ROBERT BRIAN BLACK 7659
BENJAMIN M. CREPS 9959
Public First Law Center
700 Bishop Street, Suite 1701
Honolulu, Hawai`i 96813
brian@publicfirstlaw.org
ben@publicfirstlaw.org
Telephone: (808) 531-4000
Facsimile: (808) 380-3580

Attorneys for Plaintiff Public First Law Center

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 (JJK) (Other Civil Action) MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT AGRIBUSINESS DEVELOPMENT CORPORATION BOARD OF DIRECTORS' MOTION FOR SUMMARY JUDGMENT REGARDING COUNT XIV [DKT. 218]

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT AGRIBUSINESS DEVELOPMENT CORPORATION BOARD OF DIRECTORS' MOTION FOR SUMMARY JUDGMENT REGARDING COUNT XIV [DKT. 218]

Defendant Agribusiness Development Corporation Board of Directors' (ADC Board) motion for summary judgment on Count XIV, Dkt. 218, studiously avoids the merits of the claim—whether the Office of Information Practices (OIP) Opinion Letter No. F24-03 (Opinion F24-03) is "palpably erroneous" to the extent it affirmed the *entirety* of the ADC Board's August 8 executive session. Instead, it advances procedural arguments that are divorced from the reality of this case.

The ADC Board's claim that Opinion F24-03 should remain as binding precedent contradicts the legal admissions it has made. In Opinion F24-03, OIP held the ADC Board complied with the Sunshine Law on August 8 when it interviewed, discussed, and selected a candidate for ADC Executive Director in executive session. OIP Op. No. F24-03 at 21-23. The ADC Board, however, has admitted—and this Court has ordered—that the ADC Board violated the Sunshine Law by doing so. Dkt. 211. On the same facts, the OIP opinion cannot be binding precedent consistent with this Court's order.

This Court can and should invalidate Opinion F24-03 for the reasons briefed more fully by Public First's motion for partial summary judgment on Count XIV, Dkt. 213, and below.

I. Factual Background

On August 8, 2023, the ADC Board interviewed, discussed, and selected a candidate for ADC Executive Director entirely in closed session. Dkt. 66 at 63-64 (Ex. 16), 67-110 (Ex. 17); *accord* Dkt. 125 at 24-26, No. 33, 34, 35, 36, 37 (Ex. 22) (admitting same); Dkt. 126 at 2-45 (Ex. 29).[1] On November 3, 2023, OIP concluded that executive session—in its entirety—was proper. OIP Op. No. F24-03 at 21-23.

Public First filed this action on January 12, 2024, and provided notice to OIP that same day. Dkt. 1; Dkt. 213 at 13 ¶ 2, 16; *see also* OIP Annual Report (2024) at 51, *available at* https://oip.hawaii.gov/wp-content/uploads/2025/01/OIP-2024-Annual-Report.pdf (describing this lawsuit). Public First plainly alleged the ADC Board exceeded the scope of a permissible executive session on August 8—*i.e.*, that at least a portion of the

[1] Pinpoint "Dkt." citations reference the page of the corresponding PDF.

executive session was improper. Dkt. 1 at 17 ¶ 121, 31-32 ¶¶ 228-41 (Count XII). The ADC Board denied the allegations in its answer. Dkt. 23 at 21 ¶ 121, 39-42 ¶¶ 228-41.

On October 23, 2024, Public First moved for partial summary judgment on Count XIV, among other claims. Dkt. 64 at 2. The ADC Board opposed summary judgment on Count XIV. Dkt. 79 at 8. The motion was denied. Dkt. 98.

On March 25, 2025, Public First again moved for partial summary judgment on Count XIV, among other claims. Dkt. 124 at 2. The ADC Board again opposed summary judgment on Count XIV—this time, it *submitted Opinion F24-03 and expressly argued it was "not palpably erroneous."* Dkt. 148 at 8-9; Dkt. 150. The ADC Board also affirmatively moved for summary judgment, in part, on the basis that Public First could not challenge the precedent set by Opinion F24-03. Dkt. 157 at 12-15, 17-18.

The parties subsequently settled all remaining claims except Count XIV. By Stipulation and Order entered July 3, the ADC Board admitted, and the Court so ordered, that the ADC Board exceeded the permissible scope of an executive session under the Sunshine Law on August 8. Dkt. 211 at 2.

The ADC Board also agreed to submit its August 8 executive session minutes to the Court for *in camera* review and order as to appropriate public disclosure. *Id*. On July 17, the Court ordered that the "majority of the minutes must be publicly disclosed by the ADC Board" and concluded, in part, that only "two sentences of the minutes fall within the personnel-privacy exception." Dkt. 226 at 6.

