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AGRIBUSINESS DEVELOPMENT CORPORATION
BOARD OF DIRECTORS

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)

DEFENDANT AGRIBUSINESS DEVELOPMENT CORPORATION BOARD OF DIRECTORS' MEMORANDUM IN OPPOSITION TO PLAINTIFF PUBLIC FIRST LAW CENTER'S *MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT XIV*, FILED ON JULY 11, 2025, AS DKT. 213; DECLARATION OF DAVID N. MATSUMIYA; APPENDIX A; CERTIFICATE OF SERVICE

HEARING:
Date: August 20, 2025
Time: 1:00 p.m.
Judge: Honorable Jordon J. Kimura

Judge: Honorable Jordon J. Kimura
Trial: September 22, 2025

DEFENDANT AGRIBUSINESS DEVELOPMENT CORPORATION BOARD OF DIRECTORS' MEMORANDUM IN OPPOSITION TO PLAINTIFF PUBLIC FIRST LAW CENTER'S *MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT XIV*, FILED ON JULY 11, 2025, AS DKT. 213

Defendant AGRIBUSINESS DEVELOPMENT CORPORATION BOARD OF DIRECTORS ("**Defendant ADC**"), by and through Anne E. Lopez, Attorney General for the State of Hawai'i, and its attorneys Amanda J. Weston and David N. Matsumiya, Deputy Attorneys General, hereby submits its memorandum in opposition to Plaintiff PUBLIC FIRST LAW CENTER's ("**Plaintiff**") *Motion for Partial Summary Judgment on Count XIV*, which was filed herein on July 11, 2025 as Dkt. 213 ("**Plaintiff's MSJ – Count 14**").

I. STATEMENT OF RELEVANT FACTS

On November 3, 2023, the State of Hawai'i Office of Information Practices ("**OIP**"), in response to a request by an anonymous member of the public, issued *Opinion Letter No. F24-03*[1] ("**OIP's Opinion Letter No. F24-03**"), which was/is OIP's decision on whether Defendant ADC violated the Sunshine Law during its selection of its new executive director. *See* Appendix A, which is a true and correct copy of OIP's Opinion Letter No. F24-03, at p. 1. *See* Declaration of David N. Matsumiya ("**Matsumiya Declaration**") at pp. 1-2, ¶¶ 5-8. As noted in Plaintiff's MSJ – Count 14, Section III(B) is the specific section that Plaintiff seeks to have declared "palpably erroneous." *See* Dkt. 213 at p. 2 of the PDF. Section III(B) of OIP's Opinion Letter No. F24-03 states:

> **B. The ADC Board's Candidate Interviews, and Discussions on Salary and Selection of a Candidate Were Allowed Under the Sunshine Law**
>
> The Sunshine Law does not require that meetings related to personnel matters be closed to the public; rather, that decision is discretionary, provided that certain statutory requirements are met. CBLC, 44 Haw. at 476-477, 445 P.3d at 57-58. Section 92-5(a)(2), HRS, allows boards to hold an executive session "[t]o consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held[.]"

[1] OIP publishes its formal opinions to the public on its website at https://oip.hawaii.gov/laws-rules-opinions/opinions/formal-opinion-letter-summaries-and-full-text/. A summary of OIP's Opinion Letter No. F24-03 can be found at https://oip.hawaii.gov/f24-03/. A complete copy of OIP's Opinion Letter No. F24-03 can be downloaded at https://oip.hawaii.gov/wp-content/uploads/2023/11/OIP-Op.-Ltr.-No.-F24-03-Anonymous-re-ADC-Board.pdf.

The August 8 Meeting notice stated that the Board anticipated entering an executive session under section 92-5(a)(2), HRS to discuss three agenda items: (1) ED candidate interviews; (2) discussion of ED salary; and (3) selection of the new ED. As noted above, the August 8 Meeting minutes show the Board first voted to accept the recommendations of the Search Committee. The Chair called for a motion to enter executive session to interview the top two applicants, and to select the new ED and set the ED salary.

A board may enter an executive meeting and deliberate and vote in an executive session "convened to protect an employee's privacy interest." See OIP Op. Ltr. No. 20-01 at 10-11 (concluding that the Maui County Council had a proper basis for invoking the personnel-privacy purpose under section 92-5(a)(2), HRS, when it could reasonably anticipate that it would be discussing the potential hire of employees and possibly the details of individual employee's performance and past evaluations that were likely to concern their individual privacy); OIP Op. Ltr. No 06-07 at 4 (finding that executive meeting minutes discussing a board's evaluation and dismissal of the ED of the Charter School Administrative Office reflected a discussion and vote properly done in executive session, but portions of the minutes were publicly disclosable at the time the minutes were requested because the ED no longer had a privacy interest in that information).

The applicability of section 92-5(a)(2), HRS, which the Court refers to as the "personnel-privacy exception" to the Sunshine Law's public meeting requirement, must be determined on a case-by-case basis because an analysis of privacy requires a specific look at the person and the information at issue. CBLC, 144 Haw. at 478, 445 P.3d at 58. For section 92-5(a)(2), HRS, to apply, the person at issue must have a "legitimate expectation of privacy" in the information to be discussed, and people have a legitimate expectation of privacy in "highly personal and intimate information[,]" including financial and employment records. CBLC, 144 Haw. at 480, 445 P.3d at 61 (citations omitted).

A matter discussed in an executive session affects the privacy of an individual if it is one that would generally be protected under the UIPA, which governs access to public records. OIP Op. Ltr. No. 06-07 at 4 (Opinion 06-07).[22] The UIPA includes a list of information in which individuals have a significant privacy interest, including "applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position," and information describing an individual's finances and income. HRS § 92F-14(b)(4), (6) (Supp. 2012).

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[22] Footnote 8 in Opinion 06-07 notes that, because the Sunshine Law does not elaborate on what kinds of matters affect an individual's privacy, the AG opined that it is appropriate to look to the UIPA for guidance in construing the phrase "matters affecting privacy[.]" Footnote 8 goes on to say that matters protected would be those falling within section 92F-13(1), HRS, which protects information when disclosure would constitute a clearly unwarranted invasion of personal privacy. However, the Court clarified that it does "not read the UIPA's balancing test [at section 92F-14(a), HRS] into the Sunshine Law's personnel-privacy

exception. We adhere to the plain language of this exception, which allows specific personnel discussions to take place in a closed meeting, conditioned on whether 'consideration of matters affecting privacy will be involved.' HRS § 92-5(a)(2)." CBLC at 144 Haw. 480, 445 P.3d 61.

Section 92-5(a)(2), HRS, explicitly allows executive discussions regarding the "hire" of an employee. The candidates interviewed at the August 8 Meeting were prospective employees at that time, and OIP finds that their status as applicants for government employment was a matter affecting privacy. OIP further finds that their respective interviews revealed not just their identities but additional information about their backgrounds and qualifications in which, as applicants, they had a privacy interest of the sort recognized under section 92-5(a)(2), HRS.

A discussion of the salary amount for an unfilled position is not, by itself, a matter affecting privacy, and budgetary issues relevant to that discussion are not matters affecting privacy, particularly if the salary is already set by statute. In this instance, however, OIP finds that there was no statutorily set salary and the Board's discussion of the salary amount to offer whichever applicant it chose could be reasonably anticipated to be so intertwined with its discussion of the applicants themselves and their respective qualifications for the position that the full discussion involved consideration of matters affecting privacy, whether directly or indirectly. For example, depending on which candidate was ultimately selected and offered the ED position, it was possible that the salary would be a different amount due to the individual's qualifications or salary requirements. Consequently, the salary discussion could have impacted the applicants' privacy interests.

OIP further finds that because the candidates' status as applicants for government employment was a matter affecting privacy, and the candidates remained applicants until such time as the successful candidate accepted the Board's offer, the Board could not have publicly voted on the question of hiring a specific candidate without revealing that candidate's identity and thus frustrating the purpose of the executive session. OIP therefore concludes that the Board's interviews of and discussions about the two candidates in executive session, including salary discussions, were proper.[23]

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[23] The Search Committee made its recommendations to the Board in executive session during the July 20 Meeting. OIP did not review the executive session minutes, recordings, or board packet for the July 20 Meeting. The actions taken by the Search Committee were not at issue for this appeal, and OIP notes that generally it would be appropriate for a PIG to supplement its report given for public consumption during the public portion of a meeting with a more detailed version of the report delivered in executive session, so long as the executive session was for one of the reasons set forth in section 92-5(a), HRS, and the public report sufficiently informed the public of the PIG's work to allow the

> public to meaningfully testify on it at the next meeting. See also footnote 7, supra.
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See Appendix A at pp. 21-23.

On July 3, 2025, the court executed and filed the *Stipulation and Order Regarding Counts X-XIII and Remedies* (the "**Stipulation**"). *See* Dkt. 211. In the Stipulation, Defendant ADC admitted the following:

> (3) The ADC Board violated the Sunshine Law by doing the following in executive session on July 20 and August 8: (a) discussing the recommendations of the "Executive Director Search Committee" permitted interaction group (also referred to as the "Hiring PIG"); (b) interviewing candidates; (c) evaluating the candidate's qualification and fitness; and (d) selecting the ADC Executive Director[.]

See Dkt. 211 at p. 2 of the PDF.

II. APPLICABLE STANDARDS

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Hawai'i Rules of Civil Procedure ("**HRCP**") 56(c).

> A fact is material if proof of that fact would have the effect of establishing elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn from them in the light most favorable to the non-moving party opposing the motion.

Lansdell v. Cnty. of Kauai, 110 Hawai'i 189, 194, 130 P.3d 1054, 1059 (2006) (quoting *Hawaii Cmty. Fed. Credit Union v. Keka*, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000)). *See also Field, Tr. of Est. of Aloha Sports Inc. v. Nat'l Collegiate Athletic Ass'n*, 143 Hawai'i 362, 372, 431 P.3d 735, 745 (2018).

"A summary judgment motion 'challenges the very existence or legal sufficiency of the claim or defense to which it is addressed.'" *First Hawaiian Bank v. Weeks*, 70 Haw. 392, 396, 772 P.2d 1187, 1190 (1989) (quoting 10 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2711, at 555–56 (1983). In other words, "the moving party takes the position that [he or she] is entitled to prevail because his opponent has no valid claim for relief or defense to the action, as the case may be." *First Hawaiian Bank*, 70 Haw. at 396, 772 P.2d at 1190 (quoting 10 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2711, at

555–56 (1983) (original ellipse omitted). As a result, the moving party "has the burden of demonstrating that there is no genuine issue as to any material fact relative to the claim or defense and [that he or she] is entitled to judgment as a matter of law. *First Hawaiian Bank*, 70 Haw. at 396, 772 P.2d at 1190 (quoting 10 Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2711, at 555–56 (1983).

"The moving party 'may discharge his or her burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his or her opponent.'" *Young v. Planning Comm'n of Cty. of Kauai*, 89 Hawai'i 400, 407, 974 P.2d 40, 47 (1999) (quoting *First Hawaiian Bank*, 70 Haw. at 396, 772 P.2d at 1190) (original brackets omitted).

If the moving party satisfies his or her burden, "then the burden shifts to the [non-moving party] to demonstrate 'specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.'" *Garcia v. Robinson*, 137 Hawai'i 388, 397, 375 P.3d 167, 176 (2016) (quoting *French v. Haw. Pizza Hut, Inc.,* 105 Hawai'i 462, 470, 99 P.3d 1046, 1054 (2004)). The non-moving party "may not rest upon the mere allegations or denials of the [non-moving] party's pleading, but the [non-moving] party's response, by affidavits or as otherwise provided in [HRCP 56], must set forth specific facts showing that there is a genuine issue for trial." HRCP 56(e). A non-moving party "cannot discharge his or her burden by alleging conclusions, 'nor is he [or she] entitled to a trial on the basis of a hope that he [or she] can produce some evidence at that time." *Henderson v. Professional Coatings Corp.*, 72 Haw. 387, 400-401, 819 P.2d 84, 92 (1991) (quoting 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2727 (1983)).

> In deciding a motion for summary judgment, a circuit court must keep in mind an important distinction:
>
> > **A judge ruling on a motion for summary judgment cannot summarily try the facts**; his [or her] role is limited to applying the law to the facts that have been established by the litigants' papers. Therefore, a party moving for summary judgment is not entitled to a judgment merely because the facts he offers appear more plausible than those tendered in opposition or because it appears that the adversary is unlikely to prevail at trial. This is true even though both parties move for summary judgment. Therefore, if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men [and women] might differ as to its significance, summary judgment is improper. [Citations omitted.]

Chuck Jones & MacLaren v. Williams, 101 Hawai‘i 486, 497, 71 P.3d 437, 448 (Ct. App. 2003) (quoting *Kajiya v. Department of Water Supply*, 2 Haw. App. 221, 224, 629 P.2d 635, 638-39 (1981) (quoting 10A Wright, Miller and Kane, *Federal Practice and Procedure: Civil* § 2725 (1973)) (brackets original) (bold emphasis added).

"[S]ummary judgment must be used with due regard for its purpose and should be cautiously invoked **so that no person will be improperly deprived of a trial of disputed factual issues**." *Bhakta v. Cnty. of Maui*, 109 Hawai‘i 198, 207-208, 124 P.3d 943, 952-953 (2005), as amended (Dec. 30, 2005) (quoting *Miller v. Manuel*, 9 Haw. App. 56, 65-66, 828 P.2d 286, 292 (1991)) (bold emphasis added).

