

FIRST DEFENSE: (Affirmative Defenses of Confidentiality, Frustration of Government Purpose, and Discretionary Authority)

1. The Governor avers that access to the list of nominees presented to him by the Judicial Selection Commission ("JSC") from which he appointed Associate Justice Sabrina McKenna ("List") is restricted because together, article VI, section 4 of the State Constitution, JSC Rule 5, and Haw. Rev. Stat. §§ 92F-13(3), 92F-13(4) and 92F-19(b) protect it from disclosure, and further because disclosing the List's contents would frustrate the judicial appointment process that is exclusively for the JSC and the Governor to complete.

2. Haw. Rev. Stat. § 92F-11(a) of the Uniform Information Practices Act, ("UIPA"), Haw. Rev. Stat. ch. 92F, entitled "Affirmative agency disclosure responsibilities," provides:

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

Emphasis added.

3. Article VI, section 3 of the State Constitution makes the JSC and the Governor responsible for the appointment of the State's Supreme Court justices, and the judges of the Intermediate Court of Appeals and the circuit courts. Article VI, section 4 of the State Constitution specifies that the "deliberations of the [JSC] shall be confidential."

4. JSC Rule 5 which has the force and effect of law pursuant to article VI, section 4 of the State Constitution, prescribes that "the [JSC's] proceedings must be confidential [and therefore] all commission records, proceedings, and business, including the names of all proposed nominees . . . shall be confidential"

5. Haw. Rev. Stat. § 92F-13(3) restricts access to government records when "by their nature [they] must be confidential in order for the government to avoid the frustration of a legitimate governmental interest."

6. Haw. Rev. Stat. § 92F-13(4) restricts access to government records when "pursuant to state or federal law [they] are protected from disclosure."

7. Haw. Rev. Stat. § 92F-19(b) further provides:

'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.'

8. The Hawaii Supreme Court's decision in Pray v. Judicial Selection Commission of the State of Hawaii, 75 Haw. 333, 861 P.2d 723 (1993), does not require the Governor to disclose the nominees on a JSC list. The court simply said: "we also hold that it is within the sole discretion of the appointing authorities [i.e., the Governor and the Chief

Justice] whether to make public disclosure of the JSC's lists of judicial nominees."

SECOND DEFENSE: (Failure to State Claims)

9. The Complaint fails to state claims for which relief may be granted.

THIRD DEFENSE: (Admissions and Denials)

10. The Governor denies any and all claims and allegations contained in paragraphs 36, 39, 43, 46, 47, 51, 52, 53, and 60 of the Complaint.

11. The Governor is without sufficient information or knowledge to form a belief as to the truth or falsity of the claims and allegations contained in paragraphs 2, 9, 16, 21, 27, 34, 45, and 59 of the Complaint, and therefore denies the same.

12. The Governor admits the claims and allegations contained in paragraphs 15, 18, 38, 41, 49, 50, and 58 of the Complaint.

13. In answer to paragraph 1 of the Complaint, the Governor (a) admits that the "Purposes" section of the UIPA, Haw. Rev. Stat. § 92F-2, includes the following statement, "the legislature declares that it is the policy of this State that the formation and conduct of public policy - the discussions, deliberations, decisions, and action of government agencies - shall be conducted as openly as possible;" (b) denies that this statement "presume[s] that all government records are public

unless the government has a compelling reason to withhold them;" and (c) is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 1 and therefore denies the same.

14. In answer to paragraph 3 of the Complaint, the Governor (a) admits that to date, he has not published the List; (b) denies that the List must be disclosed and that "any justification for withholding 'would end once a nominee is confirmed by the Senate;" and (c) is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 3 and therefore denies the same.

