PUBLIC FIRST
LAW CENTER

January 2, 2026

VIA ELECTRONIC MAIL

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RE: Comments Regarding September 29, 2025 Notice Inviting Public Comment on Proposed Revisions to Hawai`i Court Records Rules

Public First Law Center is a Hawai`i non-profit organization focused on solutions that promote responsiveness and transparency in government. We write to provide comments on the proposed Hawai`i Court Records Rules (HCRR) revisions with a primary focus on the process for sealing and unsealing records.

The proposed revisions greatly improve the procedures for determining the confidentiality of court records. Public First commends the Judiciary for undertaking the enormous task of revisiting these issues in a comprehensive revision. Judges, parties, and members of the public will benefit from the clarity provided in the proposed rules. On the whole, these rules embrace the constitutional principles that ensure appropriate public access to court records. Such access is critical to maintaining confidence in the administration of justice in Hawai`i.

Critical improvements in these revisions include:

- A process and standards for motions to seal;
- A process for motions to unseal;
- Procedures for handling of sealed and expunged cases;
- Better focused mandatory privacy protections; and
- Commentary that explains the rules.

If adopted, the proposed rules will place Hawai`i in the top tier of jurisdictions concerning judicial transparency and accountability. The following comments provide suggestions regarding ambiguities and other areas for potential refinement.

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1. "Confidential by Law"

Public First would discourage the Judiciary from using terminology that adopts confidentiality based solely on a statute. In Rules 2 and 13, the proposed draft defines a record as confidential if it is "confidential by law." In the rules, that designation affects whether a motion to seal must be filed for such documents. *See generally State v. Rogan*, 156 Hawai`i 233, 241-43, 573 P.3d 616, 623-26 (2025) (statute cannot eliminate procedural requirement to file motion to seal in court proceedings that are historically open to the public). For the reasons explained below, a motion to seal should be required unless proceedings "have historically been confidential"—terminology used in Rule 10(b)(1).

a. Threshold for Motion to Seal

Advance notice is a procedural prerequisite guaranteed by the U.S. and Hawai`i Constitutions before certain proceedings may be closed to the public. *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982); *Oahu Publc'ns, Inc. v. Ahn*, 133 Hawai`i 482, 497-98, 331 P.3d 460, 475-76 (2014); *accord United States v. Biagon*, 510 F.3d 844, 848 (9th Cir. 2007) (oral motion at hearing insufficient notice). That prerequisite does not apply to traditionally secret proceedings. *E.g.*, *Ahn*, 133 Hawai`i at 494, 331 P.3d at 472; *Forbes Media LLC v. United States*, 61 F.4th 1072, 1077-78 (9th Cir. 2023); *see also Times Miror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989) (common law right of public access).

Unlike the operative language of the proposed draft, however, the analysis of traditional access concerns "proceedings"—not documents. *Rogan*, 156 Hawai`i at 242, 573 P.3d at 625 ("For a right of public access to attach, the focus centers on the nature of the proceedings"); *Civil Beat Law Ctr. for the Pub. Int., Inc. v. Maile*, 117 F.4th 1200, 1209-10 (9th Cir. 2024); *Forbes Media*, 61 F.4th at 1083-85 ("Petitioners' narrow focus on categories of documents is not correct. We have never held that in making the threshold right of public access determination, courts should consider the categories of documents sought abstracted from the proceedings in which they were generated."). A statute that makes particular records confidential supports a compelling interest under the constitutional analysis, but does not itself exempt the records from constitutional procedural and substantive standards, including the requisite motion to seal. *Rogan*, 156 Hawai`i at 243, 573 P.3d at 626; *Maile*, 117 F.4th at 1211-12.

A rule that negates the procedural requirement to file a motion to seal *for documents*—irrespective of the proceeding—based solely on a confidentiality statute risks violating the constitutional rights of public access as overbroad. Such a rule would also be underinclusive because not all confidential proceedings may be codified in a confidentiality statute.

b. Second Paragraph of Comment to Rule 13

Public First supports the examples outlined in the second paragraph of the Comment to Rule 13. Those examples concern "proceedings" as contemplated in the constitutional analysis.[1] Consistent with the overall recommendation, we suggest rewording the first sentence of the second paragraph to focus on proceedings that have not historically been open to the public, rather than records confidential by law.

c. Third Paragraph of Comment to Rule 13

In contrast with the second paragraph, Public First has concerns about the examples outlined in the third paragraph of the Comment to Rule 13. Those examples concern confidentiality for categories of records, not proceedings, which only supports at best a compelling interest in the constitutional analysis.[2] *Maile*, 117 F.4th at 1211-12. That is not a basis for eliminating the motion to seal requirement.[3]

