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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

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 – VIII [DKT 129]; DECLARATION OF COUNSEL; EXHIBIT "35"; and CERTIFICATE OF SERVICE

JUDGE: Honorable Jordon J. Kimura
TRIAL DATE: June 23, 2025

HEARING MOTION
HEARING DATE: May 9, 2025
HEARING TIME: 10:30 a.m.

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS I – VIII [DKT 129]

Although the opposition identifies facts that were not disclosed in discovery, Plaintiff Public First Law Center (Public First) does not dispute any of the material non-conclusory facts. The only issues presented by briefing are questions of law.

- Does a candidate for the position of State Public Defender have a constitutionally protected expectation of privacy in his or her employment history?
- Assuming that a candidate for State Public Defender has a constitutionally protected expectation of privacy in questions about his or her mental health and personal relationships, does that expectation of privacy justify excluding the public from the entirety of an interview (*e.g.*, questions about the candidate's vision for the Office of the Public Defender and qualifications for the position)?
- Is the selection of the State Public Defender a matter "of reasonably major importance" where "action thereon by the board will affect a significant number of persons"?
- Does, for example, "[d]iscussion regarding candidates held" to summarize a fifty-minute conversation provide "a true reflection of the matters discussed at the meeting and the views of the participants"?
- Is a board required to provide an opportunity for the public to testify before it begins discussion of each agenda item?

The Sunshine Law protects the public's right to observe *and* participate when citizen-appointed boards are charged with making decisions on behalf of the community. By default, the proceedings of these boards are to be "conducted as openly as possible." HRS § 92-1. Defendant Defender Council (Council) disregarded this directive when it hired the State Public Defender behind closed doors.

Based on the record, Public First is entitled to summary judgment on its requested declaratory relief against the Council.[1]

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[1] Public First is not seeking summary judgment on its injunctive relief, including the voidability of Defendant Ikenaga's selection. Dkt. 129 at 2. Voidability concerns various facts and legal factors that neither side has introduced or briefed.

1. The executive sessions held August 4, October 4, and November 2 for selection of the State Public Defender exceeded any exempt purpose.[2]

The ultimate legal issue here is whether the Council discussed *any* non-exempt topic in an executive session on August 4, October 4, and November 2, 2023.

The legal starting point for any board meeting is a presumption of openness. Dkt. 129 at 15-16, 21-22.[3] The eight statutory exemptions and other provisions concerning closure are "strictly construed against closed meetings." HRS § 92-1(3) (exceptions to the open meeting requirements shall be strictly construed against closed meetings"); *Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City & County of Honolulu* [*CBLC*], 144 Hawai`i 466, 478-79, 486, 489, 445 P.3d 47, 59-60, 67, 70 (2019) (strictly construing the personnel-privacy exemption, attorney consultation exemption, and scope of the "directly related" provision).

The Council errs by arguing that the *entirety* of its closed-door selection process was justified because some portion of the discussion concerned a sensitive topic. Dkt. 155 at 5-8. It seeks to justify this secrecy by an expansive (not strict) construction of when "privacy will be *involved*". *Id.* Under Council's sweeping construction of HRS § 92-5(a)(2), government boards may conduct *all* hiring activity behind closed doors—so long as some small element of the process involves a protected expectation of privacy. *Id*. That construction is plainly incorrect.

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[2] Public First **consents to dismissal of Count II** concerning the June 16 executive session. The regular session minutes for June 16 indicate that the Council exited a lengthy executive session and immediately announced a detailed selection process for State Public Defender. Dkt. 61 at 69. In discovery, it admitted that the selection process "came up" June 16 because someone "remembered that the State Public Defender's appointment was expiring in January 2024." Dkt. 130 at 9-10 (RFA No. 7). The Council did not produce (or identify as withheld) executive session minutes for June 16. Chair Glendon declares here, for the first time in this litigation, that the Council "did not discuss the selection process for the appointment of the Public Defender during the Executive Session on June 16, 2023." Dkt. 155 at 14. In interests of judicial economy, Public First accepts this representation.

[3] Pinpoint "Dkt." citations refer to the page of the corresponding PDF.

The Sunshine Law explicitly addresses when closure may extend beyond the strictly construed exemption to related discussions: "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). Thus, as soon as the "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." *CBLC*, 144 Hawai`i at 486, 445 P.3d at 67; *see also* OIP Op. No. 05-11, at 6 (same). The Council failed to do so.

The Council also argues candidates for State Public Defender have a constitutional privacy interest in their employment history. Dkt. 155 at 6-7 (enumerated (1) and (6)). However, only "highly personal and intimate information" of no legitimate public concern is subject to constitutional protection. Dkt. 129 at 16; *see also, e.g., Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975) (an invasion of privacy cannot be maintained when the subject-matter of the publicity is a matter of "legitimate concern to the public"). And directly contrary to its argument here, the Council disclosed the candidates' qualifications in the form of resumes and application materials despite repeatedly stating that it was withholding "any documents or information that are personal and private to the applicants for the Public Defender position." *Compare* Dkt. 132 at 45-48, *with* Dkt. 131 (candidate application materials). The qualifications of candidates for State Public Defender are not highly personal and intimate and are plainly a subject of legitimate public concern.

August 4 Meeting (Count III)

As a threshold, the Council's "privacy . . . involved" argument presents no defense for the August 4 executive session. That session solely concerned the selection process without reference to any specific candidate. Dkt. 61 at 80; Dkt. 130 at 11-12, 36; *see also* Dkt. 129 at 17.

