

DAVID M. LOUIE 2162  
Attorney General  
State of Hawai'i  
CHARLEEN M.AINA 1899  
ROBYN B. CHUN 3661  
Deputy Attorneys General  
425 Queen Street  
Honolulu, Hawai'i 96813  
Telephone: (808) 586-1292  
Facsimile: (808) 586-1239

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Attorneys for Defendant-Appellant  
Neil Abercrombie, Governor, State of Hawai'i

CAAP NO. 13-0000127

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

OAHU PUBLICATIONS, INC., dba Honolulu Star-Advertiser,	)	CIVIL NO. 11-1-1871-08 KKS
	)	(Other Civil Action)
	)	
Plaintiff-Appellee	)	APPEAL FROM THE
	)	
vs.	)	1) AMENDED ORDER GRANTING
	)	OAHU PUBLICATIONS, INC., dba
NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawai'i,	)	HONOLULU STAR-ADVERTISER'S
	)	MOTION FOR ATTORNEYS' FEES
	)	AND COSTS, FILED NOVEMBER 28,
	)	2011, filed December 12, 2012
Defendant-Appellant,	)	
	)	2) SECOND AMENDED FINAL
and	)	JUDGMENT IN FAVOR OF PLAINTIFF
	)	OAHU PUBLICATIONS, INC., dba
DOE GOVERNMENTAL AGENCIES 1-10,	)	STAR-ADVERTISER ON ALL COUNTS
	)	OF THE COMPLAINT, filed
	)	February 8, 2013
Defendants.	)	
	)	FIRST CIRCUIT COURT
	)	
	)	HONORABLE KARL K. SAKAMOTO
	)	Judge

DEFENDANT GOVERNOR ABERCROMBIE'S OPENING BRIEF

and

CERTIFICATE OF SERVICE

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## DEFENDANT GOVERNOR ABERCROMBIE'S OPENING BRIEF

### I. INTRODUCTION

This is an appeal from an award of \$69,027.06 for attorneys' fees and costs made pursuant to Haw. Rev. Stat. § 92F-15(d) of the Uniform Information Practices Act (UIPA), ROA ICA 27 at PDF 338,<sup>1</sup> in a straight-forward statutory construction case for declaratory and injunctive relief. The case was decided on the merits within four months of the filing of the complaint, by cross motions for summary judgment, without discovery of any kind. The fees and costs were awarded in an order filed six months later.

The award must be substantially reduced because it is unreasonable. The circuit court did not have sufficient information with which to determine whether the number of hours used to litigate the Star-Advertiser's claim was reasonable. The fees awarded were based upon an excessive number of hours spent by the Star Advertiser's counsel. In a notable number of instances, the hours the Star Advertiser's counsel spent on the case were unproductive or unnecessarily spent. Evidence to support the costs claimed and awarded for photocopying was not presented.

### II. STATEMENT OF THE CASE

#### A. The Case on the Merits

The Star-Advertiser brought this suit for judicial enforcement under Haw. Rev. Stat. § 92F-15 of the UIPA, to "compel" the Governor to disclose the remaining names on the list he received from the Judicial Selection Commission (JSC) and used to appoint Associate Justice Sabrina McKenna to the Hawaii Supreme Court. The complaint was filed on August 23, 2011,

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<sup>1</sup> "ROA" refers to the Record on Appeal that was electronically filed in five parts in Adobe format. "ICA ##" refers to the docket number assigned to each of the four parts of the ROA by JEFS; "at PDF ##" refers to the Adobe assigned page number of that particular JEFS document. Accordingly, this is a reference to the Notice of Appeal which is in that part of the ROA assigned JEFS docket number 29, and Adobe page number 338 when it was electronically filed.

ROA ICA 21 at PDF 11,<sup>2</sup> after the Office of Information Practices (OIP) deferred to the courts to determine whether disclosure was required, ROA ICA 21 at PDF 42-43.<sup>3</sup>

Throughout the litigation, the Star-Advertiser asserted that the Governor resisted disclosing the list only on the basis of the frustration exception in Haw. Rev. Stat. § 92F-13(3). In fact, the First Affirmative Defense in the Governor's Answer filed on September 12, 2012, ROA ICA 21 at PDF 54, alleged that three exceptions authorized him to withhold the list: Haw.

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<sup>2</sup> The complaint pleaded four counts: Count I -- Failure to Grant Access to Requested Records; Count II -- Failure to Respond to Request in Timely Manner; Count III -- Reasonable Attorney's Fees and; Count IV -- Declaratory Judgment. ROA ICA 23 at PDF 20, 22, 23. For relief, the Star Advertiser asked that the circuit court

- A. Give this case precedence on the docket . . . [;]
- B. Enter an order and judgment compelling Governor Abercrombie to disclose the list presented to him by the JSC of the nominees to fill the vacancy in the office of Associate Justice of the Supreme Court of Hawaii created by Governor Lingle's appointment of then-Associate Justice Mark Recktenwald as Chief Justice[;]
- C. Enter a declaratory judgment that after the Senate has consented to a judicial appointment, a Governor must disclose the list of judicial nominees[;]
- D. Enter an order assessing the Defendant for the Plaintiff's reasonable attorney's fees and all other expenses reasonably incurred in the litigation pursuant to Haw. Rev. Stat. § 92F-15(d)[;]
- E. Retain jurisdiction to review the Defendant's compliance with all judgments and orders entered herein[; and]
- F. Grant such other and further relief as this Court deems just and appropriate to effectuate a complete resolution of the legal dispute between the Plaintiff and the Defendant.

ROA ICA 23 at PDF 23-24.

<sup>3</sup> The Star-Advertiser asked OIP to issue an advisory opinion on the legality of the Governor's denial, and for directions to the Governor to give the Star-Advertiser access to the JSC list. ROA ICA 23 at PDF 34. The Director of the OIP informed the Star-Advertiser by letter dated May 13, 2011, that "OIP ha[d] previously spoken to the general issue of whether, and when, the names of judicial nominees must be disclosed," and "decline[d] to expend its limited resources to issue another advisory opinion that will not resolve the current dispute and . . . instead defer[red] to the courts on this matter," ROA ICA 23 at PDF 42-43. The Star-Advertiser asked the OIP to reconsider its position. ROA ICA 23 at PDF 44. OIP declined the request. ROA ICA 23 at PDF 46.

Rev. Stat. §§ 92F-13(3) (frustration of legitimate government function); 92F-13(4) (JSC Rule 5 protected the confidentiality of its nomination lists); and 92F-19(b) (a receiving agency is subject to the same restrictions on disclosure as the originating agency), ROA ICA 21 at PDF 55.

The parties filed cross-motions for summary judgment. ROA ICA 21 at PDF 163 (Star-Advertiser's); ROA ICA 254 at PDF 6 (Governor's). The motions were heard on November 14, 2011. At that hearing, the circuit court denied the Governor's motion, and granted the Star-Advertiser's motion. A written order was filed on December 13, 2011. ROA ICA 27 at PDF 129. That order and those parts of the various final judgments filed in the case that enter judgment on the merits in favor of the Star-Advertiser, have not been appealed.<sup>4</sup>

B. The Award of Fees and Costs from which this Appeal Is Taken.

On November 28, 2011, the Star-Advertiser filed a non-hearing motion<sup>5</sup> for attorneys' fees and costs. ROA ICA 27 at PDF 87. In the motion, the Star-Advertiser asked for (1) \$66,822.29 in fees for successfully litigating the merits of its UIPA access/disclosure claim to summary judgment, (2) \$5,000 to litigate its motion for fees,<sup>6</sup> and (3) costs for photocopying, transcripts, filing fees, and extra postage totaling \$1,177.87, see Exhibit 5 to Motion for

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<sup>4</sup> Effective November 15, 2011, one day after the circuit court orally granted the Star Advertiser's motion for summary judgment, the JSC amended subsection C of Section Two, **Confidentiality**, of its Rule 5, **Code of Conduct for Commission Members**, to provide: "C. The commission shall release lists of its nominees for judicial office concurrent with its submission of each list to the appointing authority." The Governor respectfully asks the Court to take judicial notice of this fact pursuant to Haw. R. Evid. 201.