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[1] Whether there is a tradition of access to certain juvenile proceedings is not a settled constitutional issue. For example, a federal case pending in North Carolina challenges the constitutionality of denying public access to proceedings similar to Hawai`i child protective act cases. *Civil Rights Corp. v. Walker*, No. 24-cv-943 (M.D.N.C.). The magistrate judge recently recommended denial of motions to dismiss because the plaintiff "plausibly alleged that a First Amendment right to access dependency hearings exists" based on specific allegations that the historical equivalent of such proceedings were open to the public "from before the American Revolution to the present day." *Id.* Dkt. 89 at 34-38. We note this case only to illustrate the unsettled question, not to suggest that the examples in the second paragraph of the Comment are inappropriate.

[2] Two categories of records in this paragraph arguably are better described as traditionally secret *proceedings*. Pre-sentence reports and the certificates of merit for civil sexual offense actions concern processes that are separate from traditional court proceedings. Those examples thus could be recast as traditionally secret proceedings. *E.g.*, *In re Morning Song Bird Food Litig.*, 831 F.3d 765, 777 (6th Cir. 2016).

[3] Moreover, relevant to First Amendment access, the purported secrecy for some of these documents is not universally recognized as absolute, especially when the documents are directly relevant to the issues in a court proceeding. *E.g.*, 26 U.S.C. § 6103(h)(4) (tax returns not confidential in certain judicial proceedings); Cal. Health & Safety Code § 103526(b)(1) (any person may obtain "birth, death, or nonconfidential marriage record" from vital records); *see generally El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150-51 (1993) (First Amendment analysis concerns nationwide practices, not local procedures). If one of these documents were central to a dispute in a

For these reasons, we would encourage the Judiciary to rephrase Rules 2 and 13 to focus on whether proceedings are traditionally confidential—similar to the terminology used in Rule 10(b)(1)—and make corresponding adjustments to the Comment for Rule 13.

2. Process for Removing Non-Criminal Cases from the Internet

The rules should not limit the scope of the Internet access rules to criminal cases. In Rules 10(c) and 14, the proposed draft discusses removal from the Internet solely for criminal cases. In recent years, there have been bills in the Legislature that propose an expungement process for non-criminal cases. If recognized by the Legislature, restorative interests—similar to those acknowledged by the Hawai`i Supreme Court in *Rogan*—may justify removing Internet access to certain non-criminal cases.

We would propose the following amendments.

- Remove the three references to "criminal" in Rule 10(c)
- Remove the three references to "criminal" in Rule 14 (header), 14(a), and 14(d) (header).
- Remove from the Comment the reference to "on a criminal case" in the first paragraph and "criminal" in the last paragraph.
- Amend Rule 14(b) to add a fourth criteria for Qualified Individual that allows removal from the Internet when a person qualifies for relief under any other state statute that provides for removal of court records from the Internet.

3. Privacy Redactions

Proposed Rule 12 borrows heavily from Federal Rule of Civil Procedure 5.2. Public First notes that Rule 12(d) [Fed. R. Civ. P. 5.2(e)] could be read as exceptionally broad authority to redact any "additional information" based solely on "good cause." The Comments are critical to understand the narrow scope of the rule.

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constitutionally protected proceeding (*e.g.*, civil or criminal trial), courts must undertake a case-by-case analysis of whether more narrowly tailored solutions exist than the blanket sealing contemplated by the proposed draft rule. *Maile*, 117 F.4th at 1211-12. If particular categories of records of concern are regularly submitted in certain cases, the Judiciary might examine (1) whether such submission is necessary to the action; and (2) whether the particular *proceeding* is protected by the constitutional right of access.

Proposed Comment [2]—mirroring commentary on the federal rules—explains that the "additional information" under (d) only concerns comparable personal identifiers to those specified in (a). A specific example offered in the Comment is a driver's license number. Other examples from application of the federal rule include home addresses, e-mail addresses, and phone numbers. *E.g.*, *Davis v. Stidham*, No. EP-24-CV-105-DCG, 2025 U.S. Dist. LEXIS 25256, at *4-5 & n.3 (W.D. Tex. Feb. 12, 2025); *Malhan v. Grewal*, No. 16-CV-8495 (CCC), 2020 U.S. Dist. LEXIS 212376, at *4-8 (D.N.J. Nov. 13, 2020); *Reaves v. Jewell*, No. DKC-14-CV-2245, 2014 U.S. Dist. LEXIS 165542, at *5-6 (D. Md. Nov. 26, 2014).