III. ARGUMENT

Defendant ADC is not the proper party to defend OIP's Opinion Letter No. F24-03. If this Honorable Court believes that Defendant ADC is the proper party, then Plaintiff's MSJ – Count 14 should be denied because: 1) OIP did not read the privacy condition out of the exemption; 2) OIP did not rely solely on UIPA privacy interests in making its determination; 3) OIP's analysis did not ignore the Hawai‘i Supreme Court's repeated emphasis on a case-by-case determination of privacy and, in fact, applied a case-by-case analysis; 4) OIP Opinion Letter No. F24-03 did consider the ADC Executive Director's authority within government and consider other factors that may affect a general conception of privacy around personnel matters; and 5) OIP's wholesale approval of the entire August 8 executive session does comport with HRS § 92-5(b).

A. DEFENDANT ADC IS NOT THE PROPER PARTY TO DEFEND OIP'S OPINION LETTER NO. F24-03

In *Defendant Agribusiness Development Corporation Board of Directors' Motion for Summary Judgment Regarding Count XIV* ("**Defendant ADC's MSJ**"), Defendant ADC makes the following arguments as to why Defendant ADC is not the proper party to defend OIP's Opinion Letter No. F24-03:

1. Defendant ADC Actions Occurred Prior to OIP's Opinion Letter No. F24-03 Being Issued

As shown above and admitted in the Complaint, Defendant ADC's final action occurred on August 17, 2023. *See* Exhibit A at p. 17, ¶ 125. OIP's Opinion Letter No. F24-03 was issued on November 3, 2023, which is 78 days after Defendant ADC's final action.

Based on these facts, it is crystal clear that Defendant ADC did not follow OIP's Opinion Letter No. F24-03 when it selected ADC's Executive Director.

Because Defendant ADC did not follow OIP's Opinion Letter No. F24-03 when it selected ADC's Executive Director, it would be highly prejudicial to the integrity of OIP's opinions to require Defendant ADC to defend OIP's Opinion Letter No. F24-03.

2. OIP's Opinion Letter No. F24-03 Found Fault with Defendant ADC's Actions

OIP was asked to decide "whether [Defendant ADC] violated the Sunshine Law during its selection of a new executive director[.]" *See* Appendix A at p. 1. OIP broke this request into six (6) questions. *See* Appendix A at p. 2. In OIP's Opinion Letter No. F24-03, OIP found that Defendant ADC violated three (3) of the six (6) questions that OIP was asked to determine. *See* Appendix A at pp. 3-5.

Based on these facts, it is clear that Defendant ADC does not completely agree with OIP's Opinion Letter No. F24-03. This is especially true with regard to OIP's questions 1, 2, and 4. *See* Appendix A at pp. 3-4.

Because Defendant ADC does not completely agree with OIP's Opinion Letter No. F24-03, it would be highly prejudicial to the integrity of OIP's opinions to require Defendant ADC to defend OIP's Opinion Letter No. F24-03.

3. Defendant ADC is Not Attempting to Enter OIP's Opinion Letter No. F24-03 into This Action as Precedent

When read together, HRS § 92F-42(3) (2024 Cumulative Supplement) and HRS § 92-12(d) indicate that the appropriate party to defend OIP's Opinion Letter No. F24-03 is the party attempting to enter it into the action as precedent. HRS § 92F-42(3) states: "The director of the office of information practices . . . may provide **advisory opinions** or other information regarding that person's rights and the functions and responsibilities of agencies under this chapter[.]" HRS § 92F-42(3) (bold emphasis added). HRS § 92-12(d) states: "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." HRS § 92-12(d) (bold emphasis added).

HRS § 92F-42(3) allows OIP to issue advisory opinions, which means that OIP's opinions are non-binding. HRS § 92-12(d) allows a party to enter OIP's non-binding opinions into an action brought under HRS Chapter 92, Part I. HRS § 92-12(d) further allows OIP's non-binding opinions to become precedent if it is not found to be "palpably erroneous."

In this case, the party attempting to enter OIP's Opinion Letter No. F24-03 into the case is Plaintiff – Defendant ADC has never attempted to enter OIP's Opinion Letter No. F24-03 into this case nor has it ever attempted to use OIP's Opinion Letter No. F24-03 as justification for its actions. The oddity here is that Plaintiff is attempting to enter OIP's Opinion Letter No. F24-03 into this case to

have it declared "palpably erroneous." This does not appear to meet the purpose of HRS § 92-12(d).

Based on the way HRS § 92-12(d) is worded, HRS § 92-12(d)'s purpose is to allow a party who followed OIP's non-binding opinion to enter OIP's non-binding opinion into the action as justification for the party's actions. It then allows the party to justify, to the court, why OIP's non-binding opinion should be precedent for the case.

As stated above, Plaintiff is attempting to enter OIP's Opinion Letter No. F24-03 into this action to have it declared "palpably erroneous." It is also attempting to force Defendant ADC, who has shown no interest or desire to have OIP's Opinion Letter No. F24-03 entered into this action, to convince this Honorable Court that OIP's Opinion Letter No. F24-03 is not "palpably erroneous." This begs the question: Is it fair to the integrity of OIP's opinions to require a party who is not interested in entering OIP's Opinion Letter No. F24-03 into the action to prove that OIP's Opinion Letter No. F24-03 is not "palpably erroneous?" The answer is clearly "NO."

Based on the foregoing, it is clear that Defendant ADC is not the appropriate party to defend OIP's Opinion Letter No. F24-03. As a result, this Honorable Court should decline to rule on whether OIP's Opinion Letter No. F24-03 is "palpably erroneous" until an appropriate party is made a defendant in this action or in a separate action.

See Dkt. 218 at pp. 16-18 of the PDF.

In addition to the foregoing, Defendant ADC believes it is important for this Honorable Court to consider another fact as to why Defendant ADC is not the proper party to defend OIP's Opinion Letter No. F24-03: Despite the existence of OIP's Opinion Letter No. F24-03, Defendant ADC chose to admit that it violated the Sunshine Law. *See* Dkt. 211 at p. 2 of the PDF. This fact clearly indicates that it is highly prejudicial to the integrity of OIP's opinions to require a defendant who did not rely on the opinion and who has waived the protection provided by the opinion to defend the opinion. As a result, this Honorable Court should decline to find that OIP's Opinion Letter No. F24-03 is "palpably erroneous."

Furthermore, because "unpublished decisions of trial courts have no precedential value" (*Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawaii*, 92 Hawai'i 432, 446, 992 P.2d 127, 141 (2000)), the only effect that this Honorable Court's finding of OIP's Opinion Letter No. F24-03 being "palpably erroneous" will simply be the unjustified impugning of the integrity of OIP's opinions.

B. OIP OPINION LETTER NO. F24-03 IS NOT "PALPABLY ERRONEOUS"

"In an action under this section, the circuit court shall hear the matter de novo. 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[.]" HRS § 92-12(d) (2024 Cumulative Supplement). "An agency's interpretation of a statute is palpably erroneous when it is inconsistent with the legislative intent underlying the statute." *Gillan v. Gov't Emps. Ins. Co.*, 119 Hawai'i 109, 119, 194 P.3d 1071, 1081 (2008).

Plaintiff argues that OIP Opinion Letter No. F24-03 is "palpably erroneous" because: 1) "it reads the privacy condition out of the exemption;" 2) "it relies on UIPA privacy interests and specifically its prior decision in Opinion 06-07;" 3) "OIP's analysis ignores the Hawai'i Supreme Court's repeated emphasis on a case-by-case determination of privacy;" 4) OIP Opinion Letter No. F24-03 "makes no effort to address the issue of the ADC Executive Director's authority within government or any other factors that may affect a general conception of privacy around personnel matters;" and 5) OIP's wholesale approval of the entire August 8 executive session does not comport with HRS § 92-5(b).

1. OIP Did Not Read the Privacy Condition Out of the Exemption

Although OIP Opinion Letter No. F24-03 states "[a] matter discussed in an executive session affects the privacy of an individual if it is one that would generally be protected under the UIPA, which governs access to public records[,]" OIP's citation to OIP Op. Ltr. No. 06-07 and OIP's footnote 22 clearly explains its use of the term "UIPA." *See* Appendix A at p. 22. Footnote 22 states:

> Footnote 8 in Opinion 06-07 notes that, because the Sunshine Law does not elaborate on what kinds of matters affect an individual's privacy, the AG opined that it is appropriate to look to the UIPA for guidance in construing the phrase "matters affecting privacy[.]" Footnote 8 goes on to say that matters protected would be those falling within section 92F-13(1), HRS, which protects information when disclosure would constitute a clearly unwarranted invasion of personal privacy. However, the Court clarified that it does "not read the UIPA's balancing test [at section 92F-14(a), HRS] into the Sunshine Law's personnel-privacy exception. We adhere to the plain language of this exception, which allows specific personnel discussions to take place in a closed meeting, conditioned on whether 'consideration of matters affecting privacy will be involved.' HRS § 92-5(a)(2)." CBLC at 144 Haw. 480, 445 P.3d 61.

See Appendix A at p. 22. This footnote clearly indicates that OIP used the UIPA for guidance and not as the standard to be used. This footnote also clearly indicates that OIP was quite aware

of the Hawai‘i Supreme Court’s mandate that consideration of matters affecting privacy must be involved in order to conduct discussion in a closed meeting.

Another fact that clearly indicates that OIP did not read the privacy condition out of the exemption is OIP’s statement that “[f]or section 92-5(a)(2), HRS, to apply, the person at issue must have a ‘legitimate expectation of privacy’ in the information to be discussed, and people have a legitimate expectation of privacy in ‘highly personal and intimate information[,]’ including financial and employment records.” *See* Appendix A at p. 22. OIP’s use of this requirement is evidence in its statement “OIP further finds that their respective interviews revealed not just their identities but additional information about their backgrounds and qualifications in which, as applicants, they had a privacy interest of the sort recognized under section 92-5(a)(2), HRS.” *See* Appendix A at p. 23.

Based on the foregoing, it is clear that OIP did not read the privacy condition out of the exemption.

2. <u>OIP Did Not Rely Solely on UIPA Privacy Interests</u>

As shown above, OIP referenced the UIPA for guidance and not as the standard to be used. *See* Appendix A at p. 22 at footnote 22.

OIP’s statement that “Section 92-5(a)(2), HRS, explicitly allows executive discussions regarding the ‘hire’ of an employee[,]” clearly indicates that OIP also considered HRS § 92-5(a)(2) in determining what was exempt from the public meeting requirements. *See* Appendix A at p. 23. OIP’s analysis regarding this issue and its conclusion that applicants had a privacy interest of the sort recognized under HRS § 92-5(a)(2) provide further evidence that OIP was looking at HRS § 92-5(a)(2). *See* Appendix A at p. 23.

Finally, OIP’s statement that “[a] discussion of the salary amount for an unfilled position is not, by itself, a matter affecting privacy, and budgetary issues relevant to that discussion are not matters affecting privacy, particularly if the salary is already set by statute[,]” also indicates that OIP was relying upon the Hawai‘i Supreme Court’s mandate that holding that consideration of matters affecting privacy must be involved to warrant meeting in closed session. *See* Appendix A at p. 23. OIP’s holding that the salary discussion could have impacted the applicants’ privacy interest clearly indicates that it not only considered this mandate, OIP applied it.

Based on the foregoing, it is clear that OIP considered other statutes and mandates from the Hawai‘i Supreme Court in determining what privacy interest qualified for protection.

3. OIP's Analysis Did Not Ignores the Hawai‘i Supreme Court's Repeated Emphasis on a Case-by-Case Determination of Privacy"

OIP Opinion Letter No. F24-03 provides ample evidence that OIP did not ignore the Hawai‘i Supreme Court's emphasis on case-by-case determination of privacy. The following paragraphs from OIP Opinion Letter No. F24-03 clearly evidence OIP's case-by-case analysis:

> Section 92-5(a)(2), HRS, explicitly allows executive discussions regarding the "hire" of an employee. **The candidates interviewed at the August 8 Meeting** were prospective employees at that time, and OIP finds that their status as applicants for government employment was a matter affecting privacy. OIP further finds that their respective interviews revealed not just their identities but additional information about their backgrounds and qualifications in which, as applicants, they had a privacy interest of the sort recognized under section 92-5(a)(2), HRS.
>
> A discussion of the salary amount for an unfilled position is not, by itself, a matter affecting privacy, and budgetary issues relevant to that discussion are not matters affecting privacy, particularly if the salary is already set by statute. In this instance, however, **OIP finds that there was no statutorily set salary and the Board's discussion of the salary amount to offer** whichever applicant it chose could be reasonably anticipated to be so intertwined with its discussion of the applicants themselves and their respective qualifications for the position that the full discussion involved consideration of matters affecting privacy, whether directly or indirectly. For example, **depending on which candidate was ultimately selected and offered the ED position, it was possible that the salary would be a different amount due to the individual's qualifications or salary requirements.** Consequently, the salary discussion could have impacted the applicants' privacy interests.
>
> OIP further finds that because the candidates' status as applicants for government employment was a matter affecting privacy, and the candidates remained applicants until such time as the successful candidate accepted the Board's offer, the Board could not have publicly voted on the question of hiring a specific candidate without revealing that candidate's identity and thus frustrating the purpose of the executive session. OIP therefore concludes that the Board's interviews of and discussions about the two candidates in executive session, including salary discussions, were proper.[23]

See Appendix A at p. 23 (bold emphases added). These paragraphs clearly indicate that OIP looked specifically at the applicants who were interviewed on August 8 and applied their privacy interest into its analysis. OIP's reference to no statutory set salary also indicates that OIP's analysis was specific to the position of Executive Director.

