NO. CAAP-13-0000127

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

OAHU PUBLICATIONS, INC., *dba* Honolulu *Star-Advertiser*,	)	CIVIL NO. 11-1-1871-08 KKS
Plaintiff-Appellee,	)	APPEAL FROM THE SECOND AMENDED FINAL JUDGMENT IN FAVOR OF PLAINTIFF OAHU PUBLICATIONS, INC., *dba* HONOLULU STAR-ADVERTISER ON ALL COUNTS OF THE COMPLAINT, filed February 8, 2013
vs.	)	
NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawaii,	)	
Defendants-Appellants.	)	Circuit Court of the First Circuit Hon. Karl K. Sakamoto

ANSWERING BRIEF FOR THE APPELLEE

APPENDICES 1-3

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COUNTERSTATEMENT OF THE CASE

I. NATURE OF THE CASE

A. Summary

To succeed in this appeal, the Defendant-Appellant Neil Abercrombie (Governor Abercrombie) must show the circuit court: (1) clearly erred when it determined this case was "difficult," presented "novel and complex issues," and required "extensive research;" and (2) abused its discretion by concluding the attorney's fees and other expenses assessed were reasonable under section 92F-15(d) of the Hawaii Uniform Information Practices Act (UIPA). The circuit court managed the case from its inception and determined the efforts undertaken by the Plaintiff-Appellee Oahu Publications, Inc. dba *Honolulu Star-Advertiser* (*Star-Advertiser*) were reasonable, because the invoices submitted to the court reflected the actual hours worked by its lawyers, and these efforts were justifiable given the issues in the case.

The Opening Brief (Op. Br.) seeks to recast a high-stakes public lawsuit to compel disclosure of the Judicial Selection Commission's list of nominees to fill the Associate Justice vacancy on the Hawaii Supreme Court (JSC list) as a "straight-forward statutory construction case," and stakes everything on two claims: (1) the circuit court's award lacked any evidentiary basis, and (2) the *Star-Advertiser* spent too much time to prevail. Op. Br. at 1. Neither argument is supported by the record: (1) the circuit court possessed redacted invoices showing the effort incurred, and Governor Abercrombie failed to introduce the evidence he now claims was necessary (the unredacted invoices); and (2) given the complex nature of the issues, the circuit court was well within its discretion in determining Governor Abercrombie did not satisfy his burden of demonstrating the time expended was unreasonable.

To insure an accountable and transparent government, the Hawaii legislature created a private right of action under the UIPA to compel disclosure of illegally withheld public records. The legislature determined that the statute must "be applied and construed to promote its underlying purposes and policies," which include public disclosure and "enhanced governmental accountability." Haw. Rev. Stat. § 92F-2 (2012). These requirements are not empty gestures, and to encourage citizen enforcement, the legislature required the courts to assess "reasonable attorney's fees and all other expenses reasonably incurred in the litigation" if an agency wrongfully withholds documents from the public. *Id.* § 92F-15(d). Affirming the circuit court's assessment of fees and expenses fulfills these purposes because Governor Abercrombie refused to disclose the JSC list after repeated requests; he fired the Director of the Office of Information

Practices (OIP) when she opined he was wrong and replaced her with a new Director who informed the *Star-Advertiser* the OIP would not assist; and he invited a lawsuit by proclaiming that the only way the public would ever see the documents was if someone took him to court.

The *Star-Advertiser* did. In a very high-profile lawsuit in which Governor Abercrombie was represented by "the largest law firm in Hawaii,"[1] the *Star-Advertiser* was required to prepare the case exactly right, necessitating the efforts reflected in the circuit court's assessment. The case had to be pursued from the beginning as if it would end up in the Supreme Court as many UIPA cases do, particularly those involving JSC lists. *See, e.g., Pray v. Judicial Selection Comm'n*, 75 Haw. 333, 861 P.2d 723 (1993). The circuit court was not clearly wrong when it rejected the Governor's post-judgment claim that this was an easy case. Indeed, Governor Abercrombie was so sure of the merits of his arguments during the litigation that he sought summary judgment. In addition to conducting a tenacious defense on the merits, Governor Abercrombie's conduct increased costs: among other things, on the eve of the summary judgment hearing, he raised a new argument. Although the circuit court ultimately rejected those attempts, the *Star-Advertiser* was forced to respond to each. As the circuit court determined, resolution of the issues in this case was "difficult."

Nevertheless, the Opening Brief asserts this case was so easy and so "straight-forward" that the *Star-Advertiser* could have prevailed in half the time, with little apparent effort. Governor Abercrombie appeals the circuit court's conclusion the fees and other expenses assessed were reasonable, because he claims his lawyers—who perhaps lost in part because they did not spend enough time preparing his case—now have a better understanding of the effort, time, and skill it took to win than the circuit court and the lawyers who actually prevailed.

This brief makes the following points:

1. There is no "bright line standard for adequacy of documentation in the trial court's determination of attorneys' fees." *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Haw. 92, 122-23, 176 P.3d 91, 121-22 (2008). Governor Abercrombie cannot claim on appeal that "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," when he did not offer the unredacted invoices which he now claims were necessary (which he possessed) into the record. Op. Br. at 1. The circuit court did not clearly err when it determined this case was "complex" and "difficult," and Governor Abercrombie has not shown that the court abused its

[1] *See* Dep't of the Att'y General, *available at* http://hawaii.gov/ag/main/about_us.

discretion when it concluded the evidence submitted by the *Star-Advertiser* demonstrated its efforts to prevail in this case were reasonable under the circumstances of the case.

2. The UIPA does not condition the recovery of fees and other expenses on the prevailing party waiving the attorney-client and work product privileges. Nor does the statute require bare-bones staffing, and it is not unreasonable as a matter of law for more than one lawyer to litigate a "difficult" case that presented "novel and complex issues" and required "extensive research."

3. The *Star-Advertiser* need not have prevailed on every claim in the complaint in order for the circuit court to assess Governor Abercrombie all of the fees and other expenses reasonably incurred by the *Star-Advertiser*. Moreover, when applying for fees, it is reasonable to estimate the fees that will be necessary to resolve the fee application.

B. Question Presented

Was the circuit court clearly erroneous when it determined this was a "difficult" case presenting "novel and complex issues" that required "extensive research," and did the court abuse its discretion when it concluded it had documentation to support its conclusion that the assessment of fees and expenses in the circumstances of the case?

C. Relief Sought on Appeal

This court should affirm the order and judgment assessing Governor Abercrombie attorneys' fees and other expenses.

II. COUNTERSTATEMENT OF FACTS

The Statement of Facts in the Opening Brief is distorted and incomplete. To appreciate what really happened requires understanding the judicial nomination and appointment process, the obligations placed upon government by Hawaii's public records law, and the arguments and defenses—both potential and actually asserted—that arose or could have arisen in the circuit court. Armed with this background, the soundness of the circuit court's exercise of discretion is readily apparent.

A. The Judicial Nomination and Appointment Process

In the 1978 Constitutional Convention, the people of Hawaii created the JSC as a "wholly nonpartisan" commission, comprised of nine members representing a cross-section of the community. Haw. Const. art. VI, § 4. The Constitution tasks the JSC with the duty to present to the "appointing authority" (the governor) a "list of not less than four, and not more than six," nominees for vacancies in the offices of Supreme Court Justices, judges on the Intermediate

Court of Appeals, and circuit judges. Haw. Const. art. VI, § 3. The Constitution directs the JSC to adopt rules "which shall have the force and effect of law" to implement this process.

Pursuant to its Rules, the JSC is charged with recruiting applicants by "publiciz[ing] a vacancy" (JSC Rule 7.B), accepting submitted applications (JSC Rule 8), and further providing that "[c]ommissioners may actively seek out and encourage qualified individuals to apply for judicial office. Commissioners should always keep in mind that often persons with the highest qualifications will not actively seek appointment." JSC Rule 7.A.

The JSC then screens applicants and "may after it receives the applications eliminate from further consideration those applicants whom it evaluates to be unqualified for judicial office." JSC Rule 8.A. The remaining applicants are placed on a list, and the JSC seeks "additional information on each applicant as it deems appropriate." *Id*. The qualifications of these applicants are further reviewed, and they are interviewed and investigated. JSC Rules 8.C, 9, 10. Next, the JSC discusses "each applicant's qualifications for judicial office." JSC Rule 11.A. It then meets and selects for inclusion on the list "not less than four, and not more than six nominees." JSC Rule 11.B. Finally, once the JSC has determined the names on the list, it presents the list to the governor. JSC Rule 13. Pursuant to the Hawaii Constitution and the JSC Rules, the list of names is not subject to public disclosure while the lists are in the JSC's possession. *See Pray v. Judicial Selection Comm'n*, 75 Haw. 333, 861 P.2d 723 (1993).

A governor then may fill the vacancy in the judicial office "by appointing a person from the list" presented by the JSC, with the consent of the Senate. Haw. Const. art. VI, § 3. If a governor fails to make an appointment within thirty days (or within ten days of the Senate's rejection of a previous appointment), the JSC makes the appointment with the Senate's consent. *Id*. If the Senate fails to reject an appointment within thirty days, it is deemed to have consented. *Id*. If the Senate rejects a governor's appointment, that governor may make another appointment from the remaining names on the JSC list. *Id*. This process continues until the Senate consents to an appointment, "or, failing this, the [JSC] shall make the appointment from the list without Senate consent." *Id*.

