

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

In the Matter of the Petition of

RALPH S. CUSHNIE and TAMARA McKAY,

Petitioners,

v.

SCOTT T. NAGO, in his official capacity as Chief Election Officer, State of Hawai‘i;

the OFFICE OF ELECTIONS, State of Hawai‘i;

and ELECTIONS COMMISSION, State of Hawai‘i,

Respondents.

SCPW-26-0000498

**Electronically Filed
Supreme Court
SCPW-26-0000498
07-OCT-2026
07:49 PM
Dkt. 53 RACB**

EMERGENCY PETITION FOR ORIGINAL WRIT OF MANDAMUS

**PETITIONERS’ RESPONSE TO AMICUS CURIAE BRIEF OF
PUBLIC FIRST LAW CENTER**

Petitioners Ralph S. Cushnie and Tamara McKay respectfully submit this response to the Amicus Curiae Brief filed by Public First Law Center (“Public First”).

Public First addresses a narrow Sunshine Law issue: whether Elections Commission members may communicate outside a meeting concerning purely administrative matters such as scheduling a meeting and preparing an agenda. Petitioners do not dispute that Commissioners may engage in such administrative communications to the extent permitted by law.

That clarification narrows, but does not resolve, the controversy before the Court. Public First begins from a conditional premise: “If the Office of Elections needs a majority of members to request a meeting be scheduled,” the Sunshine Law does not prohibit administrative communications necessary to coordinate a meeting. Dkt. 43 at 1. Public First does not identify a statutory basis for requiring prior collective Commission action before the Office of Elections (“OE”) provides staff support under HRS § 11-1.5(b).

The distinction is consequential. Administrative coordination is not necessarily collective Commission action, and the ability of Commissioners to communicate about scheduling does not

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itself determine what constitutes a request “by the elections commission” under HRS § 11-1.5(b). The statutory question therefore remains whether OE may condition the staff support necessary for the Commission to assemble upon prior collective action by the Commission.

I. Petitioners Do Not Dispute Public First’s Narrow Administrative-Communications Proposition.

Public First challenges Petitioners’ statement in their Reply that “HRS § 92-2.5 prohibits obtaining the majority authorization Respondents require through serial communications outside a public meeting.” Dkt. 43 at 2 (quoting Dkt. 20 at 4).

Petitioners need not defend that statement as a categorical proposition concerning purely administrative communications.

HRS § 92-2.5 identifies specified interactions among board members that are not meetings for purposes of the Sunshine Law. More fundamentally for the issue raised by Public First, the distinction Public First identifies is between communications concerning “board business” and communications concerning purely administrative matters such as scheduling. Public First relies upon OIP opinions recognizing that routine scheduling matters, including availability for a meeting, may fall outside “board business.” Dkt. 43 at 1–2.

Petitioners therefore do not contend that the Sunshine Law prohibits Commissioners from communicating about purely administrative scheduling matters to the extent permitted by law. Nor do Petitioners ask the Court to decide the outer boundaries of permissible administrative communications among Commissioners.

That clarification does not, however, establish that administrative scheduling communications constitute collective action or authorization by the Elections Commission.

II. Public First’s Conditional Premise Does Not Establish That HRS § 11-1.5(b) Requires Prior Collective Commission Action.

Public First states:

“If the Office of Elections needs a majority of members to request a meeting be scheduled, nothing in the Sunshine Law prohibits all the Elections Commission members from discussing among themselves when to schedule the meeting and the agenda.”

Dkt. 43 at 1.

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The premise is expressly conditional. Public First addresses whether the Sunshine Law permits administrative communications if OE requires a majority; it does not establish that OE possesses statutory authority to impose such a requirement.

Respondents framed the asserted prerequisite more specifically. They stated that Petitioners acted without “any act of the body passed by a majority vote”; that HRS § 11-7(d) requires five votes for Commission action; that OE provides support “in response to actions passed by the Commission by a majority vote”; and that “[t]he Elections Commission has not passed any action to request” the support at issue. Dkt. 16 at 1–2, 5–6. Respondents thus relied upon prior collective Commission action under HRS § 11-7(d), not merely administrative communications among individual Commissioners.

