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FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

OAHU PUBLICATIONS, INC.,)	CIV. NO. 11-1-1871-08 KKS
dba Honolulu)	
Star-Advertiser,	)	DEFENDANT'S MEMORANDUM
	)	IN OPPOSITION TO
Plaintiff,	)	PLAINTIFF STAR-
	)	ADVERTISER'S MOTION FOR
vs.	)	SUMMARY JUDGMENT; CERTI-
	)	FICATE OF SERVICE
NEIL ABERCROMBIE, in his)	
official capacity as Governor	)	HEARING: 9:30 a.m.
of the State of Hawaii, and	)	DATE: Nov. 14, 2011
DOE GOVERNMENTAL AGENCIES	)	JUDGE: The Hon. Karl K.
1-10,	)	Sakamoto
)	
Defendants.)	
)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF STAR-ADVERTISER'S MOTION FOR SUMMARY JUDGMENT

Pursuant to the direction of the Court, Governor
Abercrombie incorporates and makes all of the arguments made
in his Memorandum of Law in Support of the Motion for Summary

Judgment in this action that he filed today, to oppose the Plaintiff's motion for summary judgment filed on October 18, 2011.

The Plaintiff's motion for summary judgment filed October 18, 2011 should be denied.

DATED: Honolulu, Hawaii, October 28, 2011.

DAVID M. LOUIE
Attorney General
State of Hawaii

By *Charleen M. Aina*
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Governor of Hawaii

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

OAHU PUBLICATIONS, INC.,) CIVIL NO. 11-1-1871-08 KKS
dba Honolulu Star-Advertiser,)
)
Plaintiff,)
)
vs.)
)
NEIL ABERCROMBIE, in his)
official capacity as Governor)
of the State of Hawaii, and)
DOE GOVERNMENTAL AGENCIES)
1-10,)
)
Defendants.)
_____)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Defendant Governor Neil Abercrombie's Memorandum In Opposition To Plaintiff Star-Advertiser's Motion For Summary Judgment was served on the following, by hand-delivering the same on October 28, 2011, addressed as follows:

Diane D. Hastert, Esq.
Robert H. Thomas, Esq.
Mark M. Murakami, Esq.
Rebecca A. Copeland, Esq.
1003 Bishop Street, Suite 1600
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Attorneys for Plaintiff
Oahu Publications, Inc.,
dba Honolulu Star-Advertiser

DATED: Honolulu, Hawaii, October 28, 2011 .



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1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2011 OCT 28 PM 4:31

J. KUBO
CLERK

Attorneys for Defendant Neil
Abercrombie, Governor of the
State of Hawaii

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

OAHU PUBLICATIONS, INC.,	)	CIV. NO. 11-1-1871-08 KKS
dba Honolulu)	
Star-Advertiser,	)	DEFENDANT'S MOTION FOR
	)	SUMMARY JUDGMENT;
Plaintiff,	)	MEMORANDUM IN SUPPORT
	)	OF MOTION FOR SUMMARY
vs.	)	JUDGMENT; NOTICE OF
	)	HEARING ON MOTION AND
NEIL ABERCROMBIE, in his	)	CERTIFICATE OF SERVICE
official capacity as Governor)	
of the State of Hawaii, and)	
DOE GOVERNMENTAL AGENCIES)	
1-10,	)	HEARING DATE: <i>Nov. 14, 2011</i>
	)	TIME: <i>9:30 Am</i>
Defendants.	)	JUDGE: The Hon. Karl K.
	)	Sakamoto

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Neil Abercrombie, Governor of Hawaii, by and
through his counsel, David M. Louie, Attorney General of
Hawaii and Charleen M. Aina and Robyn B. Chun, Deputy

Attorneys General, hereby moves this Honorable Court for an Order Granting Summary Judgment in favor of Defendant.

This motion is made pursuant to Rule 56, of the Hawaii Rules of Civil Procedure, and Rule 7 of the Rules of the Circuit Courts for the State of Hawaii, and is supported by the attached memorandum, exhibits, and records on file in this case.

DATED: Honolulu, Hawaii, October 28, 2011.

DAVID M. LOUIE
Attorney General
State of Hawaii

By *Charleen M. Aina*

CHARLEEN M. AINA
ROBYN B. CHUN
Deputy Attorneys General
Attorneys for Defendant
Neil Abercrombie,
Governor of Hawaii

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Oahu Publications, Inc., dba Honolulu Star-Advertiser ("Star-Advertiser"), filed this action against Governor Neil Abercrombie, to compel the Governor to provide it with a copy of the list of judicial nominees the Governor received from the Judicial Selection Commission ("JSC"), and used to nominate then Circuit Judge Sabrina McKenna to serve as an Associate Justice of the Hawaii Supreme Court.

