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1ST CIRCUIT COURT
STATE OF HAWAII
FILED

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N. ANAYA

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OAHU PUBLICATIONS, INC.,
dba Honolulu *Star-Advertiser*

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

OAHU PUBLICATIONS, INC., *dba*) CIVIL NO. 11-1-1871-08 KKS
Honolulu *Star-Advertiser*,) (Other Civil Action)
)
Plaintiff,) **COMPLAINT; EXHIBITS "A" – "N";**
) **SUMMONS**
vs.)
)
NEIL ABERCROMBIE, in his official)
capacity as Governor of the State of Hawai'i,)
and DOE GOVERNMENTAL AGENCIES)
1-10,)
)
Defendants.)
)

COMPLAINT

The Plaintiff Oahu Publications, Inc., *dba* Honolulu *Star-Advertiser* (*Star-Advertiser* or Plaintiff), for its claims for relief against the Defendant Neil Abercrombie, in his official capacity as Governor of the State of Hawai'i (Governor Abercrombie or Defendant), and the Defendants Doe Governmental Agencies 1-10, alleges as follows:

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


Clerk, Circuit Court, First Circuit

INTRODUCTORY STATEMENT

1. The people of the State of Hawai`i, acting through their legislature, declared “it is the policy of this State that the formation and conduct of public policy — the discussions, deliberations, decisions, and actions of government agencies — shall be conducted as openly as possible” and presumed that all government records are public unless the government has a compelling reason to withhold them.

2. The *Star-Advertiser* brings this action to compel Governor Abercrombie to honor Hawai`i’s strong public policy of open, transparent, and accountable government, and publicly disclose the list of the nominees presented to him in January 2011 by the Judicial Selection Commission (JSC) from which he appointed Associate Justice Sabrina McKenna.

3. Governor Abercrombie adamantly refused to make the list public, even after the Senate consented to Justice McKenna’s appointment, notwithstanding the State of Hawai`i Office of Information Practices’ (OIP) opinion that after Senate consent, the list must be disclosed because any justification for withholding “would end once a nominee is confirmed by the Senate.”

4. The Governor rejected the *Star-Advertiser*’s multiple requests for its release; replaced the Director of the OIP; and stated he would not comply with his duty to disclose until a court ordered him to do so. After the new OIP Director washed the OIP’s hands of responsibility and stated 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 this action to “[p]romote the public’s interest in disclosure,” “[p]rovide for accurate, relevant, timely, and complete government records,” and to “[e]nhance governmental accountability through a general policy of access to government records.”

JURISDICTION AND VENUE

5. This is an action pursuant to the Uniform Information Practices Act (UIPA) to compel disclosure of the list of the nominees to fill the Associate Justice vacancy presented to Governor Abercrombie in January 2011 by the JSC, and for a declaratory judgment that at the latest after the Senate has consented to an appointment, the Governor must disclose the list of nominees. The court has jurisdiction over this action pursuant to Haw. Rev. Stat. §§ 92F-15, 603-21.5(3), and 632-1.

6. Venue is proper in this court pursuant to Haw. Rev. Stat. §§ 92F-15(e) and 603-36 on any of the following bases: the *Star-Advertiser* made the request for the record in this judicial circuit; upon information and belief the requested record is maintained in this judicial circuit; the office of the Governor is headquartered in this judicial circuit; the claim for relief arose in this judicial circuit; and the Governor is domiciled in this judicial circuit.

PARTIES

7. The Plaintiff *Star-Advertiser* is a daily newspaper of general circulation published in Honolulu, Hawai`i, and on the Internet at www.staradvertiser.com. The *Star-Advertiser* is a “Person” as defined by Haw. Rev. Stat. § 92F-3; is a “person aggrieved by a denial of access to a governmental record” as defined by Haw. Rev. Stat. § 92F-15(a); and has standing to institute this action.

8. The Defendant is an “Agency” as defined by Haw. Rev. Stat. § 92F-3, in that he is any or all of the following: a “unit of government in this State;” a “department;” an “institution;” an “office;” a “governing authority;” or “other instrumentality of state government.”