B. UIPA Presumes Public Access to Government Records.

The UIPA, Hawaii's public records law, mandates "[a]ll government records" are public "unless access is restricted or closed by law," and requires agencies to make these records available upon request. Haw. Rev. Stat. § 92F-11(a), (b) (2012). This requirement is based on

the determination by the people of Hawaii, acting through their legislature, that public access to government records lies at the heart of a democratic government:

> In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest.

Id. § 92F-2. To fulfill this purpose, the UIPA expressly states "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." *Id*. Although the disclosure requirements of the statute must be balanced with privacy interests, the UIPA is to be "applied and construed" to "[p]romote the public interest in disclosure," "[p]rovide for accurate, relevant, timely, and complete government records," "[e]nhance government accountability through a general policy of access to governmental records," and "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them[.]" *Id*.

The statute contains a list of twenty-two specific categories of records that must always be disclosed. *See id*. § 92F-12. The statute also sets forth five limited exceptions to the disclosure requirement, three of which were relevant here:

> (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
>
> . . .
>
> (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 . . .

Id. § 92F-13.

If an agency fails in its duty of public disclosure, the UIPA created a private right of action allowing any person aggrieved by denial of access to a governmental record to institute an original jurisdiction action in circuit court. *Id*. § 92F-15. In the lawsuit, the government agency "squarely" bears the burden of proof to establish justification for nondisclosure. *Id*. § 92F-15(c); *State of Hawaii Org. of Police Officers v. Society of Pro'l Journalists-University of Hawaii Chapter*, 83 Haw. 378, 392, 927 P.2d 386, 401 (1996). Under the UIPA, "[i]f 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." Haw. Rev. Stat. § 92F-15(d) (2012).

C. Governor Abercrombie: Sue Me

Former Governors Cayetano and Lingle routinely had disclosed JSC lists during their respective tenures. Governor Cayetano released the lists after he made his appointments but before the Senate consented. *See* Dkt 25 at pdf 37-93. Governor Lingle publicly disclosed the lists after she received them from the JSC and before she announced her appointments. *See* Dkt 21 at pdf 86-152; Dkt 23 at pdf 44-118. But despite repeated requests from the *Star-Advertiser*, Governor Abercrombie adamantly refused to release to the public the list of names presented to him by the JSC from which he appointed Justice Sabrina McKenna to the Hawaii Supreme Court, claiming he could withhold it for the following reasons:

- The confidentiality requirement in article VI, section 4 of the Hawaii Constitution, which mandates the JSC operate in secret.
- Rule 5 Section Two, A of the JSC Rules, which requires the JSC keep its lists confidential.
- Section 92F-13(3) and (4) (the "frustration" and "other law" exceptions)
- OIP Op. Ltr. No. 03-03, which concluded the appointing authorities "are not required by the UIPA to disclose the List of Nominees prior to Senate confirmation of an appointee . . . and 'it is within the sole discretion of the appointing authorities whether to make public disclosure of the JSC's list of judicial nominees.'" *See* Dkt 25 at pdf 34 (quoting *Pray*).
- The Hawaii Supreme Court's opinion in *Pray*, which held that JSC lists are confidential while in possession of the JSC.

Dkt 23 at pdf 219-224. His most prominent assertion was that public disclosure of JSC lists would lessen the number of qualified individuals who would be willing to apply to the JSC for judicial vacancies and would "frustrate" the government function of nominating and appointing judges, the third point on the list above.

The OIP had issued an opinion that contradicted Governor Abercrombie's claim and clarified its earlier Opinion Letter 03-03. Dkt 21 at pdf 215 (once the Senate confirms an appointee, "[t]he frustration upon which [Op. Ltr. No. 03-03] is based would end"). On March 31, 2011, Governor Abercrombie replaced the Director of the OIP, and stated he would not disclose the JSC list until a court ordered him to do so:

> Accordingly, until a court, with the benefit of a full evidentiary record determines that the Governor is mistaken in his understanding that the JSC's lists are confidential, and more importantly that disclosure will not frustrate the JSC's and his responsibility to nominate and appoint the justices and judges of the State's courts, the Governor cannot be required to disclose the contents of the JSC's list as [the *Star-Advertiser*] and [*Honolulu Civil Beat*] request.

Dkt 21 pdf at 224. After the newly-appointed OIP Director washed the agency's hands of responsibility by stating that "rendering another OIP advisory opinion would be futile and that court action is necessary to resolve this specific dispute," the *Star-Advertiser* was left with no alternative but to institute an action pursuant to the UIPA to compel disclosure. Dkt 21 at pdf 225-26.

D. Proceedings in the Court Below

1. The *Star-Advertiser*'s UIPA Lawsuit

After retaining counsel to evaluate its claims and the Governor's defenses, the *Star-Advertiser* instituted an action seeking: (1) an order compelling disclosure of the JSC list provided to Governor Abercrombie to fill the Associate Justice vacancy; and (2) a declaratory judgment that at the very latest, governors must disclose JSC lists after the Senate consents to a judicial appointment. *See* Complaint (Aug. 23, 2011) (Dkt 21 at pdf 11-24). Governor Abercrombie's Answer raised only these defenses:

> 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. §§ 93F-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.

Dkt 21 at pdf 54-70.

2. The *Star-Advertiser*'s Arguments

On October 18, 2011, the *Star-Advertiser* sought summary judgment, making three arguments. *See* Dkt 21 at pdf 163-230.

First, its motion asserted that Governor Abercrombie could not show JSC lists are, "by their nature" confidential, because previous JSC lists were not confidential. In *Pray*, the Hawaii Supreme Court held that article VI of the Constitution does not govern whether JSC lists must be disclosed or may be kept confidential after the list is transmitted from the JSC to a governor. *Pray*, 75 Haw. at 350, 861 P.2d at 731 ("there is no express constitutional obligation imposed on

a governor or a chief justice either to disclose the names or to keep them confidential"). *Pray* also concluded that the JSC Rules do not apply to a governor. *Id*. ("The question then becomes whether this constraint [JSC Rule 5] extends to the appointing authorities—the governor and the chief justice. For the reasons set forth below, we conclude that it does not."). Therefore, any successor governor has the discretion to release any JSC list, including Governor Abercrombie's lists, which means that under *Pray*, no governor can assure applicants that the appearance of their name on a JSC list will remain forever confidential. This means that those considering applying for judicial positions as a matter of law cannot form a reasonable expectation that JSC lists—even those Governor Abercrombie might keep secret—would remain so indefinitely. Thus, Governor Abercrombie's claim that the judicial appointment process would, absent secrecy, be "frustrated" was illusory. The Supreme Court's conclusion that, "in our view, no stigma should attach to any judicial nominee not eventually appointed to office, inasmuch as all nominees are by definition deemed by the JSC to be qualified for appointment," also refuted Governor Abercrombie's assertion that potential applicants would fear having their names disclosed, because the court suggested that being merely selected by the JSC for a place on the list should be considered an honor. *Pray*, 75 Haw. at 352, 861 P.2d at 732.

Second, the *Star-Advertiser* argued it was not Governor Abercrombie's responsibility to determine how many applicants should apply to the JSC, or whether nominees on the JSC list are qualified. It is the JSC's duty to receive applications, and if it wants to increase the size of applicant pool, the JSC also has the ability to "actively seek out and encourage qualified individuals to apply . . . keep[ing] in mind that often persons with the highest qualifications will not actively seek judicial appointment." JSC Rule 7.A. Nor was it Governor Abercrombie's role to determine whether the nominees whose names are on the JSC list are "qualified," because they are, by definition, qualified by virtue of their presence on the JSC list, since the JSC screens out those applicants it deems unqualified. JSC Rule 8.A; *Pray*, 75 Haw. at 352, 861 P.2d at 732. Governor Abercrombie's constitutional duty is only to make appointments from the JSC's list of qualified nominees. Haw. Const. art. VI, § 3.

Third, the *Star-Advertiser* argued that Governor Abercrombie did not meet his burden to prove that disclosure would frustrate the judicial appointment process even if he were able to guarantee secrecy, because he had not shown that judicial applicant pools during the sixteen years of public disclosure of JSC lists were "limited," or that additional and more qualified applicants would have applied to the JSC for judicial openings if secrecy was guaranteed. In

other words, Governor Abercrombie could not prove that during the time prior governors disclosed the names on the JSC list, the judicial appointment process was "frustrated." Rather, the process worked very well.

3. Governor Abercrombie's Arguments

The parties and the court agreed to a briefing schedule (Dkt 21 at pdf 235-37), and the Governor also filed a motion for summary judgment, which raised the same arguments as his Answer. Dkt 23 at pdf 6. The motion ostensibly was supported by nine exhibits, which included OIP opinion letters, the complete lists of judicial nominees released by Governor Lingle, op-eds by a lawyer and a judge reprinted from the newspaper, press releases by Governor Lingle, a news article, excerpts of the Senate Journal, and an Attorney General opinion letter. Dkt 23 at pdf 22-182. The following business day, Governor Abercrombie filed an errata. Dkt 25 at pdf 7-9. The *Star-Advertiser* opposed the Governor's motion for summary judgment (Dkt 25 at pdf 24), and filed a reply brief in support of its own motion for summary judgment (Dkt 25 at pdf 20-23), which included the complete JSC lists publicly released by Governors Cayetano and Lingle during their tenures. *See* Dkt 25 at pdf 37-161.