<sup>5</sup> The motion was subsequently converted to a hearing motion by a notice filed by the circuit court on December 1, 2012. ROA ICA 27 at PDF 124. The motion was set to be heard on January 17, 2012.

<sup>6</sup> This amount is an "estimate" of one of the Star-Advertiser's counsel, see ¶ 21, Declaration of Mark Murakami ("I estimate that Damon Key will incur an additional \$5,000 in attorneys' fees to litigate this Motion for Attorneys' Fees and Costs"), ROA ICA 27 at PDF 101.



Attorneys' Fees and Costs, ROA ICA 27 PDF at 119. ROA ICA 27 at PDF 88 and 94.

Altogether, the fees and costs the Star-Advertiser asked the circuit court to award by means of its motion totaled \$73,000.16.<sup>7</sup>

The Plaintiff's motion was supported by the Declaration of Mark Murakami dated November 28, 2011 (MM 1<sup>st</sup> Dec), ROA ICA 27 at PDF 95, a Bill of Costs for photocopying at \$564.60, filing fee at \$275, transcript at \$330.04, and extra postage at \$8.23, see Exhibit 5, ROA ICA 27 at PDF 119, and three redacted Damon Key Leong Kupchak Hastert (DKLKH) invoices. The invoices reported that three partners (including a named partner), two associates (one with extensive appellate experience), see MM 1<sup>st</sup> Dec at ¶ 12, ROA ICA 27 at PDF 98, and one paralegal, spent 270.2 hours on this case between July 12, 2011 and November 18, 2011. See Exhibit 2, ROA ICA 27 at PDF 103 (Bill Date August 31, 2011), Exhibit 3, ROA ICA 27 at PDF 108 (Bill Date October 27, 2011), and Exhibit 4, ROA ICA 27 at PDF 114 (Bill Date November 18, 2011). A significant number of entries in the Description portion of these invoices were redacted to remove "privileged, confidential and/or unrelated matters," so that, for example, the Description for the second entry on the first page of the August 31, 2011 invoice merely states:

Date	Atty	Description	Hours	Amount
7/14/2011	MMM	Research and analyze REDACT	1.0	275.00

ROA ICA 27 at PDF 103. Other invoice entries, while not redacted, only generally describe how the attorney spent the time reported, see for example:

Date	Atty	Description	Hours	Amount
7/20/2011	DDH	Various e-mails regarding research assignment and follow-up	1.0	400.00

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<sup>7</sup> In ¶ 14 of the November 28, 2011 Declaration of Mark Murakami, Plaintiff's counsel declared that "\$66,294.54 (discounted as a courtesy from \$82,277.45)" was "[t]he total amount of attorneys' fees expending [sic] in this case." ROA ICA 27 at PDF 99.

Id.

The Star-Advertiser relied on the opinions of its counsel to establish the reasonableness of the attorneys' fees it sought and the hourly rates that those fees were based upon.<sup>8</sup> Counsel also explained that the fees "attributed to [the] hours" he and the other DKLKH attorneys and paralegal who worked on the case, were "discounted as a courtesy."<sup>9</sup> However, counsel's declaration does not similarly say that the **hours** the DKLKH attorneys and paralegal reported spending on the case were reasonable. Nothing in the MM 1<sup>st</sup> Dec (or the rest of the record) explains why all of the 270.2 hours reported in the three DKLKH invoices, or the time underlying the \$5,000 counsel estimated would be "incur[red]" litigating the motion for fees and costs, needed to be spent. In fact, the three DKLKH invoices and footnote 1 of the memorandum

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<sup>8</sup> To support his opinion that the fees requested through summary judgment were reasonable, counsel said: "Given the complex nature of the issues before the court I submit that [\$66,294.54 (discounted as a courtesy from \$82,277.45)] is reasonable in that it is at or below the prevailing market rate for professionals in this community of similar experience or background in complex litigation involving statutory and constitutional issues and is reasonable for a contested civil lawsuit litigated to summary judgment motions with limited discovery." See MM 1<sup>st</sup> Dec at ¶ 14, ROA ICA 27 at PDF 99. Regarding the fees sought for litigating the motion for fees and costs, without elaboration, counsel simply declared: "It is my opinion that [\$5,000] is a reasonable amount for the above referenced attorneys to work on this motion entry of this Court's order on the motion." MM 1<sup>st</sup> Dec at ¶ 21, ROA ICA at PDF 101.

With respect to his hourly rate he proffered: "It is my opinion that my hourly rate is reasonable in that it is at or below the prevailing market rate for professionals in this community of similar experience or background in commercial disputes." See MM 1<sup>st</sup> Dec at ¶ 9, ROA ICA 27 at PDF 97. By reference to the 2010 Pacific Business News (PBN) Book of Lists of what the PBN believed to be the Top 25 Law Firms in the State that year, see Exhibit 1 to the motion, ROA ICA 27 at PDF 102, counsel also proffered that it was his opinion that the hourly rates of the other attorneys and the paralegal who worked on the case with him were reasonable because they were equal to or less than "the prevailing rates for professionals in this community of similar experience or background in similar disputes, see MM 1<sup>st</sup> Dec at ¶¶ 10-13, 15, ROA ICA 27 at PDF 97-100. However, none of the 25 firms on the PBN List included UIPA disputes as a Specialty Area, and only one listed "Government" and two listed "Administrative Law" as Specialty Areas.

<sup>9</sup> Counsel Murakami's Declaration indicates that the courtesy discount was taken from fees totaling \$82,277.45. See ¶ 14, ROA ICA 27 at PDF 99.

in support of the Plaintiff's motion for fees and costs confirm that the hours used to calculate the discounted fees that the Star-Advertiser asked the circuit court to award, were not reviewed or adjusted to remove time spent duplicatively, unproductively, unnecessarily, or performing tasks unrelated to litigating the Star-Advertiser's claim on the merits.

The Governor filed a memorandum in opposition to the motion for fees and costs on December 29, 2011. ROA ICA 27 at PDF 182. The Governor objected to (1) the general lack of specificity in the information the Star-Advertiser furnished in support of its motion, (2) the hourly rates of four of the five DKLKH attorneys, (3) the time attributed to redacted entries on the DKLKH invoices, (4) the more than 70 hours spent preparing the Star-Advertiser's motion for summary judgment, and (5) awarding the Star-Advertiser more than \$2,200 to litigate the fee motion. The Governor also asserted that costs against the State could only be awarded pursuant to Haw. Rev. Stat. § 607-24, and only for a prevailing party's actual disbursements; accordingly, absent proof that costs for photocopying were actually disbursed, they could not be awarded here.

The Star Advertiser filed a Reply on January 5, 2012. ROA ICA 27 at PDF 272. In a second declaration from DKLKH attorney Mark Murakami dated January 5, 2012 (MM 2<sup>nd</sup> Dec) attached to the Reply, the prior estimate of fees "incur[red]" for litigating the motion for fees and costs was increased to \$6,000 because the court scheduled a hearing on the motion and counsel anticipated an additional \$1,000 in fees to prepare and argue it. MM 2<sup>nd</sup> Dec, ROA ICA 27 at PDF 278.

