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PUBLIC FIRST LAW CENTER

IN THE FAMILY COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

SPECIAL PROCEEDING TO UNSEAL
ADOPTION RECORDS

1FFM-24-0000018

MOVANT PUBLIC FIRST LAW
CENTER'S REPLY TO OPPOSITION OF
RESPONDENT ISAAC KALUA, FILED
MARCH 5, 2024 [DKT. 21];
DECLARATION OF COUNSEL;
EXHIBITS "2" - "3"

JUDGE: MATTHEW J. VIOLA

**MOVANT PUBLIC FIRST LAW CENTER'S REPLY TO OPPOSITION OF
RESPONDENT ISAAC KALUA, FILED MARCH 5, 2024 [DKT. 21]**

Movant Public First Law Center (Public First) files this response to Respondent Isaac Kalua's (Mr. Kalua) "Memorandum in Opposition to Motion to Unseal Adoption Records of Isabella P. Kalua, FKA Ariel Sellers" filed March 5, 2024 as Dkt. 21 (Opposition) pursuant to this Court's Order entered February 21 as Dkt. 7 (Order).¹

The opposition is long on unsupported rhetoric.² Mr. Kalua broadly urges this Court to give expansive effect to the confidentiality provisions of chapter 578, Hawai'i

¹ After submitting the motion to unseal to the Judiciary on December 13, 2023, Movant changed its corporate name to Public First.

² Contrary to Mr. Kalua's insinuations—*e.g.*, Dkt. 21 at 3, 14—Public First is a nonprofit dedicated to government transparency; it is not the online news publication Honolulu

Revised Statutes (HRS), but no effect to the disclosure provision. It simply cannot be that the Legislature meant nothing when it granted this Court authority to disclose adoption records for “good cause”.

Mr. Kalua offers a scattering of unavailing arguments.³ He asks this Court to rewrite section 578-15(b) to add a “proper person” requirement for disclosure. Mr. Kalua also misconstrues the holding in *Kema v. Gaddis*, *infra*, which concerned a legal standard that does not apply here. And his other asserted concerns do not justify complete closure of the subject records because they can be addressed by other alternatives to sealing this entire case.

Public First and Mr. Kalua agree, however, that Public First should not be privy to non-public information.⁴ Dkt. 21 at 3 (“in spite of the Court’s Order in this case, Respondent’s comments will be kept generic and will not deal with the specifics of any of the allegations that are directed against Respondent in this or any other matter.”). The motion to unseal did not request, and Public First does not want, special access to non-public information concerning these cases. Public First is seeking only court

Civil Beat. Public First is not representing anyone in this motion and did not file its motion on behalf or at the request of any media entity. Public First has a long-established history of filing motions to unseal to promote public access to court records. *E.g.*, *Roy v. Gov’t Emples. Ins. Co.*, 152 Hawai’i 225, 228, 524 P.3d 1249, 1252 (App. 2023) (affirming trial court’s granting of motion to unseal); *Navatek Capital Inc. v. Kao*, Civil No. 1CCV-20-0001511, Dkt. 804 (FOF/COL and order granting Public First’s motion to unseal); *Sonomura v. Kubota*, FC-D No. 11-1-0121, Dkt. 60 (order granting in part Public First’s motion to unseal).

³ Public First requested that its motion be filed in the adoption proceeding and only sought disclosure of court records filed in that proceeding, not everything in Department of Human Services files about Isabella Kalua. Dkt. 5. As the Court explained at the February 21 hearing, the Family Court elected to docket this motion as a Family Court Miscellaneous proceeding, not as part of the adoption case. Thus, Public First will not address Mr. Kalua’s criticism that the motion should have been docketed in the adoption case and decided by the judge overseeing that case. *See* Dkt. 21 at 12-13. The intended scope of the motion to unseal has not changed and is focused on the court records filed in the adoption case.

