

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

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Attorneys for Movant
PUBLIC FIRST LAW CENTER

IN THE FAMILY COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

SPECIAL PROCEEDING TO UNSEAL
PORTIONS OF CHILD PROTECTIVE
ACT PROCEEDING

1FFM-24-0000019

MOVANT PUBLIC FIRST LAW
CENTER'S COMBINED REPLY TO
OPPOSITIONS OF RESPONDENTS (1)
ISAAC KALUA, FILED MARCH 5, 2024
[DKT 19] AND (2) DEPARTMENT OF
HUMAN SERVICES, FILED APRIL 1,
2024 [DKT 47]; DECLARATION OF
COUNSEL; EXHIBITS "3" - "4"

JUDGE: MATTHEW J. VIOLA

**MOVANT PUBLIC FIRST LAW CENTER'S COMBINED REPLY TO OPPOSITIONS
OF RESPONDENTS (1) ISAAC KALUA, FILED MARCH 5, 2024 [DKT 19] AND (2)
DEPARTMENT OF HUMAN SERVICES, FILED APRIL 1, 2024 [DKT 47]**

Movant Public First Law Center (Public First)¹ files this combined response to oppositions filed by Respondents Isaac Kalua (Mr. Kalua), Dkt. 19, and Department of Human Services (DHS), Dkt. 47.

DHS and Mr. Kalua primarily argue that *no portion* of Isabella’s child protective act case can be disclosed because it is “inextricably intertwined” with her surviving siblings’ cases, citing *Kema*. However, the siblings’ guardians – representing the best interests of the siblings – do not oppose disclosure with redactions, as proposed by Public First. *Kema* is the leading authority on the disclosure standard relevant to this motion. But it is rooted in its – materially different – facts.

DHS and Mr. Kalua essentially ask this Court to give expansive effect to the confidentiality provisions of chapter 587A, but no effect to the disclosure provision. It was not an empty gesture for the Legislature to grant this Court authority to disclose records where there is a “legitimate purpose” for doing so.

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

1. *Kema* does not compel complete secrecy in this case.

As a threshold matter, *Kema* did not bar public disclosure of all information pertaining to Peter Boy’s child protective act case. *Kema* affirmed the family court’s disclosure of a synopsis of the allegations contained in the safe home guidelines.² 91 Hawai`i at 205-06, 982 P.2d at 339-40; *accord* Dkt. 47 at 6-7 (DHS acknowledging same).

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

² Judge Gaddis ordered the release – endorsed by the Hawai`i Supreme Court – of the following information from the case file in the form of a synopsis prepared by DHS:

(1) the injuries suffered by Peter Boy when he first came to the attention of DHS; (2) the circumstances and allegations that caused Peter Boy once again to come to the attention of DHS; (3) all known accounts provided to the DHS and law enforcement authorities regarding the disappearance of Peter Boy, including (a) the location of the child when last seen, (b) the names of persons the child was alleged to have been with, (c) the date the child was last seen, (d) a photograph of Peter Boy, and (e) any other information or allegations that might help the public locate Peter Boy.

Kema v. Gaddis, 91 Hawai`i 200, 202-03, 982 P.2d 334, 336-37 (1999).

While this motion invokes the same disclosure standard as *Kema*, the cases are factually distinct in several material respects. When *Kema* was decided, Peter Boy was missing. *E.g., id.* at 205, 982 P.2d at 339. Two decades passed before he was declared dead. *See Acol v. DHS*, No. 1CC181000052, Dkt. 2 ¶¶ 2, 23. The potential that he was still alive meant he was capable of being harmed by disclosure. And, importantly, the guardian ad litem for the *Kema* children, Edith Kawai, objected to disclosure.³ *Kema*, 91 Hawai`i at 201, 982 P.2d at 335.

Here, by contrast, Isabella has been declared dead. She cannot be harmed by disclosure. Her personal representative and the guardians ad litem for her siblings have not objected to redacted disclosure as requested.⁴ *See* Dkt. 31, 37, 43. Nor have they asserted that redactions are insufficient to protect the children’s privacy interests. *Id.* Isabella’s biological parents have not objected. Dkt. 22 (proof of service). And the children’s adoptive mother, who is accused of causing Isabella’s death, has not objected. Dkt. 8 (proof of service). Only two parties have objected to disclosure: the man accused of idly standing by as Isabella died a “slow and horrific death,” among other serious charges of neglect, and the State agency that recommended placing her in the care of Mr. Kalua and his wife.⁵ Dkt. 47 at 3; *see also* Dkt. 19. Neither of these objecting parties, however, submit any factual basis for this Court to find that the siblings will be harmed by the requested disclosure.

