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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PUBLIC FIRST LAW CENTER,

Plaintiff,

vs.

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

Defendants.

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

MOTION FOR PARTIAL SUMMARY
JUDGMENT ON COUNTS X - XIV;
MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT;
DECLARATION OF COUNSEL;
EXHIBITS "1" - "21"; NOTICE OF
HEARING; and CERTIFICATE OF
SERVICE

JUDGE: Honorable Jordon J. Kimura
TRIAL DATE: None

HEARING MOTION

HEARING DATE: November 25, 2024

HEARING TIME: 9:00 a.m.

MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS X - XIV

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



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

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

(a) ADC violated the Sunshine Law by:

- (1) Forming unauthorized committees of three members to evaluate the ADC Executive Director's annual performance, in violation of HRS §§ 92-2.5 and -3 (**Count X**);
- (2) Evaluating the Executive Director's performance for fiscal years 2020-2021 and 2021-2022 entirely in executive session, in violation of HRS §§ 92-3, -4, and -5 (**Count XI**);
- (3) Deliberating on the Hiring PIG's recommendations, interviewing candidates, evaluating candidate qualifications and fitness, discussing the ADC Executive Director's salary, and selecting the next ADC Executive Director entirely in executive session on July 20 and August 8, in violation of HRS §§ 92-3, -4, and -5 (**Count XII**);
- (4) Failing to dissolve the Hiring PIG after it presented a report to the ADC Board, deliberating and taking action on the Hiring PIG's report at the same meeting at which the report was presented to the ADC Board, in violation of HRS §§ 92-2.5 and -3 (**Count XIII**); and

(b) OIP Opinion Letter No. F24-03 is "palpably erroneous" to the extent it held the ADC Board properly conducted an executive session on August 8, 2023 (**Count XIV**).

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

/s/ Benjamin M. Creps
ROBERT BRIAN BLACK
BENJAMIN M. CREPS
Attorney for Plaintiff Public First Law Center

¹ Public First reserves its requests for injunctive and other relief. By separate motion, Public First moves for partial summary judgment on its declaratory claims against Defendant Defender Council.

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MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT

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Rules

HRE 201 4

Under the Sunshine Law, ADC Board meetings must be open *by default*. Closed sessions must be narrow and purposeful. *E.g.*, HRS § 92-1(2), (3) (“The provisions requiring open meetings shall be liberally construed” and “The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.”).

This case concerns the ADC Board’s series of closed-door sessions in 2022 and 2023 to evaluate the performance of then-Executive Director James Nakatani and subsequently hire his successor. By excluding the public, the ADC Board deprived interested stakeholders and the general community of the opportunity to meaningfully observe and participate in the evaluation and hiring of a government official who has substantial discretionary authority over public monies, land, and policy.

The ADC Board largely sought to justify this excessive secrecy by invoking the personnel-privacy exemption because the meetings concerned the hire or evaluation of a government official.² HRS § 92-5(a)(2). But the ADC Board ignored the necessary condition, as the Hawai`i Supreme Court explained in 2019, that closure is permitted in such personnel-related meetings only where “matters affecting privacy will be involved.” *Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City & County of Honolulu (CLBC)*, 144 Hawai`i 466, 479, 445 P.3d 47, 60 (2019). As the supreme court held, only discussions of personnel matters that “directly relate” to a *constitutionally protected privacy interest* justify a closed session. *Id.* at 478-79, 445 P.3d at 59-60. Otherwise, **“personnel matters should presumptively be discussed in an open meeting.”** *Id.*

² HRS § 92-5(a)(2) provides:

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

...

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

Summary judgment is warranted. The material facts are matters of public record and cannot be genuinely disputed. The relevant law is clear. Accordingly, Public First respectfully asks this Court to enter an order declaring: (1) the ADC Board violated the Sunshine Law in the various ways outlined below, and (2) the Office of Information Practices' (OIP) Opinion Letter No. F24-03 is palpably erroneous to the extent it held that the ADC Board properly conducted an executive session on August 8, 2023.³

I. Legal Standards

A. Summary Judgment

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Hawai'i 92, 104, 176 P.3d 91, 103 (2008). When the non-moving party has the burden of proof at trial, summary judgment is proper on a showing that the non-moving party cannot meet its burden. *Thomas v. Kidani*, 126 Hawai'i 125, 130, 267 P.3d 1230, 1235 (2011).