On February 16, 2011, the Star-Advertiser's reporter, Ken Kobayashi, submitted a written request for a copy of the list to the Office of the Governor. Citing Haw. Rev. Stat. § 92F-13(3), frustration of a legitimate government function, i.e., the Governor's obligation to appoint judges to the Supreme Court, the Governor, through his Press Secretary, denied the Star-Advertiser's request by a written Notice to Requester dated March 3, 2011.

Haw. Rev. Stat. § 92F-15(a) permits this action to be brought. It pertinently provides:

§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.

Subsection (c) of Haw. Rev. Stat. § 92F-15 assigns the burden of proof to the Governor to justify not disclosing the list to the Star-Advertiser:

§92F-15 Judicial enforcement. . . . (c) The agency has the burden of proof to establish justification for nondisclosure.

Because Haw. Rev. Stat. § 92F-11(a) and (b) provide in pertinent part that

§92F-11 Affirmative agency disclosure responsibilities. (a) All government records are open

to public inspection unless access is restricted or closed by law.

(b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours

(emphases added), this action necessarily is a statutory construction case. The issue this Court must decide de novo¹ is whether the Governor was justified in not disclosing the list the Star-Advertiser asked to see and copy. The Court must determine whether section 92F-13, or any other law restricts or closes access to the list the Star-Advertiser requested.

Notably, as even plaintiff admits,² the provisions of the Uniform Information Practices Act ("UIPA"), Haw. Rev. Stat. ch. 92F, were neither presented nor addressed by the Hawaii Supreme Court in Pray v. Judicial Selection Commission, 75 Haw. 333, 861 P.2d 723 (1993). Thus, the issue of whether access to a JSC nomination list presented to the Governor for purposes of making a judicial appointment is restricted by law and thus not subject to disclosure under the UIPA, will be judicially determined for the first time, in this case.

The Governor asserts nondisclosure of the names of judicial nominees he receives from the JSC is completely justified. As a matter of law,

- Article I, section 6 and article VI, section 4 of the State Constitution;
- Rule 5, Section Two of the Judicial Selection Commission Rules; and
- Haw. Rev. Stat. §§ 92F-13(1), -13(3), -13(4), and 92F-19 of the UIPA,

¹See Haw. Rev. Stat. § 92F-15(b) ("In an action to compel disclosure the circuit court shall hear the matter de novo").

²See Plaintiff's Memorandum of Law in Support of Its Motion ("Pl's Memo") at the bottom of page 2 ("The Pray Court did not, however, address the issue pursuant to the UIPA").

restrict, if not totally close off access to the list the JSC provides and the Governor uses to nominate a person for appointment to one of the State's appellate or circuit courts.

Accordingly, the Governor's motion for summary judgment should be granted and this action dismissed.

II. STATEMENT OF MATERIAL AND UNDISPUTED FACTS

On February 3, 2011, the then Acting Director of the Office of Information Practices wrote a letter to Star-Advertiser reporter Ken Kobayashi which said in pertinent part:

the Office of Information Practices (OIP) issued OIP Opinion Letter Number 03-03, which addressed the issue of whether the Office of the Governor and the Chief Justice were required to make the JSC list of nominees public after receipt from the JSC. OIP there concluded, based upon the reasoning that is fully set forth in the opinion, that the list of nominees may be withheld until the Senate confirms appointment of the nominee selected by the appointing authority [to avoid frustrating the judicial selection process established by the State Constitution by minimizing the opportunity for persons to inject undue influence into or politicize that process].

See Exhibits F to the Complaint and E to Plaintiff's Motion for Summary Judgment ("Pl's MSJ"), and OIP Op. Ltr. No. 03-03 attached here as Exhibit 2.

Governor Abercrombie appointed Judge McKenna to the Hawaii Supreme Court on January 25, 2011, and the Senate confirmed her nomination on February 16, 2011. See Answer ¶¶ 12 and 25, Exhibit to Pl's MSJ.

On February 16, 2011, Star-Advertiser reporter Kobayashi also completed and submitted a Request to Access a Government Record that asked to inspect and obtain a copy of the following government record:

Now that the Senate has confirmed Sabrina McKenna to the Hawaii Supreme Court, I'd like the names of the others on the list from the Judicial Selection Commission for

the vacancy on the Supreme Court, which was filled by McKenna.