HRS § 11-1.5(b) provides: “The office of elections shall provide staff support to the elections commission, as requested by the elections commission.” The statute does not expressly require prior collective Commission action as a condition of that staff support.

HRS § 11-7(d), in turn, provides that “[t]he elections commission shall act by majority vote of its membership and shall establish its own procedures, except as may be provided by law.”

Petitioners do not contend that an individual Commissioner may exercise the collective authority of the Elections Commission. But that principle presents a different question from whether an individual Commissioner may initiate the administrative process necessary for the Commission to assemble so that the Commission itself can act.

The distinction should not be collapsed. Administrative coordination is not necessarily collective Commission action; initiating the process for assembly is not exercising the Commission’s collective authority.

Accordingly, Public First’s conclusion that administrative scheduling communications may be permissible under the Sunshine Law should not convert its conditional premise into an implied condition precedent under HRS § 11-1.5(b).

III. Administrative Coordination Does Not Resolve the Institutional Question Presented by HRS § 11-1.5(b).

The Elections Commission is a nine-member collegial body. HRS § 11-7(a). Its statutory authority is exercised collectively. HRS § 11-7(d). Petitioners do not seek to transfer that authority to an individual Commissioner.

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But the Commission must be able to assemble to act as a collegial body at a meeting.

That distinction is particularly important when the permanent chairperson position under HRS § 11-7(a)(5) is vacant. Someone must be capable of initiating the administrative process through which a duly noticed public meeting can occur. Initiating that process does not determine what the Commission will decide, how Commissioners will vote, who will preside permanently, or otherwise exercise the Commission's collective authority.

Public First's analysis assists in one respect: the Sunshine Law need not prevent lawful administrative coordination necessary to move toward a Commission meeting. But the permissibility of that coordination does not answer the antecedent statutory question—whether OE may require prior collective Commission action before providing the staff support necessary for the Commission to assemble.

HRS § 11-1.5(b) should not be construed to impose an unstated prerequisite that makes the Commission's entitlement to staff support depend upon collective action that cannot occur until the Commission is able to assemble.

IV. The Court Can Accept Public First's Sunshine Law Proposition Without Resolving the Remaining Statutory Question Against Petitioners.

The issues therefore should remain distinct.

Petitioners accept for purposes of this proceeding that Commissioners may communicate concerning purely administrative scheduling matters to the extent permitted by law. That clarification eliminates any need to resolve this case upon a categorical interpretation of HRS § 92-2.5.

But three different institutional concepts remain:

Administrative coordination is not necessarily Commission action.

Initiating a meeting process is not exercising the Commission's collective authority.

The permissibility of administrative communications does not itself establish that HRS § 11-1.5(b) requires prior collective Commission action before OE must provide staff support.

The Legislature established the Elections Commission as a collegial body and required OE to provide it staff support "as requested by the elections commission." HRS §§ 11-7, 11-1.5(b).

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That statutory structure should remain capable of functioning when the Commission lacks a permanent chairperson.

CONCLUSION

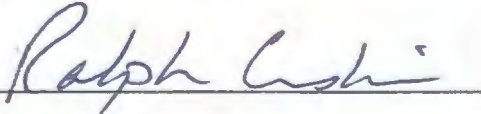
Petitioners do not dispute Public First's narrow proposition that the Sunshine Law permits lawful communications concerning purely administrative scheduling matters. Public First's analysis therefore resolves an issue that need not divide the parties.

It does not resolve whether HRS § 11-1.5(b) authorizes OE to require prior collective Commission action before providing staff support, nor does it eliminate the need for a lawful mechanism by which the Commission may initiate assembly when its permanent chairperson position is vacant.

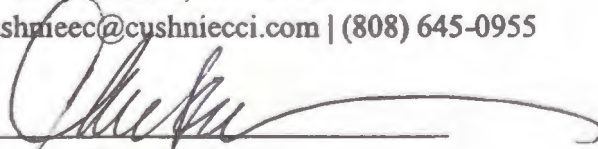
Petitioners respectfully submit that HRS § 11-1.5(b) should not be construed to require prior collective Commission action as a condition for the staff support necessary to make collective Commission action possible.

Respectfully submitted,

Dated: October 7, 2026

By: 

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