II. This Court already invalidated Opinion F24-03 by necessary implication.

There is no way to reconcile OIP Opinion F24-03 as binding precedent and the Court's prior order declaring (as admitted by the ADC Board) that the ADC Board executive session on August 8, 2023 violated the Sunshine Law—without concluding that Opinion F24-03 is palpably erroneous.[2] The same is true with respect to the Court's ruling that the "majority" of the August 8 executive session minutes must be publicly

[2] Parties cannot stipulate to conclusions of law. *LC v. MG*, 143 Hawai`i 302, 320, 430 P.3d 400, 418 (2018) ("[P]arty agreement as to a question of law is not binding on this court, and does not relieve us from the obligation to review questions of law de novo.").

disclosed and only a small portion of the discussion fell within the personnel-privacy exemption. *Id*. The OIP opinion and this Court's orders address the exact same facts and legal issue.

Twice this Court has held that the boards here violated the Sunshine Law by holding executive meetings to interview and discuss candidates for high-level government positions, contrary to the analysis in OIP Opinion F24-03 that interview candidates have a privacy interest that permits blanket executive sessions under the personnel-privacy exemption. This Court granted summary judgment on Counts IV and V in favor of Public First, concluding that Defendant Defender Council exceeded the scope of a permissible executive session when it interviewed, discussed, and selected a candidate for State Public Defender behind closed doors. Dkt. 207 at 2. And directly contradicting the analysis and conclusions of Opinion F24-03 that specifically address the August 8 executive meeting of the ADC Board, this Court entered a stipulation and order holding that the ADC Board violated the Sunshine Law, and ordered disclosure of the executive session minutes. Dkt. 211 at 2; Dkt. 226 at 6.

These rulings implicitly reject Opinion F24-03's analysis, which affirmed an executive session under identical (in the case of the ADC Board) and virtually identical (in the case of the Defender Council) facts. If Opinion F24-03 is *not* palpably erroneous, then this Court's rulings conflict with binding precedent.

But that is plainly not the case. The Defender Council and ADC Board undisputedly held presumptively open personnel discussions in executive session, without the required privacy analysis, and the Court's rulings are consistent with higher precedent. *E.g.*, Dkt. 124 at 15-21 (discussing *CBLC* holding); Dkt. 213 at 6-11 (discussing reasons Opinion F24-03 is "palpably erroneous").

III. This Court has jurisdiction to decide Count XIV.

In the absence of any argument on the merits, the ADC Board asserts unusual procedural arguments. Relying on a vacated ICA decision, the ADC Board argues it is "not the proper party" to defend Opinion F24-03 because (1) OIP issued the decision after the ADC Board acted; (2) the OIP opinion "found fault" with the ADC Board's

actions; and (3) the ADC Board is not "following" or attempting to introduce the OIP opinion into this action as precedent. Dkt. 218 at 14-18.

As a threshold matter, recent amendments to the Sunshine Law clarify that the ADC Board is the "proper party." Although the ADC Board implies that Public First should have sued OIP, the Legislature clarified last year that challenges concerning Sunshine Law compliance should be brought against boards. HRS § 92-12(c) (eff. July 2, 2024) ("Any person may commence a suit *against a board* or alleged board in the circuit court of the circuit in which a prohibited act occurs . . ." (emphasis added)).

In this regard, the ADC Board misreads *In re Office of Information Practices Opinion Letter No. F16-01* [*In re F16-01*] and Act 160 (2024). *In re F16-01* held OIP was properly named as a defendant in a lawsuit to invalidate an OIP decision that upheld the actions of the Maui County Council. 147 Hawai`i 286, 288-91, 465 P.3d 733, 735-38 (2020). The Hawai`i Supreme Court explained that the Sunshine Law did not limit the "proper defendant," as long as the claims meet the purpose of the Sunshine Law. *Id.* at 296-97, 465 P.3d at 743-44.

In response, the Legislature enacted Act 160 (2024), amending HRS § 92-12 to clarify that Sunshine Law actions should be brought against boards, not OIP.

> Following a cause of action brought after a decision by [OIP] that a board had not violated the Sunshine Law, the Hawai`i Supreme Court ruled [in *In re F16-01*] that the complaining party is allowed to sue [OIP] instead of the board for the alleged Sunshine Law violation. This measure will conform the Sunshine Law with similar Uniform Information Practices Act appeal processes to allow a person to sue the relevant board over the board's alleged violation and require the court to hear the lawsuit de novo.

Senate Stand. Comm. Report No. 3695 (2024).

The ADC Board's arguments all seek to impose additional limitations as to what entities are a "proper defendant". None of those purported new jurisdictional burdens find support in *In re F16-01* or the plain text of the law. The Hawai`i Supreme Court specifically held that a suit challenging an OIP opinion—like this one—"could meet any of the three HRS § 92-12(c) purposes." *In re F16-01,* 147 Hawai`i at 297, 465 P.3d at 744; *accord Civil Beat Law Ctr. for the Pub. Interest, Inc. v. City & County of Honolulu*, 144

Hawai`i 466, 477, 445 P.3d 47, 58 (2019) ("the Sunshine Law provides people access to the courts to ensure that boards understand and comply with their Sunshine Law obligations."). An errant OIP decision obviously frustrates compliance with the law, and a suit to correct it meets all three section 92-12(c) purposes.