⁴ As a precaution, the undersigned’s colleague, R. Brian Black, screened Mr. Kalua’s opposition memorandum and redacted arguably non-public information. The undersigned has not seen and does not have access to the redacted information.

records that – pursuant to the relevant legal standards – should be available to the general public.⁵

Accordingly, in addition to the relief sought in the motion to unseal, Public First requests that the Court provide public access to *this* proceeding to unseal – subject to any motion to seal specific matters that interested parties believes must be considered by the Court *in camera*. Proceedings to seal or unseal court records are protected by the constitutional presumption of public access and should not be entirely sealed. *E.g.*, *Grube v. Trader*, 142 Hawai'i 412, 423 & n.13, 420 P.3d 343, 354 & n.13 (2018) (recognizing right of public access to motions to seal and acknowledging that an interested person may seek leave to file “supporting evidence” for a motion “ex parte and under seal pending the court’s disposition of the motion”); *MR v. TR*, No. CAAP-17-230, 2019 Haw. App. LEXIS 38, at *11 (Jan. 29, 2019) (unpublished; attached as **Exhibit 2**) (affirming denial of request to seal a motion to seal and supporting memorandum in divorce action); *accord In re Copley Press, Inc.*, 518 F.3d 1022, 1027-28 (9th Cir. 2008) (“logic requires that at least *part* of these hearings be open to the public, because one of their purposes is to give the public an opportunity to be heard,” but portions regarding the underlying secrets may be closed). If sealing the entire adoption proceeding from public view is justified, the proponent of secrecy should be able to articulate that general justification using public information – as Mr. Kalua did – subject to leave to submit specific non-public information *in camera* if necessary. Mr. Kalua’s opposition to the motion to unseal should thus be unsealed either in its entirety or in the redacted form attached as **Exhibit 3**.

For the following reasons, Public First’s motion to unseal should be granted.

⁵ Because it seeks only records that should be available to the general public, Public First will not address Mr. Kalua’s efforts to disparage the motives or integrity of Honolulu Civil Beat (John Hill) or Special Master Stephen Lane – neither of whom appear to have been served with Mr. Kalua’s opposition. Dkt. 21 at 2-3, 10-12; Dkt. 22 (notice of electronic filing). To be clear, Public First does not solicit donations for its work and is not representing anyone or accepting funds from anyone related to this proceeding.

1. Mr. Kalua's "proper person" argument ignores the plain language of HRS § 578-15.

Courts do not rewrite statutes. Mr. Kalua borrows language from section 578-15(a) to add an unwritten limit on the Court's authority to disclose court records in section 578-15(b). Dkt. 21 at 3-5. As Mr. Kalua acknowledges, however, that the "proper person" language plainly applies to a *different* situation than that which is before the Court here. Subsection (a) applies to the inspection of adoption records "before" entry of the adoption decree:

§ 578-15. Secrecy of proceedings and records.

(a) The records in adoption proceedings, after the petition is filed and *before the entry of the decree*, shall be open to inspection only by the parties or their attorneys, the director of human services or the director's agent, or any proper person on a showing of good cause therefor, upon order of the court. [. . .]

Emphasis added. Section 578-15(b)(1), by contrast, applies – as here – after entry of the adoption decree:

(b) *Upon the entry of the decree*, or upon the later effective date of the decree, or upon the dismissal or discontinuance or other final disposition of the petition, the clerk of the court shall seal all records in the proceedings; provided that upon the written request of the petitioner or petitioners, the court may waive the requirement that the records be sealed. The seal shall not be broken and the records **shall not be inspected by any person**, including the parties to the proceedings, **except**:

- (1) **Upon order of the family court upon a showing of good cause;**
- (2) After the adopted individual attains the age of eighteen and upon submission to the family court of a written request for inspection *by the adopted individual or adoptive parents*;
- (3) After the adopted individual attains the age of eighteen and upon submission to the family court of a written request for inspection *by the natural parents*;
- (4) Upon request *by the adopted individual or adoptive parents* for information contained in the records concerning ethnic background and necessary medical information; or
- (5) Upon request *by a natural parent* for a copy of the original birth certificate. [. . .]

