)

ALSO PRESENT: Randall Nishiyama, Deputy Attorney General (virtual)
James Tabe, Public Defender (virtual)
Lee Hayakawa, Assistant Public Defender (virtual)

Virtual meeting called to order at 10:02 a.m. by Chair Glendon.

Chair Glendon opened the issue of Member Hayakawa being appointed District Court judge. Member Hayakawa recused himself from all activities of the Defender Council until such time the Hawai'i State Senate consents or rejects his nomination for district court judge. If confirmed, Hayakawa will resign. If he is rejected, Hayakawa will continue as a member.

Approval of Agenda

Member Oshiro moved to amend agenda for Friday, August 4, 2023, to include discussion of Member Hayakawa's nomination for judge that was not on the original agenda, due to new development in the time from posting agenda to public calendar and actual meeting. Chair Glendon seconded the motion. There was no opposition to the motion.

At 10:09 a.m. Member Hayakawa left meeting to avoid any conflicts of interest.

Public Testimony:

At 10:09 a.m., Chair Glendon solicited public testimony.

No public testimony received.

Public testimony closed at 10:10 a.m.

Approval of Minutes of Meeting held on June 16, 2023:

Chair Glendon opened for approval of minutes held on June 16, 2023. Member Gormley seconded the motion. Minutes approved unanimously at 10:10 a.m.

Approval of the executive session minutes was deferred to allow Chair Glendon to obtain the minutes from previous Chair De Costa.

Report by Public Defender James Tabe: 10:10 a.m.

1. Community Outreach Court nominated as Team of the Year for Budget and Finance Incentive Program team.
2. DPDs on all islands going to trial. Highlighted O'ahu DPD Edward Aquino for his acquittal on a 20+ years old murder cold case.
3. The office's request to upgrade the internet for Oahu, Hilo, Kona, and Maui has been approved. Meeting with vendor following week for installation, maintenance, and startup.
4. Congratulated and announced former DPD David Hayakawa on nomination of District Court Judge.

Executive session: 10:16 a.m.

Chair Glendon entertained a motion to enter into executive session.

Member Oshiro moved to enter executive session. Member Gormley seconded the motion. No discussion. Motion was unanimously approved. Council went into executive session at 10:16 a.m.

Open session reconvened:

Open session reconvened at 11:00 a.m.

Selection process to appoint Public Defender:

The opening of the Public Defender position will be announced on August 4, 2023. Applications will be due September 8, 2023.

Applicants will be contacted via e-mail for interview on September 11, 2023. The list of candidates will be made public. The public will be able to submit comments on the candidates; comments will be confidential. The deadline for comments will be September 22, 2023.

Interviews conducted possibly on October 4, 2023.

The next meeting to be scheduled for November 2, 2023 at 10 a.m. At the meeting, the Council will vote for the selection of the Public Defender publicly.

A working group comprised of Chair Glendon and Member Gormley was established for the purpose of the advertisement of the Public Defender position.

Working group to address legislative matters:

Defender Council previously created a working group to address legislative matters, including pay increases. The working group is comprised of Members Gormley and Chair Glendon.

Next meeting:

Next meeting is scheduled for Thursday, November 2, 2023, at 10:00 a.m. in person and via Zoom.

Member Gormley moved to adjourn the meeting. Member Oshiro seconded the motion. No discussion. Motion unanimously approved.

Adjournment:

Chair Glendon moved to adjourn the meeting. Member Gormley seconded the motion. Motion unanimously approved.

Meeting was adjourned at 10:59 a.m.

Exhibit "14"

MINUTES OF THE MEETING OF THE DEFENDER COUNCIL
EXECUTIVE SESSION

Date: August 4, 2023

Executive Session Called to Order at 10:17 am

Members present: Chair Crystal Glendon, Member Stanton Oshiro, Vice Chair Gina Gormley

Also present: DAG Randall Nishiyama

Discussed: Upcoming Public Defender selection process

Discussion held regarding dates for selection process of Public Defender.

Position announcement to be published by August 4, 2023, with a deadline of September 8, 2023. Applicants can submit application electronically to Chair Glendon and Vice Chair Gormley (emails to be published in announcement).

Draft position announcement circulated to all members for input/approval.

Primary focus of the position announcement is requiring a vision statement.

Draft position announcement approved by all members with minor grammatical changes to be made by Chair Glendon.

Chair Glendon to email position announcement to PD James Tabe and Chaston Tobosa for publication on the HSBA website/listserve.

Discussed process/platform for public to comment in a confidential way. Discussed using Survey Monkey again. Chair Glendon to look into Survey Monkey or other alternatives and report back to Selection Process sub-committee member Gormley.

Discussed deadlines/dates for interviews.

Deadline for public comment will be 9/22/23.

Interviews tentatively scheduled for 10/4/23. Notice to be sent out to applicants after close of application deadline.

Next meeting date for selection of Public Defender to be scheduled on 11/2/23 at 10am.

Vice Chair Gormley moved to adjourn Executive Session, Member Oshiro seconded, no discussion held, motion carried unanimously.

Adjourned Executive Session at 10:57 am

Exhibit "15"

DEFENDER COUNCIL
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817



CRYSTAL K. GLENDON, ESQ
SETSUKO R. GORMLEY, ESQ.
STANTON C. OSHIRO, ESQ

STATE OF HAWAII DEFENDER COUNCIL

NOTICE OF MEETING

DATE: October 4th, 2023
TIME: 9:30 a.m.
LOCATION: Glendon & Ponce
ASB Tower, 1001 Bishop Street, Suite 710
Honolulu, Hawaii'i 96813

AGENDA

1. Roll call and call to order.
2. Discussion and action to enter into executive session to interview candidates for the position of the State Public Defender
3. Executive session pursuant to section 92-5(a)(2), Hawaii Revised Statutes, to interview candidates for the position of the State Public Defender
4. Summary of what occurred in the executive session.
5. Schedule next meeting
6. Adjournment



In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you need an auxiliary aid/service or other accommodation due to a disability, contact Chaston J. Tobosa at 808-586-2291 or chaston.j.tobosa@hawaii.gov, and Lee Hayakawa at 808-586-2208 or lee.s.hayakawa@hawaii.gov as soon as possible. Requests made as early as possible have a greater likelihood of being fulfilled. Upon request, this notice is available in alternate formats.

Exhibit "16"

MINUTES OF THE MEETING OF THE DEFENDER COUNCIL
EXECUTIVE SESSION

Date: October 4, 2023

Executive Session Called to Order at 9:37 am

Members present: Crystal Glendon, Stanton Oshiro, Gina Gormley

Also present: DAG Randall Nishiyama

Discussed: Public Defender Interviews

Interview with Craig Nagamine held at 9:41 am

Informed Mr. Nagamine 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 Nagamine summarized his vision for the office, anticipated administration/leaders.

Council asked questions re: public comments.

Mr. Nagamine responded.

~~Mr. Nagamine given the opportunity to submit any further responses to the Council via email within one week.~~

Ended at 10:55 am

Interview with Darcia Forester held at 11:05 am

Informed Ms. Forester 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.

Ms. Forester summarized her vision for the office, anticipated administration/leaders, though no commitments from anyone yet.

Council asked questions re: public comments.

Ms. Forester responded.

Ms. Forester given the opportunity to submit any further responses to the Council via email within one week.

Ended at 12:37 pm

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

Interview held with Eric Neimeyer at 2:40 pm

Informed Mr. Niemeyer 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. Niemeyer summarized his vision for the office, no anticipated administration at this time. Mr. Niemeyer is new to criminal defense practice in the State of Hawai'i. No connection to the Office of the Public Defender.

Council asked questions re: public comments.

Mr. Niemeyer responded.

Based on Mr. Niemeyer's responses, Council had no further questions for Mr. Niemeyer.

Ended at 3:10pm

Discussion regarding candidates held. Council members filled out question forms for each candidate.

Member Oshiro moved to adjourn Executive Session, Member Gormley seconded, motion carried unanimously.

Adjourned Executive Session at 4:00 pm

Exhibit "17"

DEFENDER COUNCIL
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817



CRAIG A. DECOSTA, ESQ.
CRYSTAL K. GLENDON, ESQ.
SETSUKO R. GORMLEY, ESQ.
DAVID H. HAYAKAWA, ESQ.
STANTON C. OSHIRO, ESQ.

STATE OF HAWAII DEFENDER COUNCIL

NOTICE OF MEETING

Defender Council Members will hold an in person and online board meeting via Zoom on Thursday, November 2, 2023, at 10:00 a.m.

TOPIC: Defender Council Meeting
TIME: November 2, 2023, 10:00 a.m. HST

Join Zoom Meeting

<https://us06web.zoom.us/j/83485569399?pwd=wRyDQEGTRYdKf5lYdBtPISxEJXC47L.1>

Meeting ID: 834 8556 9399
Passcode: 007991

One tap mobile

+16694449171,,83485569399#,,,,*007991# US
+16699006833,,83485569399#,,,,*007991# US (San Jose)

Dial by your location

- +1 669 444 9171 US
- +1 669 900 6833 US (San Jose)
- +1 719 359 4580 US
- +1 253 205 0468 US
- +1 253 215 8782 US (Tacoma)
- +1 346 248 7799 US (Houston)
- +1 929 205 6099 US (New York)
- +1 301 715 8592 US (Washington DC)
- +1 305 224 1968 US
- +1 309 205 3325 US
- +1 312 626 6799 US (Chicago)
- +1 360 209 5623 US
- +1 386 347 5053 US
- +1 507 473 4847 US
- +1 564 217 2000 US
- +1 646 931 3860 US
- +1 689 278 1000 US

Meeting ID: 834 8556 9399
Passcode: 007991

Find your local number: <https://us06web.zoom.us/j/kc9KLEV2Ro>



In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you need an auxiliary aid/service or other accommodation due to a disability, contact Chaston J. Tobosa at 808-586-2291 or chaston.j.tobosa@hawaii.gov, and Lee Hayakawa at 808-586-2208 or lee.s.hayakawa@hawaii.gov as soon as possible. Requests made as early as possible have a greater likelihood of being fulfilled. Upon request, this notice is available in alternate formats.

The public may also attend the meeting at the Office of the Public Defender, 1130 N. Nimitz Highway, Suite A-254, Honolulu, Hawai'i, 96817, where an audiovisual connection will be provided for the public to view and participate in the meeting.

If you are having difficulty connecting to the meeting, please contact Chaston Tobosa at 808.586.2291, Kyle Kawamoto at 808.568.2187, or Lee Hayakawa at 808.586.2208.

AGENDA

1. Roll call and call to order.
2. Public testimony
 - a. Individuals may submit testimony in advance of the meeting via e-mail to chaston.j.tobosa@hawaii.gov and lee.s.hayakawa@hawaii.gov, or by mail addressed to Chaston J. Tobosa, Office of the Public Defender, 1130 N. Nimitz Highway, Suite A-254, Honolulu, Hawai'i, 96817. Individuals interested in signing up to provide oral testimony at the meeting may submit their name, e-mail address, and telephone number to chaston.j.tobosa@hawaii.gov and lee.s.hayakawa@hawaii.gov. Individuals may provide oral testimony at the meeting via the above-listed video conferencing link or by call the above-listed telephone number.
 - b. Testimony presented during the meeting will be limited to three minutes each.
3. Approval of the Regular Session and Executive Session Minutes of October 4, 2023.
4. Approval of the Regular Session and Executive Session Minutes of August 4, 2023.
5. Approval of the Executive Session Minutes of June 16, 2023.
6. Executive session pursuant to section 92-5 (a)(2), Hawaii Revised Statutes, regarding discussion and possible selection of the Public Defender.
7. Possible announcement of the selection of the Public Defender.
8. Announcements
 - a. Schedule the next meeting.
9. Adjournment



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If audiovisual communication cannot be maintained with all Council Members participating in the meeting, the meeting shall be automatically recessed for up to thirty (30) minutes to allow staff to attempt to restore communication.

If audiovisual communication with all participating Council Members can be restored, the meeting will be reconvened. If, however, audiovisual communication cannot be restored, then the meeting may be reconvened with the audio-only communication using the above-listed telephone number. Any nonconfidential visual aids brought to the meeting by Council Members or as part of a scheduled presentation will be made publicly available on the Office of the Public Defender website within fifteen (15) minutes after audio-only communication is established.

If it is not possible to reconvene the meeting within thirty (30) minutes after an interruption of communication and the Defender Council has not provided reasonable notice to the public as to how the meeting will be continued at an alternative date and time, then the meeting shall be automatically terminated.

No Defender Council action shall be invalid if the Council's good faith efforts to implement remote technology for public observations and comments do not work.

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Exhibit "18"

MINUTES OF THE MEETING OF THE DEFENDER COUNCIL

DATE: November 2, 2023

TIME: 10:00 a.m.

Join Zoom Meeting

<https://us02web.zoom.us/j/84297143555?pwd=WFpWK253YytiVjN1RZTW1tUUZrZz09>

Meeting ID: 842 9714 3555

Passcode: 707487

MEMBERS PRESENT: Crystal Glendon (in person)
Stanton Oshiro (in person)
Gina Gormley (in person)

ALSO PRESENT: Randall Nishiyama, Deputy Attorney General (in person)
James Tabe, Public Defender (in person and virtual)

Meeting called to order at 10:17 a.m. by Chair Glendon.

Motion to Amend Agenda

Chair Glendon requested a motion to amend the agenda as follows:

1. Roll call
2. Approval of the Regular Session and Executive Session Minutes of October 4, 2023.
3. Approval of the Regular Session and Executive Session Minutes of August 4, 2023.
4. Report of the Public Defender
5. Public Testimony
6. Executive session pursuant to section 92-5 (a)(2), Hawai'i Revised Statutes, regarding discussion and possible selection of the Public Defender.
7. Possible announcement of the selection of the Public Defender.
8. Announcement regarding next meeting

Member Oshiro moved to amend agenda; Member Gormley seconded motion; motion approved unanimously.

Approval of Minutes of Meetings held on August 4, 2023 and October 4, 2023:

Chair Glendon requested approval of minutes held on August 4, 2023 and October 4, 2023.

Member Stanton moved for approval of minutes held on August 4, 2023; Member Gormley seconded motion; motion approved unanimously.

Member Stanton moved for approval of minutes held on October 4, 2023; Member Gormley seconded motion; motion approved unanimously.

Public Testimony:

At 10:21 a.m., Chair Glendon solicited public testimony.

The following individuals provided testimony:

- Darcia Forester, Deputy Public Defender
- Ryan Ha, Deputy Public Defender, support the selection of Craig Nagamine
- Andrew Fukuda, Honolulu Fire Department, support the selection of Mr. Nagamine
- William Hornuck, Honolulu Fire Department, support the selection of Mr. Nagamine
- Ben Creps, Civil Beat Law Center, expressed concerns that hiring sessions should be conducted in the open, requested hiring deliberations in open session

Public Defender Report

At 10:33 a.m., Public Defender Tabe provided Public Defender Report

1. Bandwidth/internet upgrade for Oahu, Maui, Hilo, and Kona branch offices completed
2. Maui wildfire
 - a. Attorney was displaced from home
 - b. Initially, the Maui Office attorneys set up tent/table at Honokawai Park on Fridays to assist not only our clients but others seeking legal help. Also, helped people connect with social services. Several attorneys from other islands flew in to help.
 - c. The Lahaina Court assigned attorney are remaining at the courthouse after court session ended to assist people with their legal matters.