In the concluding paragraph of the Reply, the Star-Advertiser also requested an award of Costs and Expenses in the amount of "\$1,777.87," ROA ICA 27 at PDF 277, an amount which appears to be a typographical error inasmuch as counsel's attached declaration at paragraph 4

requests that the Governor be taxed fees and expenses in the amount of “\$1,177.87,” see ROA ICA 27 at PDF 279.<sup>10</sup>

The hearing on the motion for fees and costs initially scheduled for January 17, 2012 was postponed to permit the parties to engage in settlement discussions. The parties were asked to file supplemental memoranda after efforts to resolve their differences by means of two settlement conferences were unsuccessful. In his supplemental memorandum, the Governor reiterated that any fees in excess of \$2,200 to litigate the fee motion was excessive, and asserted that the case on the merits should have required no more than 120 hours to prepare and present, whether those hours were spent by one attorney or five attorneys. Fees for spending any more time than that would be unreasonable. ROA ICA 27 at PDF 299.

At the hearing on the motion held on May 22, 2012, counsel for the Governor argued that a single attorney could have litigated the Star-Advertiser’s statutory construction claim in 120 hours, and that the reasonable fees and costs for doing this should have been approximately \$30,000. May 22, 2012 Transcript at 6-8, ICA 43 at PDF 6-8. Notwithstanding these offerings, the Governor’s earlier objections to fees being awarded for time reported in the DKLKH invoices with redacted descriptions, and the court’s and counsel for the Star-Advertiser’s

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<sup>10</sup> The circuit court incorporated this error into the Order Granting Plaintiff Oahu Publications, Inc., dba Honolulu Star-Advertiser’s Motion for Attorneys’ Fees and Costs filed on November 28, 2011, filed on June 8, 2012 (“Fee Order”), and into the Final Judgment in Favor of Plaintiff Oahu Publications, Inc., dba Honolulu Star-Advertiser filed on June 28, 2012 (Final Judgment) when it summed the fees and the costs and expenses to compute the total amount awarded.

These errors were subsequently corrected when the Governor’s appeal from the circuit court’s award of fees and costs was before this Court in CAAP 12-0000625. See Order Granting Plaintiff-Appellee’s Motion For Leave to Correct Clerical Mistake in Judgment filed December 3, 2012, ROA ICA 29 at PDF 45, and the Amended Order Granting Plaintiff Oahu Publications, Inc., dba Honolulu Star-Advertiser’s Motion for Attorneys’ Fees and Costs filed November 28, 2011, filed on December 12, 2012 (Amended Fee Order), ROA ICA 29 at PDF 47, and the Amended Final Judgment in Favor of Plaintiff Oahu Publications, Inc., dba Honolulu Star-Advertiser filed on December 12, 2012 (Amended Final Judgment), ROA ICA 29 at PDF 51.

acknowledgment that the court only had redacted copies of the DKLKH invoices,<sup>11</sup> the court orally “agree[d] with the . . . Governor’s hourly fee schedules, . . . and grant[ed] as reasonable the billables made by plaintiff.” May 22, 2012 Transcript at 9, ICA 43 at PDF 9.

The Governor filed written objections (and an alternative) to the proposed order the Star-Advertiser’s counsel prepared because (1) the \$69,627.06 in fees and costs awarded was not supported by the record, (2) the redacted copies of the DKLKH invoices precluded the circuit court from knowing how all of the time the DKLKH attorneys and paralegal reported spending on the case was spent, (3) the unredacted copies of the DKLKH invoices were not admitted into evidence or entered into the record, (4) the \$564.60 for photocopying should not have been included in the award of costs because the Star-Advertiser did not proffer evidence that \$564.60 was actually disbursed, and (5) no evidence supported the court’s award of \$1,777.87, rather than \$1,177.87, in fees. ROA ICA 27 at PDF 323.

The circuit court entered the Fee Order on June 8, 2012. ROA ICA 27 at PDF 331. The Final Judgment in favor of the Star-Advertiser on both the merits of its claim, and its request for fees and costs was filed on June 28 2012. ROA ICA 27 at PDF 334. A timely Notice of Appeal from the Fee Order and the Final Judgment was filed on July 6, 2012 to initiate CAAP No. 12-0000625 in this Court. ROA ICA 27 at PDF 338.

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<sup>11</sup> See May 22, 2012 Transcript at 8, ICA 43 at PDF 8:

MR. THOMAS: Briefly, Your Honor, we just realized this morning that everyone else in the case seems to have our unredacted invoices but the court does not. So it was – we had – we brought them with us in case the court wanted to look at them. We don’t know if the court does. And State has them already so there are copies.

THE COURT: Thank you.

On July 13, 2012, the Governor filed a motion to stay the Fee Order and those portions of the Final Judgment awarding the Star-Advertiser fees and costs, pending that appeal. ROA ICA 27 at PDF 359. The Star-Advertiser took no position on the motion, ROA ICA 27 at PDF 376, and the circuit court granted the motion and ordered the stay by an order filed on August 24, 2012. ROA ICA 29 at PDF 7.

The parties filed opening, answering, and reply briefs in CAAP 12-0000625, before this Court entered its order dismissing the appeal on December 27, 2012 for lack of jurisdiction “because the [Final Judgment] does not satisfy the requirements for an appealable final judgment under Hawaii Revised Statutes (HRS) 641-1(a) (1993 & Supp. 2011), Rule 58 of the Hawai`i Rules of Civil Procedure (HRCP) and the holding in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai`i 115, 119, 869 P.2d 1334, 1338 (1994).” ROA ICA at PDF 60-61.

The parties submitted a Second Amended Final Judgment to the circuit court for its review and signature by letter dated February 5, 2013. That judgment was filed on February 8, 2013, ROA ICA 29 at PDF 64, and a Notice of Entry of Second Amended Final Judgment was filed on February 27, 2013, ROA ICA 29 at PDF 89. A timely Notice of Appeal from the Amended Fee Order filed on December 12, 2012 and the Second Amended Final Judgment filed on February 8, 2013, was filed on March 1, 2013. ROA ICA 29 at PDF 67. A stipulation and order to stay the Amended Fee Order and the Second Amended Final Judgment pending this second appeal was filed on March 12, 2013. ROA ICA 29 at PDF 91.

### III. POINT OF ERROR

The circuit court erred in awarding fees and costs to the Star-Advertiser for **all of the hours reported** in the DKLKH invoices, on the basis of only a bare estimate of its counsel that the Star-Advertiser would incur \$6,000 in fees to litigate its motion for fees, and a demonstrative

exhibit entitled “Bill of Costs” that was devoid of any details about what was actually disbursed as costs. The Star-Advertiser’s counsel did not provide, and thus the circuit court did not have sufficient information with which to determine that the \$69,027.06 awarded in fees and costs was reasonable. The Star-Advertiser’s claims on the merits were neither novel nor complex, and the total number of the hours that the Star-Advertiser claimed fees for work on the merits of its claim was excessive – no more that 120 hours needed to be spent on the Star-Advertiser’s behalf.

This error is reflected in the Amended Fee Order filed on December 12, 2012:<sup>12</sup>

The Court concludes that the fees and costs requested by the Plaintiff are reasonable and that, pursuant to Haw. Rev. Stat. § 92F-15, the Plaintiff *Star-Advertiser*, as the complainant prevailed in an action brought under the Uniform Information Practices Act, and this court “shall assess against the agency reasonable attorney’s fees and all other expenses reasonably incurred in the litigation.” . . . .