15. In answer to paragraph 4 of the Complaint, the Governor:

(a) Admits that he did not release the List to the Star Advertiser as his Press Secretary's response to its several requests indicated, i.e., because

"The Governor believes getting the names out is detrimental to attracting prospective judicial applicants. His approach in making judicial appointments is to ensure the confidentiality of these applicants;"

(b) Avers that Haw. Rev. Stat. § 92F-13(3) and (4) provide:

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

- (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 that it is his position that these provisions of the UIPA restrict access to the lists of judicial nominees he receives from the JSC, and authorize, if not require him to restrict access to the lists because disclosure would frustrate the judicial nomination and appointment process by limiting the number of qualified individuals willing to apply, and breach the confidentiality that the lists are to be accorded under article VI of the State Constitution, the rules of the JSC, and Haw. Rev. Stat. § 92F-19(b);

(c) Avers as to any and all other claims and allegations made in paragraph 4, that they constitute argument for which a responsive pleading is not required; and

(d) Is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all remaining claims and allegations made in paragraph 4 of the Complaint and therefore denies the same.

16. In answer to paragraph 5 of the Complaint, the Governor admits that this circuit court has subject matter jurisdiction over this action pursuant to Haw. Rev. Stat. § 92F-15 and 603-21.5(3), but is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 5 and therefore denies the same.

17. In answer to paragraph 6 of the Complaint, the Governor admits that venue is proper in this court, but is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 6 and therefore denies the same.

18. In answer to paragraph 7 of the Complaint, the Governor admits that Plaintiff Oahu Publications, Inc., is a "person" as defined by Haw. Rev. Stat. § 92F-3, but is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 7 and therefore denies the same.

19. In answer to paragraph 8 of the Complaint, the Governor (a) admits that the Office of the Governor is an "agency" as defined by Haw. Rev. Stat. § 92F-3; (b) denies that the governor or any other officer of the State is an "agency;" and (c) is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims

and allegations made in paragraph 8 and therefore denies the same.

20. In answer to paragraph 10 of the Complaint, the Governor admits that Governors Cayetano and Lingle respectively, disclosed the lists of judicial nominees they received from the JSC after making the appointments (Cayetano), and before making any appointment (Lingle), but the Governor is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 10 and therefore denies the same.

21. In answer to paragraph 11 of the Complaint, the Governor admits that Ken Kobayashi, a Star-Advertiser reporter asked the Governor's Press Secretary by email dated January 20, 2011, whether the Governor had received the List from the JSC and if he had, who was on the List, but the Governor is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 11 and therefore denies the same.

22. In answer to paragraphs 12 and 13 of the Complaint, the Governor admits that by email on January 20, 2011, his Press Secretary wrote to Ken Kobayashi, "The Governor will not be releasing the list. Will get you his choice when it is ready", and that by a subsequent email the same day, Mr. Kobayashi asked what the Governor's reason for not disclosing the names on the

List was, but the Governor is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraphs 12 and 13 and therefore denies the same.

23. In answer to paragraph 14 of the Complaint, the Governor admits that by email on January 21, 2011, his Press Secretary wrote to Ken Kobayashi, "The Governor believes getting the names out is detrimental to attracting prospective judicial applicants. His approach in making judicial appointments is to ensure the confidentiality of these applicants", but the Governor is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 14 and therefore denies the same.

24. In answer to paragraph 17 of the Complaint, the Governor admits that the Office of Information Practices' ("OIP") then Acting Director, Cathy L. Takase, wrote a letter to Ken Kobayashi on February 3, 2011, and that Exhibit F to the Complaint is a true and correct copy of such letter; the Governor also avers, however, that the letter speaks for itself, and denies any and all remaining claims and allegations made in paragraph 17 and therefore denies the same.

25. In answer to paragraph 19 of the Complaint, the Governor admits that the Senate confirmed the appointment of

Judge Sabrina McKenna to fill the vacancy in the office of associate justice of the Hawaii Supreme Court on February 16, 2011, but is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 19 and therefore denies the same.

26. In answer to paragraph 20 of the Complaint, the Governor admits that Mr. Kobayashi submitted a Request to Access a Government Record to "Gov. Neil Abercrombie" from himself and the Honolulu Star Advertiser which included the material quoted in the paragraph, and that Exhibit G is a true and correct copy of the front page of Mr. Kobayashi's and the Star-Advertiser's two-sided request, but the Governor is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 20 and therefore denies the same.