- d. Currently, Maui Office attorneys are working with the Maui Bar Association at the Lahaina Civic Center to not only provide legal advice, but to help people filling out government applications and connect them with service providers.
 - e. Maui Office Supervising Attorney is attending weekly meetings for “Maui Hope: Building a Systems Map for Legal Support Following the August 2023 Wildfires.”
 - f. The Maui Office is working on an outreach plan for the “tent city” in Kahului (near the airport) to support the homeless population displaced by the wildfires.
 - g. The Maui Office are defending individuals charged with cases arising from the wildfires, such a Breach of an Emergency Order.
3. Honolulu Community Outreach Court recognized as Team of the Year at the Department of Budget & Finance Incentive and Service Awards ceremony
 4. Attorneys participated in the HSBA Bench Bar Conference
 5. The annual Oahu Office Halloween party returned after a four-year hiatus.

Executive session:

At 10:38 p.m., Chair Glendon entertained a motion to enter into executive session; Member Gormley moved to enter into executive session; Member Stanton seconded motion; motion approved unanimously.

Council went into executive session at 10:39 a.m.

Open session reconvened:

At 11:54 a.m., Member Oshiro moved to reconvene open session; Member Gormley seconded motion; motion approved unanimously.

Announcement of the appointment of the Public Defender:

Chair Glendon reviewed the process of selecting the Public Defender:

The announcement for the Public Defender position was posted August 4, 2023 on HSBA website. Applications were due September 8, 2023. The Council received five applications. One application was rejected for qualification reasons.

On September 13, 2023, a request for confidential comments for the applicants was sent out to the employees of the Office of the Public Defender and HACDL

(Hawai'i Association of Criminal Defense Lawyers) members via e-mail. The request for comments was also posted on the Office of the Public Defender website. Comments were to be submitted via a third-party website (JotForm), in which do not identify the sender. Alternatively, comments were also allowed to be submitted directly to any member of the Council.

The Council received 87 confidential comments via third-party website; a few direct e-mail message and a few direct phone calls were received. The e-mails and phone calls were shared with all council members and Deputy Attorney General Nishiyama.

The four applicants were interviewed on October 4, 2023, by quorum of council members.

Each applicant went through the same process. Each applicant was asked the same standard questions; applicants were also asked a set of questions tailored to them based on the confidential comments received. If the Council had further questions, the applicant was also asked to submit follow up responses. Each applicant responded in a timely manner.

Addressed the concerns raised by confidentiality and anonymity of submitting comments. Also addressed the possibility of "fake" comments. Assured that the comments will remain confidential and anonymous.

Chair Glendon requested a motion to proceed with the vote for the appointment of the next Public Defender; Member Gormley moved to proceed; Member Oshiro seconded the motion; the motion was approved unanimously.

Chair Glendon voted for Jon Ikenaga
Member Oshio voted for Jon Ikenaga
Member Gormley voted for Jon Ikenaga

Jon Ikenaga to be appointed the next Public Defender.

Next meeting:

Next meeting is scheduled for Friday, January 26, 2024, at 10:00 a.m. in person and via Zoom.

Adjournment:

Member Oshiro moved to adjourn the meeting. Member Gormley seconded the motion. Motion unanimously approved.

Meeting was adjourned at 12:05 p.m.

Exhibit "19"

DEFENDER COUNCIL EXECUTIVE SESSION MINUTES

Date: Nov 2, 2023 10:15 am started

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.

Exhibit "20"

Thank you all for your contributions to the selection process.

I'd like to lay out the process we've engaged in to select the next State Public Defender.

On or about August 4, 2023, we published the announcement for this position via the HSBA Job Opportunities listserv and emails to the Office of the Public Defender and the Hawai'i Association of Criminal Defense Lawyers. The announcement required that applicants meet certain qualifications and submit a resume and letter of interest to the Defender Council by 9/8/23. The letter of interest was to describe the applicant's qualifications to lead the office and their leadership vision for the office.

We received 5 applications for the position.

On September 13, 2023, a request for Comments on State Public Defender Candidates was sent out to the OPD and HACDL. It was also posted to the State OPD website. Candidates were informed and allowed to forward the request for Comments to any persons interested in submitting confidential comments on any candidate. We received a total of 87 comments via Jotform, a few direct emails, and a few calls from members of the public. Each of these comments/concerns/emails/calls were shared with all council members and our AG.

1 application was rejected for qualification reasons.

4 applicants were interviewed on 10/4/23 by a quorum of Council Members.

Each applicant underwent the same process. All candidates were asked the same standard questions, and then asked a set of questions tailored to them and based on the confidential comments received by members of the public.

If the Council had further questions, we asked applicants to submit a follow up response via email. Each applicant who was invited to submit a follow up response did so within a timely manner, and the Council members were each provided a copy and reviewed the same.

Let us first start out by expressing that, I believe we speak for the majority of people here: we all love this office and what it stands for. Being a PD is a defining point for many of us – whether you're still a member of this office, a former member or even someone who practices adjacent to the office and embraces the same collective values we believe in. Indigent defense is not an easy career path, but we all chose it and it shaped us into the attorneys, and people, we are today.

The Office of the Public Defender is a special place. To lead this office takes a certain amount of experience, patience, grit, compassion and dedication.

Of the 4 candidates who we interviewed, we found 3 to possess the qualities we are looking for in the next leader of this state-wide office.

We will be addressing these 3 candidates only.

Each candidate submitted a very detailed vision plan for the office.

We were certainly impressed and see value to each of the ideas/objectives that were set forth.

We could tell the genuine thought and care that went into each vision statement and know that each candidate is dedicated to this office, leading it into its future and this process.

So thank you to each of you for your full participation.

Their interviews were intense and these candidates had to respond to very pointed questions by the Council members.

We ranked their responses on a point system.

We asked some of them to submit follow-up responses if we felt the need.

We also asked tailored questions of each candidate that were based on the comments we received from you all and other members of the public.

We thank all of you who submitted very candid comments for and against the applicants. When we first requested comments, we were bombarded with a list of concerns regarding the process. Some complained that seeking public comment has never been sought before. Others raised concerns about the true anonymity of their comments for fear of retaliation if their support or non-support of certain candidates got back to the candidate. Some expressed concerns that bots would

somehow hack the comment process and submit fake support/non-support for candidates. This didn't happen.

As for anonymity, unless you identified yourself personally, we do not have a way to identify the commentor via Jotform . However, some of the comments are very specific, so if shared publicly, it won't take much to identify the author if you have personal involvement in the situation. Because of this, we generalized the comments to the candidates and picked out the common themes for questions and responses. We promised to protect the identity of those submitting comments by keeping the comments confidential and anonymous. We also were made very aware that many people would not have participated in the commenting process if the comments were not confidential/anonymous. Due to the highly sensitive personnel related comments made by the commentors, we will continue to keep these comments confidential and anonymous.

We screened each comment and evaluated them for support/non-support of a candidate.

We took each comment very seriously and formulated our tailored questions for the candidates based upon the common themes we saw in the comments.

We also tabulated the for and against comments per candidate.

After undergoing this process since September 9, we have come to a final decision to appoint the candidate who laid out a plan that addressed:

1. Leadership
2. Training
3. Action at the legislature
4. Human Resources

Exhibit "21"

MINUTES OF THE MEETING OF THE DEFENDER COUNCIL

DATE: January 26, 2024

TIME: 10:00 a.m.

Join Zoom Meeting

<https://us02web.zoom.us/j/84807035188?pwd=cU1PSXNQVnVndkSkNCUG45Y1hWUT09>

Meeting ID: 848 0703 5188

Passcode: 923469

MEMBERS PRESENT: Crystal Glendon (in person)
Stanton Oshiro (virtual)
Gina Gormley (virtual)

ALSO PRESENT: Randall Nishiyama, Deputy Attorney General (virtual)
Jon Ikenaga, Public Defender (in person)
Hayley Cheng, Assistant Public Defender (in person)
Stella Kam, AG Attorney (in person)

Virtual meeting called to order at 10:03 a.m. by Chair Glendon.

Public Testimony:

At 10:04 a.m., Chair Glendon solicited public testimony. (in person and zoom)

No public testimony received.

Public testimony closed at 10:04 a.m.

Approval of Agenda

At 10:04 Chair Glendon requests approval for Regular session and Executive Session minutes for Thursday, November 2, 2023

Member Oshiro moved for approval of minutes held on November 2, 2024; Member Gormley second motion; motion approved unanimously at 10:09

Report by Public Defender Jon Ikenaga: 10:09 a.m.

1. Meeting with circuit court judges. Meetings with family, district, and circuit court judges on all islands as well.
2. Meetings with legislators- Rep. Tarnas, Rep. Takayama, Sen Gabbard, Rep. Ganaden.

Meetings with Sen. San Buenaventura and Sen. Rhoads
3. All staff meeting on O'ahu office for all divisions- district/family and family
Revised duties of felony supervisors, appearances in court.
4. Meetings with neighbor islands supervisors, individual island visits planned:
January 31- Maui
February- Kona, Hilo, Kaua'i.
5. Jail diversion graduation- Jerry Villanueva attended to represent OPD and gave speech.
6. Contacted prosecutors for their salary schedule to compare for future proposal to request raises/parity in pay for Deputy Public Defenders.
7. Slowly filling vacant positions. Trouble recruiting/hiring due to low salary.
8. Planning for in-person PD seminar this year.

Discussion regarding pending lawsuit: Public First Law Center v. Defender Council; Jon N. Ikenaga; and Agribusiness Development Corporation Board of Directors, First Circuit, 1CCV-24-0000050. 10:24 a.m.

Chair Glendon introduces Stella Kam (AG Attorney) who deals with Sunshine Law and Uniform Information Practices Act (UIPA) and Randal Nishiyama.

Chair Glendon explains open participation for input and comments for the applicants for Public Defender position was initiated in good faith.

Member Oshiro give their perspective that accepting comments was indeed in good faith.

Stella Kam shares the lawsuit involves only the sunshine law. Names and personal information of commenters (name, cell phone) were allowed to be masked. Comments were required to be disclosed.

Executive session: 10:46 a.m.

Chair Glendon entertained a motion to enter executive session.

Member Oshiro moved to enter executive session. Member Gormley seconded the motion. No discussion. Motion was unanimously approved. Council went into executive session at 10:35 a.m.

Open session reconvened:

Open session reconvened at 11:30 a.m.

Add statement made by Chair Glendon in open session on November 2, 2023, to meeting minutes for November 2, 2023.

Member Oshiro motion, member Gormley seconds. Unanimous. Minutes will be amended to the November 2, 2023 minutes.

Next meeting:

Next meeting is scheduled for Friday, April 26, 2024, at 10:00 a.m. in person and via Zoom.

Member Gormley moved to adjourn the meeting. Member Oshiro seconded the motion. No discussion. Motion unanimously approved.

Adjournment:

Chair Glendon moved to adjourn the meeting. Member Gormley seconded the motion. Motion unanimously approved.

Meeting was adjourned at 11:32 a.m.

Exhibit "22"

From: Jayaram, Krishna F krishna.f.jayaram@hawaii.gov
Subject: FW: [EXTERNAL] Defender Council meeting
Date: October 31, 2020 at 12:31 PM
To: R. Brian Black brian@civilbeatlawcenter.org

Brian,

The assigned DAG will work w/ the Defender Council to: (1) publish its minutes; (2) allow public to testify prior to decision making; and (3) take a vote before going into exec session.

Re the recording of the exec session, the DAG will let the Council know that you will be requesting the recording and we will advise them on how to appropriately respond.

Hope you are having a good weekend.

Krishna

From: R. Brian Black <brian@civilbeatlawcenter.org>
Sent: Wednesday, October 7, 2020 11:49 AM
To: Jayaram, Krishna F <krishna.f.jayaram@hawaii.gov>
Subject: Re: [EXTERNAL] Defender Council meeting

Any update on these issues? By the way, in a routine review of board minutes online, we noticed that Defender Council has never posted its minutes on the Internet as required.

In the ordinary course, we would send a formal letter, but since you and I are already talking, I am just letting you know.

FYI, we don't send a letter to every single board that we flag as not complying with the Sunshine Law provision for posting minutes on the Internet; we have been focusing on more critical boards generally and especially those that have been routinely delinquent in posting minutes online in our last couple reviews. But if it would be helpful for you, I am willing to share a list of all the State boards that we flagged in our most recent review.

You no doubt have many other things to handle, but if you are interested, let me know.

We don't plan to publish the information or anything like that—although we do refer to the historical information when people inquire about specific boards not posting minutes.

I am available to discuss further.

On Sep 28, 2020, at 8:39 AM, Jayaram, Krishna F <krishna.f.jayaram@hawaii.gov> wrote:

From: R. Brian Black <brian@civilbeatlawcenter.org>
Sent: Monday, September 28, 2020 8:34 AM
To: Jayaram, Krishna F <krishna.f.jayaram@hawaii.gov>
Subject: Re: [EXTERNAL] Defender Council meeting

1. [OIP Op. 06-01](#) at 2 n.2 (“Thus, if a board did not permit public comment until after it discussed or acted on an item the board would have failed to allow ‘testimony’ on the item as the Sunshine Law requires.”). And attached is an informal opinion that discusses the issue a little more.

Thank you.

2. Correct (or to know *when* to get back on even if the board did enter a public session afterward). Also please don't lose sight of the voting issue. As the Hawaii Supreme Court recently noted, votes to go into executive session are not pro forma. *CBLC v. City & County of Honolulu*, 144 Hawaii 466, 477, 445 P.3d 47, 58 (2019) ("Because the decision to close a meeting is discretionary, board members should thoughtfully weigh the interests at stake before voting.").

I'm with you on the voting issue.

3. Yes, because I am trying to avoid potential escalation of the issue. But I am willing to make a request to the Council if it will be handled in a timely and appropriate manner.

Thanks.

I am available to discuss any of these issues.

Best,
Brian

On Sep 28, 2020, at 7:30 AM, Jayaram, Krishna F <krishna.f.jayaram@hawaii.gov> wrote:

Brian,

1. Can you share anything on the issue of when the public testimony occurs? I know we've discussed before but if you have it handy that would be helpful.
2. So the board kicked everybody off to go into exec session and nobody had the chance to get 'get back on' to watch the adjournment (if in fact that was all that happened)?
3. Ok, clarifying that the email to me was a request for the recording.

Krishna F. Jayaram
Special Assistant to the Attorney General
Department of the Attorney General
425 Queen Street
Honolulu HI 96813
Ph. 808 586-1284

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From: R. Brian Black <brian@civilbeatlawcenter.org>
Sent: Sunday, September 27, 2020 11:31 AM
To: Jayaram, Krishna F <krishna.f.jayaram@hawaii.gov>
Subject: [EXTERNAL] Defender Council meeting

Aloha Krishna, thanks for the follow up.

Public testimony. Yes, as I recall, the board followed its agenda and did not even ask for any public comment until after all the public agenda items were done. OIP has interpreted the Sunshine Law to require an opportunity to testify before any substantive board discussion of an agenda item. I encourage boards to allow testimony freely, but the minimum is before any board member speaks substantively on the agenda item.

Executive session. Two problems: (1) the board did not vote on entering executive session; and (2) the board did not provide an opportunity for the public to sit in a waiting room for reconvening in public session. It was an electronic meeting. The board simply told everyone to leave the meeting, which meant that if the board came back into public session for any reason (at a minimum to adjourn) then the public could not be present. Yes, the board certainly can have breakout rooms or waiting rooms just like physical setting, but that is not what the Council did.

Recording. I have not requested the recording from the Council. I can do that, but if I get a response that the Council will get around to it when they feel like it, that will be a problem. I am seeking to mitigate the harm caused by the Sunshine issues at the meeting. If we cannot mitigate that harm, I will need to follow up on the violations.

Best,
Brian

On Sunday, Sep 27, 2020 at 10:52 AM, Jayaram Krishna F
<krishna.f.jayaram@hawaii.gov> wrote:
Brian,

Following up on this. Please see some questions and thoughts below.

