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Electronically Filed
FIRST CIRCUIT
1CCV-24-0000050
20-NOV-2024
03:08 PM
Dkt. 82 MER

Attorneys for Plaintiff Public First Law Center

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

PUBLIC FIRST LAW CENTER,

Plaintiff,

vs.

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

Defendants.

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

REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT ON COUNTS
I - IX

JUDGE: Honorable Jordon J. Kimura
TRIAL DATE: None

HEARING MOTION

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



**REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY
JUDGMENT ON COUNTS I - IX**

Plaintiff Public First Law Center (Public First) submits this reply in further support of the *Motion for Partial Summary Judgment on Counts I - IX* filed October 23 as Dkt. 60, 61, 62 and in reply to the *Memorandum in Opposition* filed November 15 by Defendants Defender Council (Council), Jon. N. Ikengaga, and Board of Agribusiness Development Corporation as Dkt. 74, 75, 76, 77 (Opposition).

As a threshold matter, the Council fails to address the evidence or law for most of the Sunshine Law violations identified in the motion: (1) improperly amending the June 16, 2023 agenda in violation of HRS § 92-7, Dkt. 60 at 20-22; (2) legally insufficient meeting minutes in violation of HRS § 92-9(a), *id.* at 23-24; (3) failure to properly take public testimony in violation of HRS § 92-3, *id.* at 24-25; and (4) failure to timely post minutes in violation of HRS § 92-9(a), *id.* at 25.¹ The Council's total silence effectively concedes these obvious violations.

The only argument by the Council concerns its four executive sessions to hire the State Public Defender. A Sunshine Law board meeting to hire personnel is *presumptively open* to the public unless "consideration of matters affecting privacy will be involved." Dkt. 60 at 14-17 (discussing *Civil Beat Law Ctr. for the Pub. Interest v. City & County of Honolulu*, 144 Hawai'i 466, 445 P.3d 47 (2019) [CBLC]). "[A]n ipse dixit claim to privacy in personnel discussions does not establish that the exception was properly invoked." CBLC, 144 Hawai'i at 478-79, 445 P.3d at 59-60. Nevertheless, the Council makes no serious attempt to establish that it had a valid basis. The Council does not even mention the relevant statutory standards or CBLC.

Contrary to the Council's discussion of summary judgment procedure, the issue for this Court is legal, not factual. Was it lawful to conduct the *entirety* of the process for hiring the next State Public Defender behind closed doors? The Council's closest attempt to addressing that issue is the argument candidates for the Public Defender position "may have privacy interests to protect." Dkt. 74 at 8. Vague ipse dixit privacy

¹ Pinpoint citations to "Dkt." entries refer to the corresponding page of the PDF.

concerns do not rise to the level of legitimate expectations of privacy that the Sunshine Law and the Hawai'i Supreme Court required for a board to close the doors to the public when hiring a government official. Public First is entitled to summary judgment on all of its declaratory claims against the Council.²

I. Public First is entitled to summary judgment on the obvious Sunshine Law violations that the Council failed to oppose.

The undisputed evidence is that the Council amended its agenda on June 16, 2023, to add discussion of the “selection process to appoint and hire Public Defender position.” Dkt. 60 at 22. The Council does not claim that such an amendment complies with the standards for amending agendas under HRS § 92-7. *Id.* at 20-22. Summary judgment is warranted.

The undisputed evidence further is that the Council prepared legally insufficient minutes for its June 16, August 4, October 4, and November 2, 2023 meetings. There are no regular session minutes for October 4; the regular session minutes for the other meetings fail to include the statutorily required information about the reason for entering executive session; and the executive session minutes fail to give a true reflection of the matters discussed at the meeting and the views of the participants including the substance of all matters proposed, discussed, or decided. Dkt. 60 at 23-24. The Council says nothing about the regular session violations and all but admits the executive session violations by arguing that no one can know what happened in the executive sessions based on the minutes. Dkt. 74 at 6-7. Summary judgment is warranted.

The undisputed evidence further is that the Council failed to properly take public testimony by (1) limiting public testimony to the beginning of the Council's agenda on June 16, August 4, and November 2; (2) failing to take any testimony on June 16 regarding the general hiring process for State Public Defender; and (3) failing to take any public testimony at the October 4 meeting held in the private office of the Council's

² As noted in its motion for partial summary judgment, Public First reserves its requests for injunctive and other relief. Dkt. 60 at 2 n.1.

Chair. Dkt. 60 at 24-25. The Council does not address this issue. Summary judgment is warranted.