Based on the foregoing, it is clear that OIP did in fact conduct a case-by-case analysis for Defendant ADC's hiring of its Executive Director.

4. OIP Considered the Issue of the ADC Executive Director's Authority Within Government and Other Factors Affect Privacy in Personnel Matters

Although OIP Opinion Letter No. F24-03 does not clearly indicate that the Executive Director's Authority within the government was expressly considered, OIP Opinion Letter No. F24-03 does indicate that it may have been considered.

As noted above, OIP's analysis did include a discussion regarding the Executive Director's salary not being established by statute. *See* Appendix A at p. 23. In addition, the facts section of OIP Opinion Letter No. F24-03 states: "The Board appoints the ADC ED, delegates authority to the ED, evaluates the ED's work performance annually, and sets the ED's salary." *See* Appendix A at p. 5. These items evidence that OIP did know about the authority and limitations of the Executive Director. Why OIP did not make a specific reference to the Executive Director's authority within the government in its analysis, Defendant ADC does not know. Based on the records in Defendant ADC's possession and before this court, OIP is the only person or entity who could answer the question of why it was not referenced in OIP Opinion Letter No. F24-03.

This clearly evidences how requiring a party, who did not rely on the opinion and who has waived the protection provided by the opinion, to defend the opinion is prejudicial to the integrity of OIP's opinions.

As for considering other matters affecting a general conception of privacy around personnel matters, OIP Opinion Letter No. F24-03 clearly shows that it did consider such things. One such example is:

> Section 92-5(a)(2), HRS, explicitly allows executive discussions regarding the "hire" of an employee. The candidates interviewed at the August 8 Meeting were prospective employees at that time, and OIP finds that their status as applicants for government employment was a matter affecting privacy. OIP further finds that their respective interviews revealed not just their identities but additional information about their backgrounds and qualifications in which, as applicants, they had a privacy interest of the sort recognized under section 92-5(a)(2), HRS.

See Appendix A at p. 23. In this analysis, OIP considered how the individual's status as an "applicant" can and does affect the individual's privacy interest. Another example is:

> OIP further finds that because the candidates' status as applicants for government employment was a matter affecting privacy, and the candidates remained applicants until such time as the successful candidate accepted the Board's offer, the Board could not have publicly voted on the question of hiring a specific candidate without revealing that candidate's identity and thus frustrating the purpose of the executive session. OIP therefore concludes that the Board's interviews of and discussions about the two candidates in executive session, including salary discussions, were proper.[23]

See Appendix A at p. 23. In this analysis, OIP further explores when an applicant's privacy interest may end – when they become the individual who is offered the position.

Based on foregoing, it is clear that OIP did consider other matters affecting a general conception of privacy around personnel matters.

5. OIP's Approval of the August 8 Executive Session Does Comport with HRS § 92-5(b).

HRS § 92-5(b) states "[i]n 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) (2024 Cumulative Supplement).

As noted above, OIP analyzed the actions of Defendant ADC against HRS § 92-5(a). OIP's analysis is as follow:

> Section 92-5(a)(2), HRS, explicitly allows executive discussions regarding the "hire" of an employee. The candidates interviewed at the August 8 Meeting were prospective employees at that time, and OIP finds that their status as applicants for government employment was a matter affecting privacy. OIP further finds that their respective interviews revealed not just their identities but additional information about their backgrounds and qualifications in which, as applicants, they had a privacy interest of the sort recognized under section 92-5(a)(2), HRS.

See Appendix A at p. 23.

Based on the foregoing, it is clear that OIP's approval of the August 8 Executive Session does comport with HRS § 92-5(b).

IV. CONCLUSION

Plaintiff's request to have OIP Opinion Letter No. F24-03 declared "palpable erroneous" in this action is not appropriate because Defendant ADC: 1) is not the party asserting that OIP Opinion Letter No. F24-03 should be precedent in this action; and 2) is not the proper party to defend Opinion Letter No. F24-03 against such a claim because it did not rely on Opinion Letter No. F24-03 in taking its actions and it has waived the protections that Opinion Letter No. F24-03 offers it.

Plaintiff's insistence on pursuing Plaintiff's MSJ – Count 14 in this action against Defendant ADC is highly prejudicial to the integrity of OIP's opinions because Defendant ADC did not rely upon OIP Opinion Letter No. F24-03 in determining its actions, is not the party seeking to have OIP Opinion Letter No. F24-03 admitted as precedent, and is the party who has waived the protections offered by OIP Opinion Letter No. F24-03. Because Defendant ADC is not fully vested in OIP Opinion Letter No. F24-03, requiring Defendant ADC to defend OIP Opinion Letter No. F24-03 is highly prejudicial to OIP and its opinion process.

Finally, based on a review of the language used in OIP Opinion Letter No. F24-03, it is clear that OIP Opinion Letter No. F24-03 is not "palpably erroneous" because 1) OIP did not read the privacy condition out of the exemption; 2) OIP did not rely solely on UIPA privacy interests in making its determination; 3) OIP's analysis did not ignore the Hawai'i Supreme Court's repeated emphasis on a case-by-case determination of privacy and, in fact, applied a case-by-case analysis; 4) OIP Opinion Letter No. F24-03 did consider the ADC Executive Director's authority within government and consider other factors that may affect a general conception of privacy around personnel matters; and 5) OIP's wholesale approval of the entire August 8 executive session does comport with HRS § 92-5(b).

DATED: Honolulu, Hawai'i, August 12, 2025.

ANNE E. LOPEZ
Attorney General for the State of Hawai'i

/s/ David N. Matsumiya
AMANDA J. WESTON
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DEFENDER COUNCIL, JON N. IKENAGA, AND
AGRIBUSINESS DEVELOPMENT CORPORATION
BOARD OF DIRECTORS

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

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) DECLARATION OF DAVID N. MATSUMIYA

DECLARATION OF DAVID N. MATSUMIYA

I, DAVID N. MATSUMIYA, declare under penalty of law that the following is true and correct to the best of my knowledge, information, and belief:

1. I am an attorney licensed to practice law before all of the courts in the State of Hawaiʻi.

2. I am a Deputy Attorney General for the State of Hawaiʻi.

3. I am the attorney for Defendants AGRIBUSINESS DEVELOPMENT CORPORATION BOARD OF DIRECTORS, DEFENDER COUNCIL, and JON N. IKENAGA in the above-captioned action.

4. I have personal knowledge of the matters discussed herein, am competent to testify as to the matters stated herein, and I make this Declaration upon personal knowledge except and unless stated to be upon information and belief.

5. The State of Hawaiʻi Office of Information Practices ("**OIP**") publishes its formal opinions to the public on its website at https://oip.hawaii.gov/laws-rules-opinions/opinions/formal-opinion-letter-summaries-and-full-text/.

6. A summary of OIP's *Opinion Letter No. F24-03* ("**OIP's Opinion Letter No. F24-03**") can be found at https://oip.hawaii.gov/f24-03/.

7. A complete copy of OIP's Opinion Letter No. F24-03 can be downloaded at https://oip.hawaii.gov/wp-content/uploads/2023/11/OIP-Op.-Ltr.-No.-F24-03-Anonymous-re-ADC-Board.pdf.

8. For ease of reference, a true and correct copy of OIP's Opinion Letter No. F24-03 is attached hereto as Appendix A.

I do declare under penalty of law that the foregoing is true and correct.

This declaration is made in lieu of an affidavit pursuant to Rule 7(g) of the Rules of the Circuit Courts of the State of Hawai'i.

DATED: Honolulu, Hawai'i, August 12, 2025.

/s/ David N. Matsumiya
DAVID N. MATSUMIYA

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BOARD OF DIRECTORS

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)

APPENDIX A

[Re: Defendant Agribusiness Development Corporation Board of Directors' Memorandum in Opposition to Plaintiff Public First Law Center's *Motion for Partial Summary Judgment on Count XIV*, Filed on July 11, 2025, as Dkt. 213]

HEARING:
Date: August 20, 2025
Time: 1:00 p.m.
Judge: Honorable Jordon J. Kimura

Judge: Honorable Jordon J. Kimura
Trial: September 22, 2025

JOSH GREEN, M.D.
GOVERNOR

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CHERYL KAKAZU PARK
DIRECTOR

OPINION

Requester: Anonymous
Board: Agribusiness Development Corporation Board of Directors
Date: November 3, 2023
Subject: Selection of New Executive Director (S APPEAL 24-02)

REQUEST FOR OPINION

Requester, an anonymous member of the public, seeks a decision as to whether the Agribusiness Development Corporation (ADC) Board of Directors (Board) violated the Sunshine Law during its selection of a new executive director (ED).

Unless otherwise indicated, this decision is based upon the facts presented in an email from Requester to OIP dated August 21, 2023; a Notice of Appeal from OIP to the Board dated August 24, 2023, but emailed to the Board on August 21, 2023, with enclosures; an email from ADC to OIP dated September 5, 2023, with attachments; an email from the Department of the Attorney General (AG) on behalf of ADC to OIP dated September 12, 2023, with attachment; an email from the AG to OIP dated September 15, 2023, with attached email thread; a letter from OIP to the AG dated September 15, 2023; an email from Board member Mr. Dane Wicker (Wicker) to OIP dated September 22, 2023, with attached email thread; an email from ADC to OIP dated September 26, 2023, with attachments; an email from OIP to the AG dated October 3, 2023, with attached email thread; an email from the AG to OIP dated October 4, 2023, with attached email thread; an email from ADC to OIP dated October 4, 2023; an email from the AG to OIP dated October 6, 2023, with attachment; an email from the AG[1] to OIP dated October 13, 2023, with attachments; an email from ADC to OIP dated October 16, 2023, with attachments;

[1] The AG's responses to this appeal on behalf of the Board are collectively referred to herein as "Response."

and an email from ADC to OIP dated October 31, 2023, with attachment and attached email thread.

QUESTIONS PRESENTED

1. Whether the Board gave proper notice that the location of an executive session would be solely the in-person location listed on a remote meeting notice, with no indication that the executive portion of the meeting was in-person only; and whether this allowed the Board to require board members to attend in-person only for the executive session portions of the agenda.

2. Whether a board may discuss an item in executive session without having first allowed public testimony on the agenda item to be discussed in the executive session.

3. Whether the Board properly considered and voted on the hire of an officer or employee in an executive session.

4. Whether the Board was authorized under the Sunshine Law to take a secret ballot vote on an item of board business.[2]

5. Whether the executive session summary provided after the Board's executive session on August 8, 2023, complied with Act 19 of 2023, to be codified at section 92-4(b), HRS (Act 19).[3]

6. Whether the Board has options to remedy Sunshine Law violations, including taking a subsequent vote to ratify selection of the ED.

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[2] "Board business" is defined as "specific matters over which a board has supervision, control, jurisdiction, or advisory power, that are actually pending before the board, or that can be reasonably anticipated to arise before the board in the foreseeable future." HRS § 92-2 (Supp. 2022) (definition of "[b]oard business").

[3] Act 19, which was enacted on April 19, 2023, and effective July 1, 2023, amended section 92-4, HRS, by retaining the statute's original language in a new section (a), and creating a new subsection (b), which requires that any discussion or final action taken by a board in an executive meeting shall be reported to the public when the board reconvenes in the open meeting at which the executive meeting is held; provided that the report need not defeat the purpose of holding the executive session. Act 19 is discussed in detail in section V, infra.

BRIEF ANSWERS

1. No. As explained in section I starting on page 16, the Sunshine Law requires that a notice be filed six days before a meeting; that the notice include the location of the meeting; and for remote meetings, the notice must list at least one physical location that is open to the public. The notice for the Board's meeting on August 8, 2023, clearly stated it was a remote meeting under section 92-3.7, HRS. The notice did not state that the executive session would be in-person only. OIP therefore concludes that the notice did not give proper notice that the "location" of the executive session would be only the listed in-person meeting location and Board members could not participate via remote link. OIP finds that the fact that there was no legal notice that the executive session was in-person only resulted in little, if any, harm to the general public, as the public is not entitled to attend the executive session. However, the Sunshine Law's protections apply to board members as well as the general public, and a meeting notice also serves as notice to the members of a board. Because members were prevented from participating remotely in the executive session, OIP finds that the improper notice of the in-person only executive session deprived Board members of the ability to attend and participate in the executive session in violation of section 92-3, HRS.

2. No. As explained in section II starting on page 19, section 92-3, HRS, requires that boards accept oral and written testimony on any agenda item, and does not exclude executive session agenda items from that requirement. Prior to taking a vote to enter executive session during the public portions of the meetings on August 8, September 21, and October 3, 2023, the Board allowed public testimony only on the decision to go into executive session, and not on the executive session agenda items themselves. OIP therefore finds that the Board denied the public's right to testify on the agenda items the Board discussed in executive session, and OIP concludes that the Board's denial violated section 92-3, HRS.