Separately, concerning Rule 12, Public First highlights that the rules no longer expressly provide for sanctions for parties that violate the requirement to redact personal identifiers without good cause (current HCRR 9.5). An express reference to the potential for sanctions may promote compliance with the rule.

4. Motions to Seal

In addition to prior comments about "confidential by law," Public First had a few suggestions concerning proposed Rule 13.

a. Timing for Filing of Redacted Version

Proposed Rule 13(b)(1)(C) provides that a motion to seal must include a statement about whether a redacted version will be publicly filed. But the rule does not require that the movant contemporaneously or promptly file that redacted version. *See, e.g.*, D. Haw. LR 5.2(c) ("state that a redacted version of the document or matter will be filed in the public record *concurrent with the motion to seal*" (emphasis added)).

The timing of a redacted filing is critical. Members of the public cannot effectively evaluate a party's sealing claims without knowing the extent of redactions. A party claiming trade secrets, for example, may not draw any objection if it only redacts one line of text, but may be challenged if redacting half a memorandum of law, even though the purported justification is the same. Judges also need to know what redactions the movant proposes. Parties reasonably may read the current proposal as requiring only a statement as to whether redactions are expected, not as requiring the actual filing of a redacted version.

The Judiciary might consider: "states whether a redacted version will be publicly filed ~~publicly~~ concurrent with the motion to seal, or why redaction is not feasible."

b. Content of Proposed Order

Proposed Rule 13(b)(1)(E) provides that a motion to seal must include a "proposed order." Having reviewed proposed orders filed in federal court under its comparable local rule, Public First would strongly recommend an express reference to the provisions concerning what an order must contain. Without further guidance, parties often will submit a proposed order that falls well short of the findings that the court must make to support sealing, rendering the proposed order functionally useless.

The Judiciary might consider: "includes a proposed order with findings as specified in subsections (i) and (j)."

c. Service on Interested Non-Parties

Proposed Rule 13(c) provides for service of a motion to seal. In *Oahu Publications v. Ahn*, the Hawai`i Supreme Court explained that courts should consider individual notice to interested members of the public. 133 Hawai`i at 497 & n.19, 331 P.3d at 475 & n.19. As the Supreme Court noted, persons who have requested extended coverage pursuant to RSCH 5.1 clearly are interested in particular proceedings. Persons who have previously opposed motions to seal in a case also have manifested an interest in future proceedings.

The Judiciary might consider the following amendments.

> **(c) Service of Motion.** A copy of the non-hearing motion must be served on all parties and members of the public that have appeared in the case. Unless the court orders otherwise, any party that already has access to the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version. Others ~~parties~~ must be served with only the public redacted version.
>
> *Comment*: Under subsection (c), in addition to service on parties that have appeared, the movant must serve members of the public that have appeared in the case. Members of the public may have appeared in the case when, for example, requesting extended coverage pursuant to Rules of the Supreme Court of the State of Hawai`i (RSCH) 5.1 or opposing sealing in the case.

d. Redacting Unnecessary Information

The intent of proposed Rule 13(g), concerning redactions, is unclear.

We would commend a rule intended to instruct parties to file a motion to seal only when resolution of the parties' substantive dispute requires that the court have unredacted access. If unredacted access by the court is *not* necessary to resolution of the dispute, then a party may file the redacted record publicly without a motion to seal. Material not presented for judicial consideration is not subject to the constitutional rights of access.

The language might alternatively be read to recognize the principle that sealing must be narrowly tailored and to reinforce the emphasis on redaction whenever possible. However, redacting material information from court records is no different from sealing. It is a limited form of sealing that must be justified to the same extent as sealing an entire document. Parties should not be left with the impression that simply submitting a redacted record is sufficient to adequately resolve any sealing disputes.

To clarify the intent and scope of Rule 13(g), the Judiciary might consider the following revision and additional comment language.