Krishna F. Jayaram
Special Assistant to the Attorney General
Department of the Attorney General
425 Queen Street
Honolulu HI 96813
Ph. 808 586-1284

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From: R. Brian Black <brian@civilbeatlawcenter.org>
Sent: Friday, September 11, 2020 11:27 AM
To: Jayaram, Krishna F <krishna.f.jayaram@hawaii.gov>
Subject: [EXTERNAL] Defender Council meeting

Aloha Krishna, there are serious problems with this one. The session was

recorded, and I would like a copy of the portions of the executive session that were not properly closed to the public.

1. No public testimony before board discussion of several agenda items.

The board followed the [agenda](#) and did not call for public testimony until after all the substantive public discussion was complete. The board had an extended discussion of officer elections, and there were numerous board questions about the operations report on the agenda. As we have discussed previously, boards must permit members of the public to testify before any board member discussion of non-procedural agenda items.

Can you clarify, did the board go through all of their discussion and votes, and then at the very end called for public testimony?

And just to make sure we are on the same page, is your position that public testimony must precede board discussion, or that public testimony must precede a vote?

2. Improper procedure for executive session. The board did not hold a vote or state the reason that it was entering executive session. HRS 92-4. The chair simply stated that the board would be going into executive session. Also, the board told every member of the public to leave the session (rather than going into a breakout room or any number of other options that I have seen boards take to enter executive sessions). As OIP has explained, forcing members of the public a meeting completely is problematic because the board should come back into public session to adjourn and/or do anything that could not be done in executive session. [OIP Op. 05-11](#) at 4 (“Given these narrow constraints on the open meeting exceptions, we believe that proper interpretation and application of those exceptions require a board to reconvene in an open meeting in too many instances to make it reasonable and practicable to meet in a place that would not allow a board to reconvene in an open meeting.”).

Was this an electronic meeting? Meaning the public exited the meeting or went into some kind of virtual waiting room? And was this at the very end, and thus your comment about adjourning in public session? I ask because at least in the physical version, I never thought there was anything wrong with asking the public to step out so long as you asked them to step back in when the meeting was back in non-executive session.

3. Improper executive session. The agenda lists an executive session under the attorney consultation exception for the evaluation of the Public Defender.

The attorney consultation exception is a narrow exception that certainly would not cover everything that would be discussed in the context of evaluating the Public Defender. *E.g.*, *Civil Beat Law Ctr. for the Public Interest v. City & County of Honolulu*, 144 Hawaii 466, 489, 445 P.3d 47, 70 (2019) (“boards and commissions, should understand that an attorney is not a talisman, and consultations in executive session must be purposeful and unclouded by pretext.”). For example, the Public Defender explained during his staff report that the Governor asked for budget scenarios, but that such scenarios would be discussed in executive session. Aside from the fact that budget scenarios for the Governor are not related to evaluating the Public Defender, staff explanation of such scenarios is not attorney consultation within the meaning of the Sunshine Law exception.

I recognize that the Council may have asked its deputy AG some questions in the context of the executive session (even though it did not follow the proper procedure). I am not asking for the portions of the recording that are “directly related” to such consultation within the meaning of the exception.

But it also seems obvious that the Council discussed matters that were not directly related to attorney consultation and should have occurred in public session. Thus, I am asking for those portions of the executive session recording that were not “directly related” to attorney consultation about the Council’s powers, duties, privileges, immunities, and liabilities.

So that I don’t miss something, you are making the request to the Council directly right? The above email to me was not the request?

The Law Center takes this type of apparent abuse of the attorney exception seriously. I welcome further discussion if there is something that I am missing.

Best,
Brian

R. Brian Black
Executive Director
Civil Beat Law Center for the Public Interest
700 Bishop Street, Suite 1701
Honolulu, HI 96813
(808) 531-4000

signature.asc
849 bytes

From: Tabe, James S <james.s.tabe@hawaii.gov> (Office of the Public Defender)
Date: Nov. 23, 2020, 9:30 p.m.
Via: Email
URL: <https://uipa.org/r/374#message-1403>
Subject: FW: [EXTERNAL] Records Request for Office of the Public Defender: September 11, 2020 Defender Council Meeting [#374]

Dear Mr. Black,

Per your request, I am attaching the minutes for the September 11, 2020 Defender Council meeting.

In regard to the minutes of the executive session held on September 11, 2020, the Department of Attorney General advised the Office of the Public Defender that the executive session's discussion was within the Sunshine Law and is not subject to release.

Please note that the Defender Council and the Office of the Public Defender have corrected the following:

1. Minutes will be published within 40 days of a meeting
2. The public comment section has been / will be moved to the beginning of the meeting
3. A vote shall be taken prior to going into the executive session

Sincerely,
James Tabe

[Text Description automatically generated]

From: DBF.UIPA <dbf.uipa@hawaii.gov>
Date: Thursday, November 5, 2020 at 10:45 AM
To: Tabe, James S <james.s.tabe@hawaii.gov>, Hayakawa, Lee S <lee.s.hayakawa@hawaii.gov>
Cc: Fukushima, Esther M <esther.m.fukushima@hawaii.gov>
Subject: FW: [EXTERNAL] Records Request for Office of the Public Defender: September 11, 2020 Defender Council Meeting [#374]
Hi James/Lee: Forwarding the following request for appropriate action. Thanks.

Raechele Joyo
Director's Office
Department of Budget and Finance
(808) 586-1519

-----Original Message-----

From: R. Brian Black <request+v68ukdmm6@foi.uipa.org>

Sent: Thursday, November 5, 2020 10:17 AM
To: DBF.UIPA <dbf.uipa@hawaii.gov>
Subject: [EXTERNAL] Records Request for Office of the Public Defender:
September 11, 2020 Defender Council Meeting [#374]

Aloha,

Pursuant to the public records law, I would like to request the following records in electronic format sent to my email address.

Minutes and recording of the September 11, 2020 Defender Council Meeting, including the executive session portion to the extent publicly accessible

Mahalo,

R. Brian Black
Civil Beat Law Center for the Public Interest

=====

Attachments:

- [1] image001.png
- [2] Minutesof09.11.20.pdf

Exhibit "23"

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

Office: (808) 531-4000
info@civilbeatlawcenter.org

VIA ELECTRONIC MAIL

October 24, 2023

Mr. Craig A. De Costa, Chair
Defender Council
Office of the Public Defender
1130 N. Nimitz Hwy, Suite A-254
Honolulu, Hawai'i 96817
craig@dhlawkauai.com

Re: Sunshine Law Compliance: Open Session for Selecting a New Public Defender and Timely Posting Minutes on the Internet

Dear Chair De Costa and members of the Defender Council:

We write regarding two matters of compliance with Hawai'i Sunshine Law: selecting a new Public Defender in *open* session and the timely posting of meeting minutes. We also write to formally request copies of the executive session minutes from the meetings held August 4 and October 4, 2023, concerning the selection of a new Public Defender.

First, we respectfully ask that the Council hold the entire selection process for the next Public Defender in open session (absent the rare need to discuss specific highly personal information about a candidate). The Council's November 2 agenda indicates the Council intends to discuss this hiring in executive session. However, the entire interview process of candidates for positions like the Public Defender is *not* "highly personal and intimate" information in which individuals have a constitutionally recognized reasonable expectation of privacy. *Civil Beat Law Ctr. for the Public Interest v. City & County of Honolulu* [CBLC], 144 Hawai'i 466, 480-81, 445 P.3d 47, 61-62 (2019).¹ The consequences of ignoring the law include:

- **Voidability.** HRS § 92-11 provides that when a government board disregards the requirement that meetings be "open to the public," the final action of the board is voidable. In this context, if the Council closes the doors on the public in selecting the next Public Defender, the Council's final selection may be subject to reversal in court, forcing a new selection process.

¹ The Law Center has litigated the relevant legal issues against the Honolulu Police Commission and understands well that the personnel practices of many boards and commissions may have been different in prior years. But public access – absent very narrow exceptions – is the law.

- **Fees and Costs.** In addition to the substantial taxpayer expense for the Council's attorneys to defend the Council's decision to exclude the public, HRS § 92-12(c) provides that a prevailing challenger to that improper closure may recover attorney's fees and costs.

The public has an interest in observing the entire process by which the next Public Defender is selected. The community should understand not only the views and experiences of the candidates, but also how you as a Council differentiate the candidates to select the Public Defender. And the Sunshine Law gives the public broad rights of access to observe this important process.

We thus request copies of the executive session minutes for the meetings held on August 4 and October 4, concerning the selection of a new Public Defender. The Hawai'i Supreme Court emphasized that there is a "presumption that all government board meetings will be open to the public" and that the exceptions "must be narrowly construed." *CBLC*, 144 Hawai'i at 476-77, 445 P.3d at 57-58. "[W]hen 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." *Id.* at 86, 445 P.3d at 67. Thus, those portions of the executive sessions that should have been conducted in an open meeting must be disclosed publicly. *Id.*; see also OIP Op. No. F20-01 at 5; HRS § 92-9(b); HRS § 92F-12(a)(7), (15), (16).

Second, we respectfully ask that, as required by law, the Council post minutes on the Internet within forty days after each Council meeting. Failure to timely post meeting minutes does a significant disservice to the public. HRS § 92-9(b) mandates that the minutes of all Board meetings shall be posted to the Board's website or otherwise be made available to the public *within forty days* after the meeting.

It appears that the Council has never posted minutes within 40 days of a meeting. For example, the minutes for the Council's August 4, June 16, January 27, December 2, November 18, and October 28 meetings are delinquent.² The Law Center previously raised this issue with the Council in November 2020, and the Council promised at the time: "Minutes will be published within 40 days of a meeting." Had the Council abided by the statutory requirement and its prior promise, the public would be more

² To address an issue occasionally raised by Boards—there is no Sunshine Law requirement that a Board formally approve minutes. If the Board has not approved its meeting minutes within forty days, draft minutes or notes must be posted. OIP Op. No. 02-06 at 16. Preliminary minutes may be marked as "draft" to designate that the documents have not been formally approved. *Id.* at 18-19.

Defender Council
October 24, 2023
Page 3

informed as to the Council's ongoing hiring process and could provide input into filing this important position.

The Law Center is committed to developing solutions that promote transparency and responsiveness in government, and we strongly believe in working with government entities collaboratively whenever possible. We have worked with other boards addressing similar hiring issues and have helped those boards arrive at solutions that comply with the Sunshine Law. In that spirit, I welcome the opportunity to discuss these issues further. I look forward to hearing from you or your representative at your earliest convenience.

Very Truly Yours,



Benjamin M. Creps
Staff Attorney
(808) 380-3576

cc: Dept. of the Attorney General (hawaiiag@hawaii.gov)
Lee S. Hayakawa (lee.s.hayakawa@hawaii.gov)
Chaston J. Tobosa (chaston.j.tobosa@hawaii.gov)

Exhibit "24"



DAVID Y. IGE
GOVERNOR

STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

CHERYL KAKAZU PARK
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: ois@hawaii.gov
www.ois.hawaii.gov

The Office of Information Practices (OIP) is authorized to resolve complaints concerning compliance with or applicability of the Sunshine Law, Part I of chapter 92, Hawaii Revised Statutes (HRS), pursuant to sections 92-1.5 and 92F-42(18), HRS, and chapter 2-73, Hawaii Administrative Rules (HAR). This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions or decisions but is binding upon the parties involved.

MEMORANDUM OPINION

Requester: Patricia Tummons
Board: Land Use Commission
Date: April 26, 2019
Subject: Improper Discussion of Matter Not on Filed Agenda and Failure to Allow Public Testimony (S APPEAL 19-4)

Request for Investigation

Requester asked for an investigation into whether the Land Use Commission (LUC) violated the Sunshine Law by (1) improperly discussing in executive session an item not on the agenda of its public meeting on November 14, 2018 (Meeting), and (2) not allowing public testimony. After the opening of this appeal, Requester also complained that the LUC did not have the requisite number of members present to vote to amend its agenda.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's appeal with attachment dated November 27, 2018; Requester's letter to OIP with attachment dated February 14, 2019; OIP's notice of appeal with enclosures dated November 28, 2018; an email with attached letter from the Department of the Attorney General (AG) on behalf of the LUC dated January 3, 2019; a letter to OIP from the AG dated January 3, 2019 with enclosures; an email to OIP from the AG dated February 14, 2019; and two emails to OIP from the AG dated and March 29, 2019.

Opinion

The LUC improperly discussed an item not on its agenda in violation of the Sunshine Law. As explained below, the discussion of subpoenas was not on the agenda as filed, and the LUC could not have voted to amend its agenda to add this item because it did not have enough members present at the Meeting to amend its agenda to add an item. Assuming the LUC intended to amend its agenda to add a discussion of subpoenas, the minutes and transcript of the Meeting show it did not actually vote to do so. See HRS § 92-7 (Supp. 2018).

While OIP need not reach these issues here after finding there were not enough members to vote to add an agenda item, OIP notes that boards may not add an item to a filed agenda if the item is of reasonably major importance affecting a significant number of persons. HRS § 92-7(d). Additionally, a discussion of the terms “Waikoloa” or “subpoenas” may have been too broad to allow a member of the public to decide whether to participate in the meeting.

Although the LUC should not have discussed an item not on its agenda, given that the LUC was evidently treating the item as an agenda item, it should have allowed testimony on that item as would be required for any agenda item, whether or not discussed in executive session. See HRS § 92-3 (2012); OIP Op. Ltr. No.15-02.

Statement of Reasons for Opinion

I. Improper Discussion of Item Not Listed on the Filed LUC Agenda

The Sunshine Law requires boards to file electronic public notice of any meeting at least six calendar days before the meeting. HRS § 92-7(a) and (b). The notice must include an agenda that lists all of the items that the board intends to consider at that meeting. HRS § 92-7(a).

Requester was a member of the public at the Hawaii island Meeting site, as the Meeting was held via videoconference on several islands. The filed Meeting agenda (Agenda) included one item relevant to this appeal, item V. Item V was a specific, narrowly worded item to “Consider Motion to Correct Transcript of September 6, 2018 meeting for Docket No. A06-767 Waikoloa Mauka” (Docket No. A06-767).¹ The one-page Agenda also contained boilerplate language at the bottom stating “The Commission may elect to consult in executive session pursuant to Section 92-5 HRS.” During the relevant portion of the Meeting, after discussion by the members, the Chair asked whether there was any testimony, and there was none. The LUC

¹ Waikoloa Mauka is a planned 398 lot residential subdivision that has not yet been developed. Nancy Cook Lauer, Waikoloa Highlands development to face Land Use Commission, Hawaii Tribune Herald, October 9, 2018, <https://www.hawaii-tribune-herald.com/2018/10/09/hawaii-news/waikoloa-highlands-development-to-face-land-use-commission/>.

heard the motion to amend the Docket No. A06-767 transcript and did vote to amend the transcript.

Following that vote on Agenda item V to amend the transcript, Requester alleged that a Commissioner made a motion to go into executive session “to talk about Waikoloa.” In response to this appeal, the AG explained in its December 10, 2018, letter to OIP (Response) that, after the Agenda was filed, a party to the LUC’s Docket No. A06-767 “requested that the LUC issue” a subpoena for the attendance of a witness before the LUC and a subpoena for the production of documents (Subpoenas). The Response stated that the LUC issued the Subpoenas on November 8, 2018, the same day the request for the Subpoenas was made. The LUC asserted in its Response that it amended the Agenda during the Meeting pursuant to 92-7(d), HRS, to “add an executive session item to consult with its attorney regarding questions and issues pertaining to the LUC’s powers, duties, privileges, immunities, and liabilities regarding motions for subpoenas received by the LUC relating to the Waikoloa Mauka project.”²

The Meeting minutes do not show a motion to amend the Agenda, but they do show a motion to go into executive session “to consult with the board’s attorney in regard [to] questions and issues pertaining to the Commission’s powers, duties, privileges, immunities and liabilities regarding Petitioner’s motions for subpoenas received by the Commission for Docket No. A06-767.” The relevant portion of the transcript of the Meeting (Transcript) differs from the minutes and show there was a motion “to go into executive session to discuss matters regarding Waikoloa with our counsel.” The relevant portion of the Transcript reads:

COMMISSIONER ACZON: I want to move for executive session.