Emphases added.

When the Legislature uses different terminology in different statutory provisions, courts “must presume this was intentional, and that the legislature means two different things.” *Peer News LLC v. City & County of Honolulu*, 138 Hawai‘i 53, 67-68, 376 P.3d 1, 15-16 (2016), *superseded by statute on other grounds*, 2020 Haw. Sess. Laws Act 47. The analysis begins and ends with the plain language that provides for inspection by “any person . . . [u]pon order of the family court upon a showing of good cause.”

Mr. Kalua’s claim that only persons with a “relationship” to the adopted child may seek an order from the Court has no grounding in the statute. To the contrary, the Legislature specifically addressed certain scenarios involving individuals with a relationship to the child. HRS § 578-15(b)(2)-(5). The Legislature knew well the difference between “any person” and persons with a biological or other legal connection to the adopted child, and chose not to limit subsection (b)(1) to any particular class of person.

Mr. Kalua’s citation to an unpublished Intermediate Court of Appeals decision, *In re Adopt. of A Male Child by C.C.*, is inapposite and unavailing. That case concerned whether a party was a proper person to set aside a decree of adoption – not unseal records under section 578-15(b)(2). *In re Adopt. of A Male Child*, No. CAAP-23-290, 2024 Haw. App. LEXIS 61, at *4 (Feb. 9, 2024) (“The dispositive issue in this appeal is whether A.M. was a person “properly interested” in setting aside or modifying Child’s adoption.”).

Mr. Kalua’s limitation on the Legislature’s “any person” standard in HRS § 578-15(b) – without any evidence of legislative intent – effectively reads the statute to never allow a member of the public to request access to adoption records under any circumstances. Such a reading raises serious concerns in conflict with the constitutional standards for public access to court records. *See Ferris Tr. v. Planning Comm’n of Kaua‘i*, 138 Hawai‘i 307, 378 P.3d 1023 (App. 2016) (“The rules of statutory construction dictate that, if possible, we must interpret a statute to avoid violating constitutional provisions.”).

The Court must give effect to the plain meaning of the Legislature’s words. *E.g.*, *In re AS*, 130 Hawai`i 486, 501-02, 312 P.3d 1193, 1208-09 (App. 2013) (foremost obligation is to give effect to intent of legislature to be obtained through language of the statute); *Price v. Coulson*, 144 Hawai`i 392, 442 P.3d 455 (App. 2019) (“sole duty” is to give effect to a statute’s plain and obvious meaning); *accord First Ins. Co. v. A & B Properties.*, 126 Hawai`i 406, 414, 271 P.3d 1165, 1173 (2012). There is no basis in the law to deny Public First standing to move to unseal under HRS § 578-15(b)(1).

2. *Kema* does not apply and Mr. Kalua misconstrues its holding.

Mr. Kalua misconstrues *Kema v. Gaddis*, the leading authority on a *different* disclosure standard. *Kema* concerns disclosure of court records under the Child Protective Act. Even if that standard applied in the context of this motion – which it does not – it is facially broader than Mr. Kalua argues.

Kalu argues “legitimate purposes” are limited to furthering the bests interest of particular children in a particular case. *E.g.*, Dkt. 21 at 10 (“Movant has failed to show how making the requested information public is going to benefit any of the Kalua children.”). Even assuming HRS § 587A-40 applied to this motion, plain and unambiguous statutory language again defeats Mr. Kalua’s argument:

The court shall keep a record of all child protective proceedings under this chapter. Written reports, photographs, x-rays, or other information that are submitted to the court may be made available to other appropriate persons, who are not parties, only upon an order of the court. The court may issue this order *upon determining that such access is in the best interests of the child or serves some other legitimate purpose.*