3. Yes. As explained in section III starting on page 20, section 92-5(a)(2), HRS, allows a board to enter an executive session to consider the hire of an officer or employee where consideration of matters affecting privacy will be involved. The Board relied on this executive session purpose when it met in executive session to interview the top two candidates[4] for the ED position, to set the next ED's salary, to select a candidate to make an employment offer to, and to decide how to inform the public of its hiring decision. OIP finds that the Board properly voted to enter an executive session in accordance with section 92-4(a), HRS, and had a valid reason to enter an executive session under section 92-5(a)(2), HRS, to interview candidates, and then to discuss the selection and salary of the new ED. OIP finds it could be reasonably anticipated that the executive session discussion of the candidates,

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[4] ADC used the terms "candidates" and "applicants" in various meeting notices and minutes, and OIP uses both terms herein interchangeably.

including the salary discussion, involved consideration of matters affecting privacy, either directly or indirectly. OIP therefore concludes that the Board was properly in executive session for these discussions. OIP concludes, however, that the discussion on how to inform the public of the successful candidate's selection did not implicate any privacy interests and should have been in the public portion of the meeting.

OIP further concludes that the Board was permitted by the Sunshine Law to vote in executive session on selection of the ED to avoid revealing the candidates' identities as both had privacy interests to be protected, and to protect the privacy interests of the selected candidate until such time as she accepted the employment offer. Holding this vote in a public meeting would have revealed the candidates' identities, which, at that time, carried privacy interests that allowed the Board to hold the executive session.

However, the Board should have voted in the public portion of the meeting on selection of the new ED's salary because the minutes show the salary discussion focused primarily on budgetary considerations and not on qualifications of either candidate such that a privacy interest would have been implicated.

4. No. As explained in section IV starting on page 26, multiple provisions of the Sunshine Law require that votes be taken in a way that makes clear how each member voted. HRS §§ 92-3.7(b)(5); 92-4; 92-9(a)(3), (b)(3) (Supp. 2022). Because the secret ballot did not identify how each member voted during the executive session on August 8, 2023, the Board was unable to meet the requirements of section 92-9, HRS, to keep minutes for all meetings, including executive session meetings, that include a record by individual member of any votes taken. OIP therefore concludes that the Board's secret ballot vote to select the ED taken during its executive session on August 8, 2023, was in violation of the Sunshine Law.

5. Yes. As explained in section V starting on page 29, Act 19 requires that any discussion or final action taken by a board in an executive meeting shall be reported to the public when the board reconvenes in the open meeting at which the executive meeting is held. Act 19 further specifies that the information reported should not be inconsistent with the purpose for which the executive meeting was convened, and a board may maintain confidentiality of information for as long as its disclosure would defeat the purpose of convening the executive meeting. The Act 19 report for the Board's executive session on August 8, 2023, did adequately describe what happened, including reporting that the board had decided to make an offer to a candidate. The Board's failure to specify which candidate it had decided to make an offer to was justifiable to protect the candidates' privacy, and thus avoid frustrating the purpose of the executive session, because the candidates had a privacy interest in the fact that they had applied for the ED position and at that point, the chosen candidate had not yet accepted the offer.

6. Yes. As explained in section VI starting on page 32, the Sunshine Law does not provide a way for a board to undo a prior violation by its subsequent action, so a board cannot entirely "cure" a violation, but it can make efforts to mitigate public harm from past violations and to follow proper procedures in the future. While this appeal was pending, the Board publicly voted to ratify its earlier selection of the ED via secret ballot vote, which did mitigate the public harm from that and other violations. While OIP favorably views timely and appropriate mitigation efforts, only the courts can determine whether such actions make voiding a board's final action inappropriate or unnecessary, as only the courts have the power to void the final action of a board under section 92-11, HRS. A circuit court action under section 92-11, HRS, to void a final action of a board must be filed within 90 days of the final action to be challenged. The courts may provide additional remedies under section 92-12(b), HRS.

FACTS

ADC is "a public body corporate and politic and an instrumentality and agency of the State" that was created "to administer an aggressive and dynamic agribusiness development program." HRS § 163D-1 and 3(a) (Supp. 2022). Its purpose is "to support the production of local agricultural products for local consumption in a manner that is economically and environmentally sustainable while continuing to develop commercial exports of locally produced agricultural products. HRS § 163D-1. In furtherance of that purpose, ADC's mission is to "acquire and manage, in partnership with farmers, ranchers and aquaculture groups, selected high-value lands, water systems and infrastructure for commercial agricultural use and to direct research into areas that will lead to the development of new crops, markets and lower production costs." Agribusiness Development Corporation, About Us, https://dbedt.hawaii.gov/adc/about-us/ (last visited October 27, 2023).

ADC is headed by the Board and is administratively attached to the Department of Business, Economic Development, and Tourism (DBEDT). Id. The Board has eleven members: three ex-officio and eight private citizens appointed by the Governor. HRS § 163D-3(b). The Board's ex officio voting members include the DBEDT Director, the Chairperson of the Board of Agriculture, and the Chairperson of the Board of Land and Natural Resources (DLNR), or their designated representatives. Id. At all times relevant to this appeal, the Board had two vacant positions.

The Board appoints the ADC ED, delegates authority to the ED, evaluates the ED's work performance annually, and sets the ED's salary. HRS § 163D-3(d), (f), (g). The ED may hire staff and prescribe staff duties, among other things. HRS § 163D-3(h).

On April 23, 2023, ADC's ED passed away. The Board held an emergency meeting[5] on April 24, 2023, to appoint a staff member as the Acting ED. At its next regular meeting on May 18, 2023 (May 18 Meeting), the Board Chair[6] established a permitted interaction group (PIG) pursuant to section 92-2.5(b)(1), HRS,[7] for the purpose of searching for the new ED (First PIG).

At its meeting on May 30, 2023 (May 30 Meeting), the Board disbanded the First PIG and created a new PIG referred to as the "Search Committee" with different Board members assigned to it. The assigned tasks of the Search Committee were to: (1) develop an ED application process; (2) develop a solicitation/advertisement for the ED position; (3) select a method of posting the solicitation/advertisement and post it; (4) develop criteria for ranking applicants; (5) accept applications and conduct the initial review and ranking of applicants; and (6) narrow the selection to the top two or three candidates and report the findings to the Board.

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[5] The Sunshine Law allows a board to hold an emergency meeting "[i]f an unanticipated event requires a board to take action on a matter over which it has supervision, control, jurisdiction, or advisory power, with less time than is provided for in section 92-7 to notice and convene a meeting of the board[.]" HRS § 92-8(b) (Supp. 2022). At an emergency meeting, a board may "deliberate and decide whether and how to act in response to the unanticipated event[,]" subject to certain conditions. Id. The Board's emergency meeting held on April 24, 2023, is not at issue in this appeal.

[6] On May 25, 2023, the Chair resigned from the Board and member Warren Watanabe (Watanabe) thereafter became the Chair.

[7] While the formation and actions of the Board's PIGs are not at issue here, a brief summary of investigative PIGs may be helpful. Section 92-2.5(b)(1), HRS, allows a board to create an investigative PIG consisting of two or more members of a board, but less than the number of members which would constitute a quorum. Investigative PIGs may be assigned to investigate a matter relating to board business. HRS § 92-2.5(b)(1) (Supp. 2022). In order for a board to take action on a matter investigated by a PIG, three separate board meetings must occur. Id. At the first meeting of the full board, the PIG is formed, and the scope of the investigation and the scope of each member's authority are defined. Id. The PIG may then conduct its investigation outside of open meetings. At a second meeting of the full board, the findings and recommendations of the PIG are presented to the board. Id. After the PIG makes its report to the board at the second meeting, the PIG is automatically dissolved and should not continue working. OIP Op. Ltr. No. F23-01 at 16. The board cannot discuss, deliberate, or make any decisions regarding the PIG's report until a third meeting held separately, which gives the public the opportunity to testify on the PIG's findings and recommendations that had been presented at the second meeting. Id. A detailed discussion of PIGs is set forth in OIP Opinion Letter Number F23-01 (Opinion F23-01).

At its meeting on July 20, 2023 (July 20 Meeting), the Search Committee reported to the Board as required by section 92-2.5(b)(1)(B), HRS. The Search Committee reported that it had selected the top three applicants for the ED position, but one subsequently withdrew from consideration. The Search Committee recommended, among other things, that the Board interview the two remaining top applicants, determine the salary to be offered, and decide upon how the public would be notified of the new ED's selection

ADC Board Meeting on August 8, 2023

Boards may hold remote meetings using interactive conference technology (ICT) in accordance with section 92-3.7, HRS. The Board published a notice for its meeting to be held "via Teleconference" on August 8, 2023 (August 8 Meeting). The August 8 Meeting notice included instructions for Board members, staff, and the public to remotely attend the meeting or to attend at the in-person location.[8]

The August 8 Meeting notice included the following agenda items of relevance here:

D. New Business

Executive Director candidate interviews

The Board may go into executive session pursuant to section 92-5(a)(2), Hawaii Revised Statutes.

2. Discussion of Executive Director Salary

The Board may go into executive session pursuant to section 92-5(a)(2), Hawaii Revised Statutes.

3. Board selection of Executive Director

The Board may go into executive session pursuant to section 92-5(a)(2), Hawaii Revised Statutes.

E. Old Business (to be taken out of order as first agenda item)

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[8] Section 92-3.7(a), HRS, requires that remote meetings held using ICT shall have "at least one meeting location that is open to the public and has an audiovisual connection." Section 92-3.7(a)(1), HRS, requires that the notice for an ICT meeting "[l]ist at least one meeting location that is open to the public that shall have an audiovisual connection[.]" Due to the in-person location requirement, remote meetings are sometimes referred to as "hybrid" meetings.

1. Deliberation and decision making on the recommendation(s) of the Executive Director Search Committee permitted interaction group submitted to the Board at the July 20, 2023 regular meeting.

At the August 8 Meeting, agenda item E.1 was taken out of order. The Chair announced that the Search Committee had recommended that the Board hold in-person interviews of the two candidates, and, among other things, select a candidate to make an employment offer to, decide on the new ED's salary, and decide on how to notify the public should the selected candidate accept the offer of employment, such as by press release, on the ADC website, and/or at the next meeting to be held on August 17, 2023.

The Board voted unanimously to accept the recommendations of the Search Committee. It then voted to enter executive session[9] for agenda items D.1, 2, and 3, and the two candidates were thereafter interviewed in executive session.[10] Although the notice did not state that the executive session would be held in-person only, the members not present at the listed physical location were unable to attend the executive session remotely.[11]

After the candidate interviews, the Board deliberated on which candidate to offer the ED position to, and at what salary. A detailed discussion of the

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[9] Prior to the vote, the Chair asked if there was any public testimony and stated that testimony would be limited to the decision to go into executive session. This testimony limitation is discussed in more detail in section II, infra.

[10] The Board's attorney was also present for this executive session and the other executive sessions discussed herein. OIP has recognized that a board may properly have its attorney in executive session whether the executive session is convened under section 92-5(a)(4), HRS, to consult with its attorney, or for one of the other executive session purposes, so it is appropriate for a board's primary attorney to be in attendance whenever it is in executive session. OIP Op. Ltr. No. F20-01 at 6 (citations omitted).

[11] The public and executive minutes of the August 8 Meeting list six members who were present "in person" at the physical location when the meeting started, one who arrived late to the physical location, and none who were present remotely. However, board members' recollections at the executive sessions held later to discuss this appeal suggested that the two absent members had initially logged in remotely and when it became clear that members could only attend the interviews in-person, one of the four remotely attending members came to the physical location and was present there from the beginning of the public meeting. Another member arrived late at the physical location but was present there for the remainder of the meeting. The remaining two members were listed as excused in the August 8 Meeting minutes. The in-person only requirement for this executive session is discussed in more detail in section I, infra.

deliberations and votes, or lack thereof, during this executive session is set forth in sections III and IV, infra. The Board then discussed how to inform the public once the new ED accepted the position.

As the executive session was ending, one member left the meeting to catch a flight, and another left to attend another meeting, so the Board lost quorum[12] and the five remaining members could not take further action. After losing quorum, the Board returned to the public portion of the August 8 Meeting and the Chair provided the report of the executive session pursuant to Act 19.[13] He announced that the Board had conducted in-person interviews of the top two applicants; discussed the salary range to offer the selected applicant; had selected an unidentified applicant to be offered the ED position and salary amount; would offer the position to the selected applicant via U.S. mail; and if the selectee accepted the position, would issue a press release naming that person as the new ED.

That same afternoon, fires resulted in the catastrophic loss of life and property on Maui, and "in respect for the ongoing tragedy," the Response stated that the Director of DBEDT and the Board "withheld the news of Ms. Wendy Gady's (Gady) acceptance of the offer of the position" until the next Board meeting.

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[12] Quorum for Sunshine Law boards is set in section 92-15, HRS, which states, in relevant part:

> [w]henever the number of members necessary to constitute a quorum to do business, or the number of members necessary to validate any act, of any board or commission of the State or of any political subdivision thereof, is not specified in the law or ordinance creating the same or in any other law or ordinance, a majority of all the members to which the board or commission is entitled shall constitute a quorum to do business, and the concurrence of a majority of all the members to which the board or commission is entitled shall be necessary to make any action of the board or commission valid[.]

HRS § 92-15 (2012). The Board is entitled to eleven members and its quorum is six.

[13] OIP reminds the Board that, as explained in Opinion F23-01 at pages 19-20, a board lacking quorum is, by definition, not in a meeting. It thus cannot discuss or take action on its agenda items. Further, it is unnecessary for a board to vote to adjourn a meeting (as the Board did after losing quorum at the August 8 Meeting) for the meeting to end; once quorum is lost, the meeting has ended, and the Chair can so announce to those present. OIP discusses the effect of losing quorum on the required executive session report in section V, infra.