B. Sunshine Law

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

³ Notwithstanding the Hawai'i Supreme Court's explanation of the relevant standards and the plain language of HRS § 92-5(a)(2), OIP held that a secret hiring process is permitted for any government official because candidates for government employment have a statutory (not constitutional) privacy interest under the public records law. OIP Op. No. F24-03 at 22-23. This opinion – remarkable in its disregard of *CBLC* – is "palpably erroneous."

exceptions to the open meeting requirements shall be strictly construed against closed meetings.” *Id.*

“Every meeting of all boards shall be open to the public and all persons shall be permitted to attend any meeting unless otherwise provided in the state constitution or as closed pursuant to sections 92-4 and 92-5[.]” HRS § 92-3. “Boards should keep in mind the Sunshine Law’s policy of openness and should not enter executive meetings unless necessary.” *CBLC*, 144 Hawai`i at 477, 445 P.3d at 58. “If board members misconstrue the Sunshine Law and take action based on these misconceptions, their conduct undermines the intent of the Sunshine Law and impairs the public’s ‘right to know.’” *Id.*

II. Undisputed Facts

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

ADC has unique powers, engages in extensive public land acquisition and management activities, and receives significant amounts of public funding. The Legislature created ADC in 1994 as “a vehicle and process to make optimal use of agricultural assets for the economic, environmental, and social benefit of the people of Hawai`i.” 1994 Haw. Sess. Laws Act 264; *accord* HRS § 163D-1. It is “a public corporation” to administer “an aggressive and dynamic agribusiness development program.” *Id.* The Legislature tasked the ADC with facilitating “the transition of agricultural infrastructure from plantation operations into other agricultural enterprises” and spearheading an “agricultural industry evolution.” *Id.*

The ADC is a powerful and unique “public agency on steroids.” Decl. of Benjamin M. Creps, dated October 23, 2024 (Creps Decl.) Ex. 1 at 12.⁴ The Legislature granted ADC “extraordinary powers” and “exemptions unique in Hawai`i state government that afford the corporation unrivaled flexibility.” *Id.* at 33.

Among other things, ADC is statutorily authorized to acquire, own, and sell land; lease or sell its lands to agricultural enterprises and farmers without having to go through a public auction process; invest in enterprises engaged in agricultural crop development, development of

⁴ Pinpoint citations to “Dkt.” entries refer to the corresponding page of the PDF.

new value-added crops, and enhancement of existing agricultural commodities; issue revenue bonds to finance acquisitions; create subsidiaries; and even reorganize itself as a non-profit organization.

...

[T]hose powers allow ADC to operate more like a business than a state agency (see 'A Public Agency on Steroids' on page 12) and give the corporation the ability to, among other things, partner with private organizations, provide options to purchase its lands, directly invest in organizations that are developing new agricultural commodities for export, create subsidiaries, and even re-form itself into a non-profit organization.

Id. at 2, 11.

ADC is exempt from significant oversight and regulatory regimes, like "public land trust regulations," which allows ADC to avoid "public auctions for property dispositions." *Id.* at 12; *see also*, HRS §§ 163D-6(b)(3), 163D-16(a). ADC is also exempt "from Public Utilities Commission regulations" and "civil service laws." Creps Decl. Ex. 1 at 12; *e.g.*, HRS §§ 163D-3(d), (h), 163D-6(b).

The ADC today manages and controls thousands of acres of State land and has extensively exercised its power to acquire and dispose of public land. Dkt. 1 at 9 ¶¶ 61-63; Dkt. 23 at 12 ¶¶ 61-63; HRS § 163D-4 (powers); Thomas Heaton, *Hawai'i's Ag Corp. is Putting Up Remainder of its Land For Lease*, Honolulu Civil Beat, Oct. 6, 2023 ("Just over 3,000 acres of unused land owned by the Agribusiness Development Corp. will soon be up for lease. . . . ADC's land portfolio is . . . just over 16,000 acres of its 22,000-acre portfolio in the state.");⁵ Creps Decl. Ex. 1 at 48.

ADC's staff and operations are funded by taxpayers. Dkt. 1 at 9 ¶¶ 61-63; Dkt. 23 at 12 ¶¶ 61-63. The ADC Executive Director has a salary close to \$150,000. Creps Decl. Ex. 17 [8/8/23 exec. sess. minutes] at 32. "In recent years, the Legislature has appropriated more than a quarter of \$1 billion to the ADC." Stewart Yerton, *Auditor:*

⁵ This Court may take judicial notice of facts reported by newspapers. HRE 201(b) (court may take judicial notice of facts not subject to reasonable dispute that are generally known within Hawai'i); *In re Pioneer Mill Co.*, 53 Haw. 496, 497 n.1, 497 P.2d 549, 551 n.1 (1972) (taking judicial notice that a land court judge had announced his candidacy for public office, based on newspaper articles submitted by the parties). All cited news articles are compiled and attached as Exhibit 2.

State Agriculture Agency Is Failing To Fulfill Mission, Honolulu Civil Beat, Jan. 14, 2021; see also Teresa Dawson, *Agribusiness Agency Explains Reasons Behind Slow Progress in Utilizing Lands*, Env't Haw., Mar. 2021 ("Over the past several years, the ADC has spent \$81,737,925 in legislatively appropriated funds to acquire 3,752 acres in Central O`ahu[.]").