9. The Defendants Doe Governmental Agencies 1-10 are persons, entities, or units of government of the State of Hawai`i, and are each an “Agency” as defined in Haw. Rev. Stat. § 92F-3. They are or may be liable for the claims for relief set forth in this Complaint, and are

named herein under fictitious names for the reason that their true identities and capacities are presently unknown to the Plaintiff, despite a diligent and good faith effort to ascertain the names and identities of these Defendants. The Plaintiff will amend the complaint as soon as they are ascertained.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

10. Former Governor Benjamin Cayetano disclosed the lists of names of nominees to fill court vacancies presented to him by the JSC, after he made his appointments from such lists and before the Senate considered whether to provide its consent to appointments. Former Governor Linda Lingle disclosed the lists after they were presented to her by the JSC and before she announced her appointments.

11. On January 20, 2011, the *Star-Advertiser*, through its reporter Ken Kobayashi (Kobayashi), requested Governor Abercrombie disclose the list presented to him by the JSC of the nominees to fill the vacancy in the office of Associate Justice of the Supreme Court of Hawai`i created by Governor Lingle's appointment of Mark Recktenwald as Chief Justice. Exhibit "A" hereto is a true and correct copy of such email from Kobayashi to the Governor's Press Secretary Donalyn Dela Cruz (Dela Cruz).

12. On the same day, January 20, 2011, Governor Abercrombie, through Dela Cruz, refused the *Star-Advertiser*'s request for disclosure of the list in an email that stated: "Hi Ken. The Governor will not be releasing the list. Will get you his choice when it is ready." Exhibit "B" hereto is a true and correct copy of such email from Dela Cruz to Kobayashi

13. Also on January 20, 2011, the *Star-Advertiser* inquired why Governor Abercrombie would not release the list. Exhibit "C" hereto is a true and accurate copy of such inquiry.

14. The following day, on January 21, 2011, Governor Abercrombie, through Dela Cruz, again refused the *Star-Advertiser*'s request in an email that stated: "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." Exhibit "D" hereto is a true and correct copy of such email from Dela Cruz to Kobayashi.

15. On January 25, 2011, Governor Abercrombie appointed Judge Sabrina McKenna to fill the vacancy in the office of Associate Justice of the Supreme Court of Hawai'i.

16. On January 27, 2011, the *Star-Advertiser*, through Kobayashi, asked the OIP whether Governor Abercrombie must release the names of judicial candidates received from the JSC after the appointment of a nominee. Exhibit "E" hereto is a true and correct copy of such email from Kobayashi to the OIP.

17. In a letter dated February 3, 2011, the OIP, though its then-Acting OIP Director Cathy L. Takase (Takase), responded to the *Star-Advertiser* as follows:

This letter responds to your inquiry as to whether the appointing authority must release the names of judicial candidates received from the Judicial Selection Commission (JSC) after appointment of a nominee. As you are aware, the Office of Information Practices (OIP) issued OIP Opinion Letter Number 03-03, which addressed the issue of whether the Office of the Governor and the Chief Justice were required to make the JSC list of nominees public after receipt from the JSC. OIP there concluded, based upon the reasoning that is fully set forth in the opinion, that the list of nominees may be withheld until the Senate confirms appointment of the nominee selected by the appointing authority. More specifically, OIP found that the list could be withheld under the frustration exception set forth in HRS § 92F-13(3), because of the potential for injection of undue influence in or politicizing of a selection process carefully established by the Constitution.

This opinion is thus applicable to the question you have raised. The frustration upon which that opinion is based would end once a nominee is confirmed by the Senate. Until that point, the same basis for frustration would exist because, if the Senate chose not to confirm a nominee appointed by the Governor, another nominee would then be selected from the list.

Please feel free to contact this office if you have any questions regarding this letter or require further assistance.

Exhibit "F" hereto is a true and correct copy of such letter from Acting Director Takase to Kobayashi.

18. The Governor received a copy of Takase's February 3, 2011 letter (Exhibit "F") to the *Star-Advertiser*.

19. On February 16, 2011, the Hawai'i Senate consented to Governor Abercrombie's appointment of Judge Sabrina McKenna to fill the vacancy in the office of Associate Justice of the Supreme Court of Hawai'i.

20. Also on February 16, 2011, the *Star-Advertiser*, through Kobayashi, submitted to Governor Abercrombie a "REQUEST TO ACCESS A GOVERNMENT RECORD," which stated:

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

The *Star-Advertiser* sought to inspect and copy the government record. Exhibit "G" hereto is a true and correct copy of such "REQUEST TO ACCESS A GOVERNMENT RECORD."