4. Governor Abercrombie's New Argument

The Governor's tactics increased costs. For example, on the Friday before the Monday, November 14, 2011 summary judgment hearing, Governor Abercrombie filed his reply memorandum. Dkt 27 at pdf 8. In this brief, he raised an entirely new affirmative defense he had not raised in his Answer or even in his memorandum in support of his motion for summary judgment. There, for the very first time, he sought to argue an additional defense that "Haw. Rev. Stat. § 92F-13(1) Excepts the JSC Lists From Disclosure." Dkt 27 at pdf 17. This new argument asserted that the individuals who were on the JSC list had significant privacy interests in withholding their names from public disclosure pursuant to section 13(1), which does not require disclosure of government records if doing so "would constitute a clearly unwarranted invasion of personal privacy." *Id.*

As an affirmative defense that had not been asserted in his answer and an argument in a reply brief that was not addressing an argument made in the *Star-Advertiser*'s memorandum in opposition, this new argument had been waived, and the circuit court could not consider it. *See* Haw. R. Civ. P. 8(c) (affirmative defenses not pleaded in an answer are waived); Haw. Cir Ct. R. 7(b) (reply memoranda are limited to addressing arguments in a memorandum in opposition). Nevertheless, to protect its position, the *Star-Advertiser* was forced to respond to this new

argument, with its counsel working through the weekend to prepare a motion to strike Governor's Abercrombie's reply memorandum. *See* Dkt 27 at pdf 20-27. This motion was filed at 8:02 a.m. on Monday, November 14, 2011, less than one hour before the circuit court hearing on the cross-motions for summary judgment commenced. *Id*.

5. Circuit Court: "Tough," "Complicated" Issues

The motions for summary judgment and the *Star-Advertiser*'s motion to strike were heard together by the circuit court. At the hearing, Governor Abercrombie acknowledged the issues presented were of first impression, and might need to be resolved by the Hawaii Supreme Court:

> [T]his is really the first time that these three exceptions have been presented to a court . . . [b]ut the courts—the courts have not addressed these issues. They've not addressed whether, at least in the—particularly in the context of the Judicial Selection Commission's list, which is of interest to everyone, the courts have not addressed which, if any exceptions apply to the general rule of disclosure. And so a complete record, consideration to all of the applicable exceptions ought to be given in this Court, and, if necessary, because this is important, by the—by the Supreme Court of Hawaii.

Transcript of Proceedings (Dkt 27 at pdf 160-61).

The circuit court began by determining the case presented "[t]ough issues." Dkt 27 at pdf 154. The court also noted "[t]hese are complicated issues, and it will take a while to go through our findings and conclusions, so let me start at the end." Dkt 27 at pdf 162. The court rejected Governor Abercrombie's argument that JSC lists can be kept secret, agreeing with the *Star-Advertiser*'s third argument that he submitted no proof to support his claim that secrecy was needed to avoid "chilling" applicants:

> In this motion Defendant argues that disclosure of the list will have a chilling effect on potential nominees. However, Defendant has failed to substantiate this argument with any evidentiary support. While the theory underlying the argument may be plausible, Defendant has failed to show that such a chilling effect in actuality exists. Defendant has not provided any evidence in the form of affidavits or declarations of potential applicants testifying that the disclosure of the judicial nominee list had any effect on their decision to apply for a judicial vacancy. In light of any actual proof, Defendant's argument of a chilling effect is speculative and cannot support a judicial determination that disclosure of nominee lists will frustrate the selection process as a matter of law.

Dkt 27 at pdf 165-66. The court also rejected Governor Abercrombie's argument that section 92F-19(4) allowed him to keep the JSC list secret.

The court granted the *Star-Advertiser* summary judgment "as to all three specific parts."

Dkt 21 at pdf 6. The court ordered Governor Abercrombie to disclose the JSC list and issued a declaratory judgment that governors must disclose JSC lists. *Id*. The proposed order prepared by the *Star-Advertiser* was circulated for approval but the Governor objected to its form, and submitted his own proposed order to the circuit court. Dkt 27 at pdf 28-86. The circuit court adopted Governor Abercrombie's form of order, which stated "for the reasons set forth by the Court in the transcript of the Court's announced decision," it entered summary judgment in favor of the *Star-Advertiser*, and denied Governor Abercrombie's cross-motion. Dkt 27 at pdf 130. Shortly after the court compelled Governor Abercrombie to publicly release JSC lists, the JSC announced it was amending its rules to mandate that in the future, it would publicly release the lists concurrently with transmission to the governor. *See* Op. Br. at 3 n.4.

6. *Star-Advertiser* Applied for Mandatory Fees

The *Star-Advertiser* applied for fees and expenses pursuant to section 92F-15(d). Dkt 27 pdf at 87. Adhering to the standards for fee applications set out by the Supreme Court in *Kamaka*, the *Star-Advertiser* supported the application with a memorandum of law (Dkt 27 pdf at 89), copies of actual invoices, and a declaration of counsel attesting to authenticity of the invoices and the hourly rates of the attorneys who worked on the case and their skill and experience. Dkt 29 pdf at 95-101. *See Kamaka*, 117 Haw. at 122-23, 176 P.3d at 121-22 (fee application supported with memorandum, a "Table of Costs," a declaration of counsel, and billing statements). The invoices submitted to the court showed the legal services rendered to secure victory in the case. Dkt 27 pdf at 103-118. The circuit court had not yet entered final judgment, and Governor Abercrombie had not ruled out an appeal. *See* Dep't of the Attorney General News Release 2011-26, "State Reviewing Circuit Court's Ruling on Star Advertiser Lawsuit Relating to Judicial Nominees" (Nov. 14, 2011), *available at* http://hawaii.gov/ag/main/press_releases/2011/2011-26.pdf. Thus, the details of communications between client and attorney, and details that might reveal lawyers' mental impressions or strategy were redacted. *See* Dkt 27 at pdf 103-18.

Counsel's declaration also stated his opinion that "[g]iven the complex nature of the issues before the court," the fees and costs incurred by the *Star-Advertiser* were "reasonable in that [they are] 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 litigation to summary judgment motions with limited discovery." Dkt 27 pdf at 99. Because the motion for fees and expenses had not

yet been fully briefed and was in progress and had not been decided, pursuant to Haw. R. Civ. P. 54(d)(2)(B), counsel's declaration also included an estimation of the fees and expenses to litigate the motion for attorneys' fees. Dkt 27 pdf at 101.

Incredibly, Governor Abercrombie initially asserted he was not liable for fees and expenses, despite the UIPA's clear command that the circuit court "shall assess against the agency reasonable attorney's fees and all other expenses." Dkt 27 pdf at 182 ("The Plaintiff Star-Advertiser's motion for fees and costs *should be denied*, or in the alternative, substantially reduced for the reasons stated in this memorandum."). The Governor subsequently abandoned that argument, and asserted only that the case was not "'complex' or 'intensely tough,'" but was "a straight forward statutory construction case, albeit of first impression." Dkt 27 at pdf 182. He argued the *Star-Advertiser*'s fees and expenses should be reduced for four reasons: (1) counsels' hourly rates were not reasonable (*id*. at 186); (2) there could be no recovery for redacted time entries (*id*. at 187); (3) counsel spent too much time to prepare for the motions for summary judgment (*id*. at 188); and (4) "Plaintiff's Should At Most Be Allowed To Recover $2,200 for Time Spent on This Motion." *Id*. at 189. Governor Abercrombie's memorandum was supported only with the billing records from three federal bankruptcy cases. *See* Dkt 27 at pdf 191, 220, 242. The following day, Governor Abercrombie corrected errors in his memorandum with an errata. *See* Dkt 27 at pdf 263-71. In its reply, the *Star-Advertiser* submitted the declarations of prominent attorneys who also represent the public in UIPA cases. Dkt 27 at 280-82.

7. Governor Provided with Unredacted Invoices

The circuit court ordered a hearing on the motion, and at the hearing suggested attempting to compromise. Dkt 21 at pdf 7 ("COURT WANTS COUNSEL TO TRY TO WORK OUT AN AMOUNT[.] COUNSEL OPEN TO DISCUSSION BETWEEN THEMSELVES. COUNSEL MAY IF THEY ARE UNABLE TO WORK IT OUT CALL AND ASK THE COURT FOR ASSISTANCE. COURT CONTINUED THE MOTION UNTIL MOVED ON."). This months-long effort included settlement conferences and briefing before a different circuit judge. *See* Dkt 27 at pdf 288-95; Dkt 21 at pdf 7. In the course of this process, the *Star-Advertiser* provided Governor Abercrombie with unredacted invoices. *See* Dkt 27 at pdf 300 ("On April 2, 2012, Plaintiff's counsel provided undersigned counsel with unreadacted copies of the invoices that were reproduced as Exhibits 2, 3, and 4, as well as a document entitled Transactions Time Entry Listing with entries from 12/1/11 through 3/29/12.").

8. Governor Did Not Offer to Introduce Unredacted Invoices

When these additional efforts to resolve the amount Governor Abercrombie was to be assessed proved unsuccessful, the circuit court rescheduled the hearing and requested supplemental briefing. Dkt 21 at pdf 7-8. Governor Abercrombie's supplemental memorandum repeated the arguments made in his earlier briefs, but critically, did *not* argue the circuit court would be unable to make a determination the fees and expenses were reasonable under section 92F-15(d) because the unreadacted invoices were not in the evidentiary record. Dkt 27 at pdf 299-310. Nor did Governor Abercrombie offer to introduce the unredacted invoices which he possessed into the record. The *Star-Advertiser*'s supplemental memorandum pointed this out. *See* Dkt 27 at pdf 315 ("Earlier, the Governor claimed the *Star-Advertiser* could not recover its section 92F-15 fees for any time entries where the details had been redacted. These entries had been partially redacted to protect the attorney-client privilege or lawyer work product. In the interest of removing this roadblock to resolving the issue, we provided all of our time entries, without redaction. . . . The Governor now knows exactly what efforts the *Star-Advertiser* undertook to win, yet he has not moved.").