> **(g) Redactions**. A court record shall not be sealed in its entirety when redaction is sufficient to preserve protected interests ~~will adequately resolve the issues before the court pursuant to subsection (b) above~~.
>
> *Comment*: ~~Under subsection (g),~~ Subsection (g) recognizes that sealing must be narrowly tailored as provided in subsection (i), and an entire record will not be sealed when redaction is adequate. ~~a~~ A party to a proceeding is obligated to prepare the redactions. In general, court staff should not be performing redactions of a record. Before filing, a party also should decide what portion of documents to be filed is necessary for the court to resolve disputed issues. If a party redacts unnecessary information from documents and does not submit that information to the court, nothing needs to be sealed.

e. Comment on Less Restrictive Alternatives

Proposed Rule 13(i)(5) references the need for a judicial finding regarding less restrictive alternatives to sealing. Redaction is the most common alternative, but depending on the nature of the compelling interest, it is not the only possible alternative. *E.g.*, *Grube v. Trader*, 142 Hawai`i 412, 427 & n.20, 420 P.3d 343, 358 & n.20

(2018) ("sealing limited to a very restricted time period" with scheduled periodic reviews of the continued need for sealing); *Sacramento Bee v. U.S. Dist. Ct.*, 656 F.2d 477, 482-83 (9th Cir. 1981) (continuance, severance, change of venue, change of venire, voir dire, additional peremptory challenges, sequestration, jury instructions). To assist courts, the Comment might identify such other alternatives as examples to consider.

f. Order Regarding Redactions

Proposed Rule 13(j)(2) refers to redacting portions of documents only if "reasonably practicable." The standard for requiring parties to redact court records should not be practicality. *See, e.g.*, *Pub. First Law Ctr. v. Viola*, 157 Hawai`i 242, 245, 576 P.3d 755, 758 (2025) ("If the unredactable material within a given record conveys information, it must be disclosed."), *quoting Honolulu Civil Beat Inc. v. Dep't of the Att'y Gen.*, 151 Hawai`i 74, 88, 508 P.3d 1160, 1174 (2022). If sealing an entire document cannot be justified, redaction is an appropriate alternative. *Grube*, 142 Hawai`i at 427, 420 P.3d at 358; *Ahn*, 133 Hawai`i at 507, 331 P.3d at 485 ("only access to those parts of transcript 'reasonably entitled to privacy' should be denied"). Rule 13(j)(2) should be amended to remove the language "if reasonably practicable."

g. Protective Orders Are Not Compelling Interest

The Comment to proposed Rule 13 discusses the concept of a compelling interest for purposes of sealing. Public First has a serious concern that the Comment encourages parties to cite protective orders. Protective orders exist to facilitate *discovery*, not sealing in court. Parties typically stipulate to the protections. But as the Hawai`i Supreme Court has observed: "All too often, parties to the litigation are either indifferent or antipathetic to disclosure requests. This is to be expected: it is not their charge to represent the rights of others." *Ahn*, 133 Hawai`i at 498, 331 P.3d at 476 (quoting *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 951 (9th Cir. 1998)). Unlike discovery, sealing concerns the rights of the public, not the parties. *San Jose Mercury News v. U.S. Dist. Ct.*, 187 F.3d 1096, 1101 (9th Cir. 1999) ("The right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away."). Moreover, in typical protective orders, judges do not review specific records; instead, the orders broadly allow parties to designate documents as confidential for exchange in discovery. In such instances, neither the public nor the judge knows what specific documents are covered by the protective order until a party files a motion to seal. And the standard for entry of a protective order (good cause) is profoundly lower than the standard for sealing court records (compelling interest).

Public First has encountered numerous instances in which parties merely cite a protective order as the basis for sealing. More is needed for sealing. *E.g.*, *Pintos v. Pac.*

Creditors Ass'n, 565 F.3d 1106, 1115-16 (9th Cir. 2009); *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003); *Citizens First Nat. Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) ("[G]rant[ing] a virtual carte blanche to either party to seal whatever portions of the record the party wanted to seal . . . [is] improper."); *accord Markel Am. Ins. Co. v. Internet Brands, Inc.*, No. CV-17-2429 (AJWx), 2017 U.S. Dist. LEXIS 224860, at *20-21 (C.D. Cal. Aug. 2, 2017) ("The issue of sealing discovery is not the same as sealing adjudicatory materials - an issue governed by the Ninth Circuit authorities cited above, and ultimately the First Amendment."); *Dew v. E.I. Dupont Nemours & Co.*, No. 5:18-CV-73-D, 2024 U.S. Dist. LEXIS 216518, at *69 (E.D.N.C. Nov. 27, 2024) ("The standard a party must satisfy before being granted a protective order differs by an order of magnitude from the standard a party must satisfy to keep judicial documents out of the public eye.").