See Exhibit G to the Complaint and F to Pl's MSJ.

Ten business days after he received Reporter Kobayashi's and the Star-Advertiser's February 16, 2011 Request to Access a Government Record, Governor Abercrombie sent reporter Kobayashi and the Star-Advertiser a Notice to Requester dated March 3, 2011 which denied their request in its entirety and noted that the JSC list of nominees they sought was withheld pursuant to Haw. Rev. Stat. § 92F-13(3) because

The Governor's obligation to appoint judges to the Supreme Court is a legitimate government function. This function could be frustrated by the chilling effect of potential nominees knowing that his or her application may be disclosed.

See Exhibit I to the Complaint and H to Pl's MSJ.

By a completed Request For Assistance To The Office of Information Practices dated March 7, 2011, see Complaint, Exhibit J, that the Governor has no basis to dispute, Reporter Kobayashi told OIP that the Governor had denied his and the Star-Advertiser's request to inspect and copy the JSC's and asked OIP to provide an opinion on whether the Governor's denial was legal, and assistance in obtaining access to the list.

By letter dated March 31, 2011, see Exhibit 3, OIP informed the Governor that the Star-Advertiser had requested its assistance in gaining access to the JSC list, and invited the Governor to provide additional information and justification, if any, for not disclosing the JSC list to the Star-Advertiser.

In his May 3, 2011 response to OIP, see Exhibit 4 at pages 1-2, and fn.2 at page 3, the Governor said that he had not disclosed the list (or the names of the nominees on the list) he received from the JSC because

disclosure would frustrate the judicial nomination and appointment process set out in article VI, sections 3 and 4 of the State Constitution by reducing the number,

and limiting the range of experience of those who are willing to apply and serve as justices and judges of the State's courts;

OIP cited no factual or legal basis for concluding in OIP Op. Ltr. No. 03-03 that attorneys would not be deterred from applying for judicial office if the JSC's lists of nominees were disclosed;

Haw. Rev. Stat. § 92F-13(4) and § 92F-19(b) permit, if not require the Governor to withhold disclosure of the names of nominees on the JSC's lists because the lists are confidential under JSC Rule 5, Section Two .

To support his first assertion, the Governor included all of the press releases by which Governor Lingle disclosed the names of nominees for judicial appointment she received from the JSC between 2003 and 2010, see Exhibit C to Exhibit 4, and the guest editorials of Retired Judge Eden Elizabeth Hifo and Daniel Case, Esq., the Co-Chair of the HSBA Committee that submitted the proposal to create the Judicial Selection Commission, see Exhibit D to Exhibit 4. Governor Abercrombie suggested that while the information gleaned from the press releases could not be

dispositive of the effect that disclosure might have had on the size of the applicant pools or the number of applications the JSC actually received [because JSC statistics as to number of applicants and frequency of applications before and after Governor Lingle's disclosure were not available], the facts seem to suggest that disclosure could have had an adverse effect on who was willing to submit an application to serve as a state judge in that period.

Exhibit 4 at page 4. It appeared that the disclosures may have had an effect on who and how many attorneys applied for appellate and circuit court appointments because

- Only 10 different individuals (8 judges and 2 private practitioners) were included in the 4 JSC lists Governor Lingle received to fill 4 vacancies on the Supreme Court while she was Governor;

- The 17 different individuals (9 judges, 6 federal, state or county employees, and 3 attorneys in private practice) were included in the 8 JSC lists Governor Lingle received to fill the 8 vacancies on the Intermediate Court of Appeals during her two terms; and
- Of the 61 individuals who applied to fill one or more of the 17 circuit court positions that were vacant during Governor Lingle's terms, 15 were already judges, 23 were government employees, 23 were private practitioners, and 3 of the private practitioners were from firms with more than 20 attorneys; in addition, more than half of the 15 judges and many of the government employees were nominated to fill two or more vacancies applied.

Id.

III. STANDARD OF REVIEW

A. As already noted, Haw. Rev. Stat. §92F-15(c) places the burden to justify nondisclosure of the JSC lists on the Governor.

B. Similarly, inasmuch as the issue presented, i.e., whether disclosure of the nominees or nomination lists presented to the Governor by the JSC is restricted or closed by law, is a "purely legal issue," SHOPO v. Society of Professional Journalists-University of Hawaii Chapter, 83 Hawai'i 378, 391, 927 P.2d 386, 399 (1996), and required to be heard by this Court de novo, Haw. Rev. Stat. §92F-15(b).