9. Circuit Court Determined Reasonable Fees and Expenses

While the circuit court agreed with Governor Abercrombie's arguments regarding the hourly rates for the *Star-Advertiser*'s lawyers, the court also held that the number of hours incurred were not "duplicative or excessive." The court minutes note:

> COURT NOTED HE DID NOT SEE ANY DUPLICATIVE OR EXCESSIVE HOURS CHARGED, HOWEVER AGREES WITH DEFD'S FEE SCHEDULE. ACCORDINGLY, THE MOTION IS GRANTED TO THE EXTENT PLTF SHALL BE PAID THE HOURS REQUESTED HOWEVER DENIED AS THE THE [sic] FEE SCHEDULE. PLTF SHALL BE PAID AT THE RATES REQUESTED BY THE STATE.

Dkt 21 at pdf 8. In its subsequently-filed written order, the circuit court further concluded:

> 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 A. Murakami	$250
Rebecca A. Copeland	$180
Matthew T. Evans	$165
Eugenie-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.

Dkt 27 at pdf 332. This order was subsequently amended to eliminate a typographical error. *See* Dkt 29 at pdf 47-49.

The circuit court stayed execution of the order assessing Governor Abercrombie fees and expenses and pending appeal. Dkt 21 at pdf 8. Governor Abercrombie appealed the order assessing fees and costs. *See Oahu Publications v. Abercrombie*, No. CAAP-12-0000525. After briefing was completed, however, the appeal was dismissed for lack of appellate jurisdiction because the circuit court's order and judgment did not contain the required "finality" language. *See* Order Dismissing Appeal for Lack of Jurisdiction, *Oahu Publications v. Abercrombie*, No. CAAP-12-0000525 (Dec. 27, 2012).

The circuit court subsequently amended the judgment to include the necessary finality language. On December 12, 2012, the circuit court again concluded that "given the novel and complex issues presented by this case[,]" $67,849.19 in attorneys' fees and $1,177.87 in costs and expenses were reasonable under Haw. Rev. Stat. § 92F-15(d), Dkt 29 at pdf 48, and entered its Second Amended Final Judgment in favor of the *Star-Advertiser* on all counts on February 7, 2013. Dkt 29 at pdf 72-74. Governor Abercrombie then filed the present appeal. Dkt 29 at pdf 67.

On April 11, 2013, this court ordered this appeal take precedence "in accordance with HRS § 92F-15," and that "[b]riefing will proceed in accordance with the schedule established by the court's March 25, 2013 order, and oral argument will proceed in accordance with Hawai`i Rules of Appellate Procedure Rule 34." Dkt 19 at pdf 2. *See* Haw. Rev. Stat. § 92F-15(f) (2012) ("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 other cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.").

COUNTERSTATEMENT OF POINT OF ERROR

The Opening Brief contains a single formal Point of Error, but also raises other issues. The Point of Error asserts the circuit court "did not have sufficient information with which to determine" the assessment of fees and expenses was reasonable. Op. Br. at 10. This is another way of arguing the record lacks substantial evidence to support the judgment, because the circuit court could not have concluded the fees and costs incurred were reasonable without unredacted invoices. *See, e.g., Sharp v. Hui Wahine, Inc.*, 49 Haw. 241, 249-50, 413 P.2d 242, 248-49 (1966) (because "no evidence was received" by the trial court to support the application for fees, the record was inadequate to support the determination the fees were reasonable). In addition, without expressly setting it forth as a separate Point of Error, the Opening Brief also argues that the circuit court's assessment "should be reduced by at least half" because the time spent was "duplicative, excessive, unproductive, or spent unnecessarily." Op. Br. at 13.

Governor Abercrombie did not preserve an appeal on the issue of whether the UIPA requires unredacted invoices to be submitted as proof of the *Star-Advertiser*'s reasonable efforts, because he did not offer the unredacted invoices into the record. If Governor Abercrombie believed the circuit court was unable to determine the reasonableness of the fees and expenses in the absence of unredacted invoices, it was his burden to offer the invoices into the record, particularly since he possessed them. The rules of civil procedure required Governor Abercrombie to have asked the circuit court to consider this issue. *See* Haw. R. Civ. P. 46 ("at the time the ruling or order of the court is made or sought, [the party must make] known to the court the action which the party desires the court to take or the party's objection to the action of the court and grounds therefor"). Also, an appellate court will not consider an appeal claiming the record lacks evidence to support a judgment unless the appellant has made an offer of proof to the trial court. *See Smith v. Laamea*, 29 Haw. 750, 761 (Haw. Terr. 1927). Governor Abercrombie's failure to offer the unredacted invoices into the record deprived the circuit court of the opportunity to consider the issue. Having stood by silently, he is precluded from raising the lack of evidence for the first time in this court as a basis for reversal. "The reason for such a rule is obvious: '[analyzing] the facts of a particular [issue] without the benefit of a full record or lower court determination is not a sensible exercise.'" 19 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 205.05[1], at 205-56-57 (3d ed. 2012) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992)). *See also Tampa Bay Water v. HDR Engineering, Inc.*, No. 8:08-CV-2446-T-27TBM, 2012 WL 5387830, at *7 (M.D. Fla. Nov. 2, 2012) ("To the extent Tampa Bay

Water complains that the redacted billing invoices 'prejudices [Tampa Bay Water] in its ability to meaningfully respond to the fee claim,' that complaint is hollow at best, since Tampa Bay Water never sought access to the unredacted invoices.").

Rule 28 of the Hawaii Rules of Appellate Procedure requires the Statement of Points of Error in an opening brief to "set forth in separately numbered paragraphs. . .where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency," and "[w]here applicable, each point shall also include . . . when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected." Haw. R. App. P. 28(b)(4)(A). The Opening Brief does not conform to this rule and is silent regarding an offer of proof, because none was made. The rule further provides that "[p]oints not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented." *Id.* Because of Governor Abercrombie's failure to offer the unredacted invoices, they are not part of the Record on Appeal, and cannot be reviewed.

STANDARD OF REVIEW

It is not enough to recite, as does the Opening Brief, that the circuit court's judgment determining Governor Abercrombie was assessed reasonable attorney's fees and expenses under the UIPA can only be reversed if the court abused its discretion. *State v. Earthjustice*, No. 29289, 2009 WL 2371920, at *4 (Haw. App. Aug. 3, 2009) (mem.) (attached as Appendix 1) ("[The appellate] court reviews the trial court's grant or denial of attorneys' fees and costs under the abuse of discretion standard.") (citing *Price v. AIG Hawaii Ins. Co.*, 107 Haw. 106, 110, 111 P.3d 1, 5 (2005)). Governor Abercrombie's statement of the standard of review omits its most critical component: the circuit court's factual determinations this case was "difficult" and "tough," presented "novel and complex issues," and required "extensive research." These findings can only be reversed if clearly erroneous. *Right to Know Committee v. City Council*, 117 Haw. 1, 8, 175 P.3d 111, 118 (Haw. App. 2007) (abuse of discretion arises when the trial court 'bases its ruling on an erroneous view of the law or on a clearly erroneous view of the evidence'") (quoting *Maui Tomorrow v. State of Hawaii Bd. of Land & Nat. Res.*, 110 Haw. 234, 242, 131 P.3d 517, 525 (2006)). A trial court's determination is clearly erroneous only when, "despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been committed." *Chun v. Bd. of Trs. of the Emples. Ret. Sys.*, 106 Haw. 416, 430, 106 P.3d 339, 353 (2005) (internal quotation marks and citations omitted)

(quoting *Allstate Ins. Co. v. Ponce*, 105 Haw. 445, 453, 99 P.3d 96, 104 (2004)); *see also Right to Know*, 117 Haw. at 8, 175 P.3d at 118 ("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").

There is no "bright line standard for adequacy of documentation in the trial court's determination of attorneys' fees." *Kamaka*, 117 Haw. at 122, 176 P.3d at 121. "Thus, the question is *w*hether the trial court's award of attorneys' fees and costs was reasonably supported by the record." *Id.* The Opening Brief nowhere mentions the amount of fees and expenses Governor Abercrombie would consider reasonable, only that maximum reasonable fee "should have been approximately $30,000." Op. Br. at 7. The appeal can be rejected on that basis alone, since it is not incumbent upon this court to calculate reasonable fees and expenses, only to determine if the circuit court abused its discretion when it determined what efforts were reasonable under the circumstances, and calculated the fees and expenses. *See Kamaka*, 117 Haw. at 122-23, 176 P.3d at 121-22 ("Thus, the question is whether the trial court's award of attorneys' fees and costs was reasonably supported by the record).

ARGUMENT

The circuit court's determinations this case was "difficult," involved "complicated" and "novel and complex issues," and required "extensive research" were supported with evidence in the record, and were not clearly erroneous. The court's view of what was reasonable in the circumstances presented in the case did not "exceed the bounds of reason." The circuit court managed the entire litigation, understood the complex issues presented, and witnessed firsthand the conduct and the efforts of the parties. The court was able to confirm its view by reviewing the "exhibits attached to the [*Star-Advertiser*]'s motion and supporting papers," which demonstrated the reasonableness of the efforts expended to secure victory, and the fees and expenses assessed. Dkt 29 at pdf 48.