The ADC Executive Director is responsible for the "day-to-day operations" of the ADC and tasked with executing board policies, supervising staff, and administering "the corporation's programs, projects, and affairs." Creps Decl. Ex. 13 at 8-9; *accord id.* Ex. 19 [E.D. job posting]. The ADC Executive Director has the authority to, among other things, approve "transactions involving purchasing, property management, budgeting, accounting, travel, insurance claims, and the issuance of manuals of administrative procedure[.]" *Id.* Ex. 19. The ADC Board sets the ADC Executive Director's salary and is required by statute to review the ADC Executive Director's performance at least annually "based on annual goals, performance measures, and other relevant criteria." HRS § 163D-3(d), (f); *accord* Dkt. 1 at 10 ¶¶ 64, 68; Dkt. 23 at 12-13 ¶¶ 64, 68.

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

ADC's work is a matter of significant public concern. In January 2021, the State Auditor released an Audit of ADC pursuant to Act 28 (Audit). The Audit concluded that ADC had made no real progress toward its central purpose: "ADC has done little – if anything – to facilitate the development of agricultural enterprises to replace the economic loss created by the demise of the sugar and pineapple industries." Creps Decl. Ex. 1 at 2, 33. "[N]otwithstanding the unique powers and exemptions conferred by the Legislature, ADC is using few of them – and none to develop agricultural enterprises to fill the economic void created by the plantation closures." *Id.* at 10. The State Auditor "found an organization unaware of its statutory purpose . . . and operating with little direction from or involvement by its Board of Directors." *Id.*; see also *id.* at 26-33 ("ADC Board's lack of oversight allows the Executive Director to operate with little to no accountability.").

The public took note of the Audit's findings. *E.g.*, T.J. Cuaresma, *Small Farmers Deserve Better Support than the ADC Has Provided*, Honolulu Civil Beat, May 12, 2021 (criticizing, among other things, ADC's lack of transparency regarding land inventory); Yerton, *Auditor* (despite appropriating about \$23.4 million for operations and \$238 million for capital investments, "it has been difficult at times for lawmakers to determine where that money had gone and how well the corporation had been fulfilling its duties."); Blaze Lovell, *Agribusiness Agency Pleads for More Time to Deal with Longstanding Issues*, Honolulu Civil Beat, Sept. 21, 2021 ("The state has paid a high cost for ADC's past inactions, and we continue to pay.") (citing Audit); Editorial Board, *Hawai'i's Agriculture Development Agency Needs to be a Priority for Lawmakers*, Honolulu Civil Beat, Apr. 16, 2021 ("The Legislature created the ADC, gave it significant power over Hawai'i's destiny and has now given it over a quarter of a billion dollars. Just when exactly will it ensure that the ADC is part of a vibrant agricultural future for the islands?").

The Legislature took note, too. After the release of the ADC audit, the Hawai'i House of Representatives convened a committee to investigate the findings of the Audit, commencing public hearings in September 2021. Compl. ¶ 77; Ans. ¶ 77; *see also* Jolanie Martinez, *Following critical audit, lawmakers to begin investigation of agribusiness agency*, Haw. News Now, July 13, 2021. The Legislature introduced bills to address issues at the ADC, eliciting extensive public testimony referencing the Audit. *E.g.*, Ex. 20 [Testimony before Senate Comm. on Ways & Means (Feb. 22, 2022) on S.B. 2473 S.D.1 https://www.capitol.hawaii.gov/sessions/Session2022/Testimony/SB2473_SD1_TESTIMONY_WAM_02-22-22_.PDF]. Act 219 (2022) substantially amended the ADC's statutory chapter to address public concerns. The Legislature amended the "focus, scope, responsibilities, and powers" of the ADC, amended the "requirements and responsibilities" of the ADC Board, and statutorily-required the ADC Board to annually review the performance of the ADC Executive Director and make a record of its delegations of authority to the ADC Executive Director. 2022 Haw. Sess. Laws Act 219.

C. The ADC Board repeatedly used the personnel-privacy exemption to evaluate Executive Director Nakatani's performance for Fiscal Years 2021 and 2022 in executive session and to withhold the evaluations from the public.

The ADC Board met five times in 2022 to discuss and deliberate on the fiscal year 2020-2021 annual performance evaluation of Executive Director James Nakatani.⁶ The evaluation was conducted by a committee (comprised of three members of the ADC Board) outside of public meetings. The committee reported its findings to the full ADC Board in executive session; the ADC Board deliberated on the evaluation in executive session; and the evaluation has never been made public. At all relevant times, the ADC Board invoked the personnel privacy exemption under HRS § 92-5(a)(2) to justify its exclusion of the public.