The Court also concludes that given the novel and complex issues presented by this case and the extensive research it entailed, the time expended by the attorneys for the Plaintiff *Star-Advertiser* was reasonable, as demonstrated by the exhibits attached to the Plaintiff’s motion and supporting papers.

IT IS ORDERED, ADJUDGED, AND DECREED that the Plaintiff *Star-Advertiser*’s Motion for Attorneys’ Fees and Costs, filed November 28, 2011 is hereby granted, and Defendant Governor Abercrombie is assessed the following, payable to the Plaintiff *Star-Advertiser*:

Attorneys’ Fees through summary judgment hearing (incl. GET)	\$61,566.47
Attorneys’ Fees to Litigate Fee Motion (incl. GET)	\$6,282.72
Costs and Expenses	\$1,177.87

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<sup>12</sup> This error is also reflected in the Fee Order filed on June 8, 2012, ROA ICA 27 at PDF 331, which was appealed in CAAP No 12-0000625 and allowed to be corrected as the Amended Fee Order, while that appeal was pending.

ROA ICA 29 at PDF 47. It is also reflected in the Second Amended Final Judgment filed on February 8, 2013,<sup>13</sup> ROA ICA 29 at PDF 64, and in the Transcript of the May 22, 2012 hearing on the motion for fees and costs, ROA ICA 43 at PDF 9.

The Governor brought this error to the circuit court's attention in the Memorandum in Opposition to the Star-Advertiser's motion for fees and costs, ROA ICA 27 at PDF 182, in the Supplemental Memorandum in Opposition to the motion for fees and costs, ROA ICA 27 at PDF 299, at the May 22, 2012 hearing on the motion for fees and costs, ICA 43 at PDF 3-8, and in the Statement of Objection to the Plaintiff's Form of Order, ROA ICA 27 at PDF 323.

#### IV. STANDARDS OF REVIEW

##### A. Award of Attorneys' Fees

"The grant and/or denial of attorney's fees is reviewed by this court for an abuse of discretion." Right to Know Committee v. City and County of Honolulu, 117 Hawaii 1, 8, 175 P.3d 111, 118 (Hawaii App. 2008). "Abuse of discretion arises when the trial court 'bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. In other words, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'" Id. quoting Maui Tomorrow v. State of Hawaii Bd. Of Land & Natural Res., 110 Hawaii 234, 242, 131 P.3d 517, 525 (2006).

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<sup>13</sup> This error is also reflected in the Amended Final Judgment, filed on December 12, 2012, ROA ICA 29 at PDF 51, and in the Final Judgment (with the erroneous Costs and Expenses entry that was subsequently corrected by this Court) filed on June 28, 2012, ROA ICA 27 at PDF 334.



B. Taxation of Costs

“The award of a taxable cost is within the discretion of the [trial] court and will not be disturbed absent a clear abuse of discretion.” Wong v. Takeuchi, 88 Hawaii 46, 52, 961 P.2d 611, 618 (1998) (internal quotation marks and citation omitted).

V. ARGUMENT

Haw. Rev. Stat. § 92F-15(d) authorizes the circuit court to assess **reasonable** attorney’s fees and all other expenses **reasonably** incurred by a complainant who succeeds in compelling a state or county agency to disclose a government record. The circuit court awarded the Star-Advertiser \$69,027.06 for attorneys’ fees and costs incurred in this litigation. ROA ICA 29 at PDF 47, 49; ROA ICA 29 at PDF 64-65. The award of fees was made in two parts: \$61,566.47 (including GET) to litigate through summary judgment; and \$6,282. 72 (including GET) for the fee motion. ROA ICA 29 at PDF 47, 49. The award of costs and expenses was for \$1,177.87. Id.

There is no dispute that the Star-Advertiser prevailed against the Governor on the merits in this action. The hourly rates the circuit court used to calculate the fees awarded are also not challenged on appeal as the court adopted the hourly rates the Governor asked the court to use. May 22, 2012 Transcript 9, ICA 43 at PDF 9. This appeal is **only about the unreasonableness of the number of hours used to compute the fee award, and the costs awarded for photocopying**. The award must be substantially reduced or vacated for at least three reasons.

First, the circuit court lacked sufficient detailed information with which to determine whether the time and costs the DKLKH lawyers and paralegal reported spending and incurring on this case were reasonable. Almost a third of the time entries on the invoices attached as support for the Star-Advertiser’s motion for fees and costs were drastically redacted. An

additional 11% of the invoice entries inadequately described how the time reported was spent.<sup>14</sup> Facts detailing why multiple attorneys spent time on the same task, attended the same meeting or hearing, or responded to the same emails were not furnished by the Star-Advertiser. In addition, the award for litigating the fee motion was based on an “estimate” made by one of the Star-Advertiser’s DKLKH attorneys. No details about who spent, how many hours litigating the fee motion that resulted in an award of \$6,282.72 in fees was submitted. Further, the only support proffered for the costs the Star-Advertiser sought was a single page, four-item list titled “Bill of Costs,” attached to the motion as Exhibit 5. No information described how many pages of what, was photocopied, when, or for what part of the litigation.

Second, even if sufficient information had been provided, the award should be reduced by at least half because a substantial portion of the hours the DKLKH attorneys and paralegal directly or impliedly reported spending on this case was either duplicative, excessive, unproductive, or spent unnecessarily or on matters unrelated to obtaining the judgment on the merits the Star Advertiser sought and secured. **None of the hours** the DKLKH lawyers and paralegal reported spending on this case **were reduced**. Nothing indicates that the invoices were reviewed to extract time spent excessively, unnecessarily, or on tasks not directly related to litigating the Star Advertiser’s claim. Although the fees the Star-Advertiser requested were discounted by approximately 20% as a courtesy, the discounted fees were still based on 100% of all the time reported by DKLKH, even if some of that time should not have been counted at all, as, for example, the billings of attorneys Thomas and Hastert reported for attending the May 22, 2012 hearing on the motions for summary judgment. Critically, this Court should be able to conclude from the pleadings on the merits included in the record on appeal, that no more than

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<sup>14</sup> E.g., “8/2/2011 MMM Review research and develop legal arguments 0.6,” ROA ICA 27 at PDF 104; “8/31/2011 DDH Prepare e-mail to Mr. Bridgewater 0.5,” ROA ICA 27 at 108.

half of the hours reported, needed to be spent preparing the complaint and summary judgment pleadings for declaratory and injunctive relief the DKLKH attorneys filed and presented on the Star-Advertiser's behalf. At the very least, the award must be reduced because neither this Court nor the Hawaii Supreme Court has held that the time billed in a law firm's invoice is per se reasonable.

Finally, the circuit court did not specify the grounds for the award of fees that it made, and this Court is without any means of effectively reviewing whether the circuit court abused its discretion in requiring the State to pay the Star-Advertiser, attorneys' fees and costs totaling \$69,027.06. The circuit court merely stated its conclusion that the issues presented by this case were novel and complex, and proceeded to use **all of the hours billed and an "estimate"** to calculate the fees it awarded.

A. The Law

When fees are sought and awarded pursuant to a fee shifting statute such as Haw. Rev. Stat. § 92F-15(d), the prevailing party is entitled to "its reasonable and necessary attorney's fees," DFS Group L.P. v. Paiea Properties, 110 Hawaii 217, 221, 131 P.3d 500, 504 (2006). Reasonable attorneys' fees are calculated by the "lodestar method" set out in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), by multiplying the hours **reasonably** spent by a **reasonable** hourly rate. "[T]he initial inquiry is 'how many hours were spent in what manner by which attorneys.' The determination of time spent in performing services "within appropriately specific categories," is followed by an estimate of its worth. . . . And when the hourly rate is applied to the actual hours worked, a "reasonably objective basis for valuing an attorney's services" is derived. DFS Group, 110 Hawaii at 222, 131 P.3d at 505. The party

seeking fees has the burden of proving that the fees requested were reasonably and necessarily incurred. Sharp v. Hui Wahine, 49 Haw. 241, 247, 413 P.2d 242, 246 (1966).