Governor Abercrombie does not contest liability for fees and expenses under section 92F-15(d), and does not claim the hourly rate determined by the circuit court was erroneous (the court accepted the Governor's argument regarding rates). Nor does he argue that particular time entries were duplicative or excessive. Instead, he makes two arguments. First, he claims the circuit court did not have sufficient evidence to determine that the effort expended to prevail was reasonable under the circumstances of the case. *See* Op. Br. at 1 ("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."). This argument fails—even if the Governor preserved this

point of error—because the invoices sufficiently revealed the effort undertaken, and the UIPA does not condition recovery of fees and other expenses on waiver of the attorney-client and work product privileges. Second, Governor Abercrombie argues the *Star-Advertiser* took too much time to prevail. This too fails because it is supported only by a vague argument that the fees "should be reduced by at least half," and not by objections to specific time entries. Op. Br. at 13. Governor Abercrombie's attempts to re-imagine this case as simple and "straight-forward," without more, are insufficient to demonstrate that the circuit court's factual determinations are clearly erroneous, or that its conclusion the fees and expenses were reasonable in the circumstances was an abuse of discretion.

I. FEES AND EXPENSES ARE ESSENTIAL TO THE UIPA'S PURPOSE OF ENFORCING GOVERNMENT TRANSPARENCY.

While not directly at issue, the UIPA's policy of open and transparent government underlies and informs this appeal. The UIPA mandates "[a]ll government records are open to public inspection unless access is restricted or closed by law" and "each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(a), (b) (2012). As the Hawaii Supreme Court concluded, enforcement of the attorneys' fees and expenses requirement is essential to fulfilling the UIPA's purpose of open government:

> Further, HRS § 92F-15 provides for *de novo* review of the agency's determination, places the burden of proof squarely on the agency, contains liberal venue provisions, and requires the court to assess attorneys' fees and costs against the agency if the complainant prevails. It was obviously the intent of the legislature to remove barriers to judicial enforcement of the UIPA; to construe the term "denial" strictly would defeat that intent.

State of Hawaii Org. of Police Officers, 83 Haw. at 393, 927 P.2d at 401. This purpose must be kept in mind as this court evaluates Governor Abercrombie's claim the circuit court had no basis by which to conclude the assessment of fees and expenses was reasonable. For example, in *Kikuchi v. Brown*, 110 Haw. 204, 130 P.3d 1069 (Haw. App. 2006), this court held that the cost of photo enlargement, although not expressly included as a cost in the statute, could be assessed after an offer of judgment pursuant to Haw. R. Civ. P. 68, to uphold the purpose of the offer of judgment rule. The photo costs were "properly included in costs taxed as a penalty for failing to accept a reasonable offer, as measured by the jury's verdict. The circuit court did not abuse its discretion in awarding the cost of enlargements." *Id.* at 212, 130 P.3d at 1077 (citing *Canalez v.*

Bob's Appliance Serv. Ctr., Inc., 89 Haw. 292, 306, 972 P.2d 295, 309 (1999)). Similarly here, the UIPA's fee and expense requirement is a critical component of the legislature's design, to "remove barriers" to correcting a wrongful interference with open government.

II. HAVING DETERMINED THE CASE WAS "DIFFICULT" AND PRESENTED "COMPLICATED" ISSUES, THE CIRCUIT COURT BEST UNDERSTOOD WHAT EFFORTS WERE REASONABLE.

To determine what are reasonable efforts given the facts and circumstances a case presents, Hawaii courts employ the "lodestar" method which multiplies a reasonable hourly rate of the attorneys by the actual hours worked:

> In essence, the 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. The value of an attorney's time generally is reflected in his normal billing rate. But it may be necessary to use several different rates for the different attorneys and the reasonable rate of compensation may differ for different activities. And when the hourly rate reached through the foregoing analysis is applied to the *actual hours worked*, a reasonably objective basis for valuing an attorney's services is derived.

DFS Group L.P. v. Paiea Props., 110 Haw. 217, 222, 131 P.3d 500, 505 (2006) (emphasis added) (internal citation and quotation marks omitted). The lodestar of "actual hours worked" must be presumed reasonable unless Governor Abercrombie objected to specific time entries. *Cnty of Hawaii v. C & J Coupe Family Ltd. P'ship*, 120 Haw. 400, 407, 208 P.3d 713, 720 (2009) (absent specific objection, "attorneys' fees must be awarded at the rates claimed . . . and for the number of hours expended"). Further, Rule 1.5 of the Hawaii Rules of Professional Conduct sets forth factors relevant to determining the reasonableness of a fee including: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; . . . (3) the fee customarily charged in the locality for similar legal services; . . . (5) the time limitations imposed by the client or by the circumstances; . . . [and] (7) the experience, reputation, and ability of the lawyer or lawyers performing the services." Haw. R. Prof. Cond. 1.5.

A. It Was Governor Abercrombie's Burden to Object.

Governor Abercrombie's failure to introduce the evidence he now claims was absolutely essential to the circuit court's determination of reasonableness also dooms his argument that *Star-Advertiser* spent too much time to prevail. Because he did not offer to make the unredacted invoices part of the record, the Opening Brief simply makes arguments the *Star-Advertiser* spent

too much time, and the award should be reduced "by at least half." Op. Br. at 13. It lacks detailed claims that particular time entries are excessive or duplicative, and instead asks this court to impose *per se* rules. *See* Op. Br. at 15 ("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"). This is because in the circuit court, Governor Abercrombie did not make a serious effort to meet his burden of objecting to the application for fees and expenses, either by offering the unredacted invoices, or by submitting other evidence that cases such as this could have been won with less effort. "A party opposing a fee application must carry the burden of explaining what therein is unreasonable or, at least, what would be reasonable under the circumstances. Absent such evidence by the objectant, the opposition fails." *Hawaii Ventures, LLC v. Otaka, Inc.*, 114 Haw. 438, 491, 164 P.3d 696, 749 (2007) (quoting *In re Blackwood Assoc., L.P.*, 165 Bankr. 108, 112 (Bankr. E.D.N.Y. 1994)). The burden is on the opposing party to contest the reasonableness of the hourly rate requested or the reasonableness of the hours expended "by affidavit or brief with sufficient specificity to give fee applicants notice" of the objections. *Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990). Arguments in a brief are not "evidence" that satisfies this burden. *United Steelworkers of Am. v. Phelps Dodge Corp*., 896 F.2d 403, 407 (9th Cir. 1990) (affidavits are satisfactory evidence of the prevailing market rate); *Velez v. Wynne*, 220 F. App'x 512, 515 (9th Cir. 2007) ("In the absence of opposing evidence, the proposed rates are presumed reasonable."); *Coupe*, 120 Haw. at 407, 208 P.3d at 720. (party opposing has the burden of objecting). Governor Abercrombie had an obligation to do more than make arguments in his circuit court briefs—he needed to support his opposition with declarations or other evidence to at least point out which time entries he claimed were excessive or duplicative.

Instead, in the circuit court, the Governor relied only on his attorneys' *arguments* that the *Star-Advertiser* could have prevailed with half the effort, which, without support, were only their own best guesses or opinions about what effort it took to prevail in this case. Highlighting this shortcoming is the Opening Brief's failure to set forth an exact amount of what Governor Abercrombie claims would have been a reasonable assessment. Op. Br. at 7 (maximum reasonable fee "should have been approximately $30,000"). As the claims in the Governor's pleadings below lacked any attestation or other evidentiary support, the circuit court properly disregarded them and concluded the time and efforts expended to prevail were reasonable. *See* Haw. R. Evid. 901 (authentication requirement). Governor Abercrombie suggests it was the *Star-Advertiser*'s burden to offer this evidence. Op. Br. at 7 & n.10. Not so. After calculating

the lodestar, the burden is on the opposing party to contest the reasonableness of the hourly rate requested or the reasonableness of the hours expended "by affidavit or brief with sufficient specificity to give fee applicants notice" of the objections. *Rode*, 892 F.2d at 1183.

The circuit court rejected Governor Abercrombie's bare assertion the *Star-Advertiser* took too much time, expressly holding the efforts were not "duplicative or excessive." *See* Dkt 23 at pdf 8 ("COURT NOTED HE DID NOT SEE ANY DUPLICATIVE OR EXCESSIVE HOURS CHARGED"). In its written order, the circuit court further concluded the issues presented by the case were "novel and complex issues" which required "extensive research . . . . *as demonstrated by the exhibits attached to the Plaintiff's motion and supporting papers*." Dkt 29 at pdf 48 (emphasis added). These factual determinations—based on the court's own observations and confirmed by the invoices submitted by the *Star-Advertiser*—were not clearly erroneous. Whether Governor Abercrombie was required under the UIPA to disclose the JSC list was an issue of first impression, as acknowledged by Governor Abercrombie. Although the Hawaii Supreme Court in *Pray* had previously addressed whether JSC lists were confidential under the JSC Rules, whether it was a public record subject to disclosure under the UIPA had not been addressed or definitively resolved. The case also presented difficult subsidiary legal issues and resolution was of great public importance, all of which meant that preparation and resolution of this case required a thorough understanding of the facts and law (which necessitated extensive legal research). The *Star-Advertiser* also faced formidable opposition from the Attorney General's office, requiring detailed analysis and strategy development. The Governor's own words belie his claims in the Opening Brief that this was a simple case of statutory construction. *See* Op. Br. at 2-3 (describing Governor Abercrombie's arguments against disclosure).