27. In answer to paragraphs 22, 23, 24, and 25 of the Complaint, the Governor (a) admits that except for what appears at the very top and very bottom of the document, i.e., "Kobayashi Response.pdf" and 3/4/11 9:59 AM", and the Internet address, respectively, Exhibit I is a true and correct copy of the front page of the two-sided Notice to Requester Donalyn Dela Cruz sent to Ken Kobayashi by email on March 3, 2011; (b) avers that the document speaks for itself; and (c) is without

sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraphs 22, 23, 24 and 25 and therefore denies the same.

28. In answer to paragraph 26 of the Complaint, the Governor denies that OIP Acting Director Takase was dismissed, and is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 26 and therefore denies the same.

29. In answer to paragraph 28 of the Complaint, the Governor admits that he received a letter dated March 31, 2011 from Cathy Takase inviting him to provide additional justification or information he would want OIP to consider concerning the Office of the Governor's denial of the Star Advertiser's and Ken Kobayashi's request for access to the List, but is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 28 and therefore denies the same.

30. In answer to paragraph 29 of the Complaint, the Governor admits that by letter dated April 1, 2011, he appointed Cheryl Kakazu Park to replace Cathy Takase, as Director of OIP, but is without sufficient information or knowledge to form a

belief as to the truth or falsity of any and all other claims and allegations made in paragraph 29 and therefore denies the same.

31. In answer to paragraphs 30, 31, and 32 of the Complaint, the Governor admits that the May 3, 2011 letter to OIP, submitted on his behalf by the Department of the Attorney General, at pages 2-3, stated the following:

"Haw. Rev. Stat. §92F-13(3) and (4),

[T]he confidentiality requirement in article VI, section 4 of the State Constitution and Rule 5, Section Two, A of the JSC's Rules, and

[T]he Supreme Court's decision in Pray,

leave it solely to him to determine whether the lists of nominees he receives from the JSC should be disclosed. He firmly believes that public disclosure "is detrimental to attracting judicial applicants" and that "confidentiality" is critical to assuring that both he and the JSC receive applications from the most willing and capable individuals [in our community] otherwise qualified to serve as our judges,

Haw. Rev. Stat. § 92F-13, entitled "Government records; exceptions to general rule," authorizes access or disclosure of a government record to be withheld when

(3) Government records, . . . by their nature must be confidential in order for the government to avoid the frustration of a legitimate government function;

and

(4) Government records which, pursuant to state or federal law including an order of any state [or] federal court, are protected from disclosure;

The drafters of the State Constitution implicitly made the JSC's lists of nominees confidential when they provided in article VI, section 4 of the State Constitution that "[t]he deliberations of the commission shall be confidential" and conferred the power to adopt rules that have the force and effect of law, on the JSC. The JSC confirmed that the contents of its lists of nominees were confidential when it adopted what is now Rule 5, Section Two, A of its rules to provide that

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 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.

The Governor understands that the drafters of the State Constitution declared it to be the State's policy that the judicial nomination process be conducted confidentially, and precludes any other state official from declaring otherwise. The Governor also understands that JSC Rule 5 effects that policy, and allows, if not requires him to withhold the identi[t]y of the nominees on the lists he receives from the JSC in order to assure the effectiveness of the judicial nomination process prescribed by article VI, section 4, and maintain the confidentiality expressly imposed upon the lists by JSC Rule 5. [Fn 5 at the end of this paragraph noted: "Moreover, Haw. Rev. Stat. § 92F-19(b) expressly directs that '[a]n agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency.'"]

He also understands the Supreme Court's holding in Pray to confer "the power and duty squarely upon the JSC and the [Governor]" to "select the best candidate for judicial office," 75 Haw. at 353, 861 P.2d at 732, and to have "sole discretion" to determine whether, if at all, he should disclose the

contents of the JSC's lists, 75 Haw. at 355, 861 P.2d at 733."