COMMISSIONER MAHI: Second.

CHAIRPERSON SCHEUER: There’s been a motion made by Commissioner Aczon to go into executive session, and there is a second by Commissioner Mahi. Is there any discussion on the motion?

MS. TUMMONS: There has to be a reason stated for the executive session.

COMMISSIONER ACZON: Sorry about that. I want to make a motion to go into executive session to discuss matters regarding Waikoloa.

CHAIRPERSON SCHEUER: The motion has been amended to state that Commissioner Aczon moves to go into executive session to discuss matters related to the current Waikoloa Mauka docket in front of us.

² As explained in section C, infra, the LUC may have thought it could discuss the Subpoenas in executive session with its attorney because the Subpoenas related to Docket No. A06-767. Agenda item V, however, pertained to correction of a transcript for Docket No. A06-767, which was too narrow to inform the public that discussion might also include the Subpoenas.

MS. SUMMONS [sic]: I don't think that's sufficient. I think there has to be a reference to the statute.

CHAIRPERSON SCHEUER: I'm going to take a five-minute recess.

(Recess taken.)

We're back on the record. Commissioner Aczon, could you restate your motion, please?

COMMISSIONER ACZON: I would like to make the motion to go into executive session to discuss matters regarding Waikoloa with our counsel.

CHAIRPERSON SCHEUER: Our attorney general says that's good enough.

COMMISSIONER MAHI: Second.

CHAIRPERSON SCHEUER: Sorry to the folks in Hawai'i Island. I understand the frustration that you're experiencing, but I don't believe we procedurally have a chance at this point in the agenda for a member of the public to opine on the appropriateness of our motion.

So there has been a motion made and seconded to go into executive session to discuss the Commission's powers and duties specifically as related to the Waikoloa Mauka docket and seconded.

All in favor say "aye". Any opposed? We are going into executive session.

(Executive session.)

Requester subsequently filed this appeal to OIP, inquiring whether the LUC violated the Sunshine Law by discussing a matter in executive session without proper notice and not allowing public testimony regarding the added item. In a separate letter to OIP, Requester complained that the LUC did not have enough votes to amend its agenda.

A. There Were Not Enough LUC Members Present to Vote to Add an Item to the Filed Agenda

The LUC asserted that it amended the Agenda during the Meeting to add discussion of the Subpoenas as an additional Agenda item. Section 92-7(d), HRS, governs when a filed meeting agenda may be amended:

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. Items of reasonably major importance not decided

at a scheduled meeting shall be considered only at a meeting continued to a reasonable day and time.

HRS § 92-7(d) (Supp. 2018).³

The minutes show that 5 LUC members were present at the Meeting. The LUC's attorney confirmed that under section 205-1(a), HRS, the LUC is entitled to 9 voting members. The LUC currently has 8 members and 1 vacancy. Because the LUC is entitled to 9 members, under section 92-7(d), HRS, it needs the favorable vote of at least 6 of its members (two-thirds of the members to which it is entitled) to amend its agenda at a meeting. Because only 5 LUC members were present at the Meeting, it was not possible for the LUC to obtain the 6 votes that it needed to amend the Agenda. OIP therefore finds that the LUC could not legally have added anything to the Agenda, and it should not have discussed any aspect of "Waikoloa" at the meeting, whether in executive or open session, other than the correction of the transcript that was on its narrowly worded Agenda as filed.

OIP also notes that even if the LUC had enough members present to amend the Agenda, the proper procedure would have been for it to first vote to amend the Agenda to add an Agenda item on consideration of the Subpoenas referred to in its Response as the reason for the executive meeting, and then to vote in accordance with section 92-4, HRS,¹ to go into executive session for that discussion (after hearing public testimony, as discussed in section II, infra.) Neither the minutes nor the Transcript show a motion to amend the Agenda. Based on a review of the minutes, Transcript, and Response, OIP finds it reasonable to infer that the LUC intended to amend its filed Agenda by adding a discussion in executive session of the Subpoenas filed for Docket No. A06-767 with its attorney. Instead of first voting to add the item to its Agenda, the LUC skipped ahead to vote to enter executive session "to discuss matters regarding Waikoloa with our counsel" which was not on the Agenda.

³ In section B, infra, OIP discusses when an item "is of reasonably major importance" and when board action thereon will "affect a significant number of persons."

¹ Section 92-4, HRS, states:

A board may hold an executive meeting closed to the public upon an affirmative vote, taken at an open meeting, of two-thirds of the members present; provided the affirmative vote constitutes a majority of the members to which the board is entitled. A meeting closed to the public shall be limited to matters exempted by section 92-5. The reason for holding such a meeting shall be publicly announced and the vote of each member on the question of holding a meeting closed to the public shall be recorded, and entered into the minutes of the meeting.

HRS § 92-4 (2012).

B. Items of Reasonably Major Importance and That Would Affect a Significant Number of Persons

While OIP need not reach this issue, it notes that even if the LUC had the requisite number of votes to amend its Agenda, the addition of an agenda item is not allowed for items of “reasonably major importance” when action thereon may “affect a significant number of persons.” HRS 92-7(d). This determination is fact-specific and must be made on a case-by-case basis. OIP Op. Ltr. No. 06-05 at 3.

For example, OIP Opinion Letter Number 06-05 (Opinion 06-05) discussed the Hawaii County Council’s (Council) amendment of its agenda by adding an item pertaining to the Hokulia lawsuit which concerned the development of a \$1 billion residential project in Kona. OIP Op. Ltr. No. 06-05 at 2. OIP found that it could reasonably be argued that the specific issues added to the Council agenda were “minor” in the sense that they required Hawaii County to agree to certain conditions that the Council could reasonably believe to be of relatively little consequence to the County and because the action taken on those specific issues would arguably result in minor consequence to the County. *Id.* at 3-4. However, when liberally interpreting the Sunshine Law to implement the State’s policy to conduct government as openly as possible, OIP found that the importance of an agenda item and the effect of a decision on that item could not be measured solely by looking to the distinct issue presented at that particular meeting or the consequences of the action taken on the item viewed in isolation. *Id.* at 4. 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. *Id.* Having already found that the LUC could not have added an item to its Agenda, OIP need not determine whether “Waikoloa” or the Subpoenas were items of reasonably major importance that would have affected a significant number of persons. The LUC should be mindful of the decision rendered in Opinion 06-05 when deciding whether to add items to future agendas.⁵

C. Sufficient Nexus to An Agenda Item

A board cannot go into executive session without making a public announcement of the reason for holding the executive session. OIP Op. Ltr. No. 04-14 at 6, citing HRS § 92-4. Requester asserted that the item the LUC announced it would consider in executive session, “Waikoloa [.]” was too broad, and in any event, it did not reflect the LUC’s actual intent of discussing the Subpoenas as stated in the

⁵ The LUC may have been able to consider the Subpoenas on December 10, 2018, if it had held an emergency meeting in accordance with section 92-8, HRS. Section 92-8, HRS, allows a board to meet with less than 6 days’ notice when there is imminent peril to the public health, safety or welfare, or an unanticipated event requires a board to take action in less than 6 days. However, the fact that the Subpoenas were issued the same day they were received, *i.e.*, prior to the Meeting, could militate against any argument that they constituted an unanticipated event requiring the LUC to act in less than 6 days.

Response. Although the LUC did not specifically argue that its discussion of the Subpoenas fell within the items listed on the Agenda as filed, OIP here discusses the concept of a board discussion having a sufficient nexus to an agenda item. In this case, the relevant item was Agenda action item V, “Consider Motion to Correct Transcript of September 6, 2018 meeting for Docket No. A06-767 Waikoloa Mauka[.]”

The clear purpose of the Sunshine Law’s notice provisions is to give the public the opportunity to exercise its right to know and to scrutinize and participate in the formation and conduct of public policy. See OIP Op. Ltr. No. 07-02 at 3, citing HRS §§ 92-1 and 92-3 (1993); Kaapu v. Aloha Tower Development Corp., 74 Haw. 365, 384, 846 P.2d 882 (1993).

OIP interprets section 92-7(a) to require that an agenda list each item a board intends to consider with sufficient detail to allow a member of the public to reasonably understand the subject of the matter the board intends to consider at the meeting so that he or she can decide whether to attend and to participate through oral or written testimony. See OIP Op. Ltr. No. 03-22; OIP Op. Ltr. No. 07-02; see also Op. Att’y Gen. No. 85-2 at 4 (all matters should “be listed on the agendas . . . to give interested members of the public reasonably fair notice of what the [board] proposes to consider.”)

OIP Op. Ltr. No. 07-06 at 3 (footnote omitted).

While OIP need not reach the issue, there is a question as to whether the Subpoenas could have been discussed under an existing Agenda item, either in the public or executive portion of the meeting, because the public could not have reasonably understood that the LUC would be discussing the Subpoenas based on the Agenda as filed and the Subpoenas did not bear a sufficient nexus to anything on the filed Agenda to allow their discussion as a natural consequence of the Agenda item’s discussion of a transcript. OIP Op. Ltr. No.02-09 (finding that, in unusual circumstances, there may be times when an item not specifically listed as an agenda item is properly discussed at a meeting as a natural consequence of the discussions on an item that was properly listed on the agenda). If the LUC had 6 members present to affirmatively vote to amend the Agenda, it would not have had to specifically use the word “Subpoenas,” but the item ultimately added to the Agenda must have had a sufficient nexus to the Subpoenas in order for the LUC to discuss them.

II. The LUC Was Required to Allow Testimony

As noted above, the Sunshine Law requires boards to allow the public an opportunity

to present oral and written testimony on any agenda item.⁶ HRS § 92-3. This requirement to accept testimony applies to every agenda item at every meeting, including items to be discussed in executive session. OIP Op. Ltr. No. 15-02 at 2. Boards can require that the testimony be related to the agenda item, but it cannot otherwise restrict or censor a person's testimony. OIP Op. Ltr. No. 07-10 at 3.

Requester alleged that, once it was clear that the LUC planned to discuss something other than the Docket No. A06-767 transcript correction, she sought to provide comments. She was told that no testimony would be accepted.

The Response conceded that there was a "technical violation" of section 92-3, HRS, and concurred that interested persons should have been allowed to present testimony on an item discussed in executive session. However, it also asserted that Requester could not have provided "pertinent and relevant testimony of the topic of the executive session item discussed," which it described as "legal advice relating to the procedural aspects of subpoenas received by the LUC."

The LUC's apparent belief that Requester would not have provided "pertinent and relevant" testimony does not allow it to avoid the requirement in section 92-3, HRS, that the public be given the opportunity to provide written and oral testimony on every agenda item. OIP has previously found that where it is at least arguable that an agenda item could be read to cover a particular issue, a board must accept proffered testimony on that issue. OIP Op. Ltr. No. 07-10 at 4. Further, the scope of an agenda item is determined by the language used on the agenda, not the board's intent as to the meaning of the agenda item. *Id.* Accordingly, Requester (and any other interested persons) should have been given the opportunity to testify on both items on the filed Agenda, and items that were added to the Agenda. Even though the item at issue was not properly added to the Agenda, the LUC evidently thought it was and thus should have followed the Sunshine Law's requirement to hear public testimony on any agenda item. Its refusal to do so heightened the public harm resulting from its violation of the Sunshine Law by discussing an item not on the Agenda.

Right to Bring Suit to Enforce Sunshine Law and to Void Board Action

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. HRS § 92-12 (2012). The court may

⁶ Arguably, since as discussed in section I the Subpoenas were not actually an item on the Agenda, the LUC's failure to allow testimony on them was not an independent violation of section 92-3, HRS, but instead was a further source of public harm stemming from the LUC's discussion of an item not on its Agenda. Nonetheless, given that the LUC apparently thought it had added discussion of the Subpoenas to its Agenda, OIP believes it worthwhile to discuss whether the LUC would have been required to allow testimony of an item added to its Agenda for discussion in executive session.

order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. Id.

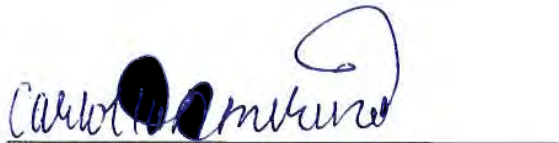
Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. Id.

This opinion constitutes an appealable decision under section 92F-43, HRS. A board may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43. HRS §§ 92-1.5, 92F-43 (2012). The board shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

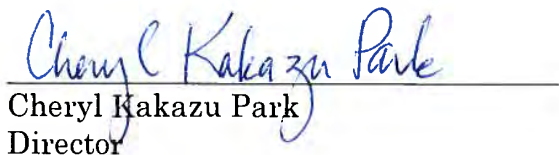
This letter also serves as a notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES



Carlotta Amerino
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director

Exhibit "25"



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GOVERNOR
SHAN TSUTSUI
LIEUTENANT GOVERNOR

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The Office of Information Practices (OIP) is authorized to issue this advisory opinion concerning compliance with part I of chapter 92, Hawaii Revised Statutes (HRS) (the Sunshine Law) pursuant to HRS § 92F-42(18). This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions.

MEMORANDUM OPINION

Requester: Neighborhood Commission Office (NCO)
Board: Mililani/Waipio/Melemanu Neighborhood Board (Board)
City and County of Honolulu
Date: June 30, 2015
Subject: Amendment of Agenda (S RFO-G 14-2)

Request for Opinion

Requester¹ seeks an advisory opinion on whether the Board violated the Sunshine Law by amending its February 25, 2013 agenda (February agenda) during its meeting held on February 27, 2013 (February meeting), to recommend that the closure time at the Mililani Neighborhood Park be changed.

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in the February agenda; the minutes for the February meeting (February minutes); an undated letter to the Department of Parks and Recreation (PARKS-HON) from the Board; an e-mail to OIP from NCO dated March 1, 2013; an e-mail to NCO from OIP dated March 1, 2013; an e-mail to the Board from NCO dated March 1, 2013; March 25, 2013 agenda (March agenda); the minutes for the March meeting (March minutes); Memorandum to the Board from NCO dated March 28, 2013; letter from the Board to NCO dated April 22, 2013; April 24, 2013

¹ NCO has primary jurisdiction over neighborhood boards. OIP requires that requesters make a complaint regarding a neighborhood board to NCO first for an initial review and factual determination, after which NCO may ask OIP for its opinion on the Sunshine Law issues raised by the complaint. In this instance, OIP received and accepted this request for an opinion directly from NCO.

agenda (April agenda); the minutes for the April meeting (April minutes); an e-mail to OIP from NCO dated May 23, 2013; a telephone conversation with NCO's Community Relations Specialist III / Acting Executive Secretary Bryan Mick on June 8, 2015; and a review of the City and County of Honolulu Department of Parks and Recreation – Mililani Neighborhood Park website at <http://gis.hicentral.com/FastMaps/Parks/ParkDetails.aspx?id=232&lyrLst=1%7C0%7C0%7C0%7C1%7Caerial> (last visited June 30, 2015).

Opinion

OIP finds that while the Board's February agenda amendment initially violated the Sunshine Law because the recommendation to change the closure time at the Mililani Neighborhood Park was a matter of "reasonably major importance" and action thereon would affect a "significant number of persons," it nevertheless effectively mitigated the harm of its violation by placing the recommendation on its subsequent April agenda and providing for community input and discussion at the April meeting. The Board's action to adopt the recommendation at its February meeting was voidable, but not voided, as no lawsuit was filed to challenge the action.