21. Further on February 16, 2011, the *Star-Advertiser*, through Kobayashi, wrote to Takase, as follows: "In view of your letter to me dated Feb. 3, 2011 (attachment 1) and the state Senate earlier today confirming Sabrina McKenna to the Hawai'i Supreme Court, I have sent another OIP request to the governor's office (attachment 2) asking for the names of the others on the list that was submitted by the Judicial Selection Commission for the supreme court vacancy filled by McKenna. We are asking for your assistance in obtaining access to the names on the list." Exhibit "H" hereto is a true and correct copy of Kobayashi's communication to Takase.

22. On March 3, 2011, Governor Abercrombie, through Dela Cruz, sent a “NOTICE TO REQUESTER” to the *Star-Advertiser* through Kobayashi, in which the Governor informed the *Star-Advertiser* that its request for a government record “is denied in its entirety.” Exhibit “I” hereto is a true and correct copy of such “NOTICE TO REQUESTER.”

23. The “RECORDS OR INFORMATION WITHHELD” section of such Notice listed “List of nominees.”

24. The “APPLICABLE STATUTES” section of such Notice listed “HRS § 92F-13(3).”

25. The “AGENCY JUSTIFICATION” section of such Notice stated:

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

26. Shortly thereafter, on or about March 4, 2011, Governor Abercrombie dismissed OIP Acting Director Takase.

27. On March 7, 2011, the *Star-Advertiser*, through Kobayashi, initiated Appeal 11-20 to the OIP by submitting a “REQUEST FOR ASSISTANCE TO THE OFFICE OF INFORMATION PRACTICES.” Exhibit “J” hereto is a true and correct copy of such “REQUEST.”

28. Upon information and belief, on March 31, 2011, the OIP invited Governor Abercrombie to provide additional justification, if any, and information for his position that the Governor may, in his sole discretion, not disclose the names of judicial nominees included on the lists presented to him by the JSC.

29. On March 31, 2011, Governor Abercrombie appointed Cheryl Kakazu Park (Park) as Director of the OIP to replace Takase.

30. On May 3, 2011, Deputy Attorney General Charleen M. Aina (Aina) responded to OIP's March 31, 2011 invitation by letter to the newly-appointed OIP Director Park, in which Aina wrote:

Governor Abercrombie has asked us to respond on his behalf to the Office of Information Practices' (OIP) March 31, 2011 invitations to provide additional justification, if any, and information for his position that the Hawaii Supreme Court's opinion in Pray v. Judicial Selection Commission of the State of Hawaii, 75 Haw. 333, 861 P.2d 723 (1993), and Haw. Rev. Stat. § 92F-13 permit him, at his sole discretion, not to disclose the names of judicial nominees included on the lists presented to him by the Judicial Selection Commission ("JSC") pursuant to article VI, section 3 of the State Constitution.

....

The Governor has not disclosed the names of the nominees who were included on the list he received from the JSC to fill the Associate Justice of the Hawaii Supreme Court seat to which he appointed Judge Sabrina McKenna on January 25, 2011, for the following reasons:

1. As already asserted, disclosure would frustrate the judicial nomination and appointment process set out article VI, Section 3 and 4 of the State Constitution.;

2. Additionally, OIP Op. Ltr. No. 03-03¹ had no factual or legal basis for its conclusion that attorneys will not be deterred from applying for judicial offices if the JSC's lists of nominees were disclosed;

3. And, Haw. Rev. Stat. § 92F-13(4) permits the Governor to withhold disclosure of the names of nominees on the JSC's lists.

....

1 In her February 3, 2011 letter to Mr. Kobayashi, the Governor understands OIP's Acting Director to have advised Mr. Kobayashi that OIP Op. Ltr. No. 03-03 was applicable to his request and required the Governor to disclose the names of the other nominees on the Judicial Selection Commission's list that "once a nominee is confirmed by the Senate" because that was when the "frustration" upon which non-disclosure hinged in that opinion, "would end."

Exhibit "K" hereto is a true and correct copy of such letter from Aina to Park.