Only reasonable fees and costs actually incurred, can be awarded. County of Hawaii v. C&J Coupe Family Limited Partnership, 120 Hawaii 400, 411, 208 P.3d 713, 724 (2009). To be “reasonable,” fees and costs must be “reasonable under the circumstances of the case.” Montalvo v. Chang, 64 Haw. 345, 361, 641 P.2d 1321, 1332 (1982). They must be based on “the number of hours productively expended by counsel.” Tirona v. State Farm Mutual Automobile Insurance Co., 821 F.Supp. 632, 636 (D. Hawaii 1993) citing Hensley, 103 S.Ct. 1933, 1939-40 (1983). A “court must guard against awarding fees and costs which are excessive, and must determine which fees and costs were self-imposed and avoidable.” Kotoshirodo v. Cart Inc., 2006 WL 2682676 at 6 (D. Hawaii).<sup>15</sup> “[T]he Court must ensure that redundant work is not compensated.” Id.

Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his [or her] fee submission. In the private sector, ‘billing judgment’ is an important component in fee setting. It is no less important here. *Hours that are not properly billed to one’s client also are not properly billed to one’s adversary* [.]

Hensley v. Eckerhart, 461 U.S. 424, 434 (1983) (citation and internal quotation marks omitted, emphasis added). Multiple attorneys billing hours for the same activity is unreasonable as a matter of law. Fought v. Steel Engineering and Erection Inc., 87 Hawaii 37, 56, 951 P.2d 487, 506 (1998). Similarly, hours spent by an attorney doing work that does not require an attorney’s expertise, including clerical work are unreasonable as a matter of law. Tirona, 821 F.Supp. at 637; see also Horizon Lines v. Kamuela Dairy, Inc., 2008 WL 4483799 at 3 (D. Hawaii).

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<sup>15</sup> Even though this is a decision of the U.S. District Court for the District of Hawaii, it should still be highly persuasive here inasmuch as “[a] federal court sitting in diversity must apply state law in determining whether the prevailing party is entitled to attorneys’ fees.” JJCO Inc. v. Isuzu Motors America, Inc., 2010 WL 3001924 (D. Hawaii) at 5.

B. The Circuit Court Lacked Sufficient Information with Which to Determine the Reasonableness of the Number of Hours DKLKH Reported Spending on this Case

The Order granting the Star-Advertiser's motion for attorneys' fees and costs concludes:

The Court also concludes that given the novel and complex issues presented by this case and the extensive research it entailed, **the time expended by the attorneys for the Plaintiff Star-Advertiser was reasonable,** as demonstrated by the exhibits attached to the Plaintiffs' motion and supporting papers.

ROA ICA 27 at PDF 332.

Earlier, at the hearing on the motion, the Court ruled:

Um, you know, **the court does not see any designation of duplicative or excessive hours performed on the billing sheets or addressing the billing sheets. In light of that the court will agree with the Page 3 of defendant Governor Abercrombie's hourly fee schedules, um, and grant as reasonable the billables made by plaintiff Oahu Publications.**

May 22, 2012 Transcript at 9, ICA 43 at PDF 9.

1. The Description Portion of Nearly One Third of the "Billables" Were Redacted

The Description portion of 56 of the 173 entries on the "billables"/invoices the circuit court said it relied upon to conclude that the time expended by the DKLKH attorneys for the Star-Advertiser was reasonable were redacted, and essentially blank.<sup>16</sup> Given this, the circuit court's Amended Fee Order and ruling have to constitute "clearly erroneous assessment[s] of the evidence," and abuses of discretion that warrant significant reductions in the Star-Advertiser's

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<sup>16</sup>The entries that were redacted are for 7/14/11, 7/25/11, 7/26/11 RAC, 7/27/11 RAC, 7/28/11 RHT, 8/1/11, 8/2/11 RHT, 8/9/11 RAC, 8/11/11 RHT, 8/13/11, 8/16/11 RAC and MMM, 8/17/11 MMM, 8/18/11 RAC, 8/19/11 RHT, 8/20/11 DDH and RHT, 8/22/11 RAC, 8/23/11 DDH and RAC, see ROA ICA 27 at PDF 103-107; 8/25/11, 8/30/11, 8/31/11 RAC, 9/1/11, 9/2/11 MMM, RAC and RHT, 9/5/11, 9/6/11, 9/7/11, 9/12/11, 9/13/11, 9/14/11 RAC and MMM, 9/15/11 EMK, 9/29/11, 10/10/11 MTE, 10/11/11 MTE, RAC and RHT, 10/12/11 MMM and MTE, 10/14/11 MMM, 10/18/11 DDH, 10/19/11 RAC, see ROA ICA 27 at PDF 108-113, 114-118; 10/29/11, 10/31/11, 11/3/11 RAC, 10/7/11 RAC and MMM, 10/9/11 RAC, 11/11/11 MMM, 11/15/11 RAC, 11/16/11 RAC, 11/17/11 RAC, see ROA ICA 27 at PDF 114-118.

award of fees and costs. Without knowing what was “researched” and “analyzed,” the court could not have judged “under the circumstances of the case,” see Montalvo, 64 Haw. at 361, 641 P.2d at 1332, whether, for example, the hour RAC spent on “Additional legal research and legal analysis REDACTED” on “10/29/11” was “reasonably expended.” The fees awarded have to be reduced by this and the other 48 hours attributable to invoice entries with “Descriptions” that were “REDACTED” because the circuit court had insufficient information with which to determine whether that time was “reasonably expended.”

2. The Descriptions of an Additional 10% of the Time Entries Were Too Generalized

The fee award similarly must be reduced by the time attributed to invoice entries with only generalized descriptions of how the time reported was spent. For example, the following entries, “Review[ing] research and develop[ing] legal arguments” on 8/2/11, “Prepar[ing] e-mail to Mr. Bridgewater” on 8/31/11, “Conduct[ing] research” on 7/22/11, “numerous emails to and from team” on 8/18/11, and “numerous strategy emails” on 9/8/11, do not include the subject that was analyzed, researched, or otherwise acted upon by the DKLKH attorneys. These entries could not have provided the circuit court with enough information to conclude that the time the attorneys reported spending on them, satisfied Montalvo, and was thus reasonably spent.

3. The Circuit Court Only Had An “Estimate” for the Fees Awarded for the Fee Motion

Notwithstanding the firmly established principle that a “court must determine a reasonable fee by multiplying the number of hours reasonably expended by a reasonable hourly rate,” Kotoshirodo, 2006 WL 2682676 at 4; see also DFS Group, 110 Hawaii at 222-23, 131 P.3d at 505-506, the circuit court awarded \$6,282.72 for litigating the fee motion, solely on the basis of counsel’s “estimate,” and without any “number of hours” on which to base that award. Without hours with which to calculate the “lodestar,” the fee awarded cannot be reasonable.

C. The Fees and Costs Award Is Unreasonable – Some of the Hours Used to Calculate the Award Were Excessive, Not Productive, Unnecessary, or Spent Performing Tasks Unrelated to Litigating the Star-Advertiser’s UIPA Claim

1. Fees for Work Not Actually Used in the Case Are Unreasonable

The DKLKH invoices include (1) time (13.5 hours) described as being spent between 11/10/11– 11/14/11 preparing a motion to strike, (2) time (.8 hours) spent on 11/14/11 analyzing issues for appeal, (3) time (.3 hours) spent on 8/12/11 analyzing jury demand issues, (4) time (2.9 hours) spent on 10/13/11 and 11/7/11 drafting a motion for judicial notice, and (5) time (.6 hours) spent on 8/29/11 on a discovery plan. All of this work was unnecessary and clearly avoidable. The fee award needs to be reduced by the fees attributable to these entries on the DKLKH invoices.

