

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

7659
9959

Electronically Filed
FIRST CIRCUIT
1FFM-24-0000018
19-APR-2024
12:46 PM
Dkt. 55 REPLY

Attorneys for Movant
PUBLIC FIRST LAW CENTER

IN THE FAMILY COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

SPECIAL PROCEEDING TO UNSEAL
ADOPTION PROCEEDINGS

1FFM-24-0000018

MOVANT PUBLIC FIRST LAW
CENTER'S REPLY TO OPPOSITION OF
RESPONDENT DEPARTMENT OF
HUMAN SERVICES, FILED APRIL 1,
2024 [DKT 53]; DECLARATION OF
COUNSEL; EXHIBITS "4" - "5"

JUDGE: MATTHEW J. VIOLA

**MOVANT PUBLIC FIRST LAW CENTER'S REPLY TO OPPOSITION OF
RESPONDENT DEPARTMENT OF HUMAN SERVICES, FILED APRIL 1, 2024
[DKT 53]**

Movant Public First Law Center (Public First)¹ files this response to Respondent Department of Human Services' (DHS) "Memorandum in Opposition to Motion to Unseal Court Adoption Records of Isabella P. Kalua F.K.A. Ariel Sellers," filed April 1, 2024 as Dkt. 53 (Opposition).

DHS does not dispute that it recommended to the family court that Isabella be adopted by Isaac and Lehua Kalua (together, Kaluas). DHS does not dispute that less than a year after the adoption was finalized, Isabella disappeared and the Kaluas were charged with her murder. And yet, in spite of these circumstances, or perhaps because of them, DHS has chosen to disclose *nothing* to help the public understand what happened in this case.

DHS expresses sympathy for the unimaginable horrors that its recommended adoption caused Isabella and her siblings. Dkt. 53 at 3. But DHS's professed concern is no substitute for genuine accountability. And DHS has the audacity to argue that it is now advocating for Isabella's siblings by fighting for continued secrecy – even though their court-appointed advocates do not oppose disclosure. *Id.* at 8. *That* is absurd.

DHS's conduct has and continues to necessitate the relief sought by this motion. DHS urges this Court to find ambiguity in a statute where none exists. Its argument seeks to deny this Court any discretion to decide how to handle its own court records despite plain language from the Legislature recognizing such discretion. Hawai'i Revised Statutes (HRS) § 578-15(b)(1) expressly provides authority – without any limitation or condition – for this Court to order disclosure "upon a showing of good cause." For the following reasons, Public First's motion to unseal should be granted.

1. HRS § 578-15(b)(1) plainly and unambiguously allows this Court to disclose records to any person for "good cause."

DHS, just like Mr. Kalua, tries to impose an unwritten limit on the Court's authority to disclose court records under section 578-15(b). *Compare* Dkt. 21 at 3 – 5 (arguing only "proper persons" can unseal adoption records) *with* Dkt. 53 at 4 – 8 (arguing only members of the adoption "triad" can unseal adoption records). As

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

addressed in response to Mr. Kalua's arguments, however, courts do not rewrite statutes. Dkt. 29 at 4-6; *see also* *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019) ("courts aren't free to rewrite clear statutes under the banner of our own policy concerns").

In a misguided attempt to have this Court disregard plain statutory language, DHS argues that the disclosure standard under HRS § 578-15(b)(1) is ambiguous. Dkt. 53 at 4. DHS, however, cannot sow ambiguity where none exists. *E.g.*, *State Farm Fire & Cas. Co. v. Pac. Rent-All, Inc.*, 90 Hawai'i 315, 324, 978 P.2d 753, 762 (1999) (parties' disagreement about meaning of a contract term does not render it ambiguous). Statutory interpretation is a question of law. *Stout v. Bd. of Trs. of the Empls. Ret. Sys.*, 140 Hawai'i 177, 185, 398 P.3d 766, 774 (2017). Ambiguity exists where there is "doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in statute." *Id.* There is no such ambiguity here.

Section 578-15(b)(1) plainly provides that, after an adoption decree is entered, the court clerk must seal all records in the adoption case—unless that is waived by the petitioner—and those records must remain under seal and unavailable for inspection by "any person, including the parties" unless the court, for "good cause" shown, orders otherwise. "Any person" is expressly (and obviously) *not* limited to the parties to the adoption. And there is absolutely no limitation in paragraph (b)(1) as to who may make a showing of good cause.