31. Based on the foregoing quoted provisions and the ensuing discussion in the May 3, 2011 letter from Aina to Park (Exhibit "K"), the reasons asserted by the Governor to withhold of disclosure of the list are: (a) the confidentiality requirement in article VI, section 4 of the Hawai'i Constitution; (b) Rule 5 Section Two, A of the JSC Rules; (c) Haw. Rev. Stat. § 92F-13(3) and (4) (the "frustration" and "other law" exceptions); (d) OIP Op. LTR. No. 03-03; and (e) the Hawai'i Supreme Court's opinion in *Pray v. Judicial Selection Comm'n*, 75 Haw. 333, 861 P.2d 723 (1993). No other justifications for withholding disclosure were provided.

32. The May 3, 2011 letter (Exhibit "K") from Aina to Park concluded:

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 Mr. Kobayashi and Levine request.

33. On May 13, 2011, in a letter to Kobayashi and Honolulu Civil Beat reporter Michael Levine (Levine), Park stated:

It has been OIP's longstanding policy and practice to defer to the courts when an issue pending before OIP is also within the scope of a related litigation and thus has the potential to be addressed by a court. Here, although no suit has yet been filed, it is apparent that rendering another OIP advisory opinion would be futile and that court action is necessary to resolve this specific dispute. Accordingly, OIP declines to expend its limited resources to issue another advisory opinion that will not resolve the current dispute and we will instead defer to the courts on this matter.

Exhibit "L" hereto is a true and correct copy of such letter from Park to Kobayashi and Levine.

34. On May 18, 2011, the *Star-Advertiser*, through its Managing Editor Ed Lynch (Lynch) wrote to Park requesting the OIP to reconsider its May 13, 2011 decision to decline to

consider the *Star-Advertiser*'s appeal. Exhibit "M" hereto is a true and correct copy of such letter from Lynch to Park.

35. On June 9, 2011, by letter from Park to Lynch, the OIP declined the *Star-Advertiser*'s request to reconsider, stating in relevant part:

Rather than having your appeal languish without resolution while our office works through the backlog and other priorities, I promptly notified the *Star-Advertiser* that OIP would not issue an advisory opinion on it so that your company could, if desired, seek an expeditious judicial remedy. As you know, OIP issued Opinion Number 03-03 regarding the Governor's disclosure of judicial nominees, which is the subject of your recent appeal. Having previously addressed this topic, OIP had no duty to issue another advisory opinion that could not be enforced by our office. Instead, OIP will be using its limited resources more effectively on matters of equal importance to other members of the public and government agencies.

A requester's right to seek assistance from the courts, on an expedited basis, does not require an OIP determination. HRS Sec. 92F-15; HRS Sec. 92F-42(1). OIP's opinions are admissible in court. HRS 92F-15(b). While OIP may intervene in a court action brought by a requester to compel disclosure by an agency, OIP does not have the power to subpoena witnesses or records on its own. HRS 92F-15.3; see HRS 92F-42. If a requester prevails in a judicial appeal, it may recover reasonable attorney fees and costs. HRS Sec. 92F-15(d).

Exhibit "N" hereto is a true and correct copy of such letter from Park to Lynch.

36. Governor Abercrombie wrongly has denied and continues to deny access to a government record, in that he has denied the *Star-Advertiser* its rights to: access the list of nominees; inspect and copy the list of nominees; and to a timely response to its requests.

COUNT I
FAILURE TO GRANT ACCESS TO REQUESTED RECORDS

37. The foregoing paragraphs are hereby realleged and incorporated by reference.

38. The UIPA provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a).

39. Governor Abercrombie is an “Agency” as defined by Haw. Rev. Stat. § 92F-3, and is subject to the affirmative disclosure responsibilities set forth in Haw. Rev. Stat. § 92F-11(b), specifically that “each agency upon request by any person shall make government records available for inspection and copying during regular business hours.”

40. The list of judicial nominees presented to Governor Abercrombie by the JSC is a “Government record” as defined by Haw. Rev. Stat. § 92F-3, and the list is subject to the UIPA’s mandatory disclosure requirements, unless Governor Abercrombie can establish a justification for nondisclosure.

41. Governor Abercrombie has the burden of proof to establish justification for nondisclosure. Haw. Rev. Stat. § 92F-15(c).

42. Governor Abercrombie has advanced only these reasons why he has not complied with his obligation to disclose: (a) Haw. Rev. Stat. § 92F-13(3) and (4); (b) the confidentiality requirement in article VI, section 4 of the Hawai‘i Constitution and Rule 5, Section Two, A of the JSC Rules; (c) and the Hawai‘i Supreme Court’s opinion in *Pray v. Judicial Selection Comm’n*, 75 Haw. 333, 861 P.2d 723 (1993).