Chair Glendon now asserts that the August 4 executive session "*included* verification from our legal counsel that the proposed dates would not present any Sunshine Law issue, regarding proper notice, and that the use of Survey Money [sic] would not create any legal problems." Dkt. 155 at 14 (emphasis added).

But Chair Glendon does not claim that the Council *only* consulted its attorney in executive session. *Id.*; *CBLC*, 144 Hawai`i at 489, 445 P.3d at 70 ("[A]n attorney is not a talisman, and consultations in executive sessions must be purposeful and unclouded by pretext. . . . [O]nce the [board] receives the benefit of the attorney's advice, it should discuss the courses of action in public, and vote in public, unless to do otherwise would defeat the lawful purpose of having the executive meeting."). The Council admits it discussed the selection process in executive session. Dkt. 130 at 11-12 (RFA No. 11) (admitting Council discussed due dates, wording of position announcement, and process for receiving public comment), *id.* at 36 (RFAI No. 3) (same). Moreover, the Council's executive session minutes do not reflect *any* attorney consultation and instead show a 40-minute discussion of a range of non-exempt, non-legal matters related to hiring the next Public Defender. Dkt. 61 at 80 (discussing, for example, grammar and primary focus of draft position announcement).

Chair Glendon's declaration does not raise a genuine issue of material dispute that the *entirety* August 4 executive session concerned an exempt purpose (attorney consultation). Once the Council's attorney answered any legal questions about deadlines and use of Survey Monkey, the Sunshine Law required the Council to reconvene in public session to discuss the selection process. It did not.

<u>October 4 and November 2 Meetings (Counts IV and V)</u>

With respect to the October 4 and November 2 meetings, for purposes of this motion, Public First does not contest that the Council discussed public comments that arguably raise issues about candidates' personal mental health or relationships.[4] *E.g.*, Dkt. 155 at 6-7 (enumerated (2)-(5)).

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[4] Although not material to this motion, the Council cannot legitimately claim that candidates had constitutionally protected expectations of privacy in the issues raised by the public comments. The comments addressed management style and interpersonal office conflicts that the Council now describes as *personal* mental health and relationship concerns. *E.g.*, *Honolulu Civil Beat Inc. v. Dep't of the Atty. Gen.*, 151 Hawai`i 74, 508 P.3d 1160 (2022) (rejecting UIPA privacy claims over discussion of office-based interpersonal conflicts) ("*Nothing* in the Report is purely personal though: there's no 'gossip' about the Subjects' (or anyone else's) personal lives, just candid descriptions of a toxic

The undisputed record is that the Council first discussed each candidate's vision and leadership plans for the Office of the Public Defender, then public comments in executive session on October 4. *E.g.*, Dkt. 61 at 84-85 (minutes reflecting same). The standardized questions in the initial portion of the interview, about the candidate's vision and plans for the office, did not "involve" any of the purported concerns raised in public comments, which were discussed in the latter portion of the interview. *Id.*; *see also* Dkt. 132 at 1-34 (Ex. 32) (identifying questions regarding candidate's vision for the office, leadership plans, legislative strategy, and how to improve training); Dkt. 130 at 29-30 (RFA No. 46-48) (admitting Council asked candidates the questions listed on Ex. 32 and members "spoke with one another" about the candidates' application materials).

Moreover, the Council admitted that its closed-door deliberations concerning the candidates on November 2 did not solely concern the public comments. Dkt. 130 at 20-23 (RFA No. 27, 28, 29, 30, 31, 32) (admitting Council discussed the candidates' qualifications and management plans and the member's candidate preference in executive session), 29 (RFA No. 48) (admitting Council "spoke with one another about the letters of interest, resumes, and other materials submitted" to the Council), and 38 (RFAI No. 5) ("During the executive session," the Council "discussed the strengths and weaknesses of each applicant, their vision, their interviews, and their answer to the 'homework' question."). Yet the Council held these discussions entirely in executive session, plainly violating the mandate to reconvene in open session to discuss non-exempt matters. Dkt. 61 at 93-94, 97.

Chair Glendon explains the Council's reasons for going into executive session, but those reasons are not legally sufficient for holding the *entirety* of the interviews and Council deliberations in secret. *See* Dkt. 129 at 17-22. Chair Glendon asserts the Council chose to interview candidates entirely in executive session because: (i) one private sector candidate (Eric Neimeyer) had "a reasonable expectation of privacy" in his prior

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workplace environment."). Moreover, the Council disclosed those comments in response to a public records request before Public First even filed this lawsuit. *E.g.*, Dkt. 132 at 35-40. The Council cannot claim constitutional privacy protection over information that it freely disclosed to the public.

work history and salary; and (ii) allegations were made about the three remaining candidates that involved inappropriate workplace behavior and potentially medical information. Dkt. 155 at 14-15. Public First accepts these factual assertions as true—they are immaterial for several reasons.

First, employment history—public or private sector—is not "highly personal and intimate" information.[5] And it certainly is not constitutionally protected information once the person chooses to apply for a high-level government position. Neimeyer's and the other candidates' qualifications to serve as the State Public Defender are legitimate matters of public concern. *E.g.*, Dkt. 60 at 15-17; Dkt. 129 at 16-20.

Second, as it concerns the "public comments", Chair Glendon's declaration does not raise a genuine issue of material dispute that the *entirety* of the interview and deliberation executive sessions concerned those comments. Nor could she credibly do so—the undisputed evidence plainly establishes that the Council asked candidates about, *inter alia*, their vision for the office, leadership plans, legislative strategy, and how to improve training.