Lastly, the undisputed evidence is that the Council did not post any minutes on the Internet as required by the Sunshine Law until October 2023. *Id.* at 25. Again, the Council does not address this issue. Summary judgment is warranted.

II. Public First is entitled to summary judgment regarding the Council's improper executive sessions.

The Council closed its doors to the public every time it discussed hiring the Public Defender. That is not disputed. That closure violates HRS § 92-3: "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."

It is not Public First's burden to negate the Council's affirmative defense that it closed the meeting pursuant to the personnel-privacy exception. *E.g., U.S. Bank Nat'l Ass'n v. Castro*, 131 Hawai'i 28, 41, 313 P.3d 717, 730 (2013) ("The plaintiff is only obligated to disprove an affirmative defense on a motion for summary judgment when 'the defense produces material in support of an affirmative defense.'"); *see generally O'Grady v. State*, 140 Hawai'i 36, 54, 398 P.3d 625, 643 (2017) (statutory exceptions in remedial statutes operate as affirmative defenses; "the State is in the best position to provide relevant evidence with regard to its decision-making, and a rule that requires the plaintiff to prove the absence of any policy consideration would not be practicable").

If the personnel-privacy exception in fact applied because there was a constitutionally protected expectation of privacy, Public First would not be entitled to discovery of what occurred in the meeting anyway. That is why the Hawai'i Supreme Court expected circuit courts to review the executive session minutes in camera to determine whether a board properly invoked an exception and kept the discussion "directly related" to that exception. *CBLC*, 144 Hawai'i at 487-89, 445 P.3d at 68-70 ("the circuit court must examine the meeting minutes in-camera to determine to what extent the Commission's discussions were 'directly related to' this purpose."; "The circuit

court must consider and strictly apply these rules when conducting in-camera review of the minutes from the Commission's . . . executive meetings."). Public First cannot submit evidence on matters that it is prohibited from knowing; that is why the Council must come forward with evidence to support its claims of an exception.³

Public First met its initial burden of production on summary judgment. *French v. Haw. Pizza Hut, Inc.*, 105 Hawai`i 462, 470, 99 P.3d 1046, 1054 (2004). The motion is supported by twenty-eight exhibits, a declaration, and citations to matters of public record. *E.g.*, Dkt. 60 at 3-7, 8-20; Dkt. 61. Again, there is no dispute that the Council excluded the public.

The Council, by contrast, has failed to meet both its evidentiary and substantive burdens. When the moving party satisfies its initial burden of production, as here, the burden shifts "to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." *French*, Hawai`i at 470, 99 P.3d at 1054; *accord Cordeiro v. Burns*, 7 Haw. App. 463, 469-70, 776 P.2d 411, 416-17 (1989) (party opposing summary judgment "must be able to point to some facts which refute the proof of the movant in some material portion" and not simply make a generic credibility challenge). As discussed below, the Council has failed to identify any genuine disputes of material fact and has failed as a matter of law to establish a valid basis for the subject executive sessions.

A. Ipse dixit claims to Sunshine Law exceptions are not evidence worthy of a trial.

The Council has not provided the Court any evidence that any of the discussions (much less the entirety of every closed-door meeting) were directly related to a Sunshine Law exception. The only evidence in the record is that the Council invoked certain exceptions, but that is not relevant to whether those exceptions in fact apply to

³ By insinuating now that Public First could conduct discovery into what happened during the executive sessions, the Council effectively concedes that the meetings did not need to occur *entirely* behind closed doors because there was no constitutionally protected expectation of privacy. *See* Dkt. 74 at 5.

the proceedings.⁴ In *CBLC*, the Hawai`i Supreme Court made clear that these determinations depend on more than just a board’s ipse dixit assertion of an exception. 144 Hawai`i at 478-79, 445 P.3d at 59-60

In the absence of any evidence that the exceptions apply, the Council blames Public First because it does not “detail everything” that occurred during the executive session. Dkt. 74 at 6-8. As discussed above, Public First does *not* need to establish *everything* that the board discussed in executive session. Public First need only establish – and has established – that the board discussed “presumptively open” personnel matters in closed session.

The Council fixates on an e-mail in which its counsel conceded that “the Public Defender is a high-level position.” Dkt. 74 at 8-9. First, although Public First sought to proactively address the Council’s exception claims in its motion, the status of the Public Defender is relevant only to the *CBLC* factors concerning the personnel-privacy exception – not Public First’s burden. Second, the Council’s admission in that e-mail ultimately is insignificant to resolution of this motion. Public First established by substantial other evidence that the Public Defender is a high-level government position; the e-mail was cited merely as an acknowledgement of the Council’s agreement. Dkt. 60 at 9-10. In the end, the Council’s argument that the documents, including the e-mail, are “subject to different interpretations” only undercuts its own affirmative defense. Dkt. 74 at 8-9.