Where "the statute is clear and perfectly understandable when read in the light of the ordinary rules of grammar," as here, there is "no necessity to transpose any portion of the statute or to give like phrases double meanings to glean the intent of the legislature, otherwise clearly expressed." *Bishop Tr. Co. v. Burns*, 46 Haw. 375, 399-400, 381 P.2d 687, 701 (1963). "It is fundamental that in construing or interpreting a statute, in order to ascertain the intent of the legislature, the language used therein is to be taken in the generally accepted and usual sense." *Id.*; *accord* *County of Kauai v. McGonagle*, 33 Haw. 915, 920 (1936) ("Where the language of the statute is plain and unambiguous there is no occasion for construction and the statute must be given effect according to its plain and obvious meaning."); *Allstate Ins. Co. v. Schmidt*, 104 Hawai'i

261, 265, 88 P.3d 196, 200 (2004) (“Where the language of the statute is plain and unambiguous, the court’s only duty is to give effect to its plain and obvious meaning.”). The analysis thus begins and ends with the plain language that allows inspection by “any person . . . [u]pon order of the family court upon a showing of good cause.” There is no basis in the law to deny Public First standing to move to unseal under HRS § 578-15(b)(1).²

DHS claims that Public First’s reading of section 578-15(b)(1) is “totally out of context.” Dkt. 53 at 4. Not so. The context of the statute as a whole *reinforces* the plain-language construction of paragraph (b)(1). First, DHS looks to subsection (a). But subsection (a) provides for confidentiality and disclosure of adoption records “after the petition is filed and before the entry of the decree.” Subsection (b) provides for confidentiality and disclosure of adoption records for an entirely distinct situation—as here—“[u]pon 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.” It is entirely logical to provide different disclosure standards for different situations. See *State v. Griffin*, 83 Haw. 105, 108 n.4, 924 P.2d 1211, 1214 n.4 (1996) (“The legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction[,] and illogicality.”); *Reefshare, Ltd. v. Nagata*, 70 Haw. 93, 98, 762 P.2d 169, 173 (1988) (“Courts will not presume an oversight on the part of the legislature where such presumption is avoidable.”); *Ringor v. State*, 88 Haw. 229, 233, 965 P.2d 162, 166 (App. 1998) (“Legislative enactments are presumptively valid and should be interpreted in such a manner as to give them effect.”).

² Moreover, DHS’s limitation on the Legislature’s “any person” standard in HRS § 578-15(b) 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.”).

Second, the plain language of paragraphs (b)(2) – (b)(5) evince a clear legislative awareness of the parties comprising the adoption triad and a deliberate intention to provide specific disclosure procedures for those parties, under specified circumstances:

(b) [. . .] 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.

As used in this subsection, “natural parent” means a biological birthing parent or non-birthing parent, or a legal parent who is not also the biological parent.

HRS § 578-15 (emphasis added). The Legislature plainly chose *not* to limit paragraph (b)(1) to any particular class of person. See *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 in different statutory provisions, courts “must presume this was intentional, and that the legislature means two different things.”). There is no conflict between paragraph (b)(1) and paragraphs (b)(2) – (b)(5). Just different disclosure procedures for different circumstances. *Griffin, supra*.

Third, subsection (c) provides, “The clerk of the court shall keep a docket of all adoption proceedings, which may be inspected only by order of the family court.” This language again evinces a legislative intent to bestow this Court with the discretion to unseal adoption records where appropriate.

DHS's claim that the plain-language construction of HRS § 578-15(b)(1) produces an "absurd" result is pure fantasy. Dkt. 53 at 4. The "good cause" standard is widely understood to be a flexible standard that provides courts with the authority to make orders where there is a good reason for doing so. *E.g., Doe v. Doe*, 98 Hawai'i 144, 154, 44 P.3d 1085, 1095 (2002) ("good cause" standard depends on "the circumstances of the individual case"); *Chen v. Mah*, 146 Hawai'i 157, 178, 457 P.3d 796, 817 (2020) (noting "good cause" standard varies depending on the context). The Legislature cannot be expected to predict every imaginable instance in which a good reason would exist for a court to make certain orders—hence, the good cause standard. This case presents precisely the situation for which the flexible "good cause" standard exists.

