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PUBLIC FIRST LAW CENTER

IN THE FAMILY COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

SPECIAL PROCEEDING TO UNSEAL
CHILD PROTECTIVE ACT
PROCEEDING

1FFM-24-0000019

MOVANT PUBLIC FIRST LAW
CENTER'S REPLY TO SUBSTANTIVE
JOINDER OF RESPONDENT COURT
APPOINTED SPECIAL ADVOCATES
PROGRAM, FILED APRIL 22, 2024
[DKT 52]

JUDGE: MATTHEW J. VIOLA

**MOVANT PUBLIC FIRST LAW CENTER'S REPLY TO SUBSTANTIVE JOINDER
OF RESPONDENT COURT APPOINTED SPECIAL ADVOCATES PROGRAM,
FILED APRIL 22, 2024 [DKT 52]**

Movant Public First Law Center (Public First) files this response to Respondent Court Appointed Special Advocates Program's (CASA) substantive joinder, filed April 22, 2024 as Dkt. 52, to the opposition filed April 1, 2024 by Respondent Department of Human Services' (DHS) as Dkt. 47.

As a threshold matter, it is unclear what interest CASA holds and for who it speaks, if anyone. CASA has not made apparent any authority it has to represent the siblings' interests or object on their behalf to the requested disclosure — over the non-objections of the court-appointed representatives.

In any event, this Court may disclose records to non-parties where it determines “that such access is in the best interests of the child” or “serves some other legitimate purpose.” HRS § 587A-40. CASA and DHS both take the position that no portion of this Court’s record can be disclosed under the latter standard, as construed by *Kema*.

CASA and DHS are wrong. While this Court must adhere to *Kema*’s construction of the relevant standard, it is not bound to reach the same conclusion as to how the standard applies under a different set of facts. *Kema* construes the standard for disclosure under the predecessor to HRS § 587A-40, but is factually distinguishable. *E.g.*, Dkt. 1, 2-12; Dkt. 49, 1-8.¹ As a result, this Court faces a fundamentally different disclosure analysis than the family court did in *Kema*.

CASA also parses language to argue this Court cannot by statute disclose what DHS can disclose by rule. But that makes no sense.

1. *Kema* is relevant, but distinguishable.

The Hawai‘i Supreme Court held that public disclosure under HRS § 587A-40 is appropriate under certain circumstances. *Kema v. Gaddis*, 91 Hawai‘i 200, 204-205, 982 P.2d 334, 338-339 (1999). In *Kema*, it was to help find a missing child, and the high court affirmed the family court’s initial release of information tailored to that purpose. *Id.* Here, by contrast, it is to help understand how a state-sponsored foster placement and adoption resulted in the death of the adopted child. Of particular relevance now, *Kema* did not express disagreement with the family court’s conclusion that “[q]uestions about the response of agencies and the family court to problems of child abuse and neglect are areas of legitimate concern to both the news media and the public.” *Id.*

CASA argues *Kema* compels a complete denial of the motion to unseal because the “interests of other parties and non-parties seeking information is [sic] not as

¹ To summarize, unlike *Kema*: (1) the court-appointed representatives for the children here do *not* object to disclosure of a redacted case file; (2) Isabella’s biological parents do not object to the requested disclosure (Peter Boy’s biological parents objected to disclosure, but that was long before they were charged with murdering him); (3) the Kaluas have already been charged and the related allegations are already public (with more to come this fall at their public trial); and (4) the primary purpose for disclosure is understanding what led up to the death of a child, not locating a missing child.

compelling as the interests of the children involved.” Dkt. 52 at 5-6 (citing *Kema*). Public First does not dispute that the protection of children and their best interests is the “overriding concern” of the child protective act, including the disclosure provision. But this proposition does not compel complete secrecy, for several reasons.

First, under *Kema*, this Court’s analysis — as discussed in earlier briefing — is not limited to considering only the best interests of Isabella’s siblings when analyzing an “other legitimate purpose” for disclosure. Dkt. 49, 1-3.

Second, the requested disclosure is not at odds with the best interests of the children involved because it concerns government actions and the Kaluas’ parental fitness — *not* personal information of the children. Legitimate disclosure can thus coexist with robust protection of the best interests of the children, through redaction.

Third, the requested disclosure is consistent with the best interests of the children involved. CASA asserts, “the release of the requested portions of Isabella’s CPA proceeding records,” even if redacted, “runs contrary to the intent and purpose of the CPA.” Dkt. 52 at 6. That is not so. From what is publicly known, chapter 587A did not work as intended in the case of Isabella and her siblings. Reasonable disclosure can help the public and policy-makers understand why, so as to better protect children. Thus, the best interests of the children in this particular case, and others similarly situated, are furthered by additional scrutiny and understanding of this chapter 587A proceeding.

Fourth, CASA offers only generic and vague assertions that disclosure is not in the children’s best interests. CASA fails to identify how release of specific records would harm those interests. CASA does not explain, for example, how disclosing the case docket (pleading index), or agency assessments of parental fitness, would release personal information about the children or otherwise cause them harm.