In *Dominguez v. Price Okamoto Himeno & Lum*, No. 28140 2009 WL 1144359 (Haw. App. Apr. 29, 2009) (SDO) (attached as Appendix 2) this court affirmed the circuit court's award of attorneys' fees, holding it "was properly supported, and the record reflects that the fees and costs were not unreasonable." *Id.* at *6. The court held the fees were reasonable due to the "novel issues" presented, the magnitude of the case, and the complexity of the procedures:

> Furthermore, under the circumstances of this case the fees requested by POHL [the law firm] were reasonable. POHL was required to address novel issues relating to the proceedings in Japan, had to answer numerous motions and other filings, POHL's attorneys charged a rate that was lower than is customary for their services, and the damages prayed for by Dominguez were well over a million dollars.

Id. at *7 (citing *Booker v. Midpac Lumber Co.*, 65 Haw. 166, 170 n.2, 649 P.2d 376, 379 n.2 (1982) (listing factors used to evaluate the reasonableness of attorneys' fees, which include time and labor required, the novelty and difficulty of the questions involved, and the magnitude of the case)). The circuit court made these same findings in the case at bar, and Governor Abercrombie has not shown the court was clearly erroneous. The hourly rate the court determined was reasonable was below the customary and prevailing rate, and the invoices submitted to the court had already been discounted.

B. The Circuit Court Reviewed Evidence of Reasonable Effort.

In this appeal, Governor Abercrombie's main contention is that there was *no evidence* to support the circuit court's conclusions. But there plainly was evidence, the invoices submitted by the *Star-Advertiser*. The circuit court expressly noted that "the exhibits attached to the Plaintiff's motion and supporting papers" demonstrated the reasonableness of the fees and expenses, and that there was no duplication of effort, or excessive hours. Dkt 27 at pdf 48; Dkt 21 at pdf 8. This factual determination by the circuit court can only be deemed clearly erroneous if "despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been committed." *Chun*, 106 Haw. at 430, 106 P.3d at 353. Contrary to the Opening Brief's assertion that there was no evidence to support the circuit court's conclusion that the time and efforts expended to prevail were reasonable, the record contains ample evidence, the foremost being the record of the case itself. Having managed the litigation from its inception, the circuit court fully understood the magnitude of the constitutional, statutory and public policy issues presented. It read the briefs submitted by the parties. It heard arguments. It witnessed the conduct of counsel.

It is not the role of an appellate court to disturb the factual determinations made by the circuit court or to rehash the entire litigation to second-guess that court's observations about what efforts were reasonable in the circumstances. *See Kamaka*, 117 Haw. at 122-23, 176 P.3d at 121-22 ("the question is whether the trial court's award of attorneys' fees and costs was reasonably supported by the record"). It was Governor Abercrombie's burden to show that the "number of hours spent on any particular task is unreasonable," which he has not done. *Coupe*, 120 Haw. at 407 n.6, 208 P.3d at 720 n.6. Instead of detailing which specific tasks were unnecessary or duplicative and supporting those claims with references to the Record which would enable this court to review whether the circuit court abused its discretion, he makes the vague claim (an opinion, actually) that the case was "straight-forward," and the *Star-Advertiser*

consequently spent too much time to win. Because Governor Abercrombie failed to meet his burden to properly object, however, "the claimed number of hours must be presumed reasonable." *Id*. The *Star-Advertiser* supported its request with invoices and declarations of its counsel, and with declarations from other lawyers who also represented the public in UIPA cases. The circuit court did not abuse its discretion when it concluded this evidence was sufficient for it to conclude the requested fees and expenses were reasonable. As the Supreme Court concluded:

> Neither *Sharp* nor any other case sets a bright line standard for adequacy of documentation in the trial court's determination of attorneys' fees. Rather, as previously stated, a trial court's award of attorneys' fees is reviewed for an abuse of discretion which occurs when the trial court clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant. Thus, the question is whether the trial court's award of attorneys' fees and costs was reasonably supported by the record. Here, Goodsill's motion and memorandum in support, along with its "Table of Costs" and eighteen exhibits, consumes over 400 pages and documents or attests to over $ 800,000 in attorneys' fees. Exhibit "G" to Goodsill's motion consists of over 140 pages of detailed billing statements from the Miller law firm, amounting to $ 406,059.38. In addition, Goodsill's memorandum in support of its motion and the declaration of Emily Reber Porter, an associate at the Goodsill firm, attached to the motion indicates that, "[w]hen the fees of Goodsill's other lead counsel, David J. Dezzani, and additional counsel are included, the total amount of fees exceed [$ 800,000.00]." Based on the record before the trial court, we cannot say that its award of fees was made without adequate documentation. Accordingly, we believe Kamaka's assertion to the contrary is without merit.

Kamaka, 117 Haw. at 122-23, 176 P.3d at 121-22 (citing *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Haw. 309, 315, 47 P.3d 1222, 1228 (2002)). Governor Abercrombie offers nothing to demonstrate the circuit court lacked necessary documentation of reasonable effort.

Having lost this case, the Governor is perhaps not in the best position to judge what time and expertise was required to win, and his opinion, without more, is insufficient. This court need look no further than the record itself for examples of how Governor Abercrombie increased costs. Yet, Governor Abercrombie attacks the *Star-Advertiser*'s efforts as "excessive, unproductive, or unnecessarily spent." Op. Br. at 1. The Supreme Court does not take such a subjective view of what is necessary, but instead reviews it pragmatically, and has rejected such second-guessing and speculation about what efforts are reasonable. *See Fought & Co. v. Steel Engineering and Erection, Inc*., 87 Haw. 37, 54, 951 P.2d 487, 504 (1998) ("The DOT's argument that Steel and Kiewit's expenses were 'unnecessary' is unpersuasive, inasmuch as it is

based upon the naive assertion that Steel and Kiewit should have paid Fought following the entry of judgment ... [i]t is unreasonable to expect a business to place itself in such a vulnerable and avoidable position. Steel's and Kiewit's litigation strategy was necessary to maintain their financial integrity."). Governor Abercrombie's arguments throughout the circuit court case were zealously pursued. To now argue that it was unreasonable to respond, and to ask this court to second-guess the circuit court's conclusion that the efforts undertaken were not necessary to achieve the result, bespeaks a misguided perception of what it took to prevail. He invited this lawsuit. He knew he would be assessed fees and expenses as a matter of law. Governor Abercrombie understood this when he withheld the requested records and told the public he would not divulge it unless sued.

This case did not involve only a matter of statutory interpretation. Rather, the litigation involved a very high-profile public dispute that involved the termination of the OIP Director, a stunning rule change by the JSC, and the interplay between the Hawaii Constitution, the UIPA, the JSC Rules, and the Supreme Court's decision in *Pray*. While impact of the litigation is not dispositive of the reasonableness of the award, the circuit court's ruling shattered Governor Abercrombie's veil of secrecy, and ended it conclusively: shortly after the circuit court issued its decision ordering the Governor to cease keeping the JSC list secret, the JSC amended its Rules to allow it to release the lists once transmitted to the Governor, rendering any appeal by the Governor pointless. Even after that occurred, however, the Governor refused to disclaim an appeal.

From day one, this case had to be prepared with utter precision as if it were going to be ultimately resolved by the appellate courts. Although no discovery turned out to be necessary, that fact was far from obvious from the outset. Moreover, the questions of law presented required the *Star-Advertiser*'s counsel to thoroughly understand the issues potentially involved including sovereign immunity, liability of Governor Abercrombie as an "agency" under the UIPA, the legislative history of statute, court opinions interpreting the UIPA, the 1978 Constitutional Convention, conflicts between the UIPA and opinions by the Attorney General and Office of Information Practices, and analysis of over 160 pages of exhibits filed by Governor Abercrombie in support of his motion for summary judgment. Governor Abercrombie's tactics also increased costs: in his final memorandum in support of his motion for summary judgment, he attempted to raise a new claim, one he had not raised previously.

The Opening Brief instead mischaracterizes this case as simple. But what is reasonable is determined by this court not by what appears in a rear-view mirror when trying to avoid an assessment of fees and expenses, but rather by the evaluating whether the circuit court was clearly erroneous and abused its discretion when it evaluated the circumstances presented to it. The Opening Brief's arguments simply ignore this case's complexity, the fact that it was litigated on the public stage, and that it was a case of first impression that had to be approached as if it were headed to the Hawaii Supreme Court. Most importantly, for purposes of this court's resolution of the appeal, Governor Abercrombie has not shown that the circuit court was clearly erroneous when it concluded the case was complex, and has not shown that the court abused its discretion when it concluded this complexity merited the attention and effort the *Star-Advertiser* paid to it.