2. Legislative intent does not support DHS's argument that only parties to the adoption can unseal adoption records under HRS § 578-15(b).

DHS also errs in its analysis of legislative intent. As discussed above, there is no basis here to resort to legislative intent because the statute is plain and unambiguous. *See also Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 90, 138 S. Ct. 1134, 1143, 200 L.Ed.2d 433, 443 (2018) ("If the text is clear, it needs no repetition in the legislative history[.]"); *accord Azar*, 139 S. Ct. at 1814, 204 L.Ed.2d at 151 ("legislative history is not the law"). Even if the Court considers legislative intent, it does not support DHS's claim that the Court's authority to disclose adoption records "was always understood to be limited to the parties to the adoption proceeding." Dkt. 53 at 5 – 6.

Before the 1990 amendments identified by DHS, section 578-15(b) provided, "The seal shall not be broken and the records *shall not be inspected by any person*, including the parties to the proceedings, *except upon order of the family court.*" 1990 Haw. Sess. Laws Act 338 (Act 338) at 1038 (emphasis added); *accord* H. Stand. Comm. Rep. No. 632-90 (1990) at 1076 -1077 ("The current law allows inspection only upon order of the court, which order is often difficult, if not impossible to obtain.").

All relevant committee reports for the 1990 amendments provide that the focus of the amendments was to make it less difficult for members of the adoption triad to obtain records—*not* to limit the existing standard. *Id.*; *accord* S. Stand. Comm. Rep. No.

3056 (1990) at 1241; Conf. Comm. Rep. No. 97 (1990) at 805 - 806.³ The Senate Committee Report leaves no doubt that the Legislature did *not* intend to limit the Court's existing authority to disclose its own records:

(2) Language has been added to clarify that the opening of adoption records can occur upon order of the family court upon a showing of good cause. *Your Committee believes this amendment is necessary to ensure that this procedure, which is currently available, will still be available in addition to the other procedures established by the bill as amended.*

S. Stand. Comm. Rep. No. 3056 at 1241 (emphasis added). And, as if predicting the very situation presented here, the Senate Committee Report even recognizes the existence of "compelling arguments for fully opening up adoption records":

Your Committee recognizes that *there are compelling arguments for fully opening up adoption records*; and that this bill as amended by your Committee, while it is a major step, may be just the first step to more liberal access to adoption records in the future.

Id. at 1242 (emphasis added).

The basic solution the Legislature arrived at in 1990 was to make it *easier* for the parties to the adoption to inspect records by allowing them to inspect certain records "upon request" — not court order. *Id.*; accord Act 338 at § 5. The Legislature did not remove the Court's authority to allow "any person" to inspect the records. It clarified that the Court may do so "upon a showing of good cause" and gave the parties to the adoption alternative (and easier) avenues for inspecting records.⁴ *E.g.*, Dkt. 53 at 7 ("Act 338 was meant to *add an avenue* for adoptees, as they turn 18, to get access to their own adoption records, without a court order[.]") (emphasis added). In doing do, the Legislature further distinguished the parties to the adoption from "any person" — again reflecting an intent that persons *other than* the adoption triad could seek an order for disclosure where appropriate. DHS's arguments to the contrary, in the face of these clear expressions of intent to make adoption records *more* accessible, lack merit.

³ Act 338 and the referenced committee reports are attached as **Exhibit 4**.

⁴ Although the Legislature subsequently amended these additional avenues in 1991, 2016, and 2023, it left the standard under section 578-15(b)(1) untouched.

Last, counsel for DHS offers the following conjecture in a last-ditch effort to persuade this Court to ignore plain statutory language:

In my experience as an attorney, the Family Court was often asked to release adoption records for adoptees and their adoptive families, by court order, for the specific purpose of proving their Hawaiian heritage to apply for educational benefits from Kamehameha Schools. It was in this context that the bill added the language “upon a showing of good cause” to modify the original language allowing inspection of adoption records by “order of the family court.” It was not intended to expand the right to inspection by court order to people who were not parties to the adoption. It was meant to preserve the limited right to inspection by court order while adding a procedure to inspect the record without court order.