C. Inasmuch as the Governor's justification can only be established if a law restricts or closes access to the JSC nomination lists he receives from the JSC, the standard of review for statutory construction applies:

[the] foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning.

Finally, in determining the purpose of the statute, we are not limited to words of the statute to discern the underlying policy which the legislature seeks to promulgate but may look to relevant legislative history.

State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70,73 (1995) (brackets, citations, ellipsis and internal quotation marks omitted). Furthermore,

We must read statutory language in thye context of the entire statute and construe it in a manner consistent with its purpose.

State v. Rauch, 94 Hawai'i 315, 322, 13 P.3d 324, 331 (2000) (block quote format, brackets, citations ellipses and internal quotations marks omitted).

Child Support Enforcement Agency v. Carlin, 96 Hawai'i 373, 379, 31 P.3d 230, 236 (App. 2001).

D. The constitutionality of JSC Rule 5³ is a question of law, 75 Haw. at 340, 861 P.2d at 727, that the Hawaii Supreme Court decided in Pray: "By Virtue Of The Provisions Of Article VI, Section 4 [of the State Constitution]," Rule 7 [of the JSC Rules, entitled "Confidentiality,"] is valid, 75 Haw. at 339, 861 P.2d at 726..

IV. ARGUMENT

The Legislature enacted the UIPA in 1988. Its stated purpose is to "[open] up the government processes to public scrutiny and participation [as] the only viable and reasonable method of protecting the public's interest." Haw. Rev. Stat. § 92F-2.

Contrary to plaintiff's assertions, the UIPA does not "presume disclosure," but instead

provides a general disclosure responsibility in Section -11 which is intended to serve as the central section of

³ When Pray was decided, the JSC's rule on Confidentiality was Rule 7 but its provisions were nearly the same, if not verbatim identical to the provisions of Rule 5 today.

the records law. Every other provision is an exception to this general rule. In addition, however, the bill will provide, in Section -12, a list of records (or categories of records) which the Legislature declares, as a matter of public policy, shall be disclosed. As to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable.

See Conf. Comm. Rept. No. 112-88, Haw. H.J. 817, 818 (1988) attached as Exhibit 5.

Haw. Rev. Stat. § 92F-11(a) and (b) expressly provide instead that

(a) All government records are open to public inspection unless access is restricted or closed by law[;] and.

(b) Except as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying

Emphases added.

Haw. Rev. Stat. § 92F-13 provides in whole as follows:

§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.

Emphases added.

Conf. Comm. Rept. No. 112-88 also noted as to Haw. Rev. Stat. §92F-13:

5. Exceptions to Access. The bill will provide in Section -13 a clear structure for viewing the exceptions to the general rule of access. The five categories of exceptions relate to personal privacy, frustration of government practice, matters in litigation, records subject to other laws and an exemption relating to the Legislature. The category relating to personal privacy is essentially the same in both the House Draft and the Senate Draft. The second category, concerning frustration of legitimate government functions, was clarified by examples on pages 4 and 5 of Senate Standing Committee Report No. 2580⁴

Finally, Haw. Rev. Stat. §92F-19 provides:

§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:

⁴S. Stand. Comm. Rept. No. 2580's list of examples for what are now Haw. Rev. Stat. §92F-13(1), (3) and (4) included:

Information . . . on applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position

Information comprising a personal recommendation or evaluation

Information that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule

The committee report also noted that "[t]he case law under the Freedom of Information Act should be consulted for additional guidance and that the UIPA is based on the Uniform Information Practices Code of the National Conference as of Commissioners on Uniform State Laws. A copy of S. Stand. Comm. Rept. No. 2580 is attached as Exhibit 6.

- (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;

(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.

And similarly, Conf. Comm. Rept. No. 112-88 noted as to Haw.

Rev. Stat. §92F-19

11. Limitation on Disclosure to Other Agencies. The bill will continue the current prohibitions on the sharing of records and information between agencies except in specific specific circumstances or where the record or information is otherwise public.

- A. The JSC List Was Validly Withheld Under Haw. Rev. Stat. §92F-13 - Discontinuing The Confidentiality Applicants For Judicial Appointment Are Accorded Under JSC Rule 5 Would Frustrate The Judicial Appointment Process Article VI, Sections 3 Of The State Constitution Establishes.

Article VI, section 4 of the State Constitution provides in relevant part:

The commission shall adopt rules which shall have the force and effect of law. The deliberations of the commission shall be confidential.