Further, the Governor (a) avers that Exhibit K is not a true and correct copy of the May 3, 2011 letter (because it does not include the Exhibits A - ED that were referenced and attached to the letter; a complete copy of the letter, including all of its exhibits is attached here as Exhibit 1; (b) admits that the complete May 3, 2011 letter speaks for itself; and (c) is otherwise without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraphs 30, 31, and 32 and therefore denies the same.

32. In answer to paragraph 33 of the Complaint, the Governor (a) admits that except for the penciled marks and underscoring, Exhibit L is a true and correct copy of the May 13, 2011 letter OIP Director Park wrote to Ken Kobayashi and Michael Levine, and copied to him; (b) avers that the letter speaks for itself; but (c) is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 33 and therefore denies the same.

33. In answer to paragraph 35 of the Complaint, the Governor (a) admits that the two page June 9, 2011 letter from OIP Director Park to Mr. Ed Lynch that is part of Exhibit N is a

true and correct copy of the June 9, 2011 letter that was copied to him; (b) avers that the letter speaks for itself; but (c) is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 35 and therefore denies the same.

34. The Governor responds to all of the claims and allegations contained in paragraph 37 of the Complaint by incorporating his responses to paragraphs 1-36 of the Complaint.

35. In answer to paragraph 40 of the Complaint, the Governor (a) admits that the List is a "government record" as defined by Haw. Rev. Stat. § 92F-3, and as such is "open to public inspection unless access is restricted or closed by law," Haw. Rev. Stat. § 92F-11(a); and (b) avers that access to the List is restricted by Haw. Rev. Stat. § 92F-13(3) and (4), and Haw. Rev. Stat. § 92F-19(b) quoted above; (c) further avers that the remaining claims and allegations in paragraph 40 constitute argument for which a responsive pleading is not required; and (d) is otherwise without sufficient information or knowledge to form a belief as to the truth or falsity of any and all of these remaining claims and allegations and therefore denies the same

36. In answer to paragraph 42 of the Complaint, the Governor (a) denies that the enumerations (a) through (d) in paragraph 42 are the Governor's "only reasons" for not disclosing the List; (b) avers that the remainder of claims and

allegations in paragraph 42 constitute argument for which a responsive pleading is not required; and (c) denies any and all other claims and allegations contained in paragraph 42 of the Complaint.

37. In answer to paragraph 44 of the Complaint, the Governor admits that Plaintiff Oahu Publications, Inc., is a "person" as defined by Haw. Rev. Stat. § 92F-3, but is without sufficient information or knowledge to form a belief as to the truth or falsity of any and all other claims and allegations made in paragraph 44 and therefore denies the same.

38. The Governor responds to all of the claims and allegations contained in paragraph 48 of the Complaint by incorporating his responses to paragraphs 1-47 of the Complaint.

39. The Governor responds to all of the claims and allegations contained in paragraph 54 of the Complaint by incorporating his responses to paragraphs 1-53 of the Complaint.

40. In answer to paragraphs 55 and 56 of the Complaint, the Governor avers that Haw. Rev. Stat. § 92F-15(d) provides that "[i]f the complainant prevails in an action brought under [§ 92F-15], the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation," and that the statute speaks for itself; to the extent Plaintiff makes other claims and allegations in paragraphs 55 and 56, the Governor is without sufficient

information or knowledge to form a belief as to their truth or falsity and therefore denies the same.

41. The Governor responds to all of the claims and allegations contained in paragraph 57 of the Complaint by incorporating his responses to paragraphs 1-56 of the Complaint.

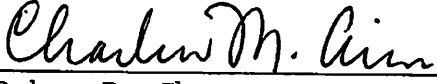
42. Any and all claims and allegations in the Complaint not heretofore expressly admitted, denied, or otherwise expressly responded to, are hereby denied.

WHEREFORE, the Governor respectfully requests that

1. All of the claims made and relief prayed for in the Complaint be denied, and the claims and the Complaint be dismissed with prejudice;
2. This Court grant the Governor such other relief in law or in equity as this Court deems just and proper; and
3. That judgment be entered in the Governor's favor.

DATED: Honolulu, Hawaii, September 9, 2011.

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