Third, as noted, the Council was required to return to open session for all portions of the interviews that did not "directly relate" to an exempt purpose. It obviously failed to do so, because it held the interviews and deliberated on the selection entirely in executive session. Dkt. 61 at 84-85, 93-94, 97. The Council had a legal obligation under the Sunshine Law to keep the need for executive sessions narrowly confined, so that its discussions were "conducted as openly as possible." HRS § 92-1. To the contrary, it came up with a few limited reasons and closed the doors to all discussion despite the presumption of openness and the existence of entire topics that did not implicate any "highly personal and intimate" information.

In the end, the reasons proffered by the Council do not swallow and cloak in secrecy the entire hiring process for State Public Defender. The Council conducts

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[5] If such information were protected by the constitutional right of privacy—it is not—Neimeyer and the other candidates would have tort claims against the Council for invasion of privacy after the Council disclosed their application materials in response to public record requests and discovery.

important public business. Its members are appointed to serve a community function, not a private function, and thus their conduct in performing those duties must be open and accountable to the community. Its closed door hiring of the State Public Defender is contrary to letter and spirit of the Sunshine Law. Public First is entitled to partial summary judgment on Counts III – V.

2. The selection process for State Public Defender is not a minor item.

The issue is whether the Council amended its June 16 meeting agenda to add an item "of reasonably major importance" where "action thereon by the board will affect a significant number of persons." HRS § 92-7(d). If it did, it violated section 92-7.

The Council has not disputed the relevant facts—*compare* Dkt. 129 at 12, 22-23, *with* Dkt. 155 at 3-4, 8-9. It only argues that, as a matter of law, the selection process for hiring the State Public Defender is a "minor item" because it only concerned the deadlines and advertisement of the State Public Defender position. Dkt. 155 at 8-9.

The Council's attempt to disconnect the administrative selection process from the actual selection of the State Public Defender directly contradicts binding OIP precedent.[6] The importance of an agenda item "cannot be measured solely by looking to the distinct issue presented for deliberation and decision at that particular meeting or the consequences of the action taken on the item viewed in isolation." OIP Op. No. 06-05 at 4. It must be evaluated "relative to the larger context in which it occurs." *Id*. Other than conclusory assertions, the Council makes no effort to address the applicable standard. *See* Dkt. 129 at 22-23; Dkt. 60 at 20-22; Dkt. 61 at 119-20, 130-32, 140 (examples of OIP decisions applying the standard). The larger context here is the selection of the State Public Defender. The Council does not argue that is a "minor item"—and it obviously is not. *E.g.,* Dkt. 60 at 9-11.

In the end, because boards have a duty under the Sunshine Law to provide adequate notice of what will be discussed at a meeting, the Council could not—on a

[6] HRS § 92-12(d) ("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.").

whim because someone brought it up—start discussing the hiring of the State Public Defender. It had an obligation to defer the discussion to a future meeting to provide members of the public an opportunity to comment on the selection process or simply decide to attend the meeting because the Council had properly announced that the selection process would be discussed.

The Council violated section 92-7(d) when it added the selection process to the June 16 agenda during the June 16 meeting. Public First is entitled to partial summary judgment on Count I.

3. The Council's minutes are plainly insufficient.

The issue is whether the Council's June 16, August 4, October 4 and November 2 meeting minutes "give a true reflection of the matters discussed at the meeting and the views of the participants" and include the "substance of all matters proposed, discussed, or decided" among other particulars. HRS § 92-9(a). The Council argues these minutes are sufficient because—in the Council's view—the minutes "provide the most central and material part" or "essence of the meeting." Dkt. 155 at 9-10. But that is not the legal standard. *See, e.g.*, Dkt. 129 at 23 (citing relevant OIP decisions).

The Council's minutes do not provide a "true reflection of the matters discussed at the meeting and the views of the participants" and the "substance of all matters proposed, discussed, or decided," as is required under the correct standard. There are simply no regular session minutes for the October 4 meeting. Dkt. 61 at 3 ¶ 20; Dkt. 130 at 17-18 (No. 22, 23). The remaining meeting minutes at issue speak for themselves. *See* Dkt. 61 at 68 (Ex. 11), 77 (Ex. 13), 93 (Ex. 18).

For example, reciting the same boilerplate for each candidate interview ("summarized . . . vision for the office") does not explain the actual views of the participants. Dkt. 61 at 84-85. Nor does a generic reference to "[d]iscussion regarding candidates held" describe the views of the individual board members. *Id.* at 85. "Each Council Member presented their position on each applicant," *id*. at 97, is not a true reflection of the matters discussed at the meeting. As OIP explained in highlighting inadequate executive session minutes in a comparable context:

> [T]he statement that "Commissioners reviewed and discussed with [the Chief] her self-evaluation for her 2020 evaluation," which is the entire record of a discussion that apparently took over an hour, is not an accurate reflection of the hour-plus discussion and entirely fails to state the views of the participants or even who spoke.

OIP Op. No. F25-01 at 18 n.12.

Had the Council prepared adequate minutes, for example, the Council would not need to—as they do here—rely on members' collective "recollections" to reconstruct what happened at the subject meetings. This only reinforces the conclusion that its minutes are legally insufficient.

Public First is entitled to partial summary judgment on Count VI & VII.

4. The Council failed to afford interested persons an opportunity to testify on each agenda item at the June 16, August 4, October 4, and November 2, 2023 meetings.

The Council's official agenda and minutes, as well as its admissions, reflect that the Council only provided the public an opportunity to testify at the beginning of each meeting. *E.g.*, Dkt. 61 at 67-70, 76-78, 84-85, 91-96; Dkt. 130 at 9, 11, 25 (RFA No. 6, 10, 25). Despite the obligation on summary judgment to present evidence that raises a material issue of fact, the Council presents nothing that contradicts Public First's reasonable inference based on the official records. HRCP 56(e). Chair Glendon, for example, does not claim that—contrary to the records—the Council did in fact offer the public the opportunity to testify before each agenda item.