⁶ Those 2022 meetings occurred:

- January 26: The ADC Board assigned three members to "Standing Administration Committee" (Standing Committee) to conduct the annual performance evaluation of the Executive Director. Creps Decl. Ex. 3 at 13.
- June 15: The Standing Committee reported to the ADC Board that it had interviewed Executive Director Nakatani, planned to conduct more interviews, and would report back to the ADC Board. *Id.* Ex. 4 at 7-8.
- August 17: The Standing Committee orally presented its findings to the ADC Board entirely in closed session and only announced in open session that "the vote will be taken up at the next meeting." *Id.* Ex. 5 at 16.
- September 21: The ADC Board discussed and deliberated on the annual performance evaluation in private. When it reconvened in open session, the ADC Board announced that it "deferred the acceptance of the annual performance evaluation of the ADC Executive Director James Nakatani until the next meeting." *Id.* Ex. 6 at 9.
- November 2: the ADC Board again met in closed session to discuss the annual performance evaluation. *Id.* Ex. 7 at 9-10. When it reconvened in open session, the ADC Board approved the "updated October 12, 2022 annual performance evaluation" without any discussion. *Id.* at 10.

The ADC Board met three times in 2023 to discuss the fiscal year 2021-2022 annual performance evaluation of Executive Director Nakatani.⁷ The evaluation was conducted by a committee (comprised of three members of the ADC Board) outside of public meetings. The committee reported its findings to the full ADC Board in executive session; the ADC Board deliberated on the evaluation in executive session; and the evaluation has never been made public. At all relevant times, the ADC Board invoked the personnel privacy exemption under HRS § 92-5(a)(2) to justify its exclusion of the public.

D. The ADC Board repeatedly used the personnel-privacy exemption to hire and select a new Executive Director.

Between May and October 2023—following the sudden death of Executive Director Nakatani on April 23—the ADC Board held five meetings to select a new Executive Director.⁸ Throughout the selection process, the ADC Board kept candidate

⁷ Those 2023 meetings occurred:

- January 25: The ADC Board established an “ad hoc” committee and appointed three members to conduct the annual performance evaluation of the Executive Director. Creps Decl. Ex. 8 at 11.
- March 16: The ADC Board met in executive session to discuss the ad hoc committee’s draft annual performance review. *Id.* Ex. 9 at 8; Ex. 10 at 1-8.
- April 20: The ADC Board met in executive session to deliberate on approval of the draft performance review of Executive Director Nakatani. When it reconvened in open session, the ADC Board Chair “called for a motion to adopt the Evaluation Committees’ report and recommendation to retain the Executive Director at his present salary,” and the ADC Board approved the report and recommendation without any discussion. *Id.* Ex. 11 at 10.

⁸ Those 2023 meetings after Executive Director Nakatani’s death occurred:

- May 30: The ADC Board formed a permitted interaction group to develop an application process, solicit and interview candidates, rank applications, and narrow the selection to two or three candidates (Hiring PIG). Creps Ex. 12 at 2-5. The ADC Board also disclosed at the May 30 meeting that “effective May 25, 2023, Chair Fred Lau (former Chair Lau) resigned from the ADC Board of Directors so he could apply for the Executive Director position.” *Id.* at 2.
- June 15: The Hiring PIG updated the ADC Board on the status of its hiring process. *Id.* Ex. 13 at 8-9. The ADC Board also stated its position that all

identities secret, interviewed them in secret, and deliberated on and selected a candidate for ADC Executive Director in secret. The ADC Board justified its closed-door hiring process by again invoking the personnel-privacy exemption.

In OIP Opinion Letter No. F24-03, OIP held – among other things – that the ADC Board’s executive sessions during the hiring of the ADC Executive Director did not violate the Sunshine Law. Ex. 21 at 20 – 23.

III. Count XI & Count XII: The ADC Board violated the Sunshine Law by evaluating Executive Director Nakatani and subsequently hiring his successor in a series of improper closed sessions.

The ADC Board violated chapter 92 in multiple respects in the course of conducting its annual performance review of Executive Director Nakatani and hiring his successor. Count XI alleges the ADC Board violated HRS §§ 92-3, -4, and -5 by evaluating the annual performance of the Executive Director in closed sessions. Dkt. 1, ¶¶ 217–227. Count XII alleges the ADC Board violated HRS §§ 92-3, -4, and -5 by hiring the new Executive Director in closed sessions. *Id.* at ¶¶ 228–241. Like the Honolulu

personnel discussions were *presumptively closed*. *Id.* at 4 - 7 (ADC Board could interview candidates and discuss their qualification during open session “only if the candidates waive their right to privacy”).