HRS § 587A-40 (emphases added). Mr. Kalua’s argument impermissibly collapses the two distinct standards provided by section 587A-40. And binding interpretation from the Hawai`i Supreme Court holds that “legitimate purposes” are “those that further the best interests of *the children who come within the jurisdiction of the family court*, pursuant to the Child Protective Act, *i.e.*, purposes that will safeguard, treat, and provide services and plans for *children in need of protection.*” *Kema v. Gaddis*, 91 Hawai`i 200, 205, 982 P.2d 334, 339 (1999) (emphasis added). The standard is not limited to the interests of any particular child or particular children – it concerns children, generally.

3. Public First does not seek to unseal confidential information concerning Isabella's surviving siblings.

Mr. Kalua's Opposition misconstrues the subject of the motion. This motion seeks to unseal records sufficient to understand what government agencies and officials knew about the Kaluas' fitness as a parents when the Department of Human Services recommended and the Family Court approved the Kaluas' adoption of Isabella. Somehow the *system* failed Isabella and her siblings because it resulted in Isabella's death and allegations of abuse and murder against the Kaluas. But the information sought concerns the Kaluas and the functioning of that system, not the personal lives of Isabella's siblings.⁶

Mr. Kalua contends that disclosing information about how the system failed Isabella is not necessary because the statutes and regulations concerning adoptions are publicly accessible. Dkt. 21 at 8-9. That is nonsense. The statutes and regulations alone say nothing about how the law was applied in this particular case when the process clearly fell short of expectations.

Mr. Kalua makes no effort to justify the asserted need for secrecy based on the intent behind adoption confidentiality generally. Dkt. 1 at 5-6. As noted by the motion to unseal, much of the information *intended* to be kept confidential is now public. Confidentiality should not be used as a pretext to cover up problems, if any, with how this adoption was handled.

And redactions provide an appropriate solution to narrowly address legitimate privacy concerns for the siblings. Redaction, however, should be altogether unnecessary for certain documents, such as DHS assessments and recommendations that focus on the Kaluas' fitness as parents. Redaction should also be unnecessary for information that is already public, including the fact of the Kaluas' adoption of Isabella and her siblings and the publicly disclosed allegations of abuse and neglect that followed.

⁶ It also is questionable whether Mr. Kalua has standing to assert the privacy concerns of Isabella's siblings – whose interests Public First would understand will be presented by the guardians ad litem.

4. Pretrial publicity concerns do not justify wholesale closure.

Nothing about the pretrial publicity here justifies sealing court records. Mr. Kalua asserts that unsealing the adoption records will “sensationalize” matters surrounding his criminal prosecution and threaten his right to a fair trial in that forum. Dkt. 21, p. 7-8 (“attempts to sensationalize matters surrounding this case may make it difficult if not impossible for Respondent and his wife to get a fair trial in the criminal proceeding.”).

Courts routinely reject such vague concerns about violating the constitutional right to a fair trial. *Gannett Pac. Corp. v. Richardson*, 59 Haw. 224, 233, 580 P.2d 49, 56 (1978) (“pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial”); *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 15 (1986) (“right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]”); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 554 (1976) (“Taken together, these cases demonstrate that pretrial publicity even pervasive, adverse publicity does not inevitably lead to an unfair trial.”); *United States v. Guerrero*, 693 F.3d 990, 1002 (9th Cir. 2012) (“We have made clear that ‘pervasive publicity, without more, does not automatically result in an unfair trial.’”); *United States v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982) (generalized concerns about “problems of publicity” insufficient to claim prejudice to right to fair trial); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1146 (9th Cir. 1983) (publicity concerns can be resolved by voir dire and clear jury instructions to ensure fair trial).

The Hawai‘i Supreme Court has addressed the intersection of public disclosure of information and the constitutional right to a fair trial twice in the context of judicial proceedings and records. *Oahu Publ’ns Inc. v. Ahn*, 133 Hawai‘i 482, 331 P.3d 460 (2014); *Gannett Pac. Corp.*, *supra*; see also *Breiner v. Takao*, 73 Haw. 499, 835 P.2d 637 (1992) (per curiam) (vacating gag order premised on right to fair trial).