Statement of Reasons for Opinion

The Sunshine Law requires that boards give written public notice of meetings, which shall include an agenda listing all items to be considered. HRS § 92-7(a) (Supp. 2014). The Sunshine Law also provides that a filed agenda may be amended to add an item by 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."** HRS § 92-7(d) (2012) (emphasis added). Determination of whether an item "is of reasonably major importance" and when board action thereon will "affect a significant number of persons" is fact-specific and must be made on a case-by-case basis. OIP Op. Ltr. No. 06-05 at 3. It must also be noted that the Sunshine Law sets forth the public policy of this State that actions of government agencies be conducted as openly as possible. HRS § 92-1 (2012).

The Board's February agenda, as posted, did not list the recommendation that the closure time at the Mililani Neighborhood Park be changed. Based on the February minutes, the recommendation was first raised during the discussion under the agenda item for "Questions, comments, and concerns." The minutes for the February meeting state, in relevant part:

Mililani Neighborhood Park – A Board member reported that the park is located next to Recreation Center III and is an ongoing nuisance. The park is not visible from the street and people remain in the dark after 10:00 p.m. She recommended that the closure time be changed to 8:00 p.m.

The recommendation was then raised again during the discussion under “NEW BUSINESS.” Here, the Board voted to add the recommendation to the February agenda. The minutes for the February meeting state, in relevant part:

Mililani Neighborhood Park Closure Time Change – Vomvoris asked to add this item to tonight’s agenda. Poirier suggested that this item be added to tonight’s agenda and noted that a two-thirds vote would be needed to do this. The Neighborhood Assistant informed the Chair that such a motion could be deemed improper if it affects a large number of people.

Vomvoris moved and Remington seconded to add Mililani Neighborhood Park closure time change be added to the agenda. The motion was ADOPTED UNANIMOUS, 17-0-0 (Aye: D. Bass, W. Bass, Dau, Freed, Garan, Iuli, Kawakami, Lee, Loomis, Marshall, Park, Poirier, Remington, Siegel, Thomas, Wong, and Vomvoris).

Discussion:

1. People in the Park after Closure Hours – It was noted that people eat and drink in the park after following baseball games; that they make noise which disturbs the surrounding neighbors; and leave evidence of consumed alcoholic beverages, trash, etc.
2. Enforcement – Even if the Honolulu Police Department responds to neighbor complaints, they can do little to rectify the situation since they must catch park patrons in the act of consuming illegal beverages, and they cannot ask the offending park user to leave since the Park is not officially closed to users until 10:00 p.m.

Freed moved, and Thomas seconded recommending that the Mililani Neighborhood Park closure time be changed from 10:00 p.m. to 8:00 p.m. The motion was ADOPTED UNANIMOUSLY, 17-0-0 Aye: D. Bass, W. Bass, Dau, Freed, Garan, Iuli, Kawakami, Lee, Loomis, Marshall, Park, Poirier, Remington, Siegel, Thomas, Wong, and Vomvoris).

(Emphases in original).

Thereafter, in the Board’s undated letter to PARKS-HON, the Board informed PARKS-HON that “our Board adopted a motion at our regular meeting on February 27, 2013, recommending that the closure time at **Mililani Neighborhood Park** be changed from **10:00 p.m. to 8:00 p.m.**...[and] request[ing] that the sign on the comfort station reflecting the hours of closure be changed to reflect the new 8:00 p.m. closing time.” (Emphases in original).

To address whether the recommendation to change the closure time at the Mililani Neighborhood Park was a matter of “reasonably major importance” and whether action thereon would affect a “significant number of persons,” Chair Richard G. Poirier defends the Board’s action in a letter to the NCO dated April 22, 2013 that stated:

it is difficult to imagine how the action of changing evening closing hours from 10:00 to 8:00 p.m. at a small neighborhood park without lights for nighttime use and play could ever be reasonably considered to be of major import [sic] to our board area constituents. Similarly, it is difficult to envision how such an action could ever be considered to impact a significant number of the 27,000 residents comprising our Board area. At best as we can determine, the change of evening closing hours impacts no more than a dozen abutting park residents and perhaps a dozen post-baseball game park users who occasionally stay on to drink illegally between the hours of 8:00 p.m. and 10 p.m.

Contrary to the Board’s argument, OIP finds that the recommendation to change the closure time at the Mililani Neighborhood Park was a matter of “reasonably major importance.” Because the Sunshine Law’s provisions must be liberally interpreted to implement this state’s policy to conduct government as openly as possible, an agenda 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. Ltr. No. 06-05 at 4. Here, OIP finds that the recommendation to change the park closure time is an item “of reasonably major importance” because an earlier closure time will limit access to community residents and nonresidents who come to Mililani to use the park’s basketball, soccer, tennis, playground, open field, picnicking, and restroom facilities. According to the park’s website, the park has lights, so an earlier closure and turning off of its lights could adversely affect active recreational activities, organized sports programs, and instructional classes. Even with limited lighting at night, passive uses of the park and its facilities for picnicking, yoga, meditation, or other lawful activities could be affected by the earlier closure. As the Board recognized, concerns have also been raised about noise disturbing nearby residents and alcoholic beverages being consumed in the park. Given the potential impacts on various park activities and concerns about its use, OIP finds that the recommendation to change the closure time at the Mililani Neighborhood Park was a matter of “reasonably major importance.”

Next, OIP looks at whether the recommendation to change the closure time at the Mililani Neighborhood Park would affect a “significant number of persons.” Because the Sunshine Law must be liberally interpreted, OIP does not believe that the effect of an action taken on an agenda item can be measured solely by looking to the distinct issue presented for deliberation and decision at a particular meeting, or the consequences of the action taken on the item viewed in isolation. OIP Op. Ltr. No. 06-05 at 4. Rather, the item’s importance and the potential consequence of action taken on it must be viewed relative to the larger context in which it occurs.

Id. OIP considers the board's constituency, which is "all residents within its district." Additionally, OIP considers resident and nonresident park users, and not just "a dozen abutting park residents" and "a dozen post-baseball game park users who occasionally stay on to drink illegally between the hours of 8:00 p.m. and 10 p.m." whom the Board had considered. Here, the earlier closure time will affect an estimated 27,000 Mililani residents as well as non-residents who come to Mililani to use the park or expect that the park's facilities are available for usage. Thus, OIP finds the recommendation to change the closure time at the Mililani Neighborhood Park would affect a "significant number of persons."

Because the recommendation to change the closure time at the Mililani Neighborhood Park was a matter of "reasonably major importance" and action thereon would affect a "significant number of persons," OIP concludes that the Board improperly amended its February agenda and did not provide sufficient notice for community input at its February meeting before adopting the recommendation.

OIP's conclusion is consistent with the advice it provided on March 1, 2013, when NCO initially inquired with OIP as to whether, under the Sunshine Law, the Board was permitted to amend its agenda to include the recommendation during the meeting by employing the "two-thirds" procedure outlined in section 92-7(d), HRS. In OIP's e-mail to NCO dated March 1, 2013, OIP advised that the recommendation to change the closure time at the Mililani Neighborhood Park was a matter of "reasonably major importance" and action thereon would affect a "significant number of persons." OIP advised that the optimal "cure" was to place the recommendation on the next agenda, then discuss it at the next meeting. NCO relayed OIP's advice in NCO's e-mail to the Board dated March 1, 2013. Although the Board Chair and Vice Chair did not respond to OIP's June 8, 2015 telephone calls for supplemental information, NCO subsequently confirmed that the Board complied with OIP's advice. According to NCO, the Board placed the recommendation on its April agenda, which stated in relevant part:

V. OLD BUSINESS

- Public input on changing the closing hours of Neighborhood Park on Kaloapau Street from 10:00 P.M. to 8:00 P.M.

(Emphasis in original).

At the April meeting, the recommendation was then raised during the discussion under "OLD BUSINESS," providing the opportunity for community input. The April minutes state, in relevant part:

Public Input on Changing the Closing Hours of Neighborhood Park on Kaloapau Street from 10:00 p.m. to 8:00 p.m. – None.

Although there was no public testimony on the issue, the public had received proper notice and an opportunity to testify at the April meeting on the recommendation to change the park closure hours. The minutes, however, do not indicate whether the Board actually voted to adopt the recommendation.

While the Board mitigated the harm of its violation by properly placing the recommendation on its subsequent April agenda and providing the opportunity for community input and discussion at the April meeting, the April minutes do not specify whether the Board actually voted to adopt the recommendation. Assuming that no action was taken at the April meeting, and having concluded that the Board had improperly amended its February agenda and acted in violation of the Sunshine Law to adopt the recommendation during its February meeting, the board's February action to recommend the change in park time was voidable under the Sunshine Law. HRS § 92-11. To void a final action, however, a lawsuit must have commenced within ninety days of the February meeting. *Id.*; see OIP Op. Ltr. No. 01-06 at 9 (stating that an action taken in violation of the Sunshine Law is not automatically void and the action must be challenged). It does not appear that a lawsuit was timely commenced to void the Board's adoption of the recommendation to change the park's closing hours at the February meeting. Consequently, while the Board's February action was improperly adopted and was voidable, it was not voided.


Right to Bring Suit to Enforce Sunshine Law and to Void Board Action

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. HRS § 92-12 (2012). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. *Id.*

Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. *Id.*

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

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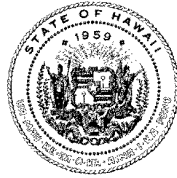
Liza R.H. Onuma
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director

Exhibit "26"



NEIL ABERCROMBIE
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BRIAN SCHATZ
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
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The Office of Information Practices (OIP) is authorized to issue this advisory opinion concerning compliance with part I of chapter 92, Hawaii Revised Statutes (HRS) (the Sunshine Law) pursuant to HRS § 92F-42(18). This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions.

MEMORANDUM OPINION

Requester: Ms. Lynne Matusow
Board: Ala Moana-Kakaako Neighborhood Board
City and County of Honolulu
Date: December 20, 2011
Subject: Amendment of Agenda (S INVES-P 12-8)

Request for Opinion

Requester seeks an advisory opinion on whether the Ala Moana-Kakaako Neighborhood Board (AMKNB) violated the Sunshine Law by amending its Regular Meeting Agenda (Agenda) during its meeting held on October 25, 2011 (Meeting), to add Bill 54 of the Honolulu City Council (City Council) for discussion and action.¹ Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in an e-mail sent by Requester to OIP dated November 17, 2011, a letter from the AMKNB Chair to OIP dated December 1, 2011, and an email sent by the Neighborhood Commission Office (NCO) to OIP on December 6, 2011.

Opinion

OIP finds that AMKNB's Agenda amendment violated the Sunshine Law.

¹ Rule 2-13-102 in the City's Neighborhood Plan lists the powers, duties, and functions of neighborhood boards. These powers include the ability to initiate, review, comment, and make recommendations concerning any substantive issue reasonably related to the processes or decisions of government.

Statement of Reasons for Opinion

Bill 54 was a City Council bill which became law in 2011. Bill 54 gave the City and County of Honolulu (City) the power to confiscate personal property kept or left on City-owned public property or in City parks for more than twenty-four hours. A number of individuals testified at City Council hearings against Bill 54, particularly advocates for the homeless. Proponents testified that Bill 54 would preserve and protect public access to public areas. The City Council voted 8-1 in support of Bill 54 at its third reading, and the Mayor subsequently signed it into law. See Reyes, B.J., "New city law lets private property be cleared from public areas." Honolulu Star-Advertiser, December 10, 2011, pages A1, A8; Levine, Michael, Honolulu Homeless on Notice: Belongings Banned From Public Places." Honolulu Civil Beat December 8, 2011, <http://www.civilbeat.com>.

The AMKNB's Agenda, as filed, listed the general topic "IV. COMMITTEE REPORTS" which contained several subsections. Subsection c "Homelessness/Citizen's Patrol – Dexter Sensui" is relevant here. Based on the minutes of the Meeting, it appears that, during the discussion on subsection c, the AMKNB voted to add Bill 54 to its Agenda. The minutes for the Meeting state, in relevant part:

Homelessness/Citizen's Patrol: Board member Sensui reported that the clearing of the homeless individuals around the Hawaii Convention Center is complete. There are still reports of homeless on the corner of Queen and Kamakee Street and around the former site of Office Depot.

The Board UNANIMOUSLY APPROVED the motion to add Bill 54 to the agenda for discussion and action, 8-0-0 (Aye: Hurst, Ibara, Minn, Okumoto, Sensui, Shiota, Tanimura, and Zehner).

Sensui moved and Zehner seconded that the Ala Moana Neighborhood Board support Bill 54 which allows unattended items on sidewalks to be removed. The motion was APPROVED, 7-1-0 (Aye: Hurst, Minn, Okumoto, Sensui, Shiota, Tanimura, and Zehner. Nay: Ibara)

(Emphasis in original.)

The Sunshine Law requires that boards give written public notice of meetings which shall include an agenda listing all items to be considered. HRS § 92-7(a). The Sunshine Law also provides that a filed agenda may be amended to add an item by 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.” HRS § 92-7(d) (emphasis added).² Determination of whether an item “is of reasonably major importance” and when board action thereon will “affect a significant number of persons” is fact-specific and must be made on a case-by-case basis. OIP Op. Ltr. No. 06-05 at 3. It must also be noted that the Sunshine Law sets forth the public policy of this State that actions of government agencies be conducted as openly³ as possible.⁴ HRS § 92-1.

OIP first looks at whether Bill 54 was a matter of “reasonably major importance.” Because the Sunshine Law’s provisions must be liberally interpreted to implement this state’s policy to conduct government as openly as possible, an agenda 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. Ltr. No. 06-05 at 4. Bill 54 created a new law allowing the City to confiscate personal property. Bill 54 impacts all users of City public property and parks. Thus, OIP believes Bill 54 was a matter of “reasonably major importance.”

Next, OIP looks at whether AMKNB’s action on Bill 54 affected a “significant number of persons.” After AMKNB voted to add Bill 54 to its Agenda⁵, it voted to

² Similarly, Rule 2-14-111(d) in the City’s Neighborhood Plan states “[o]nce filed with the city clerk, no item shall be added to the agenda for that duly noticed meeting except by a recorded two-thirds vote of all members to which the board is entitled, and 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.”

³ The City’s neighborhood boards also operate under open government principles. The website of the Honolulu Neighborhood Commission states, in part, that the “Neighborhood Board is full citizen participation in government so that the powers of the City can properly serve and advance the aspirations of its citizens. Through the Neighborhood Board system, every resident has the opportunity to participate in government decision making which affects his or her community. The system applies the concept of participatory democracy, involving communities in the decisions affecting them. It establishes an island wide network of elected neighborhood boards as communication channels, expanding and facilitating opportunities for community and government interaction.” See <http://www1.honolulu.gov/nco/nb11/index.htm> accessed December 12, 2011.

⁴ Hawaii courts have also recognized the open government provisions in the Sunshine law. See e.g., Right to Know v. City Council, 117 Haw. 1, 11 (2007), citing Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 383 (1993).

⁵ OIP notes that section 92-81(b), HRS, allows neighborhood boards to receive public input on issues not specifically noticed for consideration at a meeting. Section 92-81(b), HRS, is inapplicable here because, based on OIP’s reading of the Meeting minutes, an AMKNB member, and not a member of the public, initiated the discussion on Bill 54 at the Meeting. Even if section 92-81(b), HRS, did apply to allow AMKNB to add Bill 54 to its Agenda, section 92-81(c), HRS, requires that when a matter is raised as part of the public

support Bill 54 which was being considered by the City Council at the time. The AMKNB did not have authority, as the City Council did, to pass Bill 54 as a law. Thus, it may be argued that the action taken by AMKNB, i.e., voting to support a bill of the City Council, would not affect a significant number of persons because AMKNB had no authority to act as a law making body. However, because the Sunshine Law must be liberally interpreted, OIP does not believe that the effect of an action taken on an agenda item can be measured solely by looking to the distinct issue presented for deliberation and decision at a particular meeting, or the consequences of the action taken on the item viewed in isolation. OIP Op. Ltr. No. 06-05 at 4. Rather, the item's importance and the potential consequence of action taken on it must be viewed relative to the larger context in which it occurs. Id.