Dkt. 53 at 7 – 8. This Court should give no weight to these factual assertions.⁵ At the outset, attorney testimony is not legislative history and is irrelevant.⁶ *E.g.*, 2A Singer & Singer, *Sutherland Statutory Construction* § 48:11 at 606-08 (7th ed. 2009) (“In general, statements from nonlegislative sources probably do not have as much probative value as official statements to clarify legislative intent.”); *Dines v. Pac. Ins. Co.*, 78 Hawai‘i 325, 332, 893 P.2d 176, 183 (1995) (“A fortiori, legislative studies by nonmembers of the legislature do not have the probative value of committee reports or debates for purposes of establishing ‘legislative intent.’”); *Wright v. Home Depot U.S.A., Inc.*, 111

⁵ Statutory interpretation is not an issue of fact and cannot depend on the averments and credibility of any individual – even legislators involved in the law’s enactment. *E.g.*, 2A Singer & Singer, *Sutherland Statutory Construction* § 48:16 at 628-31 (7th ed. 2009) (“Postenactment statements made by a legislator about legislative intent, including affidavits, are not part of the original enactment’s legislative history.”).

⁶ Even if the declarant’s personal experience as a lawyer had some bearing on legislative intent – it does not – that experience could not possibly have been the “context” within which the Legislature added the “good cause” language to section 578-15(b) because counsel was not licensed to practice law in Hawai‘i until almost a decade *after* the 1990 amendments. *See Kim v. Employees’ Retirement Sys.*, 89 Hawai‘i 70, 78, 968 P.2d 1081, 1089 (App. 1998) (“We conclude that a former legislator’s statement in 1996 of the intent of the legislative committee he chaired in 1974 with respect to a bill which he introduced that ultimately became an act in 1974 is not valid evidence of legislative intent in 1974 with respect to that act.”); *accord* 2A *Sutherland* § 48:20 at 639-40 (“A legislator’s post enactment statements about legislative intent have limited value to clarify a statute’s meaning and legal effect. Consequently, courts generally have found that post-passage remarks by legislators, however explicit, cannot serve to change the legislative intent expressed before an act’s passage.”).

Hawai`i 401, 411, 142 P.3d 265, 275 n.8 (2006) (“To the extent that legislative history may be considered, it is the official committee reports that provide the authoritative expression of legislative intent.”); *Wilson v. Bd. of Dental Examiners*, No. 28399, 2009 Haw. App. LEXIS 252, at *10 (2009) (“Although Wilson may have actively lobbied for Act 121, her personal comments have no persuasive authority.”) (attached as **Exhibit 5**).

Moreover, there is zero support in the legislative history for counsel’s asserted limitation on the “good cause” language. The 1990 amendments expressly provided a separate exception for disclosure “[u]pon request by the adopted individual or the adoptive parents for information contained in the records concerning ethnic background and necessary medical information[.]” Act 338 at 1040. It would make no sense to add the “good cause” language for that same purpose. *Accord Richardson v. City & Cty. of Honolulu*, 76 Hawai`i 46, 73, 868 P.2d 1193, 1220 (1994) (courts cannot presume that the Legislature intended to enact an unnecessary amendment); *Hawaiian Airlines Inc. v. State Dept. of Taxation*, 68 Haw. 391, 398, 716 P.2d 1138, 1143-44 (1986) (courts are obliged to not interpret a statute “where the result would be the emasculation or deletion” of a statutory provision, if possible). And even assuming that counsel had personal knowledge of section 578-15(b)(1) being used for purposes of establishing a certain heritage, that only illustrates one application of the good cause standard, not the Legislature’s intent.

3. Request for Public Access to Motion to Unseal Proceeding

As previously briefed, 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 believe must be considered by the Court *in camera*. Dkt. 29 at 2 - 3.

* * *

CONCLUSION

Public First respectfully requests that, pursuant to HRS § 578-15(b), the Court grant its motion and unseal appropriate court records, or otherwise publicly disclose information, from the adoption proceeding of Isabella Kalua.

DATED: Honolulu, Hawai'i, April 19, 2024

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

Attorneys for Movant
Public First Law Center