Moreover, the purposes for disclosure evaluated in *Kema* and this case are both “legitimate”, but distinct. In *Kema*, the purpose for disclosure was to help find a missing child. 91 Hawai`i at 205, 982 P.2d at 339 (citing family court findings of fact).

³ Unlike the facts here, Peter Boy’s siblings “already had their names printed in the paper and have been filmed by television news as they were placed in foster care[.]” 91 Hawai`i 200, 203, 982 P.2d 334, 337.

⁴ The apparent position of Mr. Kalua and DHS is that any case that mentions siblings cannot be disclosed. That leads to the untenable result that the public will have access to scrutinize the conduct of DHS and operation of the foster care system when a minor dies under DHS’s care *only* if that minor had no siblings. There is no support for that position in Hawai`i Revised Statutes (HRS) § 587A-40, *Kema*, or otherwise in law.

⁵ The only outstanding response at this time is from the Court Appointed Special Advocates program (CASA). CASA’s response is due by April 22. Dkt. 41.

Records relevant to that purpose concern information *about the child* – physical attributes and the circumstances of his disappearance. The purpose here is not to help find Isabella. It is to help understand what led to Isabella’s placement with her alleged murderers and to help ensure that other children do not meet that fate. Records relevant to this purpose focus on information *about a system* – procedural information; process and procedure, actions of government officials, and the Kaluas’ fitness as parents. The analysis is thus fundamentally different than in *Kema*.

And it simply cannot be that the *entire* case file must be withheld to protect the privacy interests of Isabella’s siblings. The case docket, for example, would reveal procedural information, such as the dates of periodic review hearings held pursuant to HRS § 587A-30 – not personal information about Isabella’s siblings. Mandatory judicial findings from periodic review and permanency hearings, as another example, would reveal information about parental fitness, the provision of government services, actions and recommendations of DHS, as well as the court’s assessment of the same – not personal information about Isabella’s siblings. *E.g.*, HRS § 587A-7, -18, -30, and -32.

2. Mr. Kalua misconstrues the relevant disclosure standard.

Mr. Kalua focuses only on best interests of the children in the specific proceeding and would read out of the disclosure provision the words “or serves some other legitimate purpose.” HRS § 587A-40; *accord Kema*, 91 Hawai`i at 205, 982 P.2d at 339. This Court, however, cannot rewrite the law. *E.g.*, *In re AS*, 130 Hawai`i 486, 501-02, 312 P.3d 1193, 1208-09 (App. 2013); *accord 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 (when the Legislature uses different terminology, courts “must presume this was intentional, and that the legislature means two different things”).

Even if Mr. Kalua’s preferred construction were correct – which it is not – the requested unsealing meets that standard. With the Kaluas incarcerated, Isabella’s siblings presumably remain under State care. Thus, they too will benefit – as will all children in DHS’s care – from public scrutiny of potential flaws in the foster system.

3. DHS and Mr. Kalua ignore DHS rules that recognize a legitimate purpose for disclosure under circumstances present here.

DHS and Mr. Kalua also ignore developments in the law since *Kema*. Compare Dkt. 1 at 7-9, with Dkt. 19; Dkt. 47. Following *Kema*, DHS issued rules that recognized a “legitimate state purpose” for disclosure of child abuse records without court order. HAR § 17-1601-6(16); HRS § 587A-40(b) (“department may disclose information in the court record without order of the court” pursuant to administrative rules). As briefed, and unrefuted by DHS or Mr. Kalua, *all four* “legitimate state purposes” are present here. Thus, at minimum, DHS’s rules support the relief sought here.

4. DHS and Mr. Kalua misconstrue the subject of the motion.

DHS and Mr. Kalua generally misconstrue the subject of the motion. The information sought concerns the Kaluas and the functioning of the foster system, not the personal lives of Isabella’s siblings. These are matters of legitimate public concern.