The approved minutes[14] of the public portion of the August 8 Meeting stated, in relevant part:

> **SEE OLD BUSINESS AGENDA ITEM E-1, WHICH WAS TAKEN OUT OF ORDER AS THE FIRST AGENDA ITEM.**
>
> **D. New Business**
>
> Chair stated HRS Section 92-4 allows the board to hold an executive meeting closed to the public. The board will be discussing new business items 1, 2, and 3, which is the interview of the top 2 applicants, salary discussion, selection of the applicant and salary amount, and decide on the public notification method. This discussion may be closed to the public pursuant to HRS Section 92-5(a)(2) to allow discussion of a hiring decision where consideration of matters affecting privacy will be involved. Chair said before they go into executive session is there any public testimony. Please be advised that testimony is limited to the decision to go into executive session.
>
> There was no public testimony.
>
> Chair asked for a motion to go into executive session.
>
> Motion: Mr. Tabata; Second: Mr. Okuhama.
>
> Chair noted there was no staff presentation.
>
> Chair asked for board discussion. There was none.

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[14] The August 8 Meeting minutes presented the events of the meeting in the same order that they were listed on the agenda instead of in chronological order reflecting when they were discussed at the meeting, which differed from the agenda order because the Board took an item out of order. By listing meeting events in order of their agenda number instead of in chronological order, the August 8 Meeting minutes give the misleading impression that the meeting was adjourned due to loss of quorum prior to the Board's (actually earlier) discussion and decision to accept the Search Committee's recommendations. Because the sufficiency of the minutes was not raised in this appeal, OIP will not address it in detail, but reminds the Board that section 92-9(a), HRS, requires written minutes to "give a true reflection of the matters discussed at the meeting and the views of the participants." To give a true reflection of what happened at a meeting, the minutes of that meeting should present events in the order in which they actually occurred, regardless of their listing on the agenda, and preferably with some indication of the times at which different events occurred.

Chair called for the vote. Hearing no objection the motion was approved: 6-0

Chair stated that the public meeting was in recess subject to reconvening at the conclusion of the executive session. The Board entered into executive session at 9:20 A.M. pursuant to HRS section 92-5(a)(2).

The Board lost quorum at 12:30 p.m. with the departure of Mr. Tabata and Mr. Wicker.

Chair Watanabe called the virtual meeting back to order at 12:31 p.m.

Chair stated that pursuant to Act 19, SLH 2023, the board took the following actions based upon discussions by the full board in executive session. The board of directors conducted in-person interviews of the top 2 applicants; the board of directors discussed the salary range to be offered to the selected executive director applicant; the board of directors selected the person to be offered the executive director position and salary amount; the board of directors will offer the selected person the executive director position in writing via letter to be delivered by the US postal service. If the offer is accepted, the name of the new executive director will be made public by press release.

E. Old Business (taken out of order as first agenda item)

1. **Deliberation and decision making on the recommendation(s) of the Executive Director Search Committee permitted interaction group submitted to the Board at the July 20, 2023 regular meeting.**

   Chair stated that on July 20, 2023 the Executive Director Search Committee presented its findings and recommendations to the full board. The committee recommended that the full board conduct in person interviews of the top 2 applicants in executive session. The term in-person interview means all board members and two applicants attend the executive session in-person.

It was suggested that the in-person interviews take place on Thursday, August 3, 2023 provided that the 2 applicants were available that day. If the applicants were unavailable, the committee recommended that the in-person interviews be scheduled on a mutually agreeable date. Following the in-person interviews, the committee recommended that in executive session the full board discuss the salary to be offered and select the applicant who will be offered the Executive Director position and the salary amount. The committee recommended that the selected candidate be notified of the offer by written letter and if the offer is accepted, the board decide how the public should be notified, such as by press release, posting on the ADC website, and/or at the next board meeting to be held on August 17, 2023.

Chair asked for a motion to accept the July 20, 2023 recommendations of the Executive Director Search Committee.

Motion: Mr. Watts; Second: Mr. Tabata.

Chair noted that the applicants were not available on August 3, 2023 and the next mutually agreeable date is today, August 8, 2023.

Chair asked for public testimony on the Committee's recommendations. There was none.

Chair asked for board discussion. There was none.

Chair called for the vote. Hearing no objection the motion was approved: 6-0.

ADC Board Meeting on August 17, 2023

The Board held a meeting on August 17, 2023 (August 17 Meeting). The relevant portion of the August 17 Meeting notice stated under "Old Business" item "2. Update on the progress of the Executive Director search[.]" The relevant portion of the August 17 Meeting minutes read the "Chair stated that he was happy to announce that Wendy Gady has been selected as the new Executive Director effective August 21, 2023."

After the August 17 Meeting, Requester filed this appeal. Requester's concerns were: (1) the announcement of the ED appointment was withheld from the public until August 17, 2023, when the press release was issued, and the press release did not state when the vote was taken or ratified; (2) the announcement was made at the Board's August 17 Meeting and not the August 8 Meeting; and (3) it was not clear how and when the vote was taken, and who voted in favor and who voted against the selected candidate. Requester asked for "a review of the process that was taken to hire the" ED, and asked that OIP confirm whether the executive session vote on August 8, 2023 was ratified or whether a vote to approve the ED's appointment was made at that meeting. Two more Board meetings relevant to this appeal were subsequently held and are described next.

ADC Board Meeting on September 21, 2023

The Response stated that at the Board's next meeting on September 21, 2023 (September 21 Meeting), the Board Chair "will call for a motion to confirm the selection of Gady as the new [ED]" to address the complaint regarding the "absence of the vote and/or ratification by the" Board.

Relevant portions of the Board's notice for the September 21 Meeting stated:

> E. Action Items
>
> . . .
>
> 6. Discussion of Sunshine Law complaint (S APPEAL 24-02) by anonymous complainant regarding the hiring of the new ADC Executive Director
>
> *The Board may go into executive session, pursuant to section §92-5(a)(4), Hawaii Revised Statutes.*
>
> 7. Confirmation vote regarding the hiring of the new ADC Executive Director

OIP asked the AG to have OIP's letter to the AG dated September 15, 2023, placed in the Board packet[15] for its September 21 Meeting to provide guidance on various Sunshine Law provisions, such as the procedures for entering executive sessions and how to write legally sufficient minutes. It was not meant to serve as OIP's inclinations as to whether the Board had violated the Sunshine Law because OIP had not yet received or reviewed all of the extensive materials for this appeal.[16]

Eight members were present at the September 21 Meeting.[17] Before taking the vote on whether to enter the executive session for agenda item E. 6., the Chair stated, "[p]lease be advised that testimony is limited to the decision to go into executive session." The Board then voted to enter executive session.

The public minutes for the September 21 Meeting state that, when the Board returned to the public session, the Chair gave his executive session report. With regard to agenda item E. 6, the Chair stated "Board requires no further action." No vote was taken on agenda item E. 7 in the executive or public portion of the September 21 Meeting and the Board moved on to other agenda items not relevant to this appeal.

ADC Board Meeting on October 3, 2023

The notice for the Board's meeting on October 3, 2023 (October 3 Meeting), contained only two substantive agenda items:

C. New Business

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[15] "Board packet" means documents compiled by a board and distributed to the members before a meeting for use at the meeting. HRS § 92-7.5 (Supp. 2022). The board packet law requires that the packet be available to the public to the extent the documents are public under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA). Board packets need not disclose executive session minutes or other records for which the board cannot reasonably complete its redaction of nonpublic information in the time available. Id. OIP did not review board packets for any of the relevant meetings.

[16] OIP reviewed draft public minutes for all four meetings discussed herein, and Board approved public minutes for the August 8, August 17, and September 21 Meetings. OIP also reviewed copies of draft executive minutes for the August 8, September 21, and October 3 Meetings, and approved executive minutes for the August 8 and September 21 Meetings that had been provided by ADC, along with ADC's written transcript for the executive session on September 21, 2023. Additionally, OIP reviewed recordings for the relevant public and executive sessions for all four meetings.

[17] Member Russell Tsuji (Tsuji) became the DLNR Chairperson's designee and replaced DLNR designee Mr. Kaleo Manuel (Manuel) at the Board meetings on September 21 and October 3, 2023.

1. Executive Session to be held pursuant to HRS section 92-4, HRS section 92-5(a)(2) to discuss personnel matters, and HRS 92-5(a)(4), to consult with the board's attorney regarding OIP S APPEAL 24-02

2. Discussion and action regarding Motion for Ratification of the Selection of Wendy L. Gady as Executive Director for the State of Hawaii, Agribusiness Development Corporation

The Chair called for a motion to go into executive session for agenda item C. 1. The Chair then asked if there was any public testimony and stated that testimony was limited to the decision to go into executive session. The Board voted to enter executive session.

When the Board returned to the public session, the Chair summarized what happened in the executive session as required by Act 19 (Act 19 is discussed in detail in section V, infra). The Chair's summary stated that agenda item C. 1 was discussed with the board's attorney, and no action was taken. The Chair then asked for a motion "for the ratification of the selection of Wendy L. Gady as the Executive Director of the State of Hawaii, Agribusiness Development Corporation." It was moved and seconded. The Chair asked whether the two members who were not present at the August 8 Meeting[18] had sufficiently reviewed the materials provided and whether they were able to make an informed decision. Both replied in the affirmative. The Chair then asked the other members whether they had reviewed the materials and refreshed their recollections of the August 8 Meeting so that they could make an informed decision and all members answered in the affirmative. The Chair determined all nine members were able to make a decision and discussion ensued. The Board then voted by roll call, voting 7-2 in favor of the ratification.

Requester asked to know how and when the vote for ED was taken, as well as who voted in favor and who voted against the selected candidate. During the public meeting, Chair Watanabe and members Lyle Tabata, Jason Okuhama, Glenn Hong, Sharon Hurd, Karon Seddon, and Wicker voted in favor of the motion. Members Jayson Watts and Tsuji voted against the motion and indicated that the reason for their no votes was a preference to wait until the Board either consulted with OIP regarding the August 8 Meeting or received the OIP decision for this appeal.

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[18] Member Seddon was not present at the August 8 Meeting, and member Tsuji was not yet on the Board on August 8, 2023.

DISCUSSION

I. The August 8 Meeting was Noticed as a Remote Meeting with an In-Person Location, so Requiring In-Person Attendance of Members for the Executive Session was Improper

After this appeal was opened a Board member asked whether the Board met the Sunshine Law's notice requirements for the location of the in-person only executive session of the August 8 Meeting. Accordingly, OIP first discusses whether the August 8 Meeting notice complied with the Sunshine Law.

Boards have three options to conduct their meetings: (1) a meeting in person at one site, which is the traditional method; (2) a meeting in person at multiple sites connected via ICT, without any requirement to provide remote access, as allowed by section 92-3.5, HRS; or (3) a "remote" meeting using ICT where board members and the public may participate either remotely, or from an in-person site listed on the notice, as allowed by section 92-2.7, HRS.

The Sunshine Law requires that notice be filed six days before a meeting, and that the notice include the date, time, and location of the meeting, among other things. HRS § 92-7(a) (Supp. 2022). For remote meetings, section 92-3.7(a), HRS, requires that the notice inform the public how to contemporaneously remotely view the video and audio of the meeting through internet streaming or other means. Section 92-3.7(a), HRS, also requires that a remote meeting notice list at least one meeting location that is open to the public and has an audiovisual connection to the meeting. It also requires that a board provide a method for remote oral testimony that allows board members and other meeting participants to hear the testimony through an internet link, a telephone conference, or other means.

The August 8 Meeting was noticed as a remote meeting "Held via Teleconference." The notice stated:

> Pursuant to section 92-3.7, Hawaii Revised Statutes, this meeting will be held using interactive conference technology (ICT). Board members, staff, persons with business before the Board, and the public may participate remotely online using ICT, or may participate via the in-person meeting site which provides ICT.

The August 8 Notice contained detailed instructions for Board members and the public to participate in the meeting by ICT, telephone, or in person. The August 8 Notice did not state that the executive sessions or any other part of the meeting would be in-person only.

The Search Committee had recommended in-person candidate interviews of the top candidates, and the Board voted to adopt those recommendations at the August 8 Meeting. However, the location of a meeting is set by a board's notice, and the Sunshine Law does not generally allow a board to amend a previously filed notice and agenda. See HRS § 92-7(a), (c) (requiring agenda to include place of meeting; prohibiting board from adding items to an agenda within six days of a meeting except in limited circumstances). The Board's adoption of the Search Committee's recommendation could not retroactively amend the August 8 Meeting notice that had already been posted for a remote meeting. Similarly, the notice could not be retroactively amended by the email sent to the Board members on August 7, 2023,[19] which indicated that the candidate interviews would be conducted in person during the executive session. Indeed, because the August 8 Meeting notice clearly indicated that it was a remote meeting, at least two Board members initially attended the public portion of the meeting via ICT, suggesting that the email not only failed to provide legally sufficient notice of the location of a Sunshine Law meeting, but was also ineffective as a form of actual notice to the Board members.