Oahu Publications concerned mid-trial disclosure of information regarding potential juror misconduct during the first trial of U.S. State Department Special Agent Christopher Deedy for the shooting death of Kollin Elderts. The case involved

“[c]onsiderable public attention and media coverage.” *Oahu Publc’ns*, 133 Hawai`i at 486, 331 P.3d at 464. The trial court sealed several proceedings and related transcripts, concluding that in order to preserve a juror’s privacy and security and the integrity of a fair and impartial jury decision based solely upon the trial evidence and the law provided by the Court, and to protect the right of both parties to a fair trial and verdict, public access would not play a significant positive role in the functioning of this process. *Id.* at 489, 331 P.3d at 467. Such “generalized statements of policy,” however, are not adequate alone. *Id.* at 506, 331 P.3d at 484. The Hawai`i Supreme Court explained that “[w]hile these reasons are indisputable in the generic sense, they do not as stated provide sufficient justification for a closure of a court proceeding.” *Id.* at 505, 331 P.3d at 483. Instead, the Hawai`i Supreme Court required specific facts demonstrating that “first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.” *Id.*

In *Gannett Pacific Corp.*, the court also required specific facts to demonstrate “a substantial likelihood that [disclosure] would interfere with the defendant’s right to a fair trial by an impartial jury,” which would include consideration of: “the nature of the evidence sought to be presented; the probability of such information reaching potential jurors; the likely prejudicial impact of this information upon prospective veniremen; and the availability and efficacy of alternative means to neutralize the effect of such disclosures.” *Gannett Pac. Corp.*, 59 Haw. at 233-34, 580 P.2d 56-57 (footnotes omitted). The Hawai`i Supreme Court expressly recognized as viable alternatives to nondisclosure: “voir dire at trial”; “the exercise of peremptory and challenges for cause”; “clear and express admonitions to the jury once selected”; “trial continuances until community passions subside”; and “such other alternative means as may be available to the defendant and to the court at trial” (*e.g.*, change of venue). *Id.* at 234, 580 P.2d at 57; *accord Breiner*, 73 Haw. at 506, 835 P.2d at 641 (noting consideration of alternatives such as “voir dire, jury instructions, jury sequestration or change of venue or postponement”).

Here, Mr. Kalua merely speculates that public attention related to this matter “may make it difficult if not impossible” for Mr. Kalua to be fairly tried by a jury in his murder trial. Mr. Kalua does not provide any facts or explanation as to how disclosing *any portion* of the adoption case file would jeopardize the right to a fair trial. Nor has he addressed the available means of neutralizing any effects of pretrial publicity. With a population of over 1,000,000, the City and County of Honolulu can seat an impartial jury through adequate precautions, notwithstanding pretrial publicity. Numerous cases with a much higher profile have proceeded without difficulty using other precautions. Mr. Kalua’s conclusory beliefs to the contrary are insufficient bases to deny the motion to unseal in its entirety.

Moreover, the subject court records are presumed to be largely “factual in nature,” not highly inflammatory and inadmissible information that would irreparably prejudice the jury pool against the defendants. *Compare Murphy*, 421 U.S. at 796, 802 (fair trial despite “extensive press coverage” that was “largely factual in nature”, not “inflammatory”), *with Sheppard v. Maxwell*, 384 U.S. 333, 356-57 (1966) (“every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.”) (referring to examples of inadmissible statements and gossip about the defendant that were published by the media); *accord Ryser v. State*, 453 S.W.3d 17, 34 (Tex. App. 2014) (pretrial media coverage of surveillance video showing police officers beating a burglary suspect was not “so prejudicial and inflammatory” to require change of venue to protect a charged police officer’s right to fair trial); *Freedom Newspapers, Inc. v. Superior Court*, 227 Cal. Rptr. 518, 523 (Cal. App. 1986) (“We refuse to accept the notion a defendant’s right to a fair trial is automatically prejudiced by media disclosure of factual information concerning alleged crimes.”).