In Standing Committee Report No. 52, I Proceedings of the Constitutional Convention of the State of Hawaii 1978 at 626, the Committee on the Judiciary, echoing the statements of Daniel Case in Exhibit D of Exhibit 4 here, specifically indicated that

One important concern your Committee addressed was in regard to the actions of the judicial selection commission in the confidentiality of their deliberations. Confidentiality is necessary to encourage and protect those prospective candidates who otherwise would not be willing to be considered if the

deliberation process of the commission were to be made public.

During the debates in Committee of the Whole on the Judiciary the Chair of the Committee on the Judiciary noted that

In testimony before the Committee on Judiciary, the point made by many attorneys, including the representative of the bar association [Daniel Case], was that it was thought that applications should be confidential because oftentimes attorneys do not want their names to be known as applicants for judicial office because of the problems that might be raised with their clients knowing, and other problems of this type. Based upon the matter of the application process, I believe this to be a worthwhile amendment.

II Proceedings of the Constitutional Convention of the State of Hawaii 1978 at 393 (emphasis added). After much debate, the delegates decided to delegate responsibility for defining the scope of the confidentiality referenced in article VI, section 4 to the JSC.

The JSC adopted Section Two of Rule 5 to demarcate the boundaries of the constitutionally prescribed requirement that the deliberations of the JSC be confidential. It provides:

Under the Constitution of the State of Hawaii, the commission's proceedings must be confidential. Therefore, all commission records, proceedings, and business, including the names of all proposed nominees and the names of the nominees forwarded to the appointing authority, shall be confidential and may not be discussed outside commission meetings, except among commission members, or as made necessary by Rule 9 or Rule 12, or pursuant to Rule 13.

Governor Abercrombie withheld disclosure of the JSC list the Star-Advertiser requested to avoid frustrating the comprehensive constitutional re-design of the judicial selection process the delegates and ultimately the voters adopted in 1978. As the Hawaii Supreme Court concluded in analyzing the constitutionality of the JSC's Rule 5 in Pray, breaching the confidentiality of the

list the JSC hand-delivered to him pursuant to JSC Rules 5 and 13 could undercut the "'merit selection' process of prescreening the universe of potential applicants from which the appointing authority would be required to choose," 75 Haw. at 349, 861 P.2d at 731. His concerns, however, are different from the political concerns the Pray Court cited. His are more akin to the practical reasons cited in OIP's Op. Ltr. Nos. 91-8, see Exhibit 7, and 92-3, see Exhibit 8, case law from other jurisdictions,⁵ and the Proceedings of the 1978 Constitutional Convention quoted above - that is that disclosure of any applicant's name and interest in serving as a judge, other than the name of the JSC presented to the Senate for confirmation by the Governor, could make it more difficult for the JSC to recruit applicants, reduce the number and the qualities of the attorneys who do apply, and ultimately generally frustrate the judicial selection, nomination, and appointment process the State Constitution expects the JSC and the Governor to complete.

B. Haw. Rev. Stat. §92F-13(4) and §92F-19 Further Justify Withholding The JSC List Because The List Is Confidential Under JSC Rule 5

Haw. Rev. Stat. § 92F-13(4) **and** § 92F-19 should be obvious. They are simply logical extensions of JSC's Rule 5. Rule 5 cloaks the names of applicants for judicial appointment with confidentiality. The harm to be avoided by the JSC Rule 5 is no different with respect to the names of nominees not selected by the Governor, than the harm Rule 5 avoids by making the names of applicants not selected by the JSC confidential. Disclosing the names of nominees on the JSC list who are not selected by the Governor furthers no interest. They were not selected; nothing anyone, including the courts could do can change that result.

⁵ See cases cited and statutes from other jurisdictions that honor the confidentiality of an application process in Capital City Press v. East Baton Rouge Parish Metropolitan Council, 696 So.2d 562, 567 n.8 (La. 1997).


Unlike the appointments of members of the State Ethics Commission, judicial nominee's are subject to Senate confirmation and subject to its members' vetting. If the public disagrees with the Governor's selection, or simply suspects that the nominee was not the most qualified, the public's thoughts and concerns can be presented to the Senate.

V. CONCLUSION

For the foregoing reasons, therefore, Governor Abercrombie submits that his motion for summary judgment must be granted and the Plaintiff's complaint dismissed.

DATED: Honolulu, Hawaii, October 28, 2011.

DAVID M. LOUIE
Attorney General
State of Hawaii

By 

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Attorneys for Defendant
Neil Abercrombie,
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