The AMKNB's support of Bill 54 was on behalf of its constituency. In determining how many persons must be affected for action on a matter to "affect a significant number of persons," OIP generally advises that a board's constituency is highly relevant to the determination. The AMKNB's constituency includes all residents within its district. OIP takes it as given that the great majority, if not all, of those residents use City public property and parks. In addition, the fact that AMKNB supported Bill 54 may have been taken into consideration by the City Council during its discussions on Bill 54. Bill 54 affects all users of public parks, sidewalks, and other property within City limits. Thus, the impact of AMKNB's support of Bill 54 must be measured by the significance the City Council's action. Considering all relevant facts, OIP believes that AMKNB's action on Bill 54 was an issue affecting a significant number of persons. OIP therefore concludes that Bill 54 was of reasonably major importance and that action thereon by the AMKNB would affect a significant number of persons. Consequently, OIP is of the opinion that AMKNB acted in violation of section 92-7(d), HRS, when it voted at its Meeting to add Bill 54 to its Agenda.

OIP notes that, with a few exceptions, boards subject to the Sunshine Law all face dilemmas when they seek to take action on matters that are pending before the State legislature or county councils. These legislative bodies often have different or shorter notice deadlines than boards do under the Sunshine Law. The AMKNB Chair's letter to OIP stated that the reason Bill 54 was added to the Agenda during the Meeting was because "[i]nformation on Bill 54 was not available at the time for setting the agenda."⁶ The Sunshine Law contains a provision allowing boards to

input agenda under section 92-81(b), HRS, the neighborhood board shall not make a decision relating to the matter except at a later meeting when the matter has been properly placed on an agenda. In this case, AMKNB took action on Bill 54 after adding it to its Agenda at the same Meeting.

⁶ The website of the City Council indicates that Bill 54 passed first reading on October 5, 2011. See [http://www4.honolulu.gov/docushare/dsweb/Get/Document-117324/BILL054\(11\).htm](http://www4.honolulu.gov/docushare/dsweb/Get/Document-117324/BILL054(11).htm) accessed December 12, 2011. It is not clear on what day

hold emergency meetings in order to act upon unanticipated events within a shorter notice period. The AMKND could have considered holding an emergency meeting under section 92-8(b), HRS, if it did not have time to include Bill 54 on an agenda of a regular meeting.

The AMKNB held another regular meeting on November 22, 2011. The City Council's final hearing on Bill 54 was on December 7, 2011. Therefore, it appears that the AMKNB could have placed Bill 54 on its November 22, 2011, agenda and still have had time to take action before the City Council's final hearing on Bill 54.

The AMKNB Chair's letter to OIP also stated that Bill 54 was "public knowledge" at the time it was added to the Agenda. Although Bill 54 was widely reported on by the media, the fact that a matter to be addressed by a board is "public knowledge" does not excuse compliance with the Sunshine Law's notice provisions in section 92-7, HRS.

Finally, AMKNB's Chair stated that Requester did not file a complaint with the Neighborhood Commission Office (NCO). Normally, complaints against neighborhood boards are taken up by the NCO first, as it has primary jurisdiction over neighborhood boards. Since June of this year, it has been OIP's policy to ask new requesters to make a complaint regarding a neighborhood board to the NCO first for an initial review and factual determination, after which the NCO may ask OIP for its opinion on Sunshine Law issues raised by the complaint. In this instance, OIP received and accepted this request for an opinion directly from Requester, which was contrary to OIP's new policy. However, because the error in opening a file was OIP's and not Requester's, rather than closing the file OIP has proceeded to give its opinion by this memorandum. Future complaints regarding neighborhood boards will be referred to the NCO, in accordance with OIP's policy.

Right to Bring Suit to Enforce Sunshine Law and to Void Board Action

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. HRS § 92-12. The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. Id.

Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11. A suit to void any final action must be commenced within ninety days of the action. Id.

AMKND's agenda was filed, but it must have been filed at least six calendar days prior to its October 25, 2011 Meeting, as required by section 92-7(b), HRS.

OFFICE OF INFORMATION PRACTICES



Carlotta Amerino
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director

cc: Mr. Larry Hurst, Chair, Ala Moana-Kakaako Neighborhood Board

Exhibit "27"



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GOVERNOR

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OFFICE OF INFORMATION PRACTICES

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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR), and to resolve complaints concerning compliance with or applicability of the Sunshine Law, Part I of chapter 92, HRS, pursuant to sections 92-1.5 and 92F 42(18), HRS, and chapter 2-73, HAR. This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions or decisions but is binding upon the parties involved.

MEMORANDUM OPINION

Requester: Mr. John Thatcher
Board: State Public Charter School Commission
Date: January 11, 2024
Subject: Executive Session Minutes (U APPEAL 21-31)

Request for Decision and for Investigation

Requester seeks a decision as to whether the State Public Charter School Commission (PCSC) properly denied his request for records under Part II of the UIPA.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's email to OIP dated May 27, 2021; Requester's email to OIP dated June 9, 2021, with attached materials; Requester's email to OIP dated June 28, 2021, with attached materials; the Department of the Attorney General's (AG) letter to OIP, on behalf of PCSC, dated June 30, 2021, with enclosures including *in camera* records; and PCSC's email to OIP dated September 28, 2023, with enclosed *in camera* records.

Decision

PCSC denied access to the executive meeting minutes (Executive Minutes) for its meeting on May 27, 2021 (Meeting). To decide whether this denial was justified under the UIPA, OIP must first determine whether PCSC was properly in an executive meeting under the Sunshine Law. OIP finds that PCSC followed the steps required in section 92-4, HRS, to convene its executive sessions at the Meeting and that the executive sessions consisted of discussions between PCSC and its attorney on questions and issues pertaining to PCSC's powers, duties, privileges, immunities, and liabilities regarding a properly noticed agenda item. HRS §§ 92-4, 92-5(a)(4) (2012). OIP therefore concludes that PCSC was properly in executive session for the discussions reflected in the minutes for its executive sessions.

OIP further finds that disclosure of the executive session discussion for agenda Item VII between PCSC and its attorney, as reflected in the Executive Minutes, would frustrate the purpose of the executive session, but that other portions of the Executive Minutes may be disclosed without frustrating the purpose of the executive sessions. Specifically, OIP concludes that PCSC may withhold the contents of the discussion that took place in the executive session for agenda Item VII between PCSC and its attorney as described in section I.C., *infra*, but must disclose portions of the Executive Minutes that set out the heading, the persons present or excused, the agenda items being discussed and executive session purposes, and the portions of the Executive Minutes regarding return to open session, as none of those portions reveal attorney-client communications. HRS §§ 92-9(b), 92F-13(3), (4) (2012 and Supp. 2022). However, OIP finds that the description of the executive session discussion for agenda Item IV reflected in the Executive Minutes was so general and non-specific that disclosure would not frustrate the purpose of the executive session. Therefore, OIP concludes that PCSC must disclose the portion of the Executive Minutes concerning agenda Item IV.

OIP also finds, *sua sponte*, that the Executive Minutes do not convey a true reflection of the matters discussed and the views of the participants, and thus concludes that they are not sufficiently detailed to meet the Sunshine Law's requirements for what written minutes must include. HRS § 92-9(a). OIP concludes that to correct this Sunshine Law violation, PCSC must prepare sets of minutes that reflect the matters discussed and the views of the participants and convey the substance of the matters discussed in the executive sessions. *Id.*

Statement of Reasons for Decision

I. Facts

Agenda Item III for the Meeting was a presentation on "the Petition for Proposed Rule Making, Pursuant to Hawaii Administrative Rules (HAR) Title 8, Chapter 503." After discussing Item III, PCSC then voted to enter an executive session,

which was listed as agenda Item IV. The agenda's stated purpose for the executive session was for PCSC to consult its attorney on "questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities" regarding the proposed rulemaking listed as Item III. The executive session lasted approximately 23 minutes. PCSC then reconvened in public session and, as agenda Item V, continued discussion of the proposed rule amendment before voting on whether to take action on the matter.

Agenda Item VI was a presentation on the "Attorney General Review and Revisions of the State Public Charter School Contract 4.0." After discussing Item VI, PCSC then voted to enter a second executive session, which was listed as agenda Item VII. The agenda's stated purpose for this executive session was to allow PCSC to consult with its attorney on "questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities" regarding the proposed contract revisions presented in Item VI. The second executive session lasted approximately 42 minutes. PCSC then reconvened in public session and, as agenda Item VIII, continued discussion of the proposed contract revisions before voting on whether to take action on the matter.

On May 28, 2021, Requester made a written request to PCSC for a copy of a video recording or transcript of the Meeting, including both executive sessions. In its Notice to Requester dated June 9, 2021, PCSC denied Requester's record request, citing section 92-5(a)(4), HRS, and asserting that both executive sessions were entirely devoted to discussion with its counsel on matters pertaining to PCSC's powers, duties, privileges, immunities, and liabilities. Requester appealed the denial to OIP.

II. Both the UIPA and The Sunshine Law Address When Disclosure of Executive Meeting Minutes is Required

The UIPA generally provides that government records are public unless an exception to disclosure applies. HRS § 92F-11 (2012 and Supp. 2022). The UIPA also generally mandates the disclosure of "[m]inutes of all agency meetings required to be public." HRS § 92F-12(a)(7) (2012). This mandate does not apply to the minutes of executive meetings that are properly closed to the public. OIP Op. Ltr. No. 06-07 at 3. For executive meetings properly held under the Sunshine Law, a board may withhold executive minutes when an exception in section 92F-13, HRS, applies. Two exceptions potentially apply here. First, the UIPA's exception for records that must be confidential to "avoid the frustration of a legitimate government function" authorizes a board to withhold executive minutes when disclosure would defeat the purpose of holding the meeting closed to the public. HRS § 92F-13(3). Second, the UIPA's exception for government records that are protected from disclosure pursuant to State or federal law authorizes a board to withhold executive session minutes based on the Sunshine Law provision protecting

executive meeting minutes “so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.” HRS §§ 92-9(b) and 92F-13(4).

Regarding the question of whether the minutes of an executive session may be withheld, OIP has previously explained that if an

Executive Session was properly closed to the public under the Sunshine Law, the applicable disclosure standard is the Sunshine Law’s statutory standard for when executive session minutes must be disclosed. See HRS § 92-9 (allowing minutes of executive session to be withheld so long as disclosure would frustrate purpose of executive session). If the Executive Session should have been held as an open meeting, then the UIPA requires [minutes of it] to be made public upon request. See HRS § 92F-12(a)(15) (2012) (UIPA requires disclosure of transcript of a proceeding open to the public).

OIP Op. Ltr. No. F20-01 at 5. Additionally, OIP explained the analysis set out by the Hawaii Supreme Court (Court) regarding the application and scope of the attorney-consultation executive session purpose, which set forth

the steps to be followed in determining whether a board properly discussed an item in executive session, and the standards to apply in determining whether minutes of an executive session must be publicly disclosed. CBLC v. Honolulu, 144 Haw. 466, 445 P.3d 47 (Haw. 2019). . . . Having entered into a closed session, however, the board is obligated by the Sunshine Law to limit its discussion to topics “directly related to” its purpose for closing the meeting. Id. at 487, 445 P.3d 68, citing HRS § 92-5(b). A determination of whether a board’s discussion was properly closed to the public thus requires first examining whether the topic to be discussed fell within the scope of the claimed purpose or purposes for the executive session, and then whether and to what extent the board’s discussion and deliberation of that topic were “directly related to” the executive session’s purpose or purposes. Id. at 486-87, 445 P.3d at 67-68; see also HRS §§ 92-4, -5.

The Court also noted that disclosure of executive session minutes is required either where the discussion reflected in those minutes should have been held in open session, or where the discussion was properly held in closed session but release of the minutes would no longer frustrate the purpose of the executive session. CBLC v. Honolulu at 489-90, 445 P.3d at 70-71.

OIP Op. Ltr. No. F20-01 at 10 (footnotes omitted), citing Civil Beat Law Center for the Public Interest, Inc. v. City and County of Honolulu, 144 Haw. 466, 445 P.3d 47 (2019) (CBLC v. Honolulu).

Thus, in order to determine whether the Executive Minutes must be disclosed under the UIPA, OIP must first determine whether PCSC was properly in executive session. If PCSC was properly in executive session, OIP must then determine to what extent the discussions fell within the scope of the claimed executive session purposes and whether any part of the discussion within that scope may be disclosed on the basis that its disclosure would no longer frustrate the purpose of the executive session.

III. PCSC had a Proper Basis to Convene the Executive Sessions and Properly Voted to Enter Executive Sessions

Boards subject to the Sunshine Law must generally hold meetings open to the public. HRS § 92-3 (2012). However, for certain limited purposes, a board may hold an executive meeting closed to the public. HRS § 92-4 (2012).¹ The Sunshine Law provides a limited list of authorized purposes for which a board may hold an executive session closed to the public in section 92-5(a), HRS, and a board must vote to enter an executive session in accordance with section 92-4, HRS. Upon review of the public meeting minutes for the 2021 Meeting and *in camera* review of the Minutes, OIP finds that PCSC followed the procedural requirements set out in section 92-4, HRS, when it voted to enter both executive sessions.²

The authorized purpose PCSC relied upon for holding a closed executive session was section 92-5(a)(4), HRS, which allows a board to go into executive session to “consult with the board’s attorney on questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities.” The Court has noted that the

¹ Section 92-4, HRS, was amended by Act 19, which was enacted on April 19, 2023, and effective July 1, 2023. Act 19 amended section 92-4, HRS, by retaining the statute’s original language in a new section (a), and creating a new subsection (b), which now requires that any discussion or final action taken by a board in an executive meeting shall be reported to the public when the board reconvenes in the open meeting at which the executive meeting is held; provided that the report need not defeat the purpose of holding the executive session. PCSC should bear in mind that with the passage of Act 19 it is now required to provide a summary of every executive session when it returns to the public portion of the meeting. Because the Meeting took place before Act 19 became effective, OIP will only be citing to the law as it read at the time of the Meeting.

² Section 92-4, HRS, as it read in 2021, stated that a board “may hold an executive meeting closed to the public upon an affirmative vote, taken at an open meeting, of two-thirds of the members present; provided that the affirmative vote constitutes a majority of the members to which the board is entitled.” PCSC is entitled to nine members. HRS § 302D-3(c). According to the minutes, eight members were present for the first executive session vote and all voted to enter the executive session, and seven members were present for the second executive session vote and all voted to enter the executive session. Thus, PCSC met the voting requirements in section 92-4, HRS.

Sunshine Law's attorney-consultation exception is narrower in scope than the general attorney-client privilege³ and only protects communications relating to "questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." CBLC v. Honolulu, 144 Haw. at 488, 445 P.3d at 69 (quoting HRS § 92-9(b)). The Court also recognized that a "board may need its attorney's assistance to explain the legal ramifications of various courses of conduct available to the board." Id., 144 Haw. at 489, 445 P.3d at 70 (quoting OIP Op. Ltr. No. 03-17).

Upon review of the public minutes for the Meeting and *in camera* review of the Executive Minutes, and following the standard set out in CBLC v. Honolulu, *supra*, OIP concludes that PCSC had a proper basis to convene the executive sessions to consult with its attorney in both executive sessions.

IV. Disclosure of the Minutes Would Frustrate the Purpose of the Executive Sessions

As explained in OIP Opinion Letter Number F20-01, which discussed disclosure of a transcript of an executive session,

[h]aving determined that the Executive Session was properly convened, the next questions are (1) to what extent the discussions therein fell within the scope of the claimed executive session purposes, and (2) whether any discussion that was within the scope of the claimed purpose may nonetheless be disclosed on the basis that its disclosure would no longer frustrate the purpose of the executive session.