- July 20: The Hiring PIG reported to the ADC Board, including a public summary that ranked anonymous candidates. Ex. 14 at 4-5, 9-10. The ADC Board entered executive session to discuss and deliberate on the Hiring PIG’s full findings and recommendations. Ex. 15 at 1-5. When it reconvened in open session, the ADC Board effectively adopted the Hiring PIG’s recommendation – to interview the top two candidates selected by the Hiring PIG at the next meeting – but announced it would formally vote on it at the next meeting. Ex. 14 at 9-10.
- August 8: The ADC Board approved the Hiring PIG report – without discussion or publicly identifying the two recommended candidates – and entered executive session to interview the candidates, discuss salary, and deliberate on the selection for the ADC Executive Director. Ex. 16 at 2-3; Ex. 17 at 1-44. When it reconvened in open session, the ADC Board announced – without any discussion or explanation – that it had selected a specific candidate, but did not identify the person selected. Ex. 16 at 2-3.
- August 17: The ADC Board publicly identified its new Executive Director. Ex. 18 at 11-12.

Police Commission, the ADC Board ignored a necessary condition of the Sunshine Law's personnel-privacy exemption to improperly justify a series of executive sessions. There must be a legitimate expectation of privacy in the information that will be discussed by the board. The exemption does not apply simply because a board is evaluating or hiring a government official.

A. Board discussion of personnel matters is presumptively open.

Strictly construed against closed meetings, HRS § 92-5(a)(2) provides that a board “may” exclude the public “[t]o consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, *where consideration of matters affecting privacy will be involved*; provided that if the individual concerned requests an open meeting, an open meeting shall be held.” (emphasis added); accord HRS § 92-1 (rules of construction).

The Hawai`i Supreme Court left no doubt that the qualifying language of HRS § 92-5(a)(2) — “where consideration of matters affecting privacy will be involved” — means what it says. “The personnel-privacy exception requires the presence of legitimate privacy interests, and an ipse dixit claim to privacy in personnel discussions does not establish that the exception was properly invoked.” *CLBC*, 144 Hawai`i 466, 478-79, 445 P.3d 47, 59-60. “Even though a matter involves the personnel status of an employee, it does not necessarily follow that a legitimate privacy interest was impacted.” *Id.* In other words, “not all personnel discussions are exempt from the open meeting requirement.” *Id.* at 479, 445 P.3d at 60. “[U]nless ‘matters affecting privacy will be involved’ in a board’s discussion, personnel matters should presumptively be discussed in an open meeting.” *Id.* (citing HRS § 92-3).

B. Application of the personnel-privacy exemption is a two-part test: personnel matter + constitutional privacy interest.

The personnel-privacy exemption is a two-part test. *Id.* (“we construe the first and second clause in section 92-5(a)(2) as separate requirements.”). The first condition is whether the discussion concerns a specified personnel matter. “To be within the scope of the exception, discussions and deliberations about personnel must relate to ‘the

hire, evaluation, dismissal, or discipline’ of personnel, or to ‘charges brought against’ personnel.” *Id.*

The second condition is whether the discussion concerns “matters affecting privacy.” The “applicability of section 92-5(a)(2) must be determined on a case-by-case basis, as an analysis of privacy requires a specific look at the person and the information at issue.” *Id.* at 478, 445 P.3d at 59. For “matters affecting privacy” to be involved in a personnel discussion, the person at issue must have a “legitimate expectation of privacy” in the information—*i.e.*, the information must be protected by the constitutional right of privacy. *Id.* at 480-81, 445 P.3d at 61-62 (defining legitimate expectation of privacy by reference to constitutional privacy cases—*Nakano v. Matayoshi; Painting Industry v. Alm*; and *SHOPO v. SPJ*); accord *SHOPO v. City & County of Honolulu*, 149 Hawai`i 492, 511, 494 P.3d 1225, 1244 (2021) (clarifying that *CBLC* cited *SHOPO v. SPJ* “for its constitutional principles”).⁹ As *CBLC* explained: “People have a legitimate expectation of privacy in ‘highly personal and intimate’ information.”¹⁰ *Id.* at 480, 445

⁹ Although the Sunshine Law (1975) predates the constitutional right of privacy (1978), the standard for constitutional privacy derives from the same common law privacy standards that would have been understood by the Legislature in 1975. *SHOPO v. SPJ*, 83 Hawai`i 378, 398, 927 P.2d 386, 406 (1996) (citing Restatement standard: “if the matter publicized is of a kind that (a) would be regarded as highly offensive to a reasonable person, and (b) is not of legitimate concern to the public”). The underlying issue is protecting “*fundamental* privacy rights,” protected by the Constitution, not all potential privacy interests. *CBLC*, 144 Hawai`i at 480 & n.10, 445 P.3d at 61 & n.10 (emphasis added).

¹⁰ The Hawai`i Supreme Court elaborated on “highly personal and intimate information” in *SHOPO v. SPJ*, quoting from the Restatement (Second) of Torts:

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

P.3d at 61. Although “general conceptions of privacy may provide a useful template for a person’s reasonable expectations, these expectations will necessarily differ on a case-by-case basis, depending on the person and the topic of discussion.” *Id.* at 480-81, 445 P.3d at 61-62. “Some circumstances may reduce or perhaps entirely defeat the legitimacy of a person’s expectation of privacy in certain information.” *Id.* at 481, 445 P.3d at 62.