The public meeting minutes for the August 8 Meeting list members Manuel and Seddon as excused. During the October 3 Meeting executive session, a member recalled that when the August 8 Meeting started, four members were at the in-person location and four members (Hurd, Manuel, Seddon, and Wicker) were attending remotely by Zoom link, but that Hurd and Wicker "rushed over" to attend in person after it became apparent that members could not participate unless they were present in person. Member Hurd noted that she arrived late to the in-person location, and she was told she missed approximately 20 minutes of the first candidate's interview. Member Seddon stated at the October 3 Meeting that she did not "log in" to the August 8 Meeting because she had informed the Chair she was not available to attend in-person that day. Manuel was no longer a Board member or present at the October 3 Meeting, but another member stated that Manuel was instructed to "show up" but he was not feeling well and did not want to spread his germs. As noted in footnote 11, supra, this account of events differs from the August 8 Meeting minutes, which indicate six members were present at the in-person location when the meeting started.

The August 8 Meeting notice included over a page of detailed instructions regarding participation in the meeting, but nowhere did it state that the executive session would be in-person only. Had the notice filed six days before the August 8 Meeting included language stating that the executive session would not be

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[19] OIP did not receive a copy of the materials provided to the Board for the August 8 Meeting, but the executive session discussions on October 3, 2023, referred to an August 7 email that was sent to Board members indicating the executive session would be in-person only.

conducted as a remote meeting and would be in-person only, it would have been sufficient notice to comply with the requirement in section 92-7, HRS, that the notice and agenda include the "location" of the meeting. However, OIP finds that the Board's adoption on August 8 of the Search Committee's recommendation for an in-person executive meeting and the August 7 email sent to the Board members requiring in-person attendance the next day were not part of the meeting notice required by section 92-7, HRS. OIP therefore concludes that those attempted amendments to the meeting location could not constitute proper notice of the "location" of an in-person only executive session on August 8.

The Sunshine Law's requirements are primarily intended to protect the general public's access to the formation and conduct of public policy, but its protections apply with equal force to the board members themselves. See HRS § 92-1 (2012) (setting out policy and intent of the Sunshine Law). A meeting notice serves not only to notify members of the public of the details of an upcoming meeting, but also serves to notify the members of a board of those same details.

OIP finds that failing to provide notice of the in-person location of the executive session resulted in little, if any, harm to the public, as the public is not entitled to attend an executive session anyway. OIP finds, however, that Board members were improperly prevented from participating remotely in the August 8 Meeting executive session by the Board's decision to require in-person participation in that executive session when the meeting notice clearly stated that it was a remote meeting. Although in-person participation by all members could have been encouraged while still allowing remote participation for the members who were unable to participate in person, no members were allowed to participate remotely in the executive session despite the notice indicating the meeting was remote.[20] Thus, OIP must conclude that the improper notice of the in-person only executive session

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[20] Without having to amend its agenda, a potential way the Board could have encouraged in-person attendance was by continuing the executive meeting to a reasonable day and time, pursuant to section 92-7(d), HRS. This provision has been used to move a noticed physical location to a more suitable location, such as when a larger room was needed, or the air conditioning was inoperable. Although OIP and the courts have not previously addressed the legality of continuing a remote meeting to a fully in-person location, it may be an acceptable way to accommodate the desire for in-person interviews during an executive session where all members were already on the same island. When a meeting is continued for a short time, and especially when it is recessed and reconvened on the same day, supplemental written notice to the public is not generally necessary and the continuance requirements of section 92-7(d), HRS, can be met by an announcement of when and where the meeting will be reconvened. Here, the board could have announced that the public meeting would be recessed and then reconvened in-person for the executive session after a time period that reasonably allowed board members remotely participating to reach the in-person physical location. After the executive session was concluded, the meeting could have been recessed again and reconvened as a remote public meeting.

deprived members of the ability to attend and participate in the executive session in violation of the Sunshine Law. OIP further finds that some public harm could have resulted from the decision to require in-person attendance because the vote to select the ED could possibly have turned out differently if two additional members had been able to participate and vote remotely as the meeting had been noticed. This speculative public harm, however, was partially mitigated by the public vote taken by the Board at the properly noticed October 3, 2023, meeting to ratify the selection of Gady as the ED, as discussed in section VI, infra.

II. Testimony Not Allowed on Topic of Executive Session

During the public portion of the August 8, September 21, and October 3 Meetings reviewed by OIP, and prior to taking votes to enter executive session, the Chair asked if there was any public testimony and stated that testimony was limited to the decision to go into executive session. Each time, the Board's staff stated that no one from the public had raised their hand to testify.

The Sunshine Law requires that "boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item." HRS § 92-3 (Supp. 2022). Boards shall also "afford all interested persons an opportunity to present oral testimony on any agenda item[.]" Id. OIP previously concluded that the requirement that a board must "afford all interested persons an opportunity to present oral testimony on any agenda item" does not have any qualification or exception for agenda items that the board will discuss in executive session. OIP Op. Ltr. No. F15-02 at 8, citing OIP Op. Ltr. No. 05-02 (stating the general rule that a board must accept testimony on any agenda item at every meeting and distinguishing items not on the board's agenda, which it is not required to hear testimony on). OIP then clarified that 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. Id.

Here, OIP finds that by limiting testimony only to a discussion of whether the Board could go into executive session, the Board denied the public the opportunity to testify on the agenda items that would be discussed in executive session. For example, agenda items on the August 8 Meeting notice included candidate interviews, and the salary and selection of a new ED, and the Board did not allow public testimony on those issues. Although no one from the public raised their hand to testify on the decision to go into executive session or to object to not being able to testify on the actual agenda items being discussed in the executive sessions, that does not mean there was no public harm because the Chair's routine announcement that testimony would be limited to the decision to go into executive session apparently had the effect of deterring public testimony on the actual agenda items.

It is unknown how many members of the public may have wished to testify on the agenda items, but were not interested in testifying on the limited question of whether the Board would be going into executive session. It is clear, however, that the public was not invited to provide testimony on executive meeting agenda items. OIP therefore concludes that the Board violated the public testimony requirements of section 92-3, HRS, by preemptively declining to accept testimony on executive agenda items. A discussion on mitigation of these violations is in section VI, infra.

III. A Board May Hold an Executive Session to Consider the Hire of an Officer or Employee and May Vote in Executive Session in Appropriate Circumstances

The questions raised on appeal require OIP to next discuss whether the Board was allowed by the Sunshine Law to interview two candidates and deliberate and vote in executive session regarding the salary and selection of a new ED.

Section 92-4(a), HRS, authorizes a board to hold an executive session closed to the public "upon an affirmative vote, taken at an open meeting, of two-thirds of the members present; provided the affirmative vote constitutes a majority of the members to which the board is entitled."[21] The board must also publicly announce the reason for holding the executive session "and the vote of each member on the question of holding a meeting that is closed to the public shall be recorded and entered into the minutes of the meeting." HRS § 92-4(a).

Citing the Hawaii Supreme Court (Court), OIP previously stated:

> [h]aving entered into a closed session, however, the board is obligated by the Sunshine Law to limit its discussion to topics "directly related to" its purpose for closing the meeting. Id. at 487, 445 P.3d 68, citing HRS § 92-5(b). A determination of whether a board's discussion was properly closed to the public thus requires first examining whether the topic to be discussed fell within the scope of the claimed purpose or purposes for the executive session, and then whether and to what extent the board's discussion and deliberation of that topic were "directly related to" the executive session's purpose or purposes. Id. at 486-87, 445 P.3d at 67-68; see also HRS §§ 92-4, -5.

OIP Op. Ltr. No. F20-01 at 10, citing Civil Beat Law Center for the Public Interest v. City & County of Honolulu, 144 Haw. 466, 445 P.3d 47 (2019) (CBLC).

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[21] Section 92-4, HRS, was amended by Act 19, which recodified its existing language as section 92-4(a), HRS.

A. The ADC Board Properly Voted to Enter the Executive Session at its August 8 Meeting

OIP finds that seven members were present during the public portion of the August 8 Meeting at the time of the Board's 6-0 vote to enter an executive session, with the Chair apparently abstaining from voting. The Board is entitled to eleven members (including the two vacant positions) and a majority is six. OIP therefore concludes that the 6-0 vote met the requirement for an affirmative vote of "two-thirds of the members present; provided the affirmative vote constitutes a majority of the members to which the board is entitled" in section 92-4(a), HRS.

The August 8 Meeting minutes stated that, prior to the vote, the Chair announced that the Board was entering the executive session for:

> new business items 1, 2, and 3, which is the interview of the top 2 applicants, salary discussion, selection of the applicant and salary amount, and decide on the public notification method. This discussion may be closed to the public pursuant to HRS Section 92-5(a)(2) to allow discussion of a hiring decision where consideration of matters affecting privacy will be involved.

OIP further finds that the reason for holding the executive session was "publicly announced" by the Chair as required by section 92-4(a), HRS. OIP therefore concludes that the vote to enter the executive session at the August 8 Meeting complied with the procedural requirements in section 92-4(a), HRS.

B. The ADC Board's Candidate Interviews, and Discussions on Salary and Selection of a Candidate Were Allowed Under the Sunshine Law

The Sunshine Law does not require that meetings related to personnel matters be closed to the public; rather, that decision is discretionary, provided that certain statutory requirements are met. CBLC, 44 Haw. at 476-477, 445 P.3d at 57-58. Section 92-5(a)(2), HRS, allows boards to hold an executive session "[t]o consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held[.]"

The August 8 Meeting notice stated that the Board anticipated entering an executive session under section 92-5(a)(2), HRS to discuss three agenda items: (1) ED candidate interviews; (2) discussion of ED salary; and (3) selection of the new ED. As noted above, the August 8 Meeting minutes show the Board first voted to accept the recommendations of the Search Committee. The Chair called for a

motion to enter executive session to interview the top two applicants, and to select the new ED and set the ED salary.

A board may enter an executive meeting and deliberate and vote in an executive session "convened to protect an employee's privacy interest." See OIP Op. Ltr. No. 20-01 at 10-11 (concluding that the Maui County Council had a proper basis for invoking the personnel-privacy purpose under section 92-5(a)(2), HRS, when it could reasonably anticipate that it would be discussing the potential hire of employees and possibly the details of individual employee's performance and past evaluations that were likely to concern their individual privacy); OIP Op. Ltr. No 06-07 at 4 (finding that executive meeting minutes discussing a board's evaluation and dismissal of the ED of the Charter School Administrative Office reflected a discussion and vote properly done in executive session, but portions of the minutes were publicly disclosable at the time the minutes were requested because the ED no longer had a privacy interest in that information).

The applicability of section 92-5(a)(2), HRS, which the Court refers to as the "personnel-privacy exception" to the Sunshine Law's public meeting requirement, must be determined on a case-by-case basis because an analysis of privacy requires a specific look at the person and the information at issue. CBLC, 144 Haw. at 478, 445 P.3d at 58. For section 92-5(a)(2), HRS, to apply, the person at issue must have a "legitimate expectation of privacy" in the information to be discussed, and people have a legitimate expectation of privacy in "highly personal and intimate information[,]" including financial and employment records. CBLC, 144 Haw. at 480, 445 P.3d at 61 (citations omitted).

A matter discussed in an executive session affects the privacy of an individual if it is one that would generally be protected under the UIPA, which governs access to public records. OIP Op. Ltr. No. 06-07 at 4 (Opinion 06-07).[22] The UIPA includes a list of information in which individuals have a significant privacy interest, including "applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position," and information

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[22] Footnote 8 in Opinion 06-07 notes that, because the Sunshine Law does not elaborate on what kinds of matters affect an individual's privacy, the AG opined that it is appropriate to look to the UIPA for guidance in construing the phrase "matters affecting privacy[.]" Footnote 8 goes on to say that matters protected would be those falling within section 92F-13(1), HRS, which protects information when disclosure would constitute a clearly unwarranted invasion of personal privacy. However, the Court clarified that it does "not read the UIPA's balancing test [at section 92F-14(a), HRS] into the Sunshine Law's personnel-privacy exception. We adhere to the plain language of this exception, which allows specific personnel discussions to take place in a closed meeting, conditioned on whether 'consideration of matters affecting privacy will be involved.' HRS § 92-5(a)(2)." CBLC at 144 Haw. 480, 445 P.3d 61.

describing an individual's finances and income. HRS § 92F-14(b)(4), (6) (Supp. 2012).

Section 92-5(a)(2), HRS, explicitly allows executive discussions regarding the "hire" of an employee. The candidates interviewed at the August 8 Meeting were prospective employees at that time, and OIP finds that their status as applicants for government employment was a matter affecting privacy. OIP further finds that their respective interviews revealed not just their identities but additional information about their backgrounds and qualifications in which, as applicants, they had a privacy interest of the sort recognized under section 92-5(a)(2), HRS.

A discussion of the salary amount for an unfilled position is not, by itself, a matter affecting privacy, and budgetary issues relevant to that discussion are not matters affecting privacy, particularly if the salary is already set by statute. In this instance, however, OIP finds that there was no statutorily set salary and the Board's discussion of the salary amount to offer whichever applicant it chose could be reasonably anticipated to be so intertwined with its discussion of the applicants themselves and their respective qualifications for the position that the full discussion involved consideration of matters affecting privacy, whether directly or indirectly. For example, depending on which candidate was ultimately selected and offered the ED position, it was possible that the salary would be a different amount due to the individual's qualifications or salary requirements. Consequently, the salary discussion could have impacted the applicants' privacy interests.