While these are distinct questions from a Sunshine Law perspective, when examining the more limited question of whether minutes must be disclosed under the UIPA, these questions may as a practical matter be combined together to ask simply what portion, if any, of the discussion in the Transcript may be withheld because its disclosure would frustrate the purpose of the Executive Session.

OIP Op. Ltr. No. F20-01 at 11-12.

³ Pursuant to Rule 503 of the Hawaii Rules of Evidence, the general attorney-client privilege provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," where the confidential communications were made between the client and the client's attorney or their respective representatives. Rule 503(b), Hawaii Rules of Evidence (HRE), chapter 626, HRS. Under the UIPA, OIP has found that subsections 92F-13(2), (3), and (4), HRS, allow agencies to withhold records subject to the attorney-client privilege. OIP Op. Ltr. No. F14-01 at 6.

Having concluded above that PCSC properly convened the executive sessions under the Sunshine Law, OIP must now determine whether the Minutes must be disclosed as requested under the UIPA. In its response to this appeal, PCSC cited sections 92-5(a)(4) and 92-9(b), HRS, as its authority for not disclosing the Minutes. Section 92-5(a)(4), HRS, is the attorney-consultation exception permitting a board to hold an executive session closed to the public and section 92-9(b), HRS, allows a board to withhold executive minutes from the public, but only “so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.” If part of the Executive Minutes could be disclosed without frustrating the purpose of the executive session, then that portion of the minutes must be disclosed in redacted form.

The UIPA recognizes confidentiality statutes under section 92F-13(4), HRS, which allows an agency to withhold “[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure.” The Sunshine Law’s section 92-9(b), HRS, is a State law that protects minutes of executive meetings from public disclosure “so long as their publication would defeat the lawful purpose of the executive meeting.” The UIPA therefore recognizes it as a confidentiality statute and allows minutes of executive meetings to be withheld in response to a UIPA request to the extent authorized under section 92-9(b), HRS.

Section 92-9(b), HRS can also be read in conjunction with another UIPA exception that allows the withholding of executive minutes whose publication would frustrate the purpose of an executive session. Under the frustration exception of section 92F-13(3), HRS, an agency may withhold “[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.” If disclosure of executive session minutes would defeat the authorized purpose of an executive session under section 92-5(a)(4), HRS, then disclosure would also frustrate a legitimate government function under section 92F-13(3), HRS.

During the executive sessions, PCSC discussed with its Deputy Attorney General issues concerning PCSC’s powers, legal authority and liabilities with regard to the amendment request referenced in agenda Items IV and VII. From OIP’s review of the Minutes, OIP finds that the substantive portion of the discussion in the executive session does not appear to have strayed beyond “questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities.” After these discussions were finished, PCSC voted to exit the executive sessions. Therefore, OIP concludes that PCSC’s discussions with its attorney in executive session largely remained within the scope permitted under the Sunshine Law’s attorney-client exception.⁴ HRS §§ 92-9(b), 92F-13(3), -(4).

⁴ In addition to PCSC’s attorney, three members of PCSC’s staff were present in the executive session for agenda Item IV and five members of PCSC’s staff were present

However, the Minutes also reflect a minimal amount of information distinct from PCSC's discussion with its attorney, which is not covered by the attorney-consultation executive session purpose and must be disclosed as detailed below. In addition to that information, OIP must determine whether any portion of the discussions that did fall within the scope of the claimed executive session purpose must nonetheless be disclosed on the basis that they would no longer frustrate the executive session purpose.

In its response to this appeal, PCSC argued that disclosure of the Executive Minutes, which contain a summary of the topics discussed in PCSC's attorney-client communications during the executive session, would be inconsistent with PCSC's right to consult with its attorney in executive session under section 92-5(a)(4), HRS, and that the passage of time would not diminish that justification for non-disclosure of the minutes. OIP has already found that the substantive portion of the Executive Minutes kept within the purpose of the executive sessions, which was to consult with PCSC's attorney. OIP further finds that the substantive portion of the Executive Minutes reflected only topics of discussion, and not any of the questions raised, views expressed, or conclusions reached. OIP finds that, for the substantive portion of the Executive Minutes concerning agenda Item VII, even though this section of the Executive Minutes reflected only topics of discussion, the topics discussed did not obviously follow from the agenda item and the earlier public discussion, including the proposed revisions of specific sections of the contract. Disclosure would thus give insight into the questions PCSC was asking its counsel and thus reveal PCSC's legal concerns. OIP therefore finds that the purpose of the executive session would be frustrated by disclosure of the specific topics of discussion because disclosure would likely inhibit PCSC from seeking legal advice in the future. See OIP Op. Ltr. No. F14-01 at 6 (finding that confidential and privileged attorney-client communications under Rule 503, Hawaii Rules of Evidence, are protected from public disclosure under sections 92F-13(2), (3) and (4), HRS); see also County of Kauai v. Office of Information Practices, 120 Haw. 34, 200 P.3d 403 (Haw. Ct. App. 2009) (allowing the county to withhold executive session minutes due to the attorney-client privilege, and affirmed by the Court in a memorandum opinion on October 26, 2009)).⁵ OIP also finds that because the

in the executive session for agenda Item VII. OIP has previously concluded that a board is authorized to summon the board's administrative staff or other necessary individuals to attend executive meetings without waiving the executive nature of the meeting to provide administrative support for tasks such as taking of minutes of executive meetings. OIP Op. Ltr. No. 03-12 at 6 (partially overruled on other grounds by County of Kauai v. OIP, 120 Haw. 34 (2009)). Therefore, it does not appear that the presence of these staff members waived the executive nature of the meeting.

⁵ OIP recognizes OIP Opinion Letter Number F14-01 was written five years before CBLC v. Honolulu, and that the Court in CBLC v. Honolulu distinguished between

purpose of the executive session for agenda Item VII was the attorney-consultation exception, the passage of time has not diminished the need to protect the information contained in the Executive Minutes because it has not since become public, and no facts show a diminishing of the potential frustration that would result from disclosure of the Executive Minutes. Because disclosure of the content of this discussion would still frustrate the purpose of the executive session, OIP concludes that sections 92-9(b) and 92F-13(3) and (4), HRS, allow PCSC to withhold the portion of the Executive Minutes setting forth the discussions between PCSC and its attorney for agenda Item VII.

However, for the substantive portion of the Executive Minutes concerning agenda Item IV, OIP finds that the description of the topics discussed was so general and non-specific that this portion of the Executive Minutes provides no additional information that would not be obvious or obtainable from the public meeting minutes, and therefore disclosure of this portion of the Executive Minutes would not frustrate the purpose of the executive session. Therefore, OIP concludes that PCSC must disclose the portion of the Executive Minutes concerning agenda Item IV. When PCSC creates minutes that reflect the substance of PCSC's discussion of the listed topics in compliance with the Sunshine Law, as discussed in section V, the details of the actual discussion may still be withheld even though the topics could not be withheld.

OIP also finds that there are nonsubstantive portions of the Executive Minutes and, as detailed below, that disclosure of the Executive Minutes in redacted form, withholding the substantive portions and disclosing only the nonsubstantive portions, would not frustrate the purpose of the executive sessions. Specifically, the first page of the minutes for each executive session is a restatement of the people who were present at the meeting and the purpose for convening the executive session. These pages contain only information already present in the Meeting's notice or the public meeting minutes and do not reveal the substance of anything discussed in executive session. Likewise, the last paragraph on the second page of the minutes for each executive session is a statement that PCSC moved to exit the executive session, which is repeated verbatim in the public meeting minutes. Therefore, OIP concludes that PCSC must disclose these portions of the Executive Minutes to the Requester after redacting the substantive discussions between PCSC and its attorney.

the attorney-client privilege in Rule 503(b), HRE, and the attorney-consultation executive session purpose in section 92-5(a)(4), HRS, finding the latter to be narrower. OIP uses the terms interchangeably for purposes of this opinion and notes that in some situations, they are indeed interchangeable.

V. The Minutes Were Insufficiently Detailed to Meet the Sunshine Law's Requirements

Having answered the questions raised in the appeal, OIP now discusses *sua sponte* the issue of whether the Executive Minutes were sufficiently detailed to meet the Sunshine Law's requirements for the information that must be included in written minutes.

Under section 92-9, HRS, boards must keep written minutes of all meetings that "shall give a true reflection of the matters discussed at the meeting and the views of the participants."⁶ These minutes must include "[t]he substance of all matters proposed, discussed or decided." *Id.* OIP has generally advised that section 92-9, HRS, does not require a transcript of a meeting, but at least requires reflecting which board members spoke and summarizing what each member said. OIP has previously concluded that minutes must also reflect the participation of non-members in meetings, although for non-members it is "sufficient for the minutes to describe, in very general terms, the positions expressed by the non-board members." OIP Op. Ltr. No. 03-13.

The Executive Minutes list the topics discussed during the executive sessions and include a general list of who was present, but do not reflect who spoke, the positions expressed by any participant, or any of the substance of the discussion. Instead, the minutes for reflect that "Commissioners" and specified attorneys discussed a list of topics. The Executive Minutes list topics that PCSC discussed with its attorney, but do not contain any conclusions reached or any specific advice given. As such, the Executive Minutes do not give a "true reflection" of the matters discussed at the meeting and the views of the participants. OIP therefore concludes that the Executive Minutes are not in compliance with the Sunshine Law's minutes requirements. OIP recognizes that the passage of time may make it difficult to now revise the Executive Minutes; however, to comply with the Sunshine Law's minutes requirements PCSC must nonetheless, and to the best of its ability, create a new set of minutes for the executive sessions that includes the omitted information.

OIP further notes that the additional detail needed to give a true reflection of the matters discussed likely will be information that PCSC is more clearly justified in withholding to avoid frustrating the purpose of the executive session. Disclosure of

⁶ Section 92-9(a), HRS, requires written or recorded minutes to be kept of all meetings, including executive meetings. Even when executive meeting minutes are protected from disclosure, the minutes may potentially be disclosed at a later date when doing so would no longer frustrate the reason for the executive session. HRS § 92-9(b). Additionally, if portions of executive meeting minutes would not defeat the purpose of the executive meeting if disclosed, such as nonsubstantive portions of the minutes, then those portions may be disclosable. *Id.* OIP also notes section 92-9, HRS, has been amended since this appeal was opened, but those amendments do not affect this discussion on sufficiency of minutes.

rewritten minutes, however, is a separate issue from the UIPA record request already made for the existing Executive Minutes that is at issue in this appeal. PCSC would not automatically be required to provide Requester with a redacted copy of the rewritten minutes. Requester could make a new record request after the minutes are rewritten, but it is likely that PCSC would be entitled to withhold the portion of the minutes reflecting its attorney-client discussion in response to a request for the revised minutes.

Right to Bring Suit to Enforce Sunshine Law and to Void Board Action

Requester is entitled to seek assistance from the courts when Requester has been improperly denied access to a government record. HRS § 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d), (f) (2012).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. HRS § 92-12 (2012). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. Id.

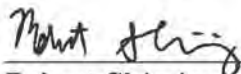
Where a final action of a board was taken in violation of the open meeting and notice requirements of the Sunshine Law, that action may be voided by the court. HRS § 92-11 (2012). A suit to void any final action must be commenced within ninety days of the action. Id.

This opinion constitutes an appealable decision under section 92F-43, HRS. A board may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43. HRS §§ 92-1.5, 92F-43 (2012). The board shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

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

OFFICE OF INFORMATION PRACTICES



Robert Shimizu
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director

Exhibit "28"



JOSH GREEN, M.D.
GOVERNOR

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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR), and to resolve complaints concerning compliance with or applicability of the Sunshine Law, Part I of chapter 92, HRS, pursuant to sections 92-1.5 and 92F 42(18), HRS, and chapter 2-73, HAR. This is a memorandum decision and will not be relied upon as precedent by OIP in the issuance of its opinions or decisions but is binding upon the parties involved.

MEMORANDUM DECISION

Requester: Mr. Steve Hirakami
Agency: State Public Charter School Commission
Date: June 30, 2023
Subject: Executive Session Minutes (U APPEAL 21-28)

Requester seeks a decision as to whether the State Public Charter School Commission (PCSC) properly denied his request for records under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email to OIP dated May 5, 2021, and attached materials; the Department of the Attorney General's (AG) email to OIP, on behalf of PCSC, dated May 27, 2021, and attached materials; and the AG's letter to OIP, on behalf of PCSC, dated May 27, 2021, and enclosed *in camera* records.

Decision

PCSC denied access to its executive meeting minutes. In order to determine whether this denial was proper, OIP must first determine whether PCSC was properly in an executive meeting under the Sunshine Law. OIP finds that PCSC properly convened its executive session in its meeting held on April 8, 2021 (April Meeting), and that the executive session consisted of a discussion between PCSC and its attorney on questions and issues pertaining to PCSC's powers, duties, privileges, immunities, and

liabilities regarding a properly noticed agenda item. HRS §§ 92-4, 92-5(a)(4) (2012). OIP therefore concludes that PCSC was properly in executive session for the discussions reflected in its executive session minutes.

OIP further finds that disclosure of the discussion between PCSC and its attorney during the executive session as contained in the minutes would frustrate the purpose of the executive session, but that some portions of the executive meeting minutes may be disclosed. Specifically, OIP concludes that PCSC may withhold the contents of the discussion that took place in the executive session between PCSC and its attorney as described in section III, *infra*, but must disclose portions of the minutes that set out the heading, the persons present or excused, the agenda item being discussed and executive session purpose, and the section of the minutes regarding returning to open session, as none of those portions would disclose attorney-client communications. HRS §§ 92-9(b), 92F-13(3), (4) (2012 and Supp. 2022).

OIP also finds, *sua sponte*, that the executive session minutes do not convey a true reflection of the matters discussed and the views of the participants, and thus concludes that they are not sufficiently detailed to meet the Sunshine Law's requirements for what written minutes must include. HRS § 92-9(a). OIP concludes that to correct this Sunshine Law violation, PCSC must prepare a set of minutes that reflect the matters discussed and the views of the participants and convey the substance of the matters discussed in the executive session. *Id.*

Statement of Reasons for Decision

I. Facts

Agenda Item VII for PCSC's April Meeting was a presentation on "the Amendment Request to Exhibit A, Educational Program of the State Public Charter School Contract for Hawaii Academy of Arts and Science Public Charter School." The item concerned a request from the Hawaii Academy of Arts and Science Public Charter School to increase enrollment for its "blended learning program." After discussing Item VII, PCSC then voted to enter an executive session, which had been listed as Item VIII of its agenda. The stated purpose of the agenda for the executive session was to consult with its attorney on "questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities" regarding the amendment request listed as Item VII. This executive session lasted approximately 18 minutes. PCSC then reconvened in public session and, as Item IX of its agenda, continued discussion of the amendment request before voting on whether to take action on the matter.

Requester made a record request dated April 8, 2021, to PCSC for a copy of the minutes of the executive session of PCSC's April Meeting (Minutes). In its Notice to Requester dated May 4, 2021, PCSC denied Requester's record request, citing section 92-5(a)(4), HRS, and asserting that the entire executive session was devoted

to discussion with its counsel on matters pertaining to PCSC's powers, duties, privileges, immunities, and liabilities. Requester appealed the denial to OIP.