C. Closed sessions must also be “directly related” to protected information.

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

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

Not all government officials have a legitimate expectation of privacy in personnel evaluations – especially evaluations mandated by statute after a scathing public audit of the official’s performance. A performance evaluation is not highly personal and intimate information. Disclosing it would not be highly offensive to a reasonable person. And the evaluation and hiring process for government officials with

reasonable [person], there is an actionable invasion of his [or her] privacy, unless the matter is one of legitimate public interest.

83 Hawai‘i at 398, 927 P.2d at 406.

substantial fiscal and discretionary authority, such as the ADC Executive Director, is of clear legitimate concern to the public.

The ADC Board thus did not have a valid basis for the executive sessions held on August 17, September 21, and November 2, 2022 and March 16 and April 20, 2023 – where it discussed the post-Audit, statutorily-required, annual performance evaluation of Executive Director Nakatani. Creps Decl. Ex. 5, 6, 7, 9, 10, and 11. The ADC Executive Director is not a low-paid, junior government employee with purely ministerial functions. Executive Director Nakatani ran the day-to-day operations of a “public agency on steroids” with substantial fiscal and discretionary authority over thousands of acres of public lands, millions of dollars of taxpayer funds, and the direction of the State’s agricultural policy. There was also extensive public information about Executive Director Nakatani’s performance as ADC Executive Director, made public by media and the State Auditor. *CBLC*, 144 Hawai`i at 482, 445 P.3d at 63 (“a person cannot claim a legitimate privacy interest in information that has already been made public.”). The ADC Board did not conduct *any* privacy analysis – and could not justify a sweeping privacy concern – when it invoked the personnel-privacy exemption to receive the Standing Committee and Ad Hoc Committee on Executive Director Nakatani’s annual performance *entirely* in closed session. *Id.*

The ADC Board similarly did not have a valid basis for the executive sessions held on July 20 and August 8, 2023, when it discussed and deliberated on the hiring of a new ADC Executive Director. Creps Decl. Ex. 14, 15, 16, and 17. The ADC Board again did not conduct any privacy analysis – and could not justify a sweeping privacy concern – when it invoked the personnel-privacy exemption to receive the Hiring PIG’s report and to interview and discuss candidates *entirely* in closed session. *Id.* Instead, the ADC Board took the position, directly contrary to *CBLC*, that it *could not* conduct the hiring process publicly unless “the candidates waive their right to privacy.” *Id.* Ex. 13 at 4 - 7; *CBLC*, 144 Hawai`i at 477-78, 480, 445 P.3d at 58-59, 61 (“the Sunshine Law does not require closed meetings when an exception applies”; “Because the decision to close a meeting is discretionary, board members should thoughtfully weigh the interests at

stake before voting.”; “The Sunshine Law . . . does not provide automatic exceptions, as boards have the discretion to determine whether a closed meeting must be held.”).

OIP post-hoc justified the ADC’s position under a sweeping blanket heading: “A Board May Hold an Executive Session to Consider the Hire of an Officer or Employee.” Creps Decl. Ex. 21 at 20. Disregarding the holding in *CBLC*, OIP collapsed the personnel-privacy exemption into one question – whether the board would discuss the hire of a government official. *Id.* at 22-23. Because candidates for government employment have a privacy *interest* (not a legitimate expectation of privacy) under the UIPA in the application process, OIP reasoned that the entire hiring process under the Sunshine Law may be exempt. *Id.* OIP did not limit its analysis to the ADC Executive Director and did not consider any facts specific to ADC or the ADC Executive Director.

First, OIP’s decision – presumably adopted by the ADC Board – reads the privacy condition out of the exemption. *Keliipuleole v. Wilson*, 85 Hawai`i 217, 221, 941 P.2d 300, 304 (1997) (“[C]ourts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute.”). Every personnel category in HRS § 92-5(a)(2) (“hire, evaluation, dismissal, or discipline” or “charges”) corresponds to a privacy interest under the UIPA. HRS § 92F-14(b)(2) (criminal matters), (4) (personnel matters including hire, evaluation, and discipline), (5) (employment history), (8) (evaluations). If the existence of a UIPA privacy interest were sufficient to exempt a personnel discussion from the Sunshine Law, then the Hawai`i Supreme Court’s two-part analysis collapses into one question in every instance. *CBLC* required a case-by-case privacy analysis, not the sweeping categorical holding imposed by OIP. 144 Hawai`i at 478-79, 445 P.3d at 59-60 (“Even though a matter involves the personnel status of an employee, it does not necessarily follow that a legitimate privacy interest was impacted.”).