Instead, the Council argues that it had no obligation to "actively seek[] public testimony." Dkt. 155 at 10-11. The Council misreads HRS § 92-3.

Section 92-3 provides, "boards shall also *afford* all interested persons an opportunity to present oral testimony on any agenda item; provided that the oral testimonies of interested persons shall not be limited to the beginning of a board's agenda or meeting." (emphasis added); *see also* OIP Op. No. F15-02 at 8 ("the requirement to accept testimony applies to every agenda item at every meeting, including items to be discussed in executive session at a meeting where only executive session items are on the agenda."); OIP Op. No. 06-01 at 2 n.2 (holding that boards must permit public testimony before any substantive discussion of an agenda item); Ex. 35

[OIP S Memo 20-04] at 5 (board violated section 92-3 by discussing an agenda item before "the Chair's call for 'any testifiers.'"); "Afford," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/afford (accessed 5/5/5) ("to supply one with : provide, furnish").

Moreover, the Council's construction of section 92-3 would lead to chaos for boards. If public testimony need not be invited on each agenda item, then to comply with the law, boards would have to afford the public the opportunity to consistently *interrupt* the meeting. The Sunshine Law does not contemplate such an absurd result, which is contrary to binding OIP precedent, in any event.

Public First is entitled to partial summary judgment on Count VIII.

CONCLUSION

Accordingly, Public First is entitled to declaratory relief that the Council violated the Sunshine Law by:

(1) Amending the June 16, 2023 agenda in violation of HRS §§ 92-7;

(2) Meeting in executive session to discuss the general selection process, interview and discuss candidates, and deliberate and select the State Public Defender in violation of HRS §§ 92-3, -4, and -5;

(3) Failing to record legally sufficient minutes in violation of HRS § 92-9; and

(4) Failing to take public testimony in violation of HRS § 92-3.

DATE: Honolulu, Hawai`i, May 6, 2025

/s/ Benjamin M. Creps
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

PUBLIC FIRST LAW CENTER, Plaintiff, vs. DEFENDER COUNCIL; et al., Defendants.	CIVIL NO. 1CCV-24-0000050 (Other Civil Action) DECLARATION OF COUNSEL; EXHIBIT "35"

DECLARATION OF COUNSEL

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

2. Attached as **Exhibit 35** is a true and correct copy of the Office of Information Practices' (OIP) S Memo 20-04, obtained via public records request and maintained by our office in the normal course of business.

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

DATED: Honolulu, Hawai`i, May 6, 2025

/s/ Benjamin M. Creps
BENJAMIN M. CREPS

Exhibit “35”

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CHERYL KAKAZU PARK
DIRECTOR

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

MEMORANDUM OPINION

Requester: Anonymous
Board: Honolulu City Council
Date: May 14, 2020
Subject: Amendment of Filed Agendas (S APPEAL 18-01, S APPEAL 18-02)

Request for Investigation

Requester asked for investigations into whether the Honolulu City Council (COUNCIL-HON) violated the Sunshine Law by adding items to the agenda at: (1) its regular meeting held on November 1, 2017 (Meeting); and (2) the City Council Committee on Budget (Budget Committee) Meeting held on November 15, 2017 (Budget Meeting). Requester further asked for an investigation into whether COUNCIL-HON violated the Sunshine Law by inadequately describing a gift resolution.[1]

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's email correspondence to OIP dated November 7, 26 (with attached appeal), and 29, 2017, and January 24, 2018; a letter with enclosures to OIP from

[1] Requester submitted two appeals, both of which seek a decision as to whether COUNCIL-HON violated the notice provisions of the Sunshine Law. HRS § 92-7 (2012). OIP's administrative rules for appeals allow OIP to consolidate appeals that have similar issues or facts. HAR § 2-73-15(g). Because the appeals involve similar issues, OIP is consolidating the two appeals.

the Department of the Corporation Counsel (CORP CNSL-HON), on behalf of COUNCIL-HON, dated December 20, 2017 (Response); and the filed agenda for the Meeting.

Opinion

COUNCIL-HON's amendments to the filed agendas, and consideration and action on items improperly added to the agendas, violated the Sunshine Law. HRS § 92-7(d) (2012) (adding an item to the agenda is not permitted if it is of reasonably major importance and action on the item by the board will affect a significant number of persons).

Statement of Reasons for Opinion

The Sunshine Law requires that boards give written public notice of any meeting, which shall include an agenda that lists all the items to be considered at the meeting. HRS § 92-7(a) (Supp. 2019). Further, the Sunshine Law sets forth limited circumstances in which a board may add items to a filed agenda, and in November 2017 when the meetings in question were held, stated in pertinent part:

> No board shall change the agenda, once filed, by adding items thereto without a two-thirds recorded vote of all members to which the board is entitled; provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons.

HRS § 92-7(d) (2012).[2]

The determination of whether an item to be added to an agenda is of "reasonably major importance" and action on the item will "affect a significant number of persons" is fact-specific and must be made on a case-by-case basis. OIP Op. Ltr. No. 06-05 at 3.