The Council ultimately poses a raft of purportedly unanswered questions about what the “State Defendants believe” in an effort to claim that the record here is insufficient to grant summary judgment. *Id.* at 9. Again, the Council seeks to blame Public First for this lack of clarity in the record regarding the personnel-privacy exception. *Id.* at 10 (“The only way to remove this question of fact is to provide additional evidence in the form of witness testimony as to which applicant was the

⁴ Facts in the current record (agendas and minutes) concern, for example, whether the Council followed the procedures for properly identifying executive sessions on agendas and requiring a supermajority vote before entering executive session – matters that Public First does not contest. *E.g.*, HRS § 92-4(a).

point of concern.”). This line of argument is absurd. The Council’s failure to sufficiently explain or support *its decision* to enter executive session is not a basis to deny summary judgment. Moreover, the existence of a legitimate privacy interest is a legal question that looks at the person at issue and topic of discussion. *E.g., CBLC*, 144 Hawai`i at 480-81, 445 P.3d at 61-62 (While 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.”). The Council’s “beliefs” – known or unknown – are irrelevant to that determination.

B. As a matter of law, the Council could not conduct the entire process of hiring the Public Defender in secret.

Under the Sunshine Law, board discussions of personnel matters are *presumptively open*. Dkt. 60 at 14-17; *CBLC*, 144 Hawai`i at 479, 445 P.3d 4 at 60. The presumption of openness means the *Council* must justify its decision to act in secret. The Council, however, seeks to reverse that presumption and claim – without any authority – that its closed-door meetings are presumptively valid. Dkt. 74 at 4 (arguing that the Council “has no burden of proof in this action”), 5 (arguing the motion “is attempting to present evidence to negate the State Defendants’ claim that they were entitled to hold the selection process discussions in an executive session.”), 7 (“Because Plaintiff has not provided any evidence as to what actually transpired at the executive sessions, Plaintiff’s statements of fact are conclusory and, as such, cannot be used to support summary judgment.”), 8 (“In this motion, Plaintiff’s [sic] believe [sic] that these exhibits definitive [sic] proves that the State Defendants had no “valid basis” for meeting in executive session and the State Defendants believe these exhibits prove nothing.”). Although the Council conspicuously avoids mentioning *CBLC*, the Hawai`i Supreme Court’s holding on this issue is unequivocal: “personnel matters should presumptively be discussed in an open meeting.” 144 Hawai`i at 479, 445 P.3d at 60.

Despite no requirement to do so, Public First addressed the Council’s claimed exceptions in its motion. Dkt. 60 at 14-20. The Council had the opportunity to support its claims, but chose not to. Public First showed why, as a matter of law, the personnel-

privacy and attorney-consultation exceptions did not apply when it came to hiring the Public Defender. And, even if the Council had established that an exemption justified a discrete portion of an executive session – there is nothing in the record here – Public First would still be entitled to summary judgment because the Council must justify conducting the *entirety* of all its secret meetings behind closed doors. Dkt. 60 at 17, 20; *CBLC*, 144 Hawai`i at 486-87, 445 P.3d at 67-68 (“If the circuit court finds that the Commission had a proper basis for invoking the personnel-privacy exception at the executive sessions under review, the court must conduct a two-step analysis. . . . 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).”).

Thus, as matter of law, the Council violated HRS §§ 92-3, -4, and -5 by discussing and deciding the general hiring process for State Public Defender in executive session on June 16 and August 4 and interviewing and evaluating candidates in executive session on October 4 and November 2. *E.g.*, Dkt. 60 at 17-20; HRS § 92-5(a)(2); *CBLC*, 144 Hawai`i at 479, 445 P.3d at 60 (unless ‘matters affecting privacy will be involved’ in a board’s discussion, personnel matters should presumptively be discussed in an open meeting”); Atty Gen. Op. No. 75-11 at 3-4 (personnel-privacy exception does not apply “where the sole purpose of the meeting is to develop employment criteria and an evaluation system applicable in the future”).

CONCLUSION

Based on the foregoing, Public First respectfully asks this Court to grant summary judgment on all the declaratory claims against the Council.

DATE: Honolulu, Hawai`i, November 20, 2024

/s/ Benjamin M. Creps
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