Except for the motion to strike, none of this work was actually used in the case. Spending time analyzing issues on appeal before the case on the merits was even decided was premature, self-imposed, avoidable, and unnecessary. Fees awarded on the basis of that time were unreasonable. Kotshirodo, 2006 WL 2682676 at 6.

Attorneys with the numbers of years of practice described in the MMM 1<sup>st</sup> Dec, should not have had to do research to know that jury trials are not available for cases in which the plaintiff sues for a declaratory judgment and injunctive relief. The claims were grounded in two statutory causes of action – Haw. Rev. Stat. § 92F-15, and Haw. Rev. Stat. § 632-1. The jury trial research was unnecessary.

No discovery was conducted. It is clear from the exhibits authenticated by the several Declarations of Ken Kobayashi included in the record that all factual material for the case was supplied to the DKLKH attorneys and paralegal by their client, the Star-Advertiser.

Finally, additional information clearly needed to be supplied to permit the court to evaluate the reasonableness of the 2.9 hours spent preparing a motion for judicial notice that was not filed.

2. Time Spent on the Same Activity by Multiple Attorneys Was Unreasonably Spent

The Star-Advertiser filed a 14 page complaint with 60 paragraphs. The first four paragraphs summarize the Star-Advertiser's reasons for filing the complaint. Paragraphs 5 through 9 are boilerplate provisions to establish jurisdiction, justify choice of venue, and describe the two parties. Paragraph 10 through 36 chronicle the events leading up to the filing of the Complaint. Most of this material merely reiterates what was said in other documents including opinions of OIP. Counts I and IV describe the single issue that the case on the merits presented. Count II was not asserted in the Star-Advertiser's motion for summary judgment and thus abandoned. Count III is self-explanatory; given the express terms of Haw. Rev. Stat. 92F-15(d), it very probably need not have been pleaded as a separate count.

Notwithstanding the straight-forwardness of the Complaint, the DKLKH attorneys reported spending over 29 hours in a 12 day period between 8/11/11 and 8/23/11 drafting, reviewing, editing, and redrafting the Complaint. There is a strong suggestion from when and how much time was spent, by which associate or partner, that the Complaint was drafted and redrafted by three attorneys -- the associate RAC who spent 8.2 hours, the second-most senior partner on the team RHT who spent 11.4 hours, and the senior partner DDH who spent 8.5 hours. No more than the 8.5 hours spent by the senior partner is reasonable. The rest of the 29+ hours spent on the complaint is redundant and duplicative and thus unreasonable under Fought.

The more than 70 hours reported spent by the DKLKH attorneys drafting the Star-Advertiser's motion for summary judgment are similarly redundant and duplicative, and thus



unreasonable. The most senior partner working on the case seems to have reviewed and made substantial revisions to the draft prepared by the second-most senior member of the team. Both reported spending the majority of the time all of the attorneys reported spending on the motion for summary judgment, 19.5 and 34.5 hours, respectively. The issue presented was not difficult, OIP had written at least three detailed opinions on whether gubernatorial disclosure of unselected nominees was required. The Star-Advertiser had the benefit of the Hawaii Supreme Court's decision in Pray v. Judicial Selection Commission, 75 Haw. 333, 861 P.2d 689 (1993). 20 hours should have been more than sufficient time for one or the other of the most senior members of the team to complete the motion for summary judgment. This seems particularly reasonable, given the substantial amount of time all of the attorneys reported spending researching the Star-Advertiser's claim in the first of DKLKH's three invoices.

D. The Costs for Photocopying Should Not Have Been Included in the Award

One of this Court's most recent decisions clearly establishes that costs not properly documented cannot be recovered. Boyd v. University of Hawaii, 2012 WL 503797 at 4 (2012). None of the costs included in the Star-Advertiser's Bill of Costs is documented. However, this court has said that we can presume that costs for transcripts and filing fees are reasonable and were actually disbursed because third parties, and not the successful litigant determine their amounts and receive them as actual disbursements from the litigant. Brown v. Kikuchi, 110 Hawaii 204, 130 P.3d 1069 (App. 2006).

The same cannot be said, however, about the \$564.60 in photocopying fees. No specifics have been provided, and there is no way that the circuit court could have judged their reasonableness without that information. Finally, and again, because the circuit court did not provide this court with the specifics with which to review its award of 100% of the Star-

Advertiser's "billables" in the face of the limited information the Star-Advertiser provided, all of the photocopying costs sought and awarded should be rejected. Globalmart Inc., v. POSEC

Hawaii, 127 Hawaii 412, 2012 WL 1650697 at 10 (Hawaii App.).

## VI. EXCERPTS OF RELEVANT STATUTES<sup>17</sup>

**§92F-13 Government records; exceptions to general rule.** This part shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;
- (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and
- (5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

**§92F-15 Judicial enforcement.** (a) A person aggrieved by a denial of access to a government record may bring an action against the agency at any time within two years after the agency denial to compel disclosure.

(b) In an action to compel disclosure the circuit court shall hear the matter de novo. Opinions and rulings of the office of information practices shall be admissible. The circuit court may examine the government record at issue, in camera, to assist in determining whether it, or any part of it, may be withheld.

(c) The agency has the burden of proof to establish justification for nondisclosure.

(d) If the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation.

(e) The circuit court in the judicial circuit in which the request for the record is made, where the requested record is maintained, or where the agency's headquarters are located shall have jurisdiction over an action brought under this section.

(f) Except as to cases the circuit court considers of greater importance, proceedings before the court, as authorized by this section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

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<sup>17</sup> Haw. Rev. Stat. § 92F-15 was amended substantially by section 4 of Act 176, Session Laws of Hawaii at 617 (2012). However, inasmuch as this appeal is not from the merits of the circuit court's order, the amendments are not material to this appeal.

**§92F-19 Limitations on disclosure of government records to other agencies.** (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

- (1) Necessary for the performance of the requesting agency's duties and functions and is also:
  - (A) Compatible with the purpose for which the information was collected or obtained; or
  - (B) Consistent with the conditions or reasonable expectations of use and disclosure under which the information was provided;
- (2) To the state archives for the purposes of historical preservation, administrative maintenance, or destruction;
- (3) To another agency, another state, or the federal government, or foreign law enforcement agency or authority, if the disclosure is:
  - (A) For the purpose of a civil or criminal law enforcement activity authorized by law; and
  - (B) Pursuant to:
    - (i) A written agreement or written request, or
    - (ii) A verbal request, made under exigent circumstances, by an officer or employee of the requesting agency whose identity has been verified, provided that such request is promptly confirmed in writing;
- (4) To a criminal law enforcement agency of this State, another state, or the federal government, or a foreign criminal law enforcement agency or authority, if the information is limited to an individual's name and other identifying particulars, including present and past places of employment;
- (5) To a foreign government pursuant to an executive agreement, compact, treaty, or statute;
- (6) To the legislature, or a county council, or any committee or subcommittee thereof;
- (7) Pursuant to an order of a court of competent jurisdiction;
- (8) To authorized officials of another agency, another state, or the federal government for the purpose of auditing or monitoring an agency program that receives federal, state, or county funding;
- (9) To the offices of the legislative auditor, the legislative reference bureau, or the ombudsman of this State for the performance of their respective functions;
- (10) To the department of human resources development, county personnel agencies, or line agency personnel offices for the performance of their respective duties and functions, including employee recruitment and examination, classification and compensation reviews, the administration and auditing of personnel transactions, the administration of training and safety, workers' compensation, and employee benefits and assistance programs, and for labor relations purposes; or
- (11) Otherwise subject to disclosure under this chapter.