Boards "are constrained at all times by the spirit and purpose of the Sunshine Law, as stated in HRS § 92-1." Kanahele v. Maui County Council, 130 Hawaii 228, 248, 307 P.3d 1174, 1194 (2013). The purpose of the Sunshine Law is "to protect the

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[2] The first clause of section 92-7(d), HRS, was amended in 2017 (effective on July 1, 2018) and now states that "[n]o board shall change the agenda, **less than six calendar days prior to the meeting**, by adding items thereto without a two-thirds recorded vote of all members to which the board is entitled[.]" 2017 Haw. Sess. Laws Act 64, § 2 at 333 (emphasis added).

people's right to know."[3] HRS § 92-1 (2012). OIP followed an approach consistent with that purpose in OIP Opinion Letter Number 06-05 (Opinion 06-05), which discussed the Hawaii County Council's (COUNCIL-H) amendment of its agenda by adding an item related to the previously agreed-to settlement of a lawsuit concerning a $1 billion residential development project. OIP Op. Ltr. No. 06-05 at 2. OIP found that it could reasonably be argued that the specific issues added to the COUNCIL-H agenda were "minor" in the sense that they required Hawaii County (County) to agree to certain settlement conditions that COUNCIL-H could reasonably believe to be of relatively little consequence to the County and because the action taken on those specific issues would arguably result in minor consequences to the County. Id. at 3-4. However, when liberally interpreting the Sunshine Law to implement the State's policy to conduct government as openly as possible, OIP found that the importance of an agenda item and the effect of a decision on that item could not be measured solely by looking to the distinct issue presented at that particular meeting or the consequences of the action taken on the item viewed in isolation. Id. at 4. Rather, the item's importance and the potential consequence of any action taken on it must be viewed relative to the larger context in which it occurs, which in that instance was the settlement agreement as a whole. Id.

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[3] In October 2019, the Civil Beat Law Center for the Public Interest filed in the First Circuit Court a complaint alleging that COUNCIL-HON violated the Sunshine Law when its Public Safety and Welfare Committee amended its agenda in order to consider a resolution about the Honolulu Police Department's (POLICE-HON) involvement in the protests at Mauna Kea. Civil Beat Law Center for the Public Interest v. City & County of Honolulu, Civ. No. 19-1-1695-10 (1st Cir. Ct.). Plaintiff filed a Motion for Partial Summary Judgment on January 24, 2020, which asked the Court to find that the defendants violated the Sunshine Law on July 25, 2019, by adding a Mauna Kea-related discussion to the committee's agenda.

COUNCIL-HON and the City and County of Honolulu (City) argued that the added agenda item was not to discuss Mauna Kea, but rather was a narrowly directed request to POLICE-HON or a report to COUNCIL-HON on POLICE-HON's involvement with protesters at Mauna Kea. Defendants further stated that any action on the resolution would not affect any member of the public, as it was a request from the City's legislative branch to the administrative branch to prepare a report on a particular event and did not approve or disapprove any further action of the POLICE-HON, did not approve or disapprove any further funding, and did not take a city or policy position regarding Mauna Kea. Finally, the defendants stated that the resolution did not violate the purpose and spirit of the Sunshine Law, because it was not a legislative act, nor would approval or disapproval of it establish COUNCIL-HON policy. Defendants described the resolution as an internal request that could have been done by a phone call, email, or a short conversation in the hallway. On April 2, 2020, the First Circuit Court issued an order granting plaintiff's motion for partial summary judgment.

I. November 1 Meeting: Resolution 17-278, CD1 – Committee Report 380

The filed agenda for the Meeting did not include Resolution 17-278, CD1, titled "Accepting a Gift to the City from Makana Pacific Development" (Resolution 17-278). Video of the Meeting provided to OIP shows that near the end of the nearly five-hour meeting, COUNCIL-HON Chair Ron Menor (Chair) stated that there were "sunshine items" that needed to be addressed.

> CHAIR: Now, we have a sunshine item. We have sunshine items that we need to take up. So, Vice Chair Anderson for the appropriate motion.
>
> VICE CHAIR ANDERSON: Pursuant to Sunshine Law Hawaii Revised Statutes chapter 92, I move that Committee Report 380 and Resolution 17-278, CD1, be added to the agenda.
>
> COUNCILMEMBER PINE: Second.
>
> CHAIR: Okay, for the explanation.
>
> VICE CHAIR: Committee Report 380 relates to Resolution 17-278, CD1, accepting a gift to the City from Makana Pacific Development. And Mr. Chair, in case anyone is wondering what this is, it is a gift to include electrical work and lighting of a tree at Maunalua Bay Beach Park, valued at $40,000.
>
> CHAIR: Okay, thank you. Any testifiers in regards to this Sunshine item? Okay, we don't have any testifiers. Discussion? Okay, are there any objections to the sunshining of this item? Noting no objections, are there any reservations? Noting no reservations Committee Report 380 has been added to the agenda. Now for the appropriate motion to adopt said Committee Report and Resolution. Vice Chair Anderson?
>
> VICE CHAIR: Thank you very much Chair. I would also like to note that this gift also involves a system to support two photovoltaic panels with batteries that will power lights for a tree in the same vicinity valued at another $58,000. Again, just in case anyone is wondering what these gifts are. I move the Committee Report 380 and Resolution 17-278, CD1, be adopted.
>
> COUNCILMEMBER PINE: Second.
>
> CHAIR: Okay, moved and seconded. Any testifiers? On this particular item, we don't have any testifiers. Discussion? Further discussion? No discussion. Any objections, reservations? Noting none, Committee Report 380 and Resolution 17-278, CD1, have been adopted. All right, we have another sunshine item.