Second, OIP relies on UIPA privacy interests and specifically its prior decision in OIP Opinion Letter No. 06-07. But the Hawai`i Supreme Court already addressed those issues. *CBLC* expressly stated that the standard for a legitimate expectation of privacy is not the UIPA privacy analysis. *Id.* at 480, 445 P.3d at 61 (“we do not read the UIPA’s

balancing test into the Sunshine Law’s personnel-privacy exception.”). And as to Opinion Letter No. 06-07, the Hawai‘i Supreme Court directly distinguished it as solely concerning the disclosure of meeting minutes under the UIPA, not the Sunshine Law personnel-privacy question. *Id.* at 490 n.18, 445 P.3d at 71 n.18 (“We do not consider these opinions palpably erroneous for referring to the UIPA, as they were limited to circumstances related to the disclosure of meeting minutes. As such, these opinions do not suggest that the UIPA’s disclosure standard must be applied to determine whether an executive meeting was properly convened.” (citation omitted)).

Third, OIP completely ignores the privacy analysis outlined by the Hawai‘i Supreme Court. *CBLC* repeatedly emphasized the need for a case-by-case determination of privacy. *Id.* at 478, 481, 445 P.3d at 59, 62 (“the applicability of section 92-5(a)(2) must be determined on a case-by-case basis, as an analysis of privacy requires a specific look at the person and the information at issue”; “these expectations will necessarily differ on a case-by-case basis, depending on the person and the topic of discussion”; “reasonable expectations will depend on the person claiming the interest”; “reasonable expectations of privacy may be affected by a person’s level of discretionary and fiscal authority in government”). The supreme court stated that, even if a general expectation of privacy may exist for certain matters, that expectation may not be legitimate for certain people or depending on other circumstances. *Id.* at 481-82, 445 P.3d at 62-63 (“In *Nakano*, we recognized generally that people ‘have a legitimate expectation of privacy’ in information concerning their ‘personal financial affairs.’ However, we recognized that this expectation will be qualified in the presence of other factors”; “These factors, while not exhaustive, should be considered by government boards and commissions – and by reviewing courts – to determine whether a legitimate privacy interest is at stake.”).

Fourth, relevant at a minimum to the ADC Executive Director, *CBLC* expressly held that “reasonable expectations of privacy may be affected by a person’s level of discretionary and fiscal authority in government,” citing the UH President as an example. *Id.* at 481, 445 P.3d at 62. Neither OIP nor the ADC Board made any effort to address the issue of the ADC Executive Director’s authority within government or any

other factors that may affect a general conception of privacy around personnel matters – which was the sole basis for OIP’s justification. Instead, the ADC Board erroneously believed that the only question was whether the subject of the discussion waived any privacy interests.

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

E. The ADC Board exceeded the scope of any permissible open meeting exemptions.

Even if there were a valid basis for a *portion* of the subject executive sessions, the discussions not “directly related” to that basis were required to be openly held – but were not. *CBLC*, 144 Hawai`i at 486, 445 P.3d at 67 (“when any board discussion extends beyond the narrow confines of the specified executive meeting purpose, which purpose must be strictly construed, the board must reconvene in a public meeting to continue the discussion.”). Thus, the ADC Board violated HRS §§ 92-3, 92-4, and 92-5. *Id.* at 487, 491, 445 P.3d at 68, 72 (“If any portions of the meetings at issue exceeded the scope of any permissible exception, then this will indicate that the Commission did not comply with section 92-5(b).”; “deliberations conducted in violation of section 92-5(b) also violate the open meetings requirement under section 92-3”); HRS § 92-4 (“A meeting closed to the public shall be limited to matters exempted by section 92-5.”); HRS § 92-5 (“In no instance shall the board make a decision or deliberate toward a decision in an executive meeting on matters not directly related to the purposes specified in subsection (a).”).

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

HRS § 92-12(d) provides, “Opinions and rulings of the office of information practices shall be admissible in an action brought under this part and shall be considered as precedent unless found to be palpably erroneous.” An opinion is

“palpably erroneous” if it “is irreconcilable with the plain text and legislative intent of the statute.” *Peer News LLC v. City & Cty. of Honolulu*, 143 Hawai‘i 472, 485-86, 431 P.3d 1245, 1258-59 (2018).

For the reasons already outlined, OIP Opinion Letter No. F24-03 is palpably erroneous because it is irreconcilable with the plain text and intent of HRS § 92-5(a)(2) as interpreted by the Hawai‘i Supreme Court in *CBLC*.

V. Count X & Count XIII: The ADC Board violated the Sunshine Law by improperly using committees and a permitted interaction group to evaluate and hire the ADC Executive Director outside of public view.

Absent a statutory “permitted interaction,” more than two board members may only discuss board business in a duly noticed public meeting. HRS §§ 92-2.5(a), 92-3. Committees of a board must comply with the Sunshine Law. OIP Op. No. 06-02 at 4 (“A committee of a board (as distinguished from an investigative task force formed as a permitted interaction), however, is subject to the Sunshine Law and must comply with all of the statute’s requirements.”); OIP Op. No. 03-07 at 6 (“Failure to subject meetings of the committees to the same requirements as the parent body would allow a committee to do what the parent itself is prohibited from doing.”).