OIP further finds that because the candidates' status as applicants for government employment was a matter affecting privacy, and the candidates remained applicants until such time as the successful candidate accepted the Board's offer, the Board could not have publicly voted on the question of hiring a specific candidate without revealing that candidate's identity and thus frustrating the purpose of the executive session. OIP therefore concludes that the Board's interviews of and discussions about the two candidates in executive session, including salary discussions, were proper.[23]

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[23] The Search Committee made its recommendations to the Board in executive session during the July 20 Meeting. OIP did not review the executive session minutes, recordings, or board packet for the July 20 Meeting. The actions taken by the Search Committee were not at issue for this appeal, and OIP notes that generally it would be appropriate for a PIG to supplement its report given for public consumption during the public portion of a meeting with a more detailed version of the report delivered in executive session, so long as the executive session was for one of the reasons set forth in section 92-5(a), HRS, and the public report sufficiently informed the public of the PIG's work to allow the public to meaningfully testify on it at the next meeting. See also footnote 7, supra.

C. The Discussion of the PIG's Recommendation on How to Inform the Public of the Successful Candidate's Selection as ED Should Have Occurred in the Public Portion of the August 8 Meeting

One of the Search Committee's recommendations that the Board approved at the August 8 Meeting was to decide on "how the public should be notified [about the selection of the ED], such as by press release, posting on the ADC website, and/or at the next board meeting to be held on August 17, 2023." This discussion occurred during the executive session at the August 8 Meeting. Having reviewed the recordings and minutes, OIP finds that this discussion in executive session did not implicate the privacy interests of the candidates, would not have frustrated the purpose of the executive session if done publicly, and thus did not fall within the executive session purpose cited to justify it. OIP concludes that the discussion on how to inform the public that the selected candidate had accepted the employment offer was not authorized to be held in executive session and should instead have been done during the public session. Although this executive session discussion was not justified by the personnel-privacy exception of section 92-5(a)(2), HRS, OIP recognizes that it occurred when the Board was about to lose quorum and was rushing to wrap up its business before two members left the meeting.

D. Boards May Vote in Executive Session in Appropriate Circumstances

Decisions of a board are made by a majority vote of members in attendance at a meeting, and they may not deliberate toward a decision or vote unless a quorum of the board is present. OIP Op. Ltr. No. 01-01 at 21, 37. OIP advises that, in most instances, a board must vote in an open meeting on the matters considered in an executive session. However, OIP has previously opined that boards may deliberate and make decisions in executive sessions in limited situations. OIP Op. Ltr. No. 03-07 at 4 (Opinion 03-07). OIP reasoned that, in some circumstances, to require a vote in an open meeting on matters discussed in executive sessions would defeat the purpose of going into an executive session. "Thus, it would be illogical if boards could enter into executive meetings pursuant to section 92-5(a), HRS, but could not vote on the matters discussed, except in an open meeting." Id. at 5. Opinion 03-07 further stated that, in keeping with the Sunshine Law's policy on openness, votes should only be held in executive session when to do otherwise would defeat the lawful purpose for holding an executive session in the first place, and such a determination must be made on a case-by-case basis. Id.

In appropriate circumstances, a vote on the hire, evaluation, discipline, or dismissal of a government employee can be one that, if taken in open session, would frustrate the purpose of the executive session in which the proposed action was discussed. In the case of a board's vote on whether to hire a particular individual, unless the individual had previously been publicly identified as a candidate, the

individual would have a significant privacy interest as an applicant. E.g., OIP Op. Ltr. No. 95-2 (finding the UIPA's personal privacy exception at section 92F-13(1), HRS, permits an agency to withhold the names and other identifying information of unsuccessful "eligibles"). Additionally, OIP has recognized the privacy interest of unsuccessful candidates and that disclosure of candidates' identities may discourage people from applying for positions due to possible adverse effects on their current employment. See OIP Op. Ltr. No. 91-08 at 4 (concluding that information identifying unsuccessful applicants for appointment to government boards and commissions can be withheld under section 92F-13(1), HRS, to avoid a clearly unwarranted invasion of their privacy).

OIP finds that the executive session during the August 8 Meeting was an appropriate circumstance for the Board to vote in executive session to select the winning candidate, to protect the privacy interests of both candidates while they remained applicants. However, the manner of voting – by secret ballot – was not appropriate and was a violation of the Sunshine Law for the reasons discussed in section IV, infra.

With regard to the Board's decision on a salary, OIP concluded above that it was proper for the Board to enter into executive session because it could have reasonably anticipated that it would be discussing different salaries to offer the ultimately selected candidate based on their individual qualifications or salary requirements. See OIP Op. Ltr. No. 20-01 at 10-11 (recognizing that because the executive session had not yet been held, the board did not know exactly what would be said and that it could go into executive session if it reasonably anticipates that it would be discussing a matter concerning possible hiring and individual privacy). The executive minutes reveal, however, that the discussion did not concern the candidates' qualifications or salary requirements, but rather what the Board could afford to pay based on its budget. OIP finds that the discussion of the salary amount was not so intertwined with the discussion of the two candidates, their qualifications, or their salary requirements as to justify a vote in executive session on the salary to be offered to an unidentified candidate. OIP finds the Board could have voted on the salary amount in public without frustrating the executive session

purpose of protecting candidates' privacy interests. OIP therefore concludes that the salary vote should have been taken in public session.[24]

Finally, the Board discussed and agreed, without a vote, upon the method by which the public would be notified of the Board's decision on selection of the new ED. Having reviewed the evidence, OIP does not find any privacy interest that would have been affected by this portion of the executive discussion. OIP concludes this discussion should also have occurred during the public portion of the meeting.

IV. Boards May Not Take Secret Ballot Votes Because the Sunshine Law Requires a Record by Individual Member of Votes Taken

Having confirmed that a board may in limited circumstances vote in an executive session, OIP next discusses the secret ballot vote that was taken to select the ED.

Several sections of the Sunshine Law clearly show that boards may not take secret ballot votes. First, section 92-9, HRS, sets forth the requirements for meeting minutes. Boards must keep written or recorded minutes of all meetings, and the minutes shall give a true reflection of the matters discussed at the meeting and the views of the participants. HRS § 92-9(a). Written minutes "shall include" the substance of all matters proposed, discussed, or decided; and "a record, by

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[24] The executive session minutes for the August 8 Meeting state that a member suggested a dollar amount, the attorney asked if everyone was "good with that," and "[t]here was a unanimous response of yes and nodding heads." The Sunshine Law does not require that votes be conducted by making and seconding of a motion, or that boards otherwise follow parliamentary procedure. However, without some kind of adherence to parliamentary procedure, it may be difficult to meet the reporting requirements in section 92-9, HRS, which states that meeting minutes shall include the substance of all matters proposed, discussed, and decided, the views of the participants, and a record of votes by individual member of motions and votes made. The motion and vote structure of typical parliamentary procedure clarifies what proposition a board is currently considering and how many of the members are for or against it, and allows each member to confirm that his or her vote has been registered correctly. The absence of that structure in the Board's executive session discussions and decisions left considerable ambiguity as to when it was discussing and when it was voting on an issue, what constituted its decision, and which members were for or against that decision. OIP therefore recommends that if a board prefers not to follow standard parliamentary procedure, it should ensure that its discussion and decisions are done in a way that makes clear when it is discussing an issue and when it is voting on a proposal, as well as what the proposal is and which members are voting for or against it. OIP specifically recommends against head nods or other types of inaudible votes because there may be confusion as to whether a vote is unanimous and because it could make it difficult for a board to create an accurate record of the meeting as required by section 92-9, HRS.

individual member, of any votes taken[.]" HRS § 92-9(a)(3). A written summary must accompany any minutes that are posted in a digital or analog recording format and shall include a "record, by individual member, of motions and votes made by the board[.]" HRS § 92-9(b)(3). The requirement to keep minutes applies to "all" meetings, and does not distinguish between public or executive sessions, and minutes shall be publicly disclosed unless "such disclosure would be inconsistent with section 92-5[(a),]" HRS, which allows executive meetings to be closed to the public for eight specified purposes. HRS § 92-9(b).[25]

Second, for a remote meeting held by ICT, section 92-3.7(b)(5), HRS, requires that "[a]ll votes shall be conducted by roll call unless unanimous[.]"

Third, section 92-4(a), HRS, requires that "the vote of each member on the question of holding a meeting that is closed to the public shall be recorded and entered into the minutes of the meeting."

All these sections clearly require, based on a plain reading, that boards record votes by individual member. To have a record of votes by individual member, a board must use a roll call vote unless the vote is unanimous (in which case it is evident that all members recorded as present voted for the same result). OIP therefore concludes that boards may not hold secret ballot votes, whether in public or executive session.

Here, during the August 8 executive session discussion of the applicants, it was suggested that the vote could be done by "secret ballot." The executive session minutes indicate that while discussions about the candidates continued, "paper ballots" were passed out and each member present wrote the name of one of the two candidates. The votes were placed in an envelope that was passed around.

Before the secret ballot results were announced, one board member asked whether, "whatever the results are," the Board could announce publicly that it was unanimous, and further discussion ensued as to whether the board could reach a "unanimous decision based on the majority." The Board's attorney then announced that Gady had received more votes, and another member asked whether there was a "consensus of a unanimous board" on selection of the candidate who had more votes. The executive minutes then show that a member asked if it was "unanimous based on a majority" and "[t]he board members nodded in agreement" without

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[25] Notably, the Court has stated that executive minutes must be disclosed "[w]here an executive meeting, or a portion thereof, unlawfully took place behind closed doors[.]" CBLC at 144 Haw. 490, 445 P.3d 71.

specifying that "all" members had nodded.[26] Due to the imminent loss of quorum, it is unclear whether board members may have intended to follow up with a more formal vote once it returned to the public meeting, but because the Board lost quorum and the ability to act, no vote could have been taken in the public portion of the meeting. Notwithstanding the ambiguity as to what constituted the Board's actual number of votes to select Gady as the ED, OIP finds that the Board's subsequent actions were consistent with an understanding that it had decided to make an offer to her.

Members also discussed the timing and approval of a press release that would subsequently be issued to announce the new ED's identity to the public. It was stated that there would be a press release, but there was no vote on the matter. Soon thereafter, two members left the executive session and the Board returned to the public session. Because there was no quorum, the Board could not take any further action on August 8, but the Chair did provide the report required by Act 19 in public session.[27]

Based on this review of the recordings and minutes of the executive sessions for the August 8 and September 21 Meetings (which recounted what occurred at the August 8 Meeting), OIP finds that (1) the Board voted by secret ballot on which candidate to make an offer to when each member wrote the name of his or her selected candidate on a paper ballot; (2) the paper ballots were collected while the Board continued to discuss the issue; and (3) the number of votes for each candidate was announced, with Gady having more votes, but without identifying how each member voted. OIP further finds that shortly before the results of the secret ballot were announced, there was a discussion on whether it would be publicly announced that there was a unanimous decision for whichever candidate had been selected by the secret ballot, and an unspecified number of Board members voted by head nods in favor of announcing that the vote for the selected candidate was unanimous.

Due to the ambiguity surrounding the head nod vote, it is not clear whether the Board's intent was to treat the secret ballot vote as an interim decision on which candidate to focus on and with that decided, agree unanimously to make an employment offer to Gady, or to publicly announce unanimous support for her despite the secret ballot vote. In either event, OIP notes that the secret ballot vote clearly affected the eventual outcome. Once the majority had selected Gady via the

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[26] During the executive discussion at the subsequent September 21 Meeting, a member stated that the Board had not taken a second vote on August 8 to select the ED, but the understanding was that the Board wanted to be "unanimous as a general rule." Thus, at least one member apparently did not understand the head-nods as a second vote to unanimously select Gady.

[27] The question of whether the Sunshine Law authorized giving the Act 19 report after the meeting ended due to lack of quorum is addressed in section V, infra.

secret ballot vote, the Board treated the question of which candidate to select as being closed; in other words, regardless of the Board's intent in the head nod vote, it is clear that the secret ballot vote decided the issue of who was the winning candidate.

Thus, OIP concludes that the secret ballot vote violated the Sunshine Law's provisions requiring a vote by individual board member. HRS §§ 92-9(a)(3); 92-3.7(b)(5); see also HRS § 92-9(b)(3). OIP also concludes that without identifying how each member had secretly voted, the Board cannot meet the Sunshine Law's requirement that the minutes of the August 8 Meeting executive session include a record, by member, of votes taken. HRS § 92-9. These conclusions are "consistent with the legislature's '[d]eclaration of policy and intent' set forth in § 92-1 (1985), 'that the formation and conduct of public policy -- the discussions, deliberations, decisions, and action of governmental agencies -- shall be conducted as openly as possible' in order 'to protect the people's right to know[.]'" Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 383, 846 P.2d 882, 890 (1993). OIP again suggests that following parliamentary procedure, even in executive session, would make clearer what decisions a board is making and how each member is voting.

V. Executive Session Reports

Act 19 requires that any discussion or final action[28] taken by a board in an executive meeting shall be reported to the public when the board reconvenes in the open meeting at which the executive meeting is held. Act 19 further provides that the information reported should not be inconsistent with the purpose for which the executive meeting was convened, and allows a board to maintain confidentiality of information for as long as its disclosure would defeat the purpose of convening the executive meeting.