DVD: Video, Honoraries & Regular Council, November 1, 2017, Disc 2 of 2, at 11:42 (transcript prepared by OIP); Meeting video may also be viewed at Honolulu City

Council, 2017-11-01 REG COUNCIL, at 4:47:53, http://honolulu.granicus.com/player/clip/555?view_id=3 (last visited Apr. 30, 2020).[4] [5]

As an initial matter, OIP observes that COUNCIL-HON did not allow for oral testimony before considering Resolution 17-278. Specifically, COUNCIL-HON's motion to adopt Resolution 17-278 (and Committee Report 380) preceded the Chair's call for "any testifiers." The Sunshine Law requires a board to "afford all interested persons an opportunity to present oral testimony on any agenda item." HRS § 92-3 (2012). OIP has found previously that a board is required to allow oral testimony prior to its consideration of an agenda item. OIP Op. No. 06-01 at 2 n.2 ("if a board did not permit public comment until after it discussed or acted on an item the board would have failed to allow 'testimony' on the item as the Sunshine Law requires"). Thus, COUNCIL-HON's discussion of Resolution 17-278 before allowing for oral testimony did not meet the requirements of section 92-3, HRS.

As for the amendment of the agenda, CORP CNSL-HON contended that COUNCIL-HON's action on Resolution 17-278, CD1 was not of "reasonably [sic] importance nor does it affect a significant number of persons[,]" because "Council's action did not encompass approval of the installation of the lights, the building permits needed to install the electricity, or the location of the specific tree. . . . The action of Council was merely to accept a gift . . . [and] only affects the donor and no other persons."[6] In contrast, Requester stated that the lighted tree is in a "highly visible area in Hawaii Kai right near the ocean[,]" and COUNCIL-HON's action is not only of major importance to the community but also "sets a precedent for similar actions throughout the island."

OIP finds that if COUNCIL-HON had not taken action at the Meeting to accept the gift, then the tree lighting process would not have moved forward. Following the Meeting, the City and County of Honolulu (City), Department of Parks and Recreation (DPR) issued a "Shade Tree Permit" dated November 16, 2017. The permit granted permission for "the installation of low voltage LED lights onto a City

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[4] The Vice Chair's reference to a gift valued at $58,000 appears to refer to the original gift of a temporary trellis system to support two photovoltaic panels with batteries to power lights for a tree, which was later revised to instead include electrical work and lighting valued at $40,000.

[5] As referenced in the last sentence of the transcript, COUNCIL-HON also added items M-6320 and Resolution 17-310, discussed infra, to its agenda for the Meeting, in the same manner as described for Resolution 17-278.

[6] The December 20, 2017 Response stated that COUNCIL-HON had been informed that the gift proposal would be amended and taken up by COUNCIL-HON in the future, and, therefore, the complaint regarding the resolution was moot. OIP reviewed COUNCIL-HON's agendas for its meetings held on January 31, 2018, and February 13 and 28, 2018, none of which appeared to include an amended Resolution 17-278.

ironwood tree[ ] located next to a parking lot at Joe Lukela Park" in Hawaii Kai, for the period from November 20, 2017 to January 2, 2018. The Response stated that COUNCIL-HON was not privy to the "shade permit" nor was it related to Resolution 17-278, CD1. However, but for COUNCIL-HON's acceptance of the gift, DPR would not have issued the permit. If COUNCIL-HON had voted not to accept the gift, then it appears there would have been no need for a permit and no tree lighting.

Minutes of the Hawaii Kai Neighborhood Board Meeting held on November 28, 2017 (HKNB Meeting), reflect that there was considerable discussion on the topic of illuminating trees in parks, particularly the one at Maunalua Bay's Joe Lukela Beach Park. City & County of Honolulu, Government, Hawaii Kai Neighborhood Board No. 1, http://www.honolulu.gov/cms-nco-menu/site-nco-sitearticles/30285-hawaii-kai-nb-november-minutes.html; then November 2017 Minutes PDF at 3-6 (last visited April 2, 2020). Participants included several residents who gave testimony in support of the tree lighting, HKNB board members and a member of another neighborhood board who expressed concern about the process by which the tree lighting was approved by COUNCIL-HON, and a representative of the Outdoor Circle who stated concern about the use of public lands for memorials. Id. Reportedly, participants at the HKNB meeting "argued about the tree for nearly two hours."[7]

COUNCIL-HON's action to approve Resolution 17-278, CD1, resulted in the lighting of a tree by a private entity in a public park near the shoreline, which was visible to many. Based on the clear community interest in the tree lighting and the possible impact of COUNCIL-HON's action on the use of City parks in the future, OIP is of the opinion that the issue was of "reasonably major importance." Therefore, OIP finds that Resolution 17-278, CD1, was an item of "reasonably major importance." With regard to the number of people affected by the issue, OIP finds that COUNCIL-HON's action affected those who lived near the lighted tree and those residents who resided outside the area but viewed it in passing. Also, as Requester noted, such action might set a precedent for similar actions throughout the island, which would affect an even greater number of COUNCIL-HON's constituents. Thus, OIP finds that COUNCIL-HON's action "affect[ed] a significant number of persons." Accordingly, OIP concludes that COUNCIL-HON violated section 92-7(d), HRS, when it voted to add the Resolution to its agenda and took action on it at the Meeting.[8]

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[7] Chelsea Davis, A glowing symbol of holiday hope sparks community disagreement, Hawaii News Now (Nov. 30, 2017, 12:02 AM), at 2, https://www.hawaiinewsnow.com/story/ 36958916/ illuminated-tree-in-hawaii-kai-to-honor-loved-one-draws-criticism/.