(b) An agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency.

**§607-24 No bonds or costs to be filed or paid by government.** Neither the State nor any county or any political subdivision, board, or commission thereof, nor any officer, acting in the officer's official capacity on behalf of the State or any county or other political subdivision, board, or commission thereof, shall be taxed costs or required to pay or make any deposit for the same or file any bond in any case whether for costs, on motion for new trial, or on appeal, or for any other purpose whatsoever. In all cases in which a final judgment or decree is obtained against the State, county, or other political subdivision or any board or commission thereof, any and all deposits for costs made by the prevailing party shall be returned to the prevailing party, and the prevailing party shall be reimbursed by the State, county, or other political subdivision, board, or commission thereof, as the case may be, all actual disbursements, not including attorney's fees or commissions, made by the prevailing party and approved by the court.

## VII. CONCLUSION

The single issue on the merits presented in the Star-Advertiser's Complaint was not novel or complex. The Star-Advertiser's attorneys were more than capable of litigating this case and prevailing on the merits as they in fact did, in substantially less time than they reported spending. At minimum, the \$69,027.06 the circuit court awarded the Star-Advertiser for attorneys' fees and costs needs to be reduced by the sum of (1) the entirety of the \$6,282.72 in fees awarded for litigating the fee motion that was based merely on counsel's dollar estimate, (2) all billings that were based on invoice entries that were either redacted or that inadequately described how the time billed was spent, (3) all billings that were based on time that was spent duplicatively, excessively, unproductively, unnecessarily, or on activities unrelated to litigating the Star-Advertiser's claim on the merits, and (4) all of the photocopying costs included in the Star Advertiser's Bill of Cost, Exhibit 5.

The Second Amended Final Judgment must be vacated and the Amended Fee Order reduced to include only those fees and costs reasonably incurred and actually disbursed.

DATED: Honolulu, Hawaii, April 23, 2013.

David M. Louie  
Attorney General  
State of Hawaii

By /s/ Charleen M. Aina  
Charleen M. Aina  
Deputy Attorney General

Attorneys for Defendant-Appellant  
Governor Neil Abercrombie

Statement of Related Cases

No other cases are deemed related.

/s/ Charleen M. Aina  
Charleen M. Aina  
Deputy Attorney General

**APPENDIX**

**INDEX TO APPENDIX**

**Appendix A – Amended Order Granting Plaintiff Oahu Publications, Inc., dba Honolulu Star-Advertiser’s Motion For Attorney’s Fees And Costs Filed November 28, 2011**

**Appendix B – Second Amended Final Judgment In Favor Of Plaintiff Oahu Publications, Inc., dba Honolulu Star-Advertiser On All Counts Of The Complaint**

Of Counsel:  
DAMON KEY LEONG KUPCHAK HASTERT  
Attorneys at Law  
A Law Corporation

FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED

2012 DEC 12 PM 2:53

DIANE D. HASTERT 2240-0  
ROBERT H. THOMAS 4610-0  
MARK M. MURAKAMI 7342-0  
1003 Bishop Street, Suite 1600  
Honolulu, Hawai'i 96813  
[www.hawaiilawyer.com](http://www.hawaiilawyer.com)  
Telephone: (808) 531-8031  
Facsimile: (808) 533-2242

L. PARALES  
CLERK

Attorneys for Plaintiff  
OAHU PUBLICATIONS, INC.,  
*dba Honolulu Star-Advertiser*

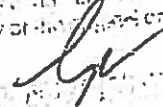
IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

OAHU PUBLICATIONS, INC., *dba* )  
Honolulu *Star-Advertiser*, )  
)  
Plaintiff, )  
)  
vs. )  
)  
NEIL ABERCROMBIE, in his official )  
capacity as Governor of the State of Hawai'i, )  
and DOE GOVERNMENTAL AGENCIES )  
1-10, )  
)  
Defendants. )

CIVIL NO. 11-1-1871-08 KKS  
(Other Civil Action)  
  
AMENDED ORDER GRANTING  
PLAINTIFF OAHU PUBLICATIONS,  
INC., *dba* HONOLULU STAR-  
ADVERTISER'S MOTION FOR  
ATTORNEYS' FEES AND COSTS,  
filed November 28, 2011

Hearing:  
Date: May 22, 2012  
Time: 10:00 a.m.  
Judge: Honorable Karl K. Sakamoto

I do hereby certify that this is a full, true and  
correct copy of the original as filed in this office.  
  
L. Parales  
Clerk



**AMENDED ORDER GRANTING PLAINTIFF OAHU PUBLICATIONS, INC.,  
dba HONOLULU STAR ADVERTISER'S  
MOTION FOR ATTORNEYS' FEES AND COSTS, filed November 28, 2011**

The Plaintiff Oahu Publications, Inc., *dba Honolulu Star-Advertiser's* ("Star-Advertiser") Motion for Attorneys' Fees and Costs, filed November 28, 2011, came on for hearing at 10:00 a.m. on Tuesday, May 22, 2012, in the Circuit Court of the First Circuit before the Honorable Karl K. Sakamoto. The Plaintiff was represented by Robert H. Thomas. The Defendant Neil Abercrombie, in his official capacity as Governor of the State of Hawai'i ("Governor Abercrombie") was represented by Deputy Attorney General Charleen M. Aina. The Court has reviewed the motion, the memoranda in support and opposition, the supplemental briefing, the supporting exhibits and declarations, and has heard oral argument on the motion.

The Court concludes that the fees and costs requested by the Plaintiff are reasonable and that, pursuant to Haw. Rev. Stat. § 92F-15, the Plaintiff *Star-Advertiser*, as the complainant prevailed in an action brought under the Uniform Information Practices Act, and this court "shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation." The Court concludes that in the context of this litigation, the following are reasonable hourly rates for each of the professionals who worked on this case:

Diane D. Hastert	\$350
Robert H. Thomas	\$300
Mark M. Murakami	\$250
Rebecca A. Copeland	\$180
Matthew T. Evans	\$165
Eugenic-Mae Kincaid	\$140

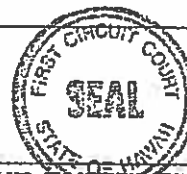
The Court also concludes that given the novel and complex issues presented by this case and the extensive research it entailed, the time expended by the attorneys for the Plaintiff *Star-Advertiser* was reasonable, as demonstrated by the exhibits attached to the Plaintiff's motion and supporting papers.