C. The Cases on Which Governor Abercrombie Relies Do Not Apply the Appellate Standard of Review.

Rather than deal with the applicable abuse of discretion standard of appellate review, Governor Abercrombie in effect argues for *de novo* review by arguing that fee orders by federal magistrate judges "should still be highly persuasive here." Op. Br. at 14 n.15. *See Horizon Lines, LLC v. Kamuela Dairy, Inc*., No. 08-00039 JMS/LEK, 2008 WL 4483799 (D. Haw. Sep. 29, 2008); *Kotoshirodo v. Cart, Inc.*, No. CV 05-00035 DAE LEK, 2006 WL 2682676 (D. Haw. Sep. 18, 2006); *Tirona v. State Farm Mut. Auto. Ins. Co*., 821 F. Supp. 632 (D. Haw. 1993). In contrast to the case at bar, these orders involved first instance determinations of fees, not appeals from a trial court's assessment. These courts were not exercising appellate jurisdiction and did not apply an appellate standard of review, so these orders are of no use to evaluate whether the circuit court in this case "clearly exceeded the bounds of reason" or "base[d] its ruling on . . . a clearly erroneous view of the evidence." *Kamaka*, 117 Haw. at 122-23, 176 P.3d at 121-22 (appellate court applies abuse of discretion standard to review circuit court award of fees and costs); *Right to Know*, 117 Haw. at 8, 175 P.3d at 118 (same). The plenary assessments undertaken by the cases cited in the Opening Brief are profoundly different inquiries than the limited appellate standards of review this court applies to the circuit court's assessment in this appeal.

The same holds for two Hawaii appellate cases relied upon by the Opening Brief cited as authority. *See DFS*, 110 Haw. at 218, 131 P.3d at 501 (appellee "requests that this court award attorneys' fees . . . as reasonably and necessarily incurred on appeal") (footnote omitted);

Fought, 87 Haw. at 41, 951 P.2d at 491 (appellee prevailed on appeal and sought fees and costs from the Supreme Court). Both of these cases involve the Supreme Court determining the reasonable fees to be awarded for efforts *on appeal*. Thus, the Supreme Court in those cases made its own essentially *de novo* factual conclusions and was not exercising appellate review to determine whether a circuit court abused its discretion or was clearly erroneous. *See DFS Group*, 110 Haw. at 221, 131 P.3d at 504 (detailing the evidence submitted to the Supreme Court by the party prevailing on appeal); *Fought*, 87 Haw. at 52, 951 P.2d at 502 ("appellate courts have jurisdiction to make factual determinations in the limited context of taxing attorneys' fees and costs incurred *on appeal*") (emphasis in original).

Ignoring the appellate standard of review, Governor Abercrombie asks this court to calculate the lodestar. Op. Br. at 13-14 ("this Court should be able to conclude from the pleading on the merits included in the record on appeal, that no more than half of the hours reported, need to be spent preparing the complaint and summary judgment"). This misapprehends the nature of this court's review, and the appeal can be rejected on that basis alone since it is not incumbent upon an appellate court to "make factual determinations" and calculate reasonable fees and expenses, only to determine if the circuit court abused its discretion when it did so. *Cf. Fought*, 87 Haw. at 52, 951 P.2d at 502

III. THE UIPA DOES NOT MANDATE WAIVER OF PRIVILEGES, OR REQUIRE BARE-BONES STAFFING OR A PARSING OF CLAIMS.

In the absence of his showing the circuit court clearly erred and abused its discretion, Governor Abercrombie asks this court to adopt three new *per se* rules, none of which is supported.

A. The UIPA Does Not Require Waiver of Attorney-Client or Work Product Privileges.

First, Governor Abercrombie's argument that the circuit court could not make a determination of reasonableness in the absence of unredacted invoices is based on the Governor's unspoken theory that a prevailing party seeking to recover fees and expenses in a UIPA case must waive the attorney-client and work product privileges. The Opening Brief has not pointed to anything in the UIPA or its legislative history to suggest the statute requires a prevailing party to waive privileges as a condition of recovering fees and expenses under section 92F-15. To the contrary, such a cramped reading of the UIPA would be contrary to the Supreme

Court's acknowledgement that the requirement to assess attorneys' fees and expenses is essential to upholding the purposes of transparent government and public access to agency records. *State of Hawaii Org. of Police Officers*, 83 Haw. at 393, 927 P.2d at 401.

Redaction of attorney invoices to remove attorney-client communications, and the attorney's strategies and mental impressions to protect these privileges are common in fee requests. *See, e.g., Coupe*, 120 Haw. at 407, 208 P.3d at 720 (undersigned counsel represented Coupe and successfully obtained fees and costs in the Supreme Court supported with redacted invoices); *see also Tampa Bay Water v. HDR Engineering, Inc.*, No. 8:08-CV-2446-T-27TBM, 2012 WL 5387830, at *7 (M.D. Fla. Nov. 2, 2012) (party seeking fees "satisfied its burden of 'supplying the court with detailed evidence from which the court can determine a reasonable fee,'" when it submitted both redacted and unredacted invoices) (quoting *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1311 (11th Cir. 2001)); *Southern U.S. Trade Ass'n v. Unidentified Parties*, No. 10-1669, 2012 WL 1918598 (E.D. La. May 25, 2012) (redacted invoice submitted in support of fee request). In *Tampa Bay*, the court rejected the claim that invoices redacted to preserve the attorney-client and work product privileges were insufficient:

> To the extent Tampa Bay Water complains that the redacted billing invoices "prejudices [Tampa Bay Water] in its ability to meaningfully respond to the fee claim," that complaint is hollow at best, since Tampa Bay Water never sought access to the unredacted invoices.

Tampa Bay, 2012 WL 5387830, at *7. Redacted invoices in support of a fee and expense request are entirely appropriate. *See, e.g., Dominguez*, 2009 WL 1144359, at *7 ("Dominguez's argument that the costs and fees were not properly supported by invoices is without merit. The record shows that [the law firm] submitted both redacted and unredacted invoices which provide detailed billing times, amounts, the name of the attorney who was billing the time, his or her rate, and the work for which they were billing."). In the interest of removing any roadblock to resolving the issue, the *Star-Advertiser* provided to Governor Abercrombie all of its unredacted time entries. He therefore knew exactly what efforts the *Star-Advertiser* undertook to win. Yet he did not, as noted earlier in this brief, offer to introduce them into the record to support his claim that they were absolutely essential to a finding of reasonableness. The *Star-Advertiser* had no obligation to affirmatively waive its attorney-client or work product privileges and offer the unredacted invoices itself (although it did offer to do so, an offer the court declined). It was Governor Abercrombie's burden to object to redacted invoices if he believed them insufficient to

support the circuit court's conclusion that the "number of hours spent on any particular task is [reasonable.]" *Coupe*, 120 Haw. at 407 n.6, 208 P.3d at 720 n.6. In the absence of an offer of proof and objection, it was not an abuse of discretion for the circuit court to assess fees "for the number of hours expended." *Id*. at 407, 208 P.3d at 720. As this court noted in *Dominguez*:

> Finally, Dominguez asserts that POHL [the law firm] had excess fees and costs, yet fails to show where in the record these complained of expenses were, nor does Dominguez provide any citation to the part of the record where POHL's alleged "excessive preparation time of paralegal, duplicative efforts by the attorney and paralegal, and performance of clerical functions" can be found. Thus, these arguments are deemed waived. HRAP Rule 28(b)(7).
>
> Accordingly, the circuit court did not abuse its discretion in awarding POHL attorneys' fees, GET, and costs on the FAC, subject to any reduction on remand for expenses associated with the prosecution of the breach of contract counterclaim.

Dominguez, 2009 WL 1144359, at *7; *see also In re Kekauoha-Alisa*, Nos. 05-01215, 06-90041, 268, 2008 Bankr. LEXIS 2788, at *1 (Bankr. D. Haw. Sep. 9, 2008) (rejecting claim that billing records do not adequately describe work done).

Similarly, Governor Abercrombie has not supported his bare claims that more than one-half of the time expended by the *Star-Advertiser* was duplicative or excessive. It was his burden to produce evidence of what was unreasonable. *See Hawaii Ventures*, 114 Haw. at 491, 164 P.3d at 749 ("A party opposing a fee application must carry the burden of explaining what therein is unreasonable or, at least, what would be reasonable under the circumstances. Absent such evidence by the objectant, the opposition fails."). Thus, if Governor Abercrombie believed the circuit court was unable to determine the reasonableness of the fees and expenses in the absence of unredacted invoices or that too much time was spent on a particular task, it was his burden to make these arguments and to offer support, particularly since he possessed all of the unredacted invoices. A claim in a brief or legal memorandum is not "evidence." *United Steelworkers*, 896 F.2d at, 407 (affidavits are satisfactory evidence of the prevailing market rate).

B. There Is No *Per Se* Requirement for Bare-Bones Staffing.

Second, it is not unreasonable "as a matter of law," as the Opening Brief argues, for multiple attorneys to represent a client. Op. Br. at 15. *See Williamsburg Fair Hous. Comm. v. Ross-Rodney Hous. Corp*., 599 F. Supp. 509, 518 (S.D.N.Y. 1984) ("Multiple attorneys may be essential for planning strategy, eliciting testimony or evaluating facts or law."). Governor Abercrombie urges this court to adopt a rule that only one lawyer can be assigned to any one

task, and that any more is "excessive." This claim rings hollow, however, because Governor Abercrombie was represented by several lawyers. *Cf. id.* at 518 ("Although the defendants object to the plaintiffs' use of multiple attorneys, the defendants themselves were represented by more than one attorney at various times."). Far from "excessive," this is prudent and accepted practice. *Id*. ("The use of multiple attorneys, however, is not unreasonable per se. Indeed, division of responsibility may make it necessary for more than one attorney to attend activities such as depositions and hearings.") (citing *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1146 (2d Cir. 1983); *Seigal v. Merrick*, 619 F.2d 160, 164 (2d Cir. 1980); *Craik v. Minnesota State Univ. Bd.*, 738 F.2d 348, 350 (8th Cir. 1984) (per curiam)).