[8] Requester asked whether COUNCIL-HON must identify the nature of gifts on the agenda when it hears a resolution to accept a gift and asked that OIP "declare the

II. November 1 Meeting: Communication M-6320, Extension Request

Communication M-6320 (M-6320) is Hawaii City Plaza LP's request for an extension of ninety calendar days for COUNCIL-HON to act on Resolution 17-305. The request is dated October 26, 2017 and was date-stamped by the City Clerk on October 31, 2017, a day before COUNCIL-HON's Meeting. Resolution 17-305, is titled "Approving a Conceptual Plan for an Interim Planned Development-Transit Project for the Development of the Hawaii City Plaza Condominium Development Project," a controversial project located in Honolulu.[9]

As the Response explained, if COUNCIL-HON did not take action on Resolution 17-305 within sixty days after receipt of the application, the application would be deemed denied. Revised Ordinances of the City and County of Honolulu 1990 § 21-2.110-2(f). CORP CNSL-HON asserted that the matter was not of "major importance," because COUNCIL-HON took no action to either deny or approve the application and "merely allowed for further review and public discussion."[10] The

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Council's description inadequate and require that the Council provide more detailed descriptions of gift resolutions on future agendas." Requester stated that on the day of and before the start of the Meeting, COUNCIL-HON made a written announcement of its intent to add Resolution 17-278, CD1 to the agenda: "CR-380 and Resolution 17-278, CD1, Accepting a gift to the City from Makana Pacific Development. To be added to the Agenda." Because OIP has concluded that the resolution was not properly added to the agenda, OIP has already determined that it was not adequately noticed.

For guidance, however, OIP notes that the Sunshine Law requires that an agenda for a public meeting list each item a board intends to consider with sufficient detail to provide members of the public with reasonable notice so that they can decide whether to participate in the meeting. OIP Op. Ltr. No. 03-22 at 6. OIP agrees with Requester that an agenda must allow any member of the public to know what a board will consider at a forthcoming meeting without being required to refer to another source, such as the minutes of another meeting. OIP Op. Ltr. No. 07-02 at 4-5 (citations omitted). The Committee on Parks' discussion of Resolution 17-278, CD1 at its October meeting and the Committee Chair's announcement at that meeting of when the resolution would be discussed again, cannot substitute for an agenda that meets the Sunshine Law's notice requirements.

[9] See Rick Daysog, Developer of luxury condo threatens boycott over permitting snag, Hawaii News Now (May 12, 2017, 2:31 AM - Updated Aug. 12, 2017, 11:17 PM), https://www.hawaiinewsnow.com/story/35412120/developer-threatens-boycott-accuses-council-member-of-racism/; Gordon Y. K. Pang, Council give OK to Keeaumoku condo tower project (Dec. 7, 2017), https://www.staradvertiser.com/2017/12/07/business/council-gives-ok-to-keeaumoku-condo-tower-project/.

[10] CORP CNSL-HON stated that the public was afforded the opportunity to provide additional comments on Resolution 17-305 at a Committee on Zoning meeting held on December 5, 2017, and a COUNCIL-HON meeting held on December 6, 2017, at which Resolution 17-305 was approved.

Response further stated that "[w]ithout the additional time that was approved at the [Meeting], there would have been no further opportunity for additional public comment."

In video of the Meeting, Councilmember Anderson stated he had "great concern" about the project but because the issue does warrant further discussion, he will vote to grant the extension of time but reserves the right to vote in opposition at a later date. Honolulu City Council, 2017-11-01 REG COUNCIL, at 4:50:55, http://honolulu.granicus.com/player/clip/555?view_id=3 (last visited Apr. 30, 2020). Also, Councilmember Manahan said he would be "voting with reservations," noted that the developer had been "really rude to the Council, breaking decorum" at a previous meeting and "retained his right to vote no" depending on how the issue moves forward. Councilmember Elefante also noted his "very significant concerns" with the development. Two Councilmembers approved M-6320 with reservations. No Councilmember voted against M-6320.

OIP finds that M-6320 was of reasonably major importance and action thereon would affect a significant number of persons because, as CORP CNSL-HON stated, had COUNCIL-HON not taken action to approve the deadline extension, the application for the project would have been "deemed denied." Although CORP CNSL-HON contended that COUNCIL-HON did not take any action on the project, COUNCIL-HON did in fact take action to approve the extension request in M-6320, and if it had not done so the application, and therefore the project, would not have proceeded. Thus, the larger context for item M-6320 and COUNCIL-HON's action thereon was the entire project, which would have affected many, including those associated with the development project or who may work on the project in the future, constituents who live near the project, those who may buy or rent units in the project, and those who visit the area. Consequently, in accordance with the decision in Opinion 06-05, OIP concludes that COUNCIL-HON violated section 92-7(d), HRS, when it voted to add M-6320 to its agenda and took action on it at the Meeting.

III. November 1 Meeting: Resolution 17-310, Sponsorship Programs

Resolution 17-310 is titled "Urging the City Administration to Implement Sponsorship Programs for the Honolulu Zoo and Other City Facilities." The Response stated that "[t]his matter merely reminds and encourages the use of sponsorship procedures as previously authorized in Ordinance 15-42 (Sponsorships In Honolulu Zoo) and Ordinance 17-16 (Sponsorship of City Facilities)[]" and was "not project specific, rather it merely conveyed a reminder to the City Administration to use the recently passed law on sponsorships." CORP CNSL-HON asserted that the "matter was not of major importance and does not affect anyone."

Resolution 17-310 mentioned several city facilities, including the Honolulu Zoo, Waikiki Park improvements, and a multimillion-dollar inclusive playground

proposed for Ala Moana Beach Park, and it discussed Kapolei Regional Park (KRP), a City park, in more detail. Resolution 17-310 stated in relevant part: (1) KRP has experienced numerous challenges; (2) a sacred, historical Native Hawaiian site is located at KRP; (3) residents have repeatedly volunteered to repair the sprinkler system at the site, which had experienced problems; and (4) despite continued vandalism within KRP, a community group's offer to donate a security system has not been accepted. COUNCIL-HON added the resolution to the agenda and adopted it unanimously.

