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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 OF LAW IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT ON COUNTS
X - XV

JUDGE: Honorable Jordon J. Kimura
TRIAL DATE: None

HEARING MOTION

HEARING DATE: November 25, 2024

HEARING TIME: 9:00 a.m.



**REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT ON COUNTS X - XV**

Plaintiff Public First Law Center (Public First) submits this reply in further support of the *Motion for Partial Summary Judgment on Counts X - XV* filed October 23 as Dkt. 64, 65, 66, 67 and in reply to the opposition filed November 15 by Defendants Defender Council (Council), Jon. N. Ikengaga, and Board of Agribusiness Development Corporation (ADC Board) as Dkt. 79, 80 (Opposition).

The overarching arguments of the ADC Board mirror those advanced by the Council and lack merit for the reasons more fully briefed by the *Reply Memorandum in Support of Motion for Partial Summary Judgment on Counts I - IX* filed as Dkt. 82 (DC Reply) and incorporated here by reference. Like the Council, the ADC Board ostensibly concedes some of the Sunshine Law violations identified in the motion; wrongly assumes it has no burden to establish a valid basis for the entirety of each executive session; wrongly claims Public First's evidence is "conclusory" and "subject to different interpretations"; makes no serious attempt to address the supporting evidence and arguments; and fails to establish, as it must, a valid basis for holding "presumptively open" personnel discussions in closed session. *Cf.* Dkt. 79 at 4-9 *with* Dkt. 82 at 3-8.¹

Despite the centrality in this case of the personnel-privacy exception and the leading authority interpreting it, *Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City & Cty. of Honolulu [CBLIC]*, 144 Hawai'i 466, 445 P.3d 47 (2019), the ADC Board does not bother to address either. This total abstention effectively concedes the issue – the ADC Board lacked a valid basis for evaluating and hiring its executive director in secret.

Similarly, the ADC Board makes virtually no effort to defend OIP Opinion Letter No. F24-03, which Public First challenges as "palpably erroneous." The ADC Board ducks entirely Public First's detailed analysis. *Cf.* Dkt. 64 at 18-23 (§§ II(D), III(D) and – (E), and IV) *with* Dkt. 79 at 7 (§ III(D)).

The question left for this Court to decide now is legal, not factual. Was it lawful to conduct the *entirety* of the process for hiring the next ADC Executive Director behind

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

closed doors? The ADC Board did not even identify the candidates it was considering. The public never had a chance to participate. While a board's vague ipse dixit privacy concerns are insufficient to close the doors to the public when hiring a government official, *e.g.*, Dkt. 82 at 5-7, the ADC Board makes no privacy argument whatsoever. Dkt. 79, *passim*. The ADC Board provides no evidence that its overly secret hiring process complied with the Sunshine Law.

Public First is entitled to summary judgment on all of its declaratory claims against the ADC Board.²

I. Public First is entitled to judgment as a matter of law regarding the ADC Board's unauthorized committees and permitted interaction group violations.

The undisputed evidence is that three members of the ADC Board – the Standing Administration Committee in 2022 and the Ad Hoc Committee in 2023 – met to discuss an evaluation of the ADC Executive Director's annual performance. Dkt. 64 at 13-15, 23. There is no public record that these committees posted agendas on the Internet, held meetings open to the public, allowed public testimony, or published minutes on the ADC Board's website as required by the Sunshine Law. HRS §§ 92-3, -7, -9; Dkt. 64 at 23. The ADC Board does not claim these committees complied with any of the Sunshine Law requirements. Dkt. 79 at 8-10. Nor does the ADC Board claim that these committees constituted a permitted interaction group under HRS § 92-2.5. *Id.* Instead, the ADC Board simply argues its own minutes are unclear – in irrelevant respects.³ *Id.* Summary judgment is warranted.

The undisputed evidence further is that the ADC Board (1) failed to dissolve the Hiring PIG after it reported to the ADC Board on June 15, 2023, *see* OIP Op. No. 23-01 at 8-9, 16-17; and (2) on July 20, 2023, deliberated and took action (adopting the Hiring

² As noted in its motion for partial summary judgment, Public First reserves its requests for injunctive and other relief. Dkt. 64 at 2 n.1.

³ Contrary to the ADC Board's arguments, it does not matter in this context what happened at the ADC Board meetings. Dkt. 79 at 9. The ADC Board needed to come forward with proof that the *committees* complied with the procedural requirements to hold a Sunshine Law meeting, which would have included published agendas and minutes for the committee meetings (that do not exist).

PIG's recommendation to interview the Hiring PIG's top two candidates at the ADC Board's next meeting) on the Hiring PIG's report at the same meeting at which the report was presented to the ADC Board. Dkt. 64 at 13-15, 23-24. The ADC Board does not claim that the Hiring PIG complied with the *strict* mandates of HRS § 92-2.5. Dkt. 79 at 8-10; *accord* OIP Op. No. 23-01 at 8 ("Strictly following these procedures is necessary to prevent the board from circumventing the Sunshine Law's constraints that favor open meetings."). If the ADC Board wanted this Court to know what was discussed at the July 20 meeting, it should have submitted the unredacted executive session minutes for in camera review as the Hawai'i Supreme Court expected. *See CBLC*, 144 Hawai'i at 486-87, 445 P.3d at 67-68. Summary judgment is warranted.