> Therefore, as to the first and second purposes, a situation could occur in which OIP allegedly violates its duties and purpose and the circuit court must then "requir[e] compliance with or prevent[] violations of [the Sunshine Law]." As to the third purpose, OIP could act in a way that would require the circuit court "to determine the applicability of [the Sunshine Law] to discussions or decisions of [OIP]." Since the plain language of the statute permits "any person to commence a suit in the circuit court," *the circuit court must have jurisdiction to review OIP's actions and decisions as long as the requirements of HRS § 92-12(c) are met*.

In re F16-01, 147 Hawai`i at 297, 465 P.3d at 744 (emphasis added).

As to the ADC Board's arguments, it is nonsensical to argue that this Court cannot consider Opinion F24-03 because the ADC Board acted before OIP issued its decision. Contrary to all legislative intent, that would make OIP opinions effectively unreviewable because OIP decisions concerning specific board actions can never be issued *before* the board acts. The public must be able to challenge OIP decisions—that are otherwise binding precedent for future actions of all Hawai`i boards and commissions—to require compliance, prevent violations, and determine the applicability of the Sunshine Law to board discussions. *Id.* at 296-97, 465 P.3d at 743-44.

Similarly, it is irrelevant that OIP held in Opinion F24-03 that the ADC Board violated the Sunshine Law in other ways that are not at issue in this case. The ADC Board had an opportunity to challenge Opinion F24-03 to the extent OIP held Sunshine Law violations occurred. HRS § 92F-43; *see also* HRS § 92-12(d). It did not do so. And Public First has never claimed that Opinion F24-03 is palpably erroneous as it concerns those violations. *E.g.*, Dkt. 1 at 35 ¶ 260 ("palpably erroneous to the extent it held that the ADC Board properly conducted an executive session on August 8"). This case only concerns OIP's holding as to the issue that the ADC Board vigorously defended until recently—the validity of the August 8 executive session.

Lastly, the ADC Board's claim that it "never attempted to enter [Opinion F24-03] into this case nor has it ever attempted to use [Opinion F24-03] as justification for its actions" is not true. Dkt. 218 at 17. The ADC Board submitted Opinion F24-03 to this Court to defend against summary judgment and expressly argued that the opinion is *not* "palpably erroneous." Dkt. 148 at 8-9; Dkt. 150; Dkt. 157 at 12-15, 17-18. But such reliance is not a jurisdictional requirement in any event. As the Hawai`i Supreme Court held, circuit courts plainly have the authority to invalidate "palpably erroneous" OIP decisions—irrespective of whether a defendant "relies" on the decision—because it serves the purposes of HRS § 92-12(c). *In re F16-01*, 147 Hawai`i at 297, 465 P.3d at 744.

In the end, this Court is simply not bound by erroneous OIP decisions. *E.g.*, *Peer News LLC v. City and Cty. of Honolulu*, 143 Hawai`i 472, 485, 431 P.3d 1245, 1258 (2018) ("we are not bound to acquiesce in OIP's interpretation when it is 'palpably erroneous'").

IV. Count XIV is timely.

The ADC Board argues Count XIV is untimely because it was filed more than 90 days after the August 8, 2023 executive session of the ADC Board, citing HRS § 92-11. Dkt. 218 at 11-14. The ADC Board is wrong.

First, the 90-day limitations period expressly applies *only* to "[a] suit to void any final action." Public First did not seek to void any final action of the ADC Board. Dkt. 1 at 36-38 ¶¶ F-O. And nothing about declaring Opinion F24-03 to be palpably erroneous would void any action of the ADC Board. *E.g.*, OIP Op. No. F23-01 at 33 ("board actions cannot be voided by OIP").

Second, there is no limitations period for claims to declare OIP decisions palpably erroneous—just as there is no statute of limitations for the Hawai`i Supreme Court to overturn erroneous precedent. For example, in *Peer News*, the Hawai`i Supreme Court held decades' of OIP decisions to be palpably erroneous —"eight opinion letters issued between 1989 and 2007." 143 Hawai`i at 475, 431 P.3d at 1248. That lawsuit was filed in 2015 and like this case, asserted a stand-alone claim to invalidate OIP's "deliberative process privilege" opinions. *Id*. at 477, 431 P.3d at 1250. As another example, the circuit court action in *In re F16-01* was commenced on

December 4, 2015—more than two years after the board's "final action" on February 19, 2013 and just under six months after OIP issued its decision on July 24, 2015. 147 Haw. at 289-91, 465 P.3d at 736-38. Contrary to the ADC Board's position, OIP opinions do not become unreviewable after 90 days.

Third, even if the section 92-11 or 92-12 limitations periods applied to Count XIV—they do not—Count XIV is still timely under either limitations period. This action was commenced January 12, 2024—*seventy-one* days after OIP issued Opinion F24-03 on November 3, 2024.

CONCLUSION

Based on the foregoing, Public First respectfully requests that the Court deny the ADC Board's motion and declare that Opinion F24-03, at section III(B), is "palpably erroneous" to the extent it held that the ADC Board properly conducted an executive session on August 8, 2023.

DATED: Honolulu, Hawai`i, July 21, 2025

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