II. Both the UIPA and The Sunshine Law Address When Disclosure of Executive Meeting Minutes is Required

Regarding the question of whether the minutes of an executive session may be withheld, OIP has previously explained,

[if an] Executive Session was properly closed to the public under the Sunshine Law, the applicable disclosure standard is the Sunshine Law's statutory standard for when executive session minutes must be disclosed. See HRS § 92-9 (allowing minutes of executive session to be withheld so long as disclosure would frustrate purpose of executive session). If the Executive Session should have been held as an open meeting, then the UIPA requires [minutes of it] to be made public upon request. See HRS § 92F-12(a)(15) (2012) (UIPA requires disclosure of transcript of a proceeding open to the public).

OIP Op. Ltr. No. F20-01 at 5. Additionally, OIP explained the analysis set out by the Hawaii Supreme Court (Court):

The [Court] in CBLC v. Honolulu addressed the application and scope of both the personnel-privacy and the attorney-consultation executive session purposes, the steps to be followed in determining whether a board properly discussed an item in executive session, and the standards to apply in determining whether minutes of an executive session must be publicly disclosed. CBLC v. Honolulu, 144 Haw. 466,445 P.3d 47 (Haw. 2019). The Court noted that a board's decision to "close a meeting to engage in deliberations without risking the invasion of fundamental privacy rights" is properly made "before such deliberations take place." CBLC v. Honolulu at 480, 445 P.3d 61 (emphasis in original). Having entered into a closed session, however, the board is obligated by the Sunshine Law to limit its discussion to topics "directly related to" its purpose for closing the meeting. Id. at 487, 445 P.3d 68, citing HRS § 92-5(b). A determination of whether a board's discussion was properly closed to the public thus requires first examining whether the topic to be discussed fell within the scope of the claimed purpose or purposes for the executive session, and then whether and to what extent the board's discussion and deliberation of that topic were "directly related to" the executive session's purpose or purposes. Id. at 486-87, 445 P.3d at 67-68; see also HRS §§ 92-4, -5.

The Court also noted that disclosure of executive session minutes is required either where the discussion reflected in those minutes should

have been held in open session, or where the discussion was properly held in closed session but release of the minutes would no longer frustrate the purpose of the executive session. CBLC v. Honolulu at 489-90, 445 P.3d at 70-71. In addition, the Court distinguished the question of whether an executive session was properly convened under the Sunshine Law's personnel-privacy executive session purpose, to which the standard set out in the UIPA's privacy exception is not directly applicable, from the question of whether any part of the minutes of that executive session must later be disclosed, which is properly analyzed under both the Sunshine Law and the UIPA. Id. at 490 n.18, 445 P.3d at 71 n.18.

OIP Op. Ltr. No. F20-01 at 9-10 (footnotes omitted), citing Civil Beat Law Center for the Public Interest, Inc. v. City and County of Honolulu, 144 Haw. 466, 445 P.3d 47 (2019) (CBLC v. Honolulu).

Thus, in order to determine whether the Minutes must be disclosed under the UIPA, OIP must first determine whether PCSC was properly in executive session. If the meeting was properly in executive session, OIP must then determine to what extent the discussions fell within the scope of the claimed executive session purposes and whether any part of the discussion within that scope may be disclosed on the basis that its disclosure would no longer frustrate the purpose of the executive session.

III. PCSC had a Proper Basis to Convene the Executive Session and Properly Voted to Enter Executive Session

Boards subject to the Sunshine Law must generally hold meetings open to the public. HRS § 92-3 (2012). However, for certain limited purposes, a board may hold an executive meeting closed to the public. HRS § 92-4. The Sunshine Law provides a limited list of authorized purposes for which a board may hold an executive session closed to the public in section 92-5(a), HRS, and a board must vote to enter an executive session in accordance with section 92-4, HRS. Upon review of the public meeting minutes for the April 8, 2021 meeting and *in camera* review of the Minutes, OIP finds that PCSC properly voted to enter the executive session under section 92-4, HRS.¹

¹ Section 92-4, HRS, states that a board "may hold an executive meeting closed to the public upon an affirmative vote, taken at an open meeting, of two-thirds of the members present; provided that the affirmative vote constitutes a majority of the members to which the board is entitled." The PCSC is entitled to nine members. Seven were present at the meeting at the time of the vote to enter executive session, and seven voted to enter the executive session, so PCSC met the voting requirements.

PCSC relied upon the authorized purpose for holding a closed executive session found in section 92-5(a)(4), HRS, which allows a board to go into executive session to “consult with the board’s attorney on questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities.” The Hawaii Supreme Court (Court) has noted that the Sunshine Law’s attorney-client exception is narrower in scope than the general attorney-client privilege² and only protects communications relating to “questions and issues pertaining to the board’s powers, duties, privileges, immunities, and liabilities.” CBLC v. Honolulu, 144 Haw. at 488, 445 P.3d at 69 (quoting HRS § 92-9(b)). The Court also recognized that a “board may need its attorney’s assistance to explain the legal ramifications of various courses of conduct available to the board.” Id., 144 Haw. at 489, 445 P.3d at 70 (quoting OIP Op. Ltr. No. 03-17).

Upon review of the general minutes for the April 8, 2021 meeting and *in camera* review of the Minutes, and following the standard set out in CBLC v. Honolulu, *supra*, OIP concludes that PCSC had a proper basis to convene the executive session to consult with its attorney.

IV. Disclosure of the Minutes Would Frustrate the Purpose of the Executive Session

As explained in OIP Opinion Letter Number F20-01,

[h]aving determined that the Executive Session was properly convened, the next questions are (1) to what extent the discussions therein fell within the scope of the claimed executive session purposes, and (2) whether any discussion that was within the scope of the claimed purpose may nonetheless be disclosed on the basis that its disclosure would no longer frustrate the purpose of the executive session.

While these are distinct questions from a Sunshine Law perspective, when examining the more limited question of whether minutes must be disclosed under the UIPA, these questions may as a practical matter be combined together to ask simply what portion, if any, of the discussion in the Transcript may be withheld because its disclosure would frustrate the purpose of the Executive Session.

² Pursuant to Rule 503 of the Hawaii Rules of Evidence, the general attorney-client privilege provides that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client,” where the confidential communications were made between the client and the client’s attorney or their respective representatives. Rule 503(b), Hawaii Rules of Evidence, chapter 626, HRS. Under the UIPA, OIP has found that subsections 92F-13(2), (3), and (4), HRS, allow agencies to withhold records subject to the attorney-client privilege. OIP Op. Ltr. No. F14-01 at 6.

OIP Op. Ltr. No. F20-01 at 11-12.

Thus, having concluded that PCSC properly convened the executive session under the Sunshine Law, OIP must now determine whether the Minutes must be disclosed as requested under the UIPA. The UIPA generally provides that government records are public unless an exception to disclosure applies. HRS § 92F-11 (2012 and Supp. 2022). The UIPA also generally mandates the disclosure of minutes of public meetings of government boards. See HRS § 92F-12(a)(7) (2012) (agency shall make available “[m]inutes of all agency meetings required to be public”). This mandate does not apply to the minutes of executive meetings that are properly closed to the public. See OIP Op. Ltr. No. 92-27 at 5 n.1 (finding that the phrase “required to be public” modifies “agency meetings” rather than “minutes”).

In its response to this appeal, PCSC cited section 92-5(a)(4), HRS, as its authority for not disclosing the Minutes. However, section 92-5(a)(4), HRS, is not a confidentiality statute and does not, in itself, permit a board to withhold records under the UIPA; section 92-5(a)(4), HRS, instead provides a Sunshine Law exception that a board may use to justify holding an executive session closed to the public.

As part of PCSC’s argument that section 92-5(a)(4), HRS, should be interpreted to imply that executive session minutes are confidential, PCSC cited section 92-9(b), HRS, which provides that minutes of the executive meeting “may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.” Unlike section 92-5(a)(4), HRS, section 92-9(b), HRS, is a confidentiality statute allowing a board to withhold records under the UIPA, but only “so long as their publication would defeat the lawful purpose of the executive meeting, but no longer.” If part of the executive meeting minutes could be disclosed without frustrating the purpose of the executive session, then that portion of the minutes must be disclosed in redacted form.

The UIPA recognizes confidentiality statutes under section 92F-13(4), HRS, which allows an agency to withhold “[g]overnment records which, pursuant to state or federal law . . . are protected from disclosure.” Because the Sunshine Law’s section 92-9(b), HRS, is a State law that protects minutes of executive meetings from disclosure “so long as their publication would defeat the lawful purpose of the executive meeting,” an agency is not required by the UIPA to disclose executive minutes if publication of the minutes would defeat the lawful purpose of the executive meeting. Additionally, OIP notes that the UIPA’s frustration exception could also be read in conjunction with section 92-9(b) to provide an additional UIPA justification to withhold executive minutes whose publication would frustrate the purpose of an executive session. Under section 92F-13(3), HRS, an agency may withhold “[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.” If

disclosure of executive session minutes would defeat the purpose of the executive session under section 92-5(a)(4), HRS, of the Sunshine Law, then disclosure would also frustrate a legitimate government function under section 92F-13(3), HRS, of the UIPA.

During the executive session PCSC discussed with its Deputy Attorney General issues concerning PCSC's powers, legal authority and liabilities with regard to the amendment request referenced in Agenda Item VIII. From OIP's review of the Minutes, OIP finds that the substantive portion of the discussion in the executive session does not appear to have strayed beyond "questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities." After this discussion was finished PCSC's Chair stated that further deliberation would take place in the public session and called for a motion to exit out of the executive session. Therefore, OIP concludes that PCSC's discussion with its attorney in executive session largely remained within the scope permitted under the Sunshine Law's attorney-client exception.³ HRS §§ 92-9(b), 92F-13(3), -(4).

However, the Minutes also reflect a minimal amount of information distinct from PCSC's discussion with its attorney, which is not covered by the attorney-client executive session purpose and must be disclosed as detailed below. In addition to that information, OIP must determine whether any of portion of the discussions that did fall within the scope of the claimed executive session purpose must nonetheless be disclosed on the basis that they would not frustrate the executive session purpose.

In its response to this appeal, PCSC argued that disclosure of the Minutes, which contain a summary of the topics discussed in PCSC's attorney-client communications during the executive session, would be inconsistent with PCSC's right to consult with its attorney under section 92-5(a)(4), HRS, and that the passage of time would not diminish that justification for non-disclosure of the minutes. OIP has already found that the substantive portion of the Minutes kept within the purpose of the executive session, which was to consult with PCSC's attorney. OIP further finds that even though the substantive portion of the Minutes reflected only topics of discussion, and not any of the questions raised, views expressed, or conclusions reached, the purpose of the executive session would nonetheless be frustrated by disclosure of even the specific topics of discussion because disclosure would reveal PCSC's legal concerns and likely inhibit PCSC from seeking legal advice in the future. See OIP Op. Ltr. No. F14-01 at 6 (finding that confidential and privileged attorney-client communications

³ In addition to PCSC's attorney, four members of PCSC's staff were present in the executive session. OIP has previously concluded that a board is authorized to summon the board's administrative staff or other necessary individuals to attend executive meetings without waiving the executive nature of the meeting to provide administrative support for tasks such as taking of minutes of executive meetings. OIP Op. Ltr. No. 03-12 at 6 (partially overruled on other grounds by County of Kauai v. OIP, 120 Haw. 34 (2009)). Therefore, it does not appear that the presence of these staff members waived the executive nature of the meeting.

under Rule 503, Hawaii Rules of Evidence, are protected from public disclosure under sections 92F-13(2), (3) and (4), HRS); see also County of Kauai v. Office of Information Practices, 120 Haw. 34, 200 P.3d 403 (Haw. Ct. App. 2009) (affirmed by Hawaii Supreme Court in memorandum opinion on October 26, 2009) (allowing the county to withhold executive session minutes due to the attorney-client privilege). OIP also finds that because the executive session purpose was the attorney-client exception, passage of time has not made the reason for nondisclosure less sensitive, and disclosure would still frustrate the purpose of the executive session. Because disclosure of the contents of this discussion would frustrate the purpose of the executive session, disclosure of the Minutes would frustrate a legitimate government function and the substantive portion of the Minutes are protected from disclosure by a state law. OIP thus concludes that sections 92-9(b) and 92F-13(3) and (4), HRS, allow PCSC to withhold the discussion between PCSC and its attorney.

However, PCSC must disclose the nonsubstantive portion of the Minutes, as OIP finds it can disclose the Minutes in redacted form without frustrating the purpose of the executive session. The first page of the Minutes is a restatement of the people who were present at the meeting and the purpose for convening the executive session. It contains only information already present in the April Meeting's agenda or the public meeting minutes, and OIP finds these portions could be disclosed without frustrating the purpose of the executive session. The first sentence of the first paragraph on the second page appears to merely reiterate that PCSC consulted with its attorney, and OIP finds PCSC could also disclose this portion without frustrating the purpose of the executive session. Likewise, OIP finds PCSC's Chair's announcement that further deliberation could be taken in the public open session and the Chair's call for a motion to exit the executive session must be disclosed as their disclosure would not frustrate the purpose of the executive session. The Minutes are two pages long and it appears that the discussion between PCSC and its attorney is contained within the remainder of the first paragraph after the first sentence and the second and third paragraphs of the second page. Therefore, OIP concludes that PCSC may redact the discussion between PCSC and its attorney and must disclose the redacted Minutes to the Requester.

V. The Minutes Were Insufficiently Detailed to Meet the Sunshine Law's Requirements

Having answered the questions raised in the appeal, OIP will now raise *sua sponte* the issue of whether the minutes were sufficiently detailed to meet the Sunshine Law's requirements for the information that must be included in written minutes.

Under section 92-9, HRS, boards must keep written minutes of all meetings that "shall give a true reflection of the matters discussed at the meeting and the views of

the participants.” HRS § 92-9.⁴ These minutes must include “[t]he substance of all matters proposed, discussed or decided.” *Id.* OIP has generally advised that section 92-9, HRS, does not require a transcript of a meeting, but at least requires reflecting which board members spoke and the gist of what each member said. OIP has previously concluded that minutes must also reflect the participation of non-members in meetings, although for non-members it is “sufficient for the minutes to describe, in very general terms, the positions expressed by the non-board members.” OIP Op. Ltr. No. 03-13.

The Minutes list the topics discussed during the executive session and include a general list of who is present, but do not reflect the positions expressed by any participant in that discussion or any of the substance of the discussion. Instead, the Minutes reflect that “Commissioners” and specified attorneys discussed a list of topics. The Minutes list issues and concerns that PCSC discussed with its attorney, but do not contain any conclusions reached or any specific advice given. As such, the Minutes do not appear to give a “true reflection” of the matters discussed at the meeting and the views of the participants. OIP therefore concludes that the Minutes are not in compliance with the Sunshine Law’s minutes requirement and directs PCSC to create a new set of minutes for the executive session that includes the omitted information, to the best of PCSC’s ability.

OIP further notes that with greater details provided, PCSC would likely be more clearly justified in withholding the contents of the rewritten minutes. Disclosure of rewritten minutes, however, is a separate issue from the UIPA record request already made in this case. PCSC would not automatically be required to provide Requester with a redacted copy of the rewritten minutes. Requester could make a new record request after the minutes are rewritten, but it is likely that PCSC would still be entitled to withhold the portion of the minutes reflecting its attorney-client discussion in response to a request for the revised minutes.

Right to Bring Suit

Requester is entitled to seek assistance from the courts when Requester has been improperly denied access to a government record. HRS § 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney’s fees and costs. HRS §§ 92F-15(d), (f) (2012).

⁴ Section 92-9(a), HRS, requires written or recorded minutes to be kept of all meetings, including executive meetings. Even when executive meeting minutes are protected from disclosure, the minutes may potentially be disclosed at a later date when doing so would no longer frustrate the reason for the executive session. HRS § 92-9(b). Additionally, nonsubstantive portions of executive meeting minutes may be disclosable.

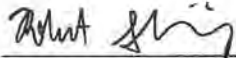
For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This decision constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

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

OFFICE OF INFORMATION PRACTICES



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APPROVED:



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Director