The ADC Board violated the Sunshine Law by improperly using committees to circumvent the open meetings requirements when evaluating Executive Director Nakatani. For the 2022 evaluation, the ADC Board used its Standing Administration Committee (3 members), but did not follow the Sunshine Law for meetings of that committee.¹¹ For the 2023 evaluation, the ADC Board used an Ad Hoc Committee (3 members), but did not follow the Sunshine Law for meetings of that committee.

The ADC Board may argue that, contrary to its contemporaneous discussions, it created an investigative “permitted interaction group” for each of the evaluations—the process that it adopted for hiring a new ADC Executive Director. But the ADC Board

¹¹ According to ADC, its bylaws recognized a Standing Administration Committee for the broad purpose to “review and make recommendations regarding all personnel matters requiring approval of the board of directors.” Creps Decl. Ex. 3 at 13.

also violated the investigative PIG requirements of the Sunshine Law, during both the evaluations (using committees) and the hiring process (using Hiring PIG).

An investigative PIG permits a small group of board members to interact on board business within the strict confines set by the Sunshine Law. HRS § 92-2.5(b)(1).¹² To use an investigative PIG, a board must hold three separate meetings: (1) to appoint the members and define the scope of the PIG; (2) to report the PIG's findings and recommendations; and (3) to deliberate on the PIG's report. OIP Op. No. 23-01 at 6-8. The board cannot discuss or act on the PIG's report at the second meeting. *Id.* at 7; OIP Op. No. 06-02 at 5. The investigative PIG also cannot make multiple reports to the board. OIP Op. No. 23-01 at 8-9 ("will make a single report back to its board"), 16-17 (finding that PIG automatically dissolved after it provided an update to the board on its progress). "Strictly following these procedures is necessary to prevent the board from circumventing the Sunshine Law's constraints that favor open meetings." *Id.* at 8.

Here, the Hiring PIG, Standing Committee, and Ad Hoc Committee all violated the law governing PIGs. First, the Standing Committee and Hiring PIG reported back to the ADC Board on more than one occasion, violating the requirement that it report only once. Creps Decl. Ex. 4 [6/15/22 minutes]; Ex. 13 [6/15/23 minutes]. Second, the Ad Hoc Committee and the Hiring PIG improperly discussed the investigative PIG's

¹² HRS § 92-2.5(b)(1) provided at the time:

(b) Two or more members of a board, but less than the number of members that would constitute a quorum for the board, may be assigned to:

- (1) Investigate a matter relating to board business; provided that:
 - (A) The scope of the investigation and the scope of each member's authority are defined at a meeting of the board;
 - (B) All resulting findings and recommendations are presented to the board at a meeting of the board; and
 - (C) Deliberation and decisionmaking on the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board[.]

findings and recommendations in the same meeting that the PIG made its report. *Id.* Ex. 10 [3/16/23 exec. sess. minutes] at 1 - 8 (committee presentation and ostensible board discussion of “draft evaluation report”); Ex. 9 [3/16/23 reg. sess. minutes] at 8; and Ex. 15 [7/20/23 exec. sess. minutes] at 1-5 (Hiring PIG presentation of its findings and recommendations and board discussion of same). The ADC Board even took action on the Hiring PIG’s report at the same meeting by following the recommendation to interview the top two candidates selected by the Hiring PIG and scheduling those interviews for its next meeting. Ex. 14 [7/20/23 minutes] at 4-5, 9-10.

The ADC Board cannot invoke an exception to the open meetings provision of the Sunshine Law, then disregard the precise strictures of that exception to deprive the public of its “right to know” what its government is doing through observation and participation in duly noticed public board meetings. HRS § 92-1.

CONCLUSION

Based on the foregoing, Public First respectfully asks this Court to enter an order:

(a) That ADC violated the Sunshine Law by:

- (1) Forming unauthorized committees of three members to evaluate the ADC Executive Director’s annual performance;
- (2) Evaluating the Executive Director’s performance for fiscal years 2020-2021 and 2021-2022 entirely in executive session;
- (3) Deliberating on the Hiring PIG’s recommendations, interviewing candidates, evaluating candidate qualifications and fitness, discussing the ADC Executive Director’s salary, and selecting the next ADC Executive Director entirely in executive session on July 20 and August 8;
- (4) Failing to dissolve the Hiring PIG after it presented a report to the ADC Board; and
- (5) Deliberating and engaging in decision-making on the Hiring PIG’s findings and recommendations at the same meeting at which the findings and recommendations were presented to the ADC Board; and

(b) That OIP Opinion Letter No. F24-03 is palpably erroneous to the extent it held that the ADC Board properly conducted an executive session on August 8, 2023.

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

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