If sealing is justified, a protective order does not add to the analysis. To avoid formulaic motions that merely cite protective orders, Public First encourages removing reference to protective orders as a basis for compelling interest. Instead, the Comment should warn parties—as the federal court does—that "[a] stipulation or blanket protective order that allows a party to designate matters to be filed under seal will not suffice to allow the filing of the matter under seal." D. Haw. LR 5.2(b).

5. Costs for Motions to Unseal

Proposed Rule 16(d)(2) provides that the clerk shall create a new case for a motion to unseal that concerns a confidential case file. Public First greatly appreciates that clarification. However, because we have been charged a filing fee to create a new case for a comparable motion, Public First respectfully asks that the Judiciary specify in the rule or comment that members of the public will not be charged hundreds of dollars as a filing fee for a motion to unseal. The public is not charged to file a motion in an existing publicly accessible case. A motion to unseal concerning a confidential case file should be treated the same.

6. Review of Sealing Decisions

Proposed Rule 17 addresses review of orders denying a motion to unseal filed by a non-party. Nothing in the proposed Rules addresses review of orders granting a non-party motion to unseal, orders granting a motion to seal over a non-party or party objection, or orders denying a motion to seal. In contrast, the existing rule covers all such orders. HCRR 10.15 ("A person or entity may seek review of a denial or grant of access to a record by petitioning the supreme court, in accordance with Rule 21 of the Hawai`i Rules of Appellate Procedure."). Public First encourages clarification of the procedure for review of all motions concerning access to court records.

Even under the existing rule, Public First has encountered instances in which parties have disregarded the HCRR and appealed adverse sealing decisions to the Intermediate Court of Appeals. *E.g.*, *Roy v. GEICO*, 152 Hawai`i 225, 524 P.3d 1249 (App. 2023). Appeals raise several concerns. The ICA applies a potentially more permissive standard of review (de novo). *See State v. Kealaiki*, 95 Hawai`i 309, 313 n.4 & 314 n.5, 22 P.3d 588, 592 n.4 & 593 n.5 (2001) (writs not intended to "cure a mere legal error" and may not be granted "even when the judge has acted erroneously"). An appeal—unlike a petition for writ—may divest the trial court of jurisdiction, delaying the underlying proceeding. *See Ogeone v. Au*, No. CAAP-18-449, 2023 Haw. App. LEXIS 391 at *8-9 (2023) ("We similarly conclude that the filing of the petition for writ of mandamus did not divest jurisdiction of the case from the Circuit Court."). The appeal also delays resolution of the access question to the detriment of the public. *See Grube*, 142 Hawai`i at 428 n.21, 420 P.3d at 359 n.21 ("Because the right of public access exists to provide members of the public with contemporary information about matters of current public interest so that they may effectively exercise their First Amendment rights, the belated release of records to which the public is rightfully entitled is not an adequate remedy."). And if appeals are an unwritten option in addition to petitions for writ, it creates confusion as to when the different avenues of review are appropriate and whether denial of a petition for writ is final or subject to later appeal.

The Judiciary might consider the following amendments.

> Rule 17. REVIEW OF ORDERS GRANTING OR DENYING ACCESS TO A COURT RECORD~~; NON-PARTY REQUEST TO UNSEAL CONFIDENTIAL RECORD~~.
>
> ~~A non-party may seek review~~ Application for review of an order granting or denying access to a court record ~~a motion filed by a non-party under Rule 16 of these Rules seeking to unseal a confidential record,~~ shall be made by a party or non-party filing a petition with the supreme court in accordance with Rule 21 of the Hawai'i Rules of Appellate Procedure (HRAP) within 30 days after entry of the order ~~denying access to a confidential record~~.
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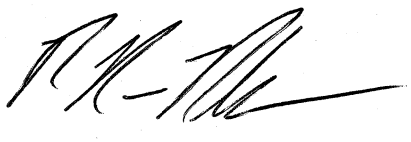
> If the record of the underlying proceeding is confidential, the Clerk of the trial court or ADLRO, upon notice of the petition, shall provide notice of the petition to all parties to the case, shall file a copy of the Clerk's certificate of service on each party, and shall file the certificate of service as an *in camera* document in the record of proceeding before the supreme court.

> This rule shall not operate to foreclose any right of appeal that a party may have under applicable law, nor the right of a party or non-party to seek relief under HRAP 21 for other grounds independent of this Rule.

* * *

Public First appreciates the Judiciary's ongoing commitment to open courts and the invitation to submit comments regarding the proposed HCRR revisions. We welcome the opportunity to discuss any of these issues with other interested stakeholders to share experiences, research alternatives, and provide more tailored ideas.

Respectfully,



R. Brian Black