Courts routinely hold that the operations of government agencies involved in the care of children are matters of legitimate public concern—particularly where a child has died. For example, in unsealing state death reports, critical incident reports, and substantiated reports in child abuse cases, a court explained: “The ultimate basis for the Court’s decision is two-fold - a concern that we all share - the safety and welfare of our children - and the Court’s belief that letting in some reasonable sunlight on the way government works will serve to protect these children by providing the resources necessary to accomplish that goal.” *Charlie H. v. Whitman*, 213 F.R.D. 240, 248-52 (D.N.J. 2003); *see also Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (“custodial needs of children fuels a heightened concern for openness and public review of governmental operations.”); *Harman v. City of N.Y.*, 140 F.3d 111, 118 (2d Cir. 1998) (effectiveness of child welfare agency, relative to child fatalities, was a matter of public concern); *San Bernardino Cty. Dep’t of Pub. Soc. Servs. v. Superior Court*, 232 Cal. App. 3d 188, 203, 283 Cal. Rptr. 332, 342 (1991) (“As is true with shocking crimes generally, the crimes committed against and the neglect visited upon children often result in an understandable community reaction of outrage. . . . Public access to juvenile dependency proceedings can serve an important prophylactic purpose, providing an

outlet for community concern, hostility, and emotion.”) (cleaned up). Confidentiality should not be used as a pretext to cover up problems, if any, with how this foster placement was handled.

Redaction provides an appropriate solution to narrowly address legitimate privacy concerns for the siblings and should be altogether unnecessary for certain documents, such as records that focus on the Kaluas’ fitness as parents or issues of process and procedure. If this Court in its review of the record disagrees, however, the Court could still grant the alternative relief sought by the motion, including releasing the case docket and any reports prepared by Special Master Lane (redacted, as necessary). Dkt. 1 at 12.

5. 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. *E.g.*, Dkt. 19, p. 5, 11. 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); *United States v. Guerrero*, 693 F.3d 990, 1002 (9th Cir. 2012); *United States v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982); *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 death of Kollin Elderts. The case involved “[c]onsiderable public attention and media coverage.” *Oahu Publ’ns*, 133 Hawai‘i at 486, 331 P.3d at 464. The trial court sealed several proceedings and related transcripts, concluding that to, among other things, protect the right of both parties to a fair trial, public access would not play a significant positive role in the functioning of this process. *Id.* at 489, 331 P.3d at 467. 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 child protective act 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.

Further refuting Mr. Kalua’s speculation, 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. *Cf. 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.

6. 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 19 at 5-7. Mr. Kalua is wrong. The stipulated protective orders in the criminal and civil cases are *not* a basis to withhold records 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 court records for a “legitimate purpose” under HRS § 587A-40(a). 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.”); *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.”).

7. Mr. Kalua’s and DHS’s oppositions highlight the propriety of releasing the Special Master’s report.

DHS objects to Public First’s alternative request that Special Master Lane prepare a case synopsis because he is “legally a stranger to the proceedings” of Isabella’s siblings and should not be provided “access any more than the Petitioner.” Dkt. 47 at 7-8. This appears to tacitly acknowledge that the Special Master prepared his report based on records pertaining to Isabella that are not inextricably intertwined with information about her siblings. Thus, releasing the Special Master’s report and records he reviewed would not harm the privacy interests of Isabella’s siblings.

Mr. Kalua simply argues there is no basis for the report to be released. Dkt. 19 at 7-9. 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.

8. Request for Public Access to Motion to Unseal Proceeding

As noted by Public First’s reply filed as Dkt. 29 in 1FFM-24-18, Public First agrees it should not be privy to non-public information.⁶ Public First is seeking only court records that should be available to the general public. 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 3**) (affirming denial of request to

⁶ As a precaution, the undersigned’s colleague, R. Brian Black, has screened filings.

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 child protective act proceeding from public view is justified, the proponent of secrecy should be able to articulate that general justification using public information.

With the exception of Mr. Kalua (*see, e.g., Exhibit 4*, redactions), the parties that have responded thus far have seemingly *not* disclosed nonpublic information. Public First’s motion to unseal and supporting memoranda similarly do not disclose any nonpublic information. This special proceeding should thus be unsealed, subject to leave to submit specific non-public information *in camera* if necessary.⁷

CONCLUSION

Public First respectfully requests that, pursuant to HRS § 587A-40, the Court grant its motion and unseal appropriate court records, or otherwise publicly disclose information, from the child protective act case of Isabella Kalua.

DATED: Honolulu, Hawai‘i, April 12, 2024

/s/ Benjamin M. Creps
ROBERT BRIAN BLACK
BENJAMIN M. CREPS

Attorneys for Movant
Public First Law Center

⁷ The Kalua Opposition should be unsealed either in its entirety or in the redacted form attached as **Exhibit 4**.