Considering the larger context, i.e., the various projects and proposals referenced in Resolution 17-310 as a whole, OIP is of the opinion that Resolution 17-310 was of "reasonably major importance" to COUNCIL-HON's constituents, including the residents and community group who had been attempting to help the City maintain its assets at KRP. Had they received the notice normally required by the Sunshine Law informing the public that the matter would be on the agenda, they might have attended the Meeting or otherwise participated in the process. CORP CNSL-HON's argument that the matter "does not affect anyone" appears to assume that Resolution 17-310 would have no direct legal impact on City administration. However, OIP finds that a COUNCIL-HON resolution asking the City administration to take certain actions, while not a mandate, does have its intended effect of signaling support for those actions and thus making them more likely to happen. Further, the proposals and projects for which COUNCIL-HON was thus stating its support affected a "significant number of persons," including not only the administration but also those who had already repeatedly offered their assistance to KRP and all park users.

OIP reviewed the Meeting agenda and minutes and noted the listing on the agenda of seven other resolutions "urging" or "requesting" the City administration, a City department, or the State Legislature to take a specified action. In some cases, there was written testimony or public oral testimony on those items, underlining the public interest in having the opportunity to weigh in on such resolutions and offering an example of how COUNCIL-HON's failure to list Resolution 17-310 on the agenda impaired "the people's right to know[.]" HRS § 92-1. OIP concludes that COUNCIL-HON violated section 92-7(d), HRS, when it voted to add Resolution 17-310 to its agenda and took action on it at the Meeting.

IV. Budget Committee Meeting: Resolution 17-328, Workforce Study

The Budget Committee amended its agenda at its Budget Meeting to add Resolution 17-328:

> WORKFORCE STUDY. Requesting the City Administration, Oahu Transit Service, Inc., and the Honolulu Authority for Rapid Transportation to conduct a workforce study to assess the staffing requirements for the City's entire multimodal transportation system;

> to consider and recommend methods to develop the local workforce, such as developing training opportunities for local workers and partnering with local community colleges to ensure that graduating students have adequate technical skills; and to consider and recommend policies and procedures for successful employee transfer, integration, and retention.

The Response stated that COUNCIL-HON was "merely requesting that the City Administration perform a review and study as to whether there are sufficient labor force and/or training opportunities that will provide the required staffing" for the City's public transportation system. Further, "since this matter does not implement any action, it is not of major importance. As to whatever the recommendations that come from the work study may come before Council, public comment would be received at that time."

Andrew Robbins, Executive Director of Honolulu Authority for Rapid Transportation (HART), Wes Frysztacki, Director of the Department of Transportation Services (DTS), Roger Morton, Executive Director of Oahu Transit Services, Inc. (OTS), and a member of the public testified at the Budget Meeting. The Budget Committee deferred action on Resolution 17-328 to allow DTS to thoroughly review the measure and make amendments if needed.

OIP disagrees with CORP CNSL-HON's contention that Resolution 17-328 is "not of major importance." As noted earlier in this opinion, an agenda item's importance and the potential consequence of any action taken on it must be viewed relative to the larger context in which it occurs. OIP Op. Ltr. No. 06-05 at 4. OIP believes that a resolution requesting a workforce study to look for ways to merge the workforces of HART and OTS and to recommend methods to develop the local workforce is of reasonably major importance, because it could be the first step toward a major change in the workforce structure of the City's transportation services. For the same reason, action on it would affect a significant number of persons, including current and future local workers in the transit system, unions, and the educational system. Accordingly, OIP concludes that the Budget Committee violated section 92-7(d), HRS, when it voted to add Resolution 17-328 to the agenda and discussed and voted to defer action on it.

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

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

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

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

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

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

SPECIAL NOTICE: During the COVID-19 pandemic, Hawaii's Governor issued his Supplementary Memorandum on March 16, 2020, which suspended the UIPA in its entirety. The suspension was continued until May 31, 2020, by the Governor's Sixth Supplementary Proclamation dated April 25, 2020. On May 5, 2020, the Governor's Seventh Supplementary Proclamation (SP7) modified the prior suspension of the UIPA in its entirety and now provides that the UIPA and Chapters 71 and 72, Title 2, HAR, "are suspended to the extent they contain any deadlines for agencies, including deadlines for the OIP, relating to requests for government records and/or complaints to OIP." SP7, Exhibit H.

The UIPA's part IV sets forth OIP's powers and duties including jurisdiction over the Sunshine Law in section 92F-42(18), HRS, which have been restored by SP7, except for the deadline restriction, and give OIP authority to resolve this appeal. Thus, for OIP's Sunshine Law opinions issued while SP7 is still in force, agencies will have a reasonable time to request reconsideration of an opinion to OIP, but a request for reconsideration shall be made no later than ten business days after suspension of the UIPA's deadlines are lifted upon expiration of SP7 after May 31, 2020, unless SP7 is terminated or extended by a separate proclamation of the Governor. Agencies wishing to appeal a Sunshine Law opinion to the court under section 92F-43, HRS, have a reasonable time to do so, subject to any orders issued by the courts during the pandemic, and no later than thirty days after suspension of

the UIPA's deadlines is lifted upon expiration of SP7 after May 31, 2020, unless terminated or extended by a separate proclamation of the Governor.

OFFICE OF INFORMATION PRACTICES

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI`I

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) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing reply memorandum was served on the below-identified parties by electronic mail.

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