The sufficiency of the executive session report made at the August 8 Meeting, and specifically whether it should have named the selected candidate, has been questioned as part of this appeal. At the August 8 Meeting, after the executive session, the Chair announced the Board had:

> conducted in-person interviews of the top 2 applicants; . . . discussed the salary range to be offered to the selected executive director applicant; . . . selected the person to be offered the executive director

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[28] The Sunshine Law does not define the term "final action," but the Court has defined it in the context of section 92-11, HRS, to mean "the final vote required to carry out the board's authority on a matter." Kanahele v. Maui County Council, 130 Haw. 228, 259, 307 P.3d 1174, 1205 (2013) (Kanahele) (holding that multiple continuances of public meetings did not violate the Sunshine Law, but the distribution of memoranda between councilmembers was a violation).

> position and salary amount; [and noted it] will offer the selected person the executive director position in writing via letter to be delivered by the US postal service. If the offer is accepted, the name of the new executive director will be made public by press release.

Although the executive session report did not state which candidate had been selected, OIP finds that the Board was authorized under Act 19 to withhold Gady's name as the selectee at that time because she had not yet been informed of her selection and had not accepted the position. At that time, the Board had not disclosed the name of any applicant for the ED position to protect their privacy interests, and as OIP has already concluded, the Board legally discussed and voted on which candidate to select in executive session under section 92-5(a)(2), HRS, to protect their privacy as applicants. OIP accepts that there was a significant privacy interest here by Gady in the fact that she applied for the ED position and that premature disclosure would have frustrated the purpose of the executive session at the August 8 Meeting, which was to protect applicant privacy.[29]

Gady retained a privacy interest in the fact that she was an applicant until she accepted the offer, and OIP declines to find here that the Board should have disclosed a "short list"[30] of the top two candidates who were interviewed. The Board did not publicly disclose the names of any candidates during the selection process, including when the Search Committee reported its recommendations. The applicants were all being treated as having significant privacy interests. OIP therefore concludes that in this instance, Act 19 allowed the Board to leave out the

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[29] OIP notes, that one way to protect a candidate's privacy interests while also conducting the meeting as openly as possible could have been to conduct a vote in public without stating the candidate's name or providing any other identifying information or candidate ranking. For example, a vote could have been taken in the public session on a motion to "make an offer of employment to Candidate X or Candidate Y."

[30] For some positions of particularly high public interest, a "short list" of finalists being considered is made public prior to selection of the individual to be offered the position. See OIP Op. Ltr. No. 93-13 (finding that lists of nominees generated by the Judicial Council to fill vacancies on the State Ethics Commission from which the Governor must make an appointment are public under the UIPA because none of the exceptions to disclosure at section 92F-13, HRS, permit the Judicial Council to withhold the list). However, this is not a UIPA appeal where publication of a list of names is at issue. Further, the Court previously stated that it does "not read the UIPA's balancing test [at section 92F-14(a),HRS] into the Sunshine Law's personnel-privacy exception. We adhere to the plain language of this exception, which allows specific personnel discussions to take place in a closed meeting, conditioned on whether 'consideration of matters affecting privacy will be involved.' HRS § 92-5(a)(2)." CBLC, 144 Haw. at 480, 445 P.3d at 61.

selected candidate's name, even though it was a key detail of the action taken, to avoid frustrating the purpose of the executive session.

Regarding the salary amount the Board had agreed upon, OIP has already concluded that the salary amount to be offered, by itself, was not a matter affecting privacy since the candidates remained unidentified, and the vote on it should have been taken in public. OIP therefore concludes that in this case the salary amount decided upon at the time of the August 8 Meeting should have been disclosed in the executive session report.[31]

OIP notes also that the executive session report for the August 8 Meeting was actually delivered after the meeting had ended due to the Board's loss of quorum. In other words, five members of the Board (including the Chair) were present at the time the Chair made the executive session report to the public, but they were not in a meeting. No permitted interaction clearly authorizes this situation, and the most applicable permitted interaction, section 92-2.5(d), HRS, only authorizes board members "present at a meeting that must be canceled for lack of quorum" to receive testimony and presentations on agenda items, with no deliberation or decision-making. Yet at the same time, the plain language of Act 19 calls for the executive session report to be given "when the board reconvenes in the open meeting at which the executive meeting is held." HRS §92-4(b). A board that loses quorum in executive session could technically meet that requirement by continuing the meeting to a later date and time at which it can make its executive session report, but the delay entailed in doing so would be contrary to Act 19's purpose to promptly inform the public as to what occurred in an executive session. OIP therefore concludes that to give effect to Act 19 when a board's meeting has ended prematurely due to a loss of quorum in executive session, the Sunshine Law must be interpreted to allow the remaining members present to nonetheless give the

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[31] The actual salary or salary range for most current and former government employees is public under section 92F-12(a)(14), HRS. Until an ED was hired, this section would not have required the ED's actual salary to be disclosed. A board could, however, discuss in public the salary or salary range that it intended to offer any successful applicant for a position, without discussing individual applicant's qualifications or confidential information.

public executive session report before announcing the meeting's adjournment, as the Board did here.[32]

VI. Potential Remedies

A. Courts May Void a Board's Final Action

OIP does not have the power to void final actions taken in violation of the Sunshine Law. This power is reserved to the courts, as section 92-11, HRS, states that "[a]ny final action taken in violation of sections 92-3 and 92-7 may be voidable upon proof of violation. A suit to void any final action shall be commenced within ninety days of the action."

For an action to be voided, there must first be a violation of section 92-3 or 92-7, HRS, or a violation of another Sunshine Law provision that also results in violation of the open meetings requirement of section 92-3, HRS. CBLC, 144 Haw. at 491, 445 P.3d at 72 (concluding that discussions and deliberations that are not directly related to a permissible exception, as required under section 92-5(b), HRS, also violate the open meetings requirement under section 92-3, HRS, and thus the board's final action is voidable under section 92-11, HRS).

Second, the final action must be timely challenged within 90 days under section 92-11, HRS. The Court has recognized that in establishing a 90-day limit on the voidability provision of section 92-11, HRS, the Legislature recognized that "[v]iolations cannot be made to render administrative action invalid without durational limitations" as to do so would mean that "administrative actions would be robbed of all sense of finality." Kanahele, 130 Haw. 228, 258, 307 P.3d 1174, 1204 (2013) (citing the Senate Judiciary Committee's S. Stand. Comm. Rep. No. 878 in the 1975 Senate Journal at 1178). The 90-day limit helps to bring finality to board actions and avoid a perpetual cloud of uncertainty as to whether a board's

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[32] OIP notes there were executive summaries given after the executive sessions at the September 21 and October 3 Meetings. The sufficiency of those executive summaries was not raised in this appeal, so OIP does not make a determination regarding them. OIP nonetheless reminds the Board that an executive session report is specifically required to include the board's "discussion" during the executive session. When no action was taken the report should not simply state that no action was necessary but instead should generally summarize the issues raised or considered by the board in the course of its discussion, leaving out any details that might frustrate the purpose of the executive session.

action is final. The beginning of the 90-day period for a court challenge depends upon when the final vote is taken.[33]

The Court has "expressly decline[d] to adopt a standard for determining when the Sunshine Law would warrant invalidation under HRS § 92-11." Kanahele 130 Haw. at 260, 307 P.3d at 1206. Moreover, the Court has warned that it is not suggesting "that HRS § 92-11 applies only to meetings at which a "final action" is taken, or that any actions taken in violation of the Sunshine Law during meetings or discussions prior to "final action" are "cured" if the final action is taken in compliance with the Sunshine Law. Id. at 259, 307 P.3d at 1205.

Finally, even if section 92-11, HRS, is not directly applicable, the courts "may award any appropriate remedy" pursuant to section 92-12(b), HRS, which states, "The circuit courts of the State shall have jurisdiction to enforce the provisions of this part by injunction or other appropriate remedy." CBLC, 144 Haw. at 489, 445 P.3d at 70. In CBLC, in addition to possibly voiding a retirement agreement, the Court stated that the circuit court "shall order the Commission to release the applicable executive meeting minutes, either in full or in redacted form, if a violation is found." Id. at 489-90, 445 P.3d at 70-71.

B. Ratification and Other Mitigation Efforts

When a violation of the Sunshine Law has occurred, a board's later action cannot undo the fact that the violation occurred. As discussed above, the Court has recognized that retroactive attempts to correct improper procedures may not necessarily "cure" a Sunshine Law violation. Kanahele at 259, 307 P.3d at 1205.

Nevertheless, boards will often take steps to attempt to "cure" a violation and in such a case, what the board is really doing is acting to "mitigate" public harm that may have resulted from it. Boards have also changed their procedures so as to not repeat past Sunshine Law violations.

This opinion makes clear that the Board did violate the Sunshine Law by, among other things, preventing Board members' remote participation in the executive session and taking the secret ballot vote that resulted in selection of the ED at the August 8 Meeting. At its October 3 Meeting, the Board proactively took action to mitigate possible violations by voting 7-2 "for the ratification of the selection of Wendy L. Gady as the Executive Director of the State of Hawaii, Agribusiness Development Corporation."

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[33] In Kanahele, the Court concluded that because the Maui County Council's first of three readings on bills did not constitute a "final action," the complaint was prematurely filed and had not been taken within 90 days of the final action as required by section 92-11, HRS. Kanahele, 130 Haw. At 259, 307 P.2d at 1205.

Black's Law Dictionary includes four legal definitions for "ratification." The one most relevant here defines "ratification" as "[c]onfirmation and acceptance of a previous act, thereby making the act valid from the moment it was done[.]" Black's Law Dictionary 1289 (8th ed. 2004). Robert's Rules of Order, which sets suggested rules for parliamentary procedure, describes ratification as a motion used to confirm or make valid an action already taken that cannot become valid until approved by the assembly. Robert, Henry M. (2011), Robert's Rules of Order Newly Revised, 11th ed., p. 124. Based on the legal and parliamentary definitions of the term that are generally aligned, OIP's understanding is that "ratification" is generally the act of adopting or confirming a prior act, including one that was not validly taken. Ratification, however, does not necessarily "cure" Sunshine Law violations. Kanahele at 259, 307 P.3d at 1205.

Nevertheless, OIP commends the Board's attempt to mitigate its Sunshine Law violations by taking a ratification vote by roll call at the October 3 Meeting. OIP further finds that, despite the multiple Sunshine Law violations found herein, there was no bad faith by the Board, and the Board evidenced its desire to be transparent and to comply with the law. OIP, however, is unable to predict whether the ratification would satisfy the courts if a lawsuit challenging the Board's action is timely filed.

There may be no other practical remedy besides ratification of the August 8 secret ballot vote. While "re-doing" the hiring process and starting from scratch is theoretically an option, this could raise new problems given that Gady is already in place as the ED, and it seems unlikely that the Board's support of Gady would have changed following the August 17 public announcement of her selection as the ED. Moreover, different and potentially greater harm to the public could occur from a complete "re-do" as the delay and uncertainty could hamstring the Board and cast doubt on the validity of actions taken in the interim by it and the ED.

OIP notes, however, it may not be possible to mitigate any harm caused by disallowing Board members' remote participation at the August 8 Meeting or by failing to provide an opportunity for public testimony on executive session agenda items. Moreover, the Board's ratification still does not inform the public what the original vote was by member, and thus does not meet the purpose of the minutes requirement and other Sunshine Law requirements that call for recording votes by member to ensure that each member agrees his or her vote was reflected correctly and inform the public of who voted in which way.

Because the ratification vote would not serve to mitigate these and other Sunshine Law violations, the Board may want to consider the guidance regarding potential remedies provided by the Court in CBLC, such as the disclosure of executive session minutes. Here, relevant executive session minutes could be disclosed with redactions to only those portions that related to the applicant

interviews or that could identify unsuccessful applicants or adversely affect any applicants' legitimate privacy interests under section 92-5(a)(2), HRS. CBLC, 144 Haw. at 478-482, 445 P.3d at 59-63; OIP Op. Ltr. No. F20-01 at 11-17. Factors relevant to applicants' legitimate privacy interest include whether the information is required by law to be disclosed or has already been publicly disclosed. CBLC at 481-82, 445 P.3d at 62-63. Further redactions may be possible if the executive session materials may also be withheld under the attorney consultation exception at section 92-5(a)(4), HRS, regarding "questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities."[34] See OIP Op. Ltr. No. F20-01 at 11-12, 16-17 (concluding that the board's discussion of internal management issues at a systemic level and their legal implications fell within the attorney consultation exception of 92-5(a)(4), HRS, and could be redacted).

In conclusion, OIP is unable to predict what the courts would do if a timely lawsuit is filed under section 92-11, HRS, but it has found no bad faith by the Board and has provided guidance to aid the Board with additional mitigation possibilities and advice on how to comply with the Sunshine Law in the future. Additionally, OIP has extensive online training materials at oip.hawaii.gov, and reminds the members of the Board that they, as well as the public, are always welcome to contact OIP's "Attorney of the Day" (AOD) by email or telephone for informal guidance on the Sunshine Law or UIPA.

RIGHT TO BRING SUIT

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 §§ 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

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[34] As the Court explained in CBLC, the Sunshine Law's attorney consultation exception is not equivalent in scope and is far narrower than the attorney-client privilege. CBLC, 144 Haw at 488-89, 445 P.3d at 69-70.

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

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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 hereby certifies that on the date stated below, the foregoing document was duly served upon the party named below, via the method indicated below, at their respective last-known address.

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DATED: Honolulu, Hawai‘i, August 12, 2025.

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