A local bankruptcy court rejected the argument that it is unreasonable for multiple attorneys to work on a case, and its rationale is instructive. In *In re Kekauoha-Alisa*, 2008 Bankr. LEXIS 2788, at *1, the court awarded fees for two attorneys to attend a depositions and conferences "and to conduct interoffice discussions." The court held:

> It was entirely appropriate for two attorneys to work on the representation of the plaintiff. (At least three attorneys handled the matter for the defendants.) Whenever two or more attorneys work on a particular matter, some interoffice conferences are necessary to coordinate their work. Interoffice conferences can be highly productive and beneficial because they allow attorneys to share ideas, plan effectively, and reach sensible decisions about tactics and strategy. Similarly, it is often efficient and beneficial to have two attorneys attend depositions or hearings because, as the old saying goes, two heads are better than one. Having observed the work of these attorneys, I find that they work as an effective team and that they employ their complementary skills and talents to the client's advantage.

Id. at *2-3. As that court correctly recognized, part and parcel of representing a client is the sharing of ideas among lawyers, discussion of issues, and development of arguments. Governor Abercrombie has failed to show the circuit court abused its discretion when it similarly rejected his argument the *Star-Advertiser*'s efforts were duplicative or excessive simply because they involved more than a single lawyer. Careful development of the issues by more than one lawyer benefits the court, which is presented with arguments that are supported in law and fact, are detailed, and are well thought out, thus making consideration and resolution of the case less work for the court. Governor Abercrombie has pointed out nothing from the factual record demonstrating the court "exceeded the bounds of reason" when it concluded the *Star-Advertiser*'s efforts were reasonable under the circumstances.

C. The Agency Is Assessed Fees and Expenses for All Efforts by a Prevailing Plaintiff in a UIPA Case.

Third, the Opening Brief advances a restricted reading of section 92F-15 that is not supported by the UIPA, and was rejected in an analogous circumstance by this court. Governor Abercrombie argues he can be assessed only for the narrow claim on which the *Star-Advertiser* ultimately prevailed. *See* Op. Br. at 18 ("Fees For Work Not Actually Used in the Case Are Unreasonable"). In *Right to Know*, the circuit court treated each claim made by the plaintiff separately, and awarded fees under the Sunshine Law (chapter 92) only for those issues that the plaintiff actually litigated, and rejected recovery for efforts on issues that were determined to be moot. *Right to Know*, 117 Haw. at 6, 175 P.3d at 116. This court rejected that approach, concluding that if a plaintiff prevails, it is entitled to recovery for all fees incurred in the case, whether it eventually prevailed on all theories, as long as the plaintiff's claim "involve a common core of fact or are based on related legal theories and much of counsel's time is devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* at 15, 175 P.3d at 125 (quoting *Hensley v. Eckerhart*, 461 U.S. 242, 435 (1983)). This court reversed the circuit court's fee reduction and awarded the full amount requested. *Id*. at 15, 175 P.3d at 125.

The Hawaii Supreme Court has endorsed the same approach when analyzing attorneys' fees and costs generally. *See Schefke v. Reliable Collection Agency, Ltd*., 96 Haw. 408, 32 P.3d 52 (2001) (adopting *Hensley*'s "common core" test). Additionally, in *Coupe*, the court rejected an argument similar to the Governor's, holding that under the fee-shifting provision in the eminent domain statute, the prevailing party was entitled to its attorneys' fees and costs expended for all of its efforts—even those it ultimately lost—provided it eventually prevailed in the case. Here, there is no question the *Star-Advertiser*'s claim arose from a "common core of facts," and sought relief under the UIPA, even though it raised several claims for relief in the Complaint.

D. It Is Reasonable to Estimate the Effort Necessary to Resolve a Fee Request.

Governor Abercrombie also asserts the circuit court could not have concluded the fees and expenses incurred to litigate the *Star-Advertiser*'s application for section fees and expenses were reasonable, because they were based on an estimate provided by counsel and not actual invoices. Estimating the fees and expenses it may take to resolve a motion for fees and expenses

is, contrary to Governor Abercrombie's suggestion, quite common. Indeed, the rules of court expressly contemplate estimation:

> [T]he motion [for attorneys' fees] must . . . state the amount or provide a fair estimate of the amount sought.

Haw. R. Civ. P. 54(d)(2)(B). This makes sense because invoices are not always available within the short time period required by this rule to seek fees and expenses (14 days), and in the case of fees incurred for a motion seeking fees, have not even been fully incurred at the time of the initial request. At the time the *Star-Advertiser* submitted its application, it obviously did not know the full extent of the time that, in the end, would be necessary to litigate the issue fully. Indeed, this process ended up taking over six months, and required supplemental briefing; the *Star-Advertiser* had at the outset no choice but to estimate the future fees and expenses it would incur. Governor Abercrombie has not shown that the circuit court abused its discretion when it followed the rules and awarded fees and costs based on counsel's estimate.

E. The Circuit Court Did Not Abuse Its Discretion in Assessing Expenses.

Governor Abercrombie's only objection to the circuit court's assessment of "all other expenses reasonably incurred in the litigation," is that $546.60 in photocopying expenses were not "documented," because "no specifics have been provided." Op. Br. at 20. Citing *Kikuchi* as authority, the Opening Brief implies that in-house copying expenses are not recoverable because there must be some special proof they were "actually disbursed." Governor Abercrombie argues "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." Op. Br. at 19. He also asserts that "because the circuit court did not provide this court with the specifics with which to review its award," the award must be "rejected." Op. Br. at 21 (citing *Globalmart v. Posec Hawaii, Inc*., No. 28249, 2012 WL 1650697 (Haw. App. May 10, 2012) (attached as Appendix 3). Neither of these arguments states the law accurately.

First, in *Kikuchi*, this court held only that items such as messenger fees, telephone charges, and "minimal" copying are treated as attorney overhead unless paid to a third party. *Kikuchi*, 110 Haw. at 211-12, 130 P.3d at 1076-77. Generally, however, copying that is not included in attorney overhead—whether in-house or outsourced—is properly charged as a cost, assessment of which will not be disturbed on appeal in the absence of a showing the circuit court abused its discretion. Consequently in *Kikuchi*, the court affirmed the award for copying

expenses. *Id*. at 211, 130 P.3d at 1076 ("Given the information provided to the court by the [applicants] in their motion, there was no abuse in awarding the duplication costs prayed for here.").

Second, neither *Kikuchi*, *Globalmart*, nor any other case required the circuit court to make specific findings about whether expenses were "disbursed." In *Kikuchi*, this court rejected that argument, holding "there is no requirement—although it would greatly aid in the appellate review of the decision—that the circuit court explicitly make findings regarding the propriety of its award of costs." *Id.* In *Globalmart*, this court made clear that the circuit court should provide "an explanation for how it reached its decision" if there is an issue regarding the legal basis for assessing costs. In that case, the basis for the cost award was the assumpsit statute but the dispute also included non-assumpsit claims. In that circumstance, the circuit court should have explained "the grounds for its award of attorneys' fees and costs" and whether it apportioned the assessment between the assumpsit claim and the others. *Globalmart*, 2012 WL 1650697, at *10 (citing *Price v. AIG Hawaii, Ins. Co.*, 107. Haw. 106, 113, 111 P.3d 1, 8 (2005) ("the issue of apportionment between assumpsit and non-assumpsit claims was clearly before the circuit court")). By contrast, in the present case there is no question that all the claims asserted by the *Star-Advertiser* were under the UIPA, which makes fee and expense assessment mandatory. Because there was nothing to apportion, the circuit court did not abuse its discretion when it assessed Governor Abercrombie all photocopying expenses.

Moreover, Governor Abercrombie fails to explain what type of "documentation" he claims is required. He simply ignores the fact that the *Star-Advertiser*'s application included a declaration attesting to the authenticity of invoices which detailed the costs incurred, including photocopying. *See* Dkt 29 at pdf 101. This is accepted practice. *See*, *e.g.*, *Wong v. Takeuchi*, 88 Haw. 46, 52 n.5, 961 P.2d 611, 617 n.5 (1998) (application provided a "summary," which included "itemized breakdown of the particular items requested" and an authenticating affidavit). In the present case, the *Star-Advertiser* submitted a declaration that the copying costs were incurred. This is sufficient, and the circuit court did not abuse its discretion when it assessed these copying costs as "other expenses" under section 92F-15(d).

CONCLUSION

The circuit court's amended order assessing Governor Abercrombie reasonable attorneys' fees and other expenses (Dkt 29 at pdf 47-49), and its Second Amended Final Judgment (Dkt 29 at pdf 64-66) should be affirmed.

DATED: Honolulu, Hawaii, April 29, 2013.

Respectfully submitted,

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NO. CAAP-13-0000127

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

OAHU PUBLICATIONS, INC., *dba* Honolulu *Star-Advertiser*,	)	CIVIL NO. 11-1-1871-08 KKS
	)	APPEAL FROM THE SECOND
Plaintiff-Appellee,	)	AMENDED FINAL JUDGMENT IN
	)	FAVOR OF PLAINTIFF OAHU
vs.	)	PUBLICATIONS, INC., *dba* HONOLULU
	)	STAR-ADVERTISER ON ALL COUNTS
NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawaii,	)	OF THE COMPLAINT, filed February 8, 2013
	)	
Defendants-Appellants.	)	Circuit Court of the First Circuit
	)	Hon. Karl K. Sakamoto

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing Answering Brief for the Appellee; Appendices 1-3; Certificate of Service; and Notice of Electronic Filing, was duly served on the following party at their last known address, in the manner described below:

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