2. CASA misconstrues the relevance of DHS rules that authorize public disclosure under circumstances present here.

CASA argues that DHS rules — enacted *pursuant to* HRS § 587A-40’s predecessor and which authorize disclosure *to the public* under the *exact* circumstances presented here — are “merely a distraction.” Dkt. 52 at 7. CASA is mistaken. DHS’s rules have

persuasive force, at minimum, and support the requested disclosure.

HRS § 587-81 (1993) provided that child protective act court records are generally confidential, subject to two exceptions – disclosures pursuant to Court order and disclosures by DHS pursuant to agency rules:

Court records. The court shall keep a record of all child protective proceedings under this chapter. The written reports, photographs, x-rays, or other information of any nature which are submitted to the court may be made available to other appropriate persons, who are not parties, only upon order of the court after the court has determined that such access is in the best interest of the child or serves some other legitimate purpose; *provided that the department may disclose, without order of the court, such information as is in the court record in the manner and to the extent as is set forth in departmental rules that have been legally promulgated and concern the confidentiality of records.*

Emphasis added; *accord* HRS § 587A-40 (substantially same).

Those “departmental rules” authorize disclosure of “all or a portion of the [court] record” to “the public” where the disclosure serves a “legitimate state purpose”:

Disclosure to third parties without consent or court order. Disclosure of all or a portion of the record without consent or court order shall be authorized when made pursuant to a legitimate state purpose and in accordance with 17-1601-4. *A legitimate state purpose shall include but is not limited to disclosure to the persons listed below unless otherwise specified in Public Law No. 104-235 [CAPTA], 45 C.F.R. §§205.50, 1340.14(i)(2)(xi); 42 U.S.C. §5106a and sections 17-1601-7, 17-1601-8, 17-1601-9, and 17-1601-10:*
[. . .]

(16) Disclosure *to the public* when:

- (A) The subject of the report has been criminally charged with committing a crime relating to the child abuse or neglect report;
- (B) A law enforcement agency or official, a state’s attorney, or a judge of the state court system has publicly disclosed in a report, as part of his or her official duty, information regarding the investigation of a report, or the provision of services by the department;
- (C) A legal custodian of the child, the alleged perpetrator, or other party has voluntarily made a public disclosure concerning a child abuse and neglect report, investigation of a report, or the provision of services by the department; or
- (D) The child named in the report is missing, has suffered a near fatality, been critically injured, or has died[.]

HAR § 17-1601-6 (emphasis added). HAR § 17-1601-6 explicitly identifies HRS § 587-81 as a statute it implements. *Id.*

Far from a distraction, this is DHS recognition – in rules – that disclosing information “to the public” serves a legitimate purpose in cases with extreme facts, such as any one of the situations identified by HAR § 17-1601-6(16)(A) – (D). CASA points to no meaningful difference between “legitimate purpose” and “legitimate state purpose.” In this context, there is none. It is nonsense to argue that this Court is somehow precluded by statute from disclosing records DHS has declared by rule that it “shall be authorized” to disclose.

3. The disclosure standard is met here.

CASA asserts that the standard for disclosure has not been met. CASA is wrong, for all the reasons previously briefed. Dkt. 1 (motion); Dkt. 49 (combined reply to DHS and Isaac Kalua’s oppositions).

CASA contends that finding a “legitimate purpose” for disclosure under the circumstances of this case is inconsistent with the purpose of the child protective act. There is nothing inconsistent between protecting children’s interests and disclosing records to allow public scrutiny of a government-sponsored foster placement and adoption that resulted in the death of the adopted child. Under the extreme facts of this case, public understanding of the government’s treatment of Isabella is very much the public’s concern. A recent state audit of DHS confirms this conclusion.

Just last month, the Office of the State Auditor released a highly critical performance audit of DHS – Report No. 24-05 (April 2024) (Audit) – which was triggered in part by DHS’s handling of Isabella’s case.² *E.g.*, S. Conc. Reso. No. 102, S.D. 1, H. D. 1 (2022). The Audit concluded DHS systematically violated its own rules and put other concerns ahead of the safety and well-being of children in foster care: “By not complying with legal requirements, DHS increased the risk to children in foster care

² This Court may take judicial notice of the Audit as it is a “public record and easily verifiable.” *Williams v. Aona*, 121 Hawai’i 1, 11 n.6, 210 P.3d 501, 511 (2009). The Audit is available at: <https://auditor.hawaii.gov/summary/24-05-audit-of-the-department-of-human-services-child-welfare-services-branch/>.

and lost out on funding for services to support abused and neglected children.” *Id.* at

32. The State Auditor noted that DHS’s response was equally alarming:

We are compelled to respond to the department’s comments, specifically those that attempt to justify its noncompliance with legal requirements and to minimize the significance of the findings. While we recognize the challenges DHS faces in performing its work, *the importance of the department’s responsibility – protecting Hawai‘i’s keiki – simply cannot be overstated. Yet, many of the department’s comments seem to reflect different priorities.*

Id. at 57 (emphasis added). DHS’s blanket opposition to any disclosure here—joined by CASA and *none* of the court-appointed advocates for Isabella and her siblings—may similarly reflect priorities *other than* the safety and well-being of the children in its care. This further supports finding a legitimate purpose for the requested disclosure.

4. 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. 49 at 9-10.

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 proceeding of Isabella Kalua.

DATED: Honolulu, Hawai‘i, May 10, 2024

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