Vague pretrial publicity concerns do not warrant continued sealing here.

5. Blanket protective orders for discovery in other cases do not prohibit this Court from unsealing adoption records under HRS § 578-15(b)(1).

Mr. Kalua alludes to potential protective orders entered in the criminal and civil cases involving Mr. Kalua, without providing copies of any to this Court, and argues

these orders might prevent the disclosure sought by the motion. Dkt 21 at 8-9, 13. Mr. Kalua is wrong. Any such protective orders do not compel withholding here.

First, neither protective order purports to bind this Court. The criminal protective order only restricts the information obtained in discovery from the prosecution that the defense counsel may share with the defendants or that defendants may share outside the litigation. *State v. Kalua*, 1CPC-21-1427, Dkt. 58. Public First has moved for disclosure of court records, not disclosure from Mr. Kalua of information he obtained in criminal discovery. The civil protective order only restricts the use of records to the extent disclosed through discovery requests to the Department of Human Services. *Cummings v. Kalua*, 1CCV-23-1049, Dkt. 91 at 2 (“records in the possession of the Department of Human Services”) (“this Stipulated Protective Order shall apply to the disclosure of records held by DHS”) (referring to discovery requests served on DHS). It does not “apply to . . . any records which are not in DHS possession,” such as this Court’s records. *Id.* It also expressly binds only parties to the civil action. *Id.* at 7. Again, Public First moved for disclosure from this Court’s records, not from any discovery that the parties to the civil case received from DHS.

Second, protective orders for discovery do not and cannot override the statutory authority of this Court to disclose adoption records for “good cause” under HRS § 578-15(b)(1). Mr. Kalua has offered no authority to suggest otherwise. Even if the protective orders purported to do so – they don’t – parties to a lawsuit cannot simply agree to deny Public First its right to otherwise obtain court records (or strip this Court of its authority over disposition of its own court records). *See, e.g., Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003) (common law presumption of public access is not rebutted by a stipulated protective order); *San Jose Mercury News v. U.S. Dist. Ct.*, 187 F.3d 1096, 1101 (9th Cir. 1999) (“The right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away.”); *Markel Am. Ins. Co. v. Internet Brands, Inc.*, 2017 U.S. Dist. LEXIS 224860, *20-21 (C.D. Cal. Aug. 2, 2017) (“A similar issue arises where the parties have agreed that certain discovery material should be treated as confidential pursuant to a protective order. The issue of sealing discovery is not the same as sealing adjudicatory materials -

an issue governed by the Ninth Circuit authorities cited above, and ultimately the First Amendment.”); *see also State v. Tangalin*, 66 Haw. 100, 100-01, 657 P.2d 1025, 1026 (1983) (“It is well established that matters affecting the public interest cannot be made the subject of stipulation so as to control the court’s action with respect thereto.”); *LC v. MG*, 143 Hawai‘i 302, 320, 430 P.3d 400, 418 (2018) (party agreement as to a question of law is not binding on courts).

The stipulated protective orders in the criminal and civil cases are not a basis to withhold records.

6. Special Master’s Report.

Mr. Kalua argues there is no basis for the report to be released. Dkt. 21 at 10. In its requested relief, Public First suggested access to the report or a summary prepared by the Special Master as a way of protecting the privacy of the siblings and to reduce the potential burden of redacting intertwined pleadings. But we welcome discussion of other suggested alternatives.

CONCLUSION

Public First respectfully requests that, for good cause shown, the Court grant its motion and unseal appropriate court records, or otherwise publicly disclose information, from the adoption case of Isabella Kalua.

DATED: Honolulu, Hawai‘i, March 15, 2024

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