II. Public First is entitled to judgment as a matter of law regarding the ADC Board's improper executive sessions.

The ADC Board shut out the public entirely every time it evaluated the ADC Executive Director's annual performance for fiscal years 2020-2021 and 2021-2022, over the course of five meetings. Dkt. 64 at 13-22. That is not disputed. The ADC Board does not claim that these secret evaluations complied with HRS §§ 92-3, -4, or -5. Dkt. 79, *passim*. Summary judgment is warranted.

Similarly, it is undisputed that the ADC Board interviewed ADC Executive Director candidates, evaluated their qualifications and fitness, discussed the ADC Executive Director's salary, and selected the next ADC Executive Director entirely in executive session, over the course of two meetings. Dkt. 64 at 14-22. The ADC Board again offers zero evidence to suggest its secret hiring process complied with the Sunshine Law. Dkt. 79, *passim*. Summary judgment is warranted.

It is not Public First's burden to disprove the ADC Board's affirmative defense that these discussions qualified for some strictly construed exception to the Sunshine Law's open meeting mandate. Dkt. 82 at 4-5.

Nevertheless, *CBLC* provides this Court with a clear analytical framework for deciding whether the ADC Board properly invoked the personnel-privacy exception. First, the Court must determine whether the ADC's performance evaluations and hiring discussions actually involved matters in which the individuals involved had a

constitutionally protected legitimate privacy interest. The Hawai`i Supreme Court described several factors relevant to that question, none of which the ADC Board addresses in its opposition. But even if there is a protected privacy interest involved, the Court must determine to what extent the executive session was “directly related” to that concern:

To determine whether the personnel-privacy exception applied to the January 4 and 6 executive meetings, or the January 18 executive meeting, the circuit court must determine (1) whether the Commission considered Kealoha’s “hire, evaluation, dismissal, or discipline,” or charges against him, and (2) *whether the considerations involved matters in which Kealoha had a legitimate privacy interest.* HRS § 92-5(a)(2).

[. . .]

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. First, the court will determine to what extent the Commission’s discussions and deliberations therein fell within the scope of the personnel-privacy exception. That is, the court must determine to what extent the Commission’s discussions and deliberations were “directly related to” the purpose of closing the meeting pursuant to the personnel-privacy exception. HRS § 92-5(b).

CBLC, 144 Hawai`i at 486-87, 445 P.3d 47, 67-68 (emphasis added).

As a threshold, the ADC Board has offered nothing to contradict Public First’s showing that the ADC Executive Director is a high-level government official with significant fiscal and discretionary authority. *Cf.* Dkt. 64 at 9-12 *with* Dkt. 79, *passim*. It does not even discuss the exemption it invoked as a basis for the subject executive sessions. As briefed, *CBLC* makes clear that personnel discussions are “presumptively open.” Dkt 64 at 16; Dkt. 82 at 7-8. The ADC Board offers this Court nothing to conclude that it overcame that presumption.

Because the ADC Board has elected not to engage in a meaningful defense of its closed-door personnel discussions, this Court can decide that they were improper as a matter of law based on the evidence submitted, or review the relevant executive session minutes *in camera*. Dkt. 82 at 4-5 (discussing *CBLC*’s directive for *in camera* review in resolving personnel-privacy exception claims).

III. OIP’s decision to uphold the ADC Board’s executive sessions is palpably erroneous.

As a matter of law, 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. The ADC Board claims that Public First’s “entire argument for this issue is: ‘[f]or the reasons already outlined, OIP Opinion Letter No. F24-03 is palpably erroneous because it is irreconcilable with the plain [sic] text and intent of HRS § 92-5(a)(2) as interpreted by the Hawai’i Supreme Court in *CBLC*.’” Dkt. 79 at 8 (*citing* Dkt. 64 at 21). While that certainly is the condensed reason why the opinion is palpably erroneous, the full argument, as noted, was extensively briefed elsewhere in the Motion. *See* Dkt. 64 at 11-12, 18-22 (§§ II(B), III(D), III(E)).

In brief, OIP Opinion Letter No. F24-03 is palpably erroneous to the extent that it held that the ADC Board did not violate the Sunshine Law in its use of executive sessions to hire the ADC Executive Director. *Id.* Like the ADC Board now, Opinion F24-03 completely disregards *CBLC*’s holding that personnel discussions are “presumptively open” and can only be closed to the extent those discussions “directly relate” to legitimate privacy interests (determined after a case-by-case review). *Id.* OIP’s analysis erroneously collapses the personnel-privacy exception, as it concerns hiring, into a single question of whether a board is hiring a government official – by this logic, regardless of whether the board is hiring the UH President or a landscaper, *all* candidates for a government position would have a protect privacy interest and thus an executive session would be proper for *all* board hirings. OIP Op. No. F24-03 at 20-23. Because Opinion F24-03 renders the “matters affecting privacy” prong superfluous and ignores the standard set by the Hawai’i Supreme Court, it is “palpably erroneous.”

The ADC Board’s only contribution to this issue is to claim that the facts are “conclusory and subject to multiple interpretation [sic].” Dkt. 79 at 8. That makes no sense. If there were sufficient facts for OIP to render Opinion F24-03, affirming the subject executive sessions, then there are sufficient facts for this Court to review that decision.

Public First is entitled to summary judgment.

CONCLUSION

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

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

/s/ Benjamin M. Creps
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