43. None of these reasons support withholding of the JSC lists after the Senate consents to an appointee, and Governor Abercrombie has not and cannot meet his burden of proof to establish justification for nondisclosure.

44. The *Star-Advertiser* is a “Person” as defined by Haw. Rev. Stat. § 92F-3; and is a “person aggrieved by a denial of access to a governmental record” as defined by Haw. Rev. Stat. § 92F-15(a); and has the right to bring an action against the Governor.

45. The OIP’s responses to the *Star-Advertiser*’s appeals and requests for reconsideration — which include the OIP’s statement that “rendering another OIP advisory opinion would be futile” — had no effect on the *Star-Advertiser*’s right to initiate this action.

46. By refusing to disclose the list, Governor Abercrombie has denied and is denying the *Star-Advertiser* its rights to access, inspect, and copy the list, in violation of the UIPA.

47. The *Star-Advertiser* is entitled to an order compelling Governor Abercrombie to provide access, inspection, and the right to copy such list.

COUNT II
FAILURE TO RESPOND TO REQUEST IN TIMELY MANNER

48. The foregoing paragraphs are hereby realleged and incorporated by reference.

49. Hawai'i Administrative Rules § 2-71-13 require Governor Abercrombie to respond to a request to disclose government records within a reasonable time not to exceed ten (10) business days.

50. The February 16, 2011 "REQUEST TO ACCESS A GOVERNMENT RECORD" by the *Star-Advertiser* was a formal written request for access to government records.

51. Governor Abercrombie failed to respond to the *Star-Advertiser*'s request within ten (10) business days thereof.

52. Governor Abercrombie's failure timely to respond to the *Star-Advertiser*'s request within ten (10) business days thereof was in violation of Haw. Admin. R. § 2-71-13, and renders the denial of the *Star-Advertiser*'s request unlawful, since Governor Abercrombie cannot show that he can avoid his duty to disclose, and withhold the requested governmental record.

53. The *Star-Advertiser* is entitled to an order that Governor Abercrombie violated Haw. Admin. R. § 2-71-13.

COUNT III
REASONABLE ATTORNEY'S FEES AND EXPENSES

54. The foregoing paragraphs are hereby realleged and incorporated by reference.

55. The UIPA provides that "[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).

56. If the *Star-Advertiser* prevails in this action, it will be entitled to such attorney’s fees and expenses.

COUNT IV DECLARATORY JUDGMENT

57. The foregoing paragraphs are hereby realleged and incorporated by reference.

58. An actual controversy exists between contending parties, or antagonistic claims are present between the parties involved which indicates imminent and inevitable litigation, or the *Star-Advertiser* asserts a legal relation, status, right, or privilege in which it has a concrete interest and there is a challenge or denial of the relation, status, right, or privilege by the Defendant who also asserts a concrete interest therein.

59. A declaratory judgment will serve to terminate the uncertainty or controversy.

60. The *Star-Advertiser* is entitled to a declaratory judgment that the Governor must disclose the list of judicial nominees after the Senate has consented to an appointment at the very latest.

PRAYER FOR RELIEF

FOR THE FOREGOING REASONS, the *Star-Advertiser* respectfully requests that this Court:

A. Give this case precedence on the docket over all other cases, and assign it for hearing and trial or for argument at the earliest practicable date and expedite it in every way, as required by Haw. Rev. Stat. § 92F-15(f).

B. Enter an order and judgment compelling Governor Abercrombie to disclose the list presented to him by the JSC of the nominees to fill the vacancy in the office of Associate Justice of the Supreme Court of Hawai‘i created by Governor Lingle’s appointment of then-Associate Justice Mark Recktenwald as Chief Justice.

C. Enter a declaratory judgment that after the Senate has consented to a judicial appointment, a Governor must disclose the list of judicial nominees.

D. Enter an order assessing the Defendant for the Plaintiff's reasonable attorney's fees and all other expenses reasonably incurred in the litigation pursuant to Haw. Rev. Stat. § 92F-15(d).

E. Retain continuing jurisdiction to review the Defendant's compliance with all judgments and orders entered herein.

F. Grant such other and further relief as this Court deems just and appropriate to effectuate a complete resolution of the legal dispute between the Plaintiff and the Defendant.

DATED: Honolulu, Hawai'i, August 23, 2011.

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