IT IS ORDERED, ADJUDGED, AND DECREED that the Plaintiff *Star-Advertiser's* Motion for Attorneys' Fees and Costs, filed November 28, 2011 is hereby granted, and Defendant Governor Abercrombie is assessed the following, payable to the Plaintiff *Star-Advertiser*:

Attorney's Fees through summary judgment hearing (incl. GET)	\$61,566.47
Attorney's Fees to Litigate Fee Motion (incl. GET)	\$ 6,282.72
Costs and Expenses	\$ 1,177.87

DATED: Honolulu, Hawai'i, DEC 12 2012

KARL K. SAKAMOTO



JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

*Charleen M. Aina*

DAVID M. LOUIE

Attorney General

ROBYN B. CHUN

CHARLEEN M. AINA

Deputy Attorneys General

Attorneys for Defendant NEIL ABERCROMBIE,  
Governor of the State of Hawai'i

*OAHU PUBLICATIONS, INC., dba Honolulu Star-Advertiser v. NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawai'i, Circuit Court of the First Circuit, State of Hawai'i, Civil No. 11-1-1871-08 KKS; AMENDED ORDER GRANTING PLAINTIFF OAHU PUBLICATIONS, INC., dba HONOLULU STAR-ADVERTISER'S MOTION FOR ATTORNEYS' FEES AND COSTS, filed November 28, 2011*

Of Counsel:  
DAMON KEY LEONG KUPCHAK HASTERT  
Attorneys at Law  
A Law Corporation

1ST CIRCUIT COURT  
STATE OF HAWAII  
FILED

2013 FEB -8 AM 10: 27

DIANE D. HASTERT 2240-0  
ROBERT H. THOMAS 4610-0  
MARK M. MURAKAMI 7342-0  
1003 Bishop Street, Suite 1600  
Honolulu, Hawai'i 96813  
www.hawaiilawyer.com  
Telephone: (808) 531-8031  
Facsimile: (808) 533-2242

J. KUBO  
CLERK

Attorneys for Plaintiff  
OAHU PUBLICATIONS, INC.,  
*dba Honolulu Star-Advertiser*

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

OAHU PUBLICATIONS, INC., <i>dba</i>	)	<b>CIVIL NO. 11-1-1871-08 KKS</b>
Honolulu <i>Star-Advertiser</i> ,	)	(Other Civil Action)
	)	
Plaintiff,	)	<b>SECOND AMENDED FINAL</b>
	)	<b>JUDGMENT IN FAVOR OF</b>
vs.	)	<b>PLAINTIFF OAHU PUBLICATIONS,</b>
	)	<b>INC., <i>dba</i> HONOLULU STAR-</b>
NEIL ABERCROMBIE, in his official	)	<b>ADVERTISER ON ALL COUNTS OF</b>
capacity as Governor of the State of Hawai'i,	)	<b>THE COMPLAINT</b>
and DOE GOVERNMENTAL AGENCIES	)	
1-10,	)	
	)	
Defendants.	)	
	)	
	)	

**SECOND AMENDED FINAL JUDGMENT IN FAVOR OF PLAINTIFF OAHU PUBLICATIONS, INC., *dba* HONOLULU STAR-ADVERTISER ON ALL COUNTS OF THE COMPLAINT**

Pursuant to Rules 56 and 58 of the Hawaii Rules of Civil Procedure, and this Court's

(1) Order Granting Plaintiff's Motion for Summary Judgment (Filed October 18, 2011) and

I do hereby certify that this is a full, true, and correct copy of the original on file in this office.

Denying Defendant's Motion for Summary Judgment (Filed October 28, 2011), filed herein on December 13, 2011, and (2) Amended Order Granting Plaintiff Oahu Publications, Inc., *dba* Honolulu Star-Advertiser's Motion for Attorneys' Fees and Costs, filed November 28, 2011, filed herein on December 12, 2012,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. In the Complaint, filed herein on August 23, 2011, Plaintiff Oahu Publications, Inc., *dba* Honolulu Star-Advertiser ("Star Advertiser") asserted **four (4) counts** against Defendant NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawai'i, and DOE GOVERNMENTAL AGENCIES 1-10. That the true names, identities, and capacities of Defendants DOE GOVERNMENTAL AGENCIES 1-10 were never ascertained, and the Complaint was never amended; no counterclaims or cross-claims were brought by any party;

2. Pursuant to the Order Granting Plaintiff's Motion for Summary Judgment (Filed October 18, 2011) and Denying Defendant's Motion for Summary Judgment (Filed October 28, 2011), filed herein on December 13, 2011, **final judgment is hereby entered in favor of Plaintiff Star-Advertiser and against Defendant NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawai'i, on Counts I, II, and IV of the Complaint** (filed Aug. 23, 2011);

3. Pursuant to the Amended Order Granting Plaintiff Oahu Publications, Inc., *dba* Honolulu Star-Advertiser's Motion for Attorneys' Fees and Costs, filed November 28, 2011, filed herein on December 12, 2012, Plaintiff Star-Advertiser is awarded the sum of **SIXTY-NINE THOUSAND TWENTY-SEVEN AND 06/100 U.S. Dollars (\$69,027.06)**, and **final judgment is hereby entered in favor of Plaintiff Star-Advertiser and against**

**Defendant NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawai`i, on Count III of the Complaint (filed Aug. 23, 2011); and**

4. Having resolved all claims by entering final judgment on the four (4) counts of the Complaint, Plaintiff Star-Advertiser's claims against Defendants DOE GOVERNMENTAL AGENCIES 1-10 are dismissed, and any and all other claims or counts not specifically identified are hereby dismissed.

DATED: Honolulu, Hawai`i, \_\_\_\_\_

FEB 07 2013

KARL K. SAKAMOTO



\_\_\_\_\_  
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

*Charleen M. Aina*

\_\_\_\_\_  
DAVID M. LOUIE  
Attorney General, State of Hawaii  
ROBYN B. CHUN  
CHARLEEN M. AINA  
Deputy Attorneys General

Attorneys for Defendant NEIL ABERCROMBIE,  
Governor of the State of Hawai`i

\_\_\_\_\_  
OAHU PUBLICATIONS, INC., *dba* Honolulu Star-Advertiser v. NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawai`i, and DOE GOVERNMENTAL AGENCIES 1-10, Civil No. 11-1-1871-08 (KKS), Circuit Court of the First Circuit, State of Hawai`i; SECOND AMENDED FINAL JUDGMENT IN FAVOR OF PLAINTIFF OAHU PUBLICATIONS, INC., *dba* HONOLULU STAR-ADVERTISER ON ALL COUNTS OF THE COMPLAINT

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

OAHU PUBLICATIONS, INC.,	)	CIVIL NO. 11-1-1871-08 KKS
dba Honolulu Star-Advertiser,	)	(Other Civil Action)
	)	
Plaintiff-Appellee	)	APPEAL FROM THE
	)	
vs.	)	1) AMENDED ORDER
	)	GRANTING PLAINTIFF OAHU
NEIL ABERCROMBIE, in his official	)	PUBLICATIONS, INC., dba HONOLULU
capacity as Governor of the State of	)	STAR-ADVERTISER'S MOTION
Hawai'i,	)	FOR ATTORNEYS' FEES AND COSTS,
	)	FILED NOVEMBER 28, 2011
Defendant-Appellant,	)	filed December 12, 2012
	)	
and	)	2) SECOND AMENDED FINAL
	)	JUDGMENT IN FAVOR OF PLAINTIFF
	)	OAHU PUBLICATIONS, INC., dba
DOE GOVERNMENTAL AGENCIES 1-10,	)	HONOLULU STAR-ADVERTISER ON
	)	ALL COUNTS OF THE COMPLAINT,
	)	filed February 8, 2013
Defendants.	)	
	)	FIRST CIRCUIT COURT
_____	)	
	)	HONORABLE KARL K. SAKAMOTO
	)	Judge

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing Defendant Governor Abercrombie's Opening Brief, was served upon the Plaintiff-Appellee Oahu Publications, Inc., Star-Advertiser's counsel, electronically (through JEFS):

Diane H. Hastert, Esq.  
Robert H. Thomas, Esq.  
Mark M. Murakami, Esq.  
Damon Key Leong Kupchak Hastert  
1003 Bishop Street, Suite 1600  
Honolulu, Hawai'i 96813

DATED: Honolulu, Hawai'i, April 23, 2013.

/s/ Charleen M. Aina  
Charleen M. Aina  
Deputy Attorney General Hawai'i