

Office Outlook Web Access Type here to search This Folder Address Book Options Log Off

1

1

Deleted Items (15)

Drafts (4)

Inbox (1)

Junk E-Mail

Sent Items

Link to New Mail

Manage Folders

hi, donalyn. i'm following up from last week: did the governor get the list of candidates

Ken Kobayashi

You forwarded this message on 8/16/2011 11:44 AM.

Sent: Thursday, January 20, 2011 10:46 AM

To: donalyn.Dole@hawaii.gov

from the judicial selection commission for the associate justice vacancy on the hawaii supreme court, and if so, can you tell me who's on the list?

thanks.

Connected to Microsoft Exchange

Microsoft Office Outlook Web Access

Type here to search

This Folder

Address Book Options Log Off

Mail

Calendar

Contacts

Deleted Items

Drafts [33]

Inbox (1)

Junk E-Mail

Sent Items

Click to view all folders

Manage Folders...

Reply Reply to All Forward Move Delete Close

Re: hi, donalyn. i'm following up from last week: did the governor get the list of candidates

Donalyn.DelaCruz@hawaii.gov [Donalyn.DelaCruz@hawaii.gov]

You replied on 1/20/2011 5:48 PM.

Sent: Thursday, January 20, 2011 5:27 PM

To: Ken Kobayashi

Hi Ken. The Governor will not be releasing the list. Will get you his choice when it is ready.

Mahalo,

Donalyn Dela Cruz
Press Secretary
Office of the Governor
415 S. Beretania St.
Honolulu, HI 96813
(808) 586-0012
donalyn.delacruz@hawaii.gov
<http://hawaii.gov/gov>

Connected to Microsoft Exchange

Office Outlook Web Access Type here to search This Folder Address Book Options Log Off

RE: hi, donalyn. i'm following up from last week: did the governor get the list of candidates

Ken Kobayashi

Sent: Thursday, January 20, 2011 5:48 PM

To: Donalyn.DelaCruz@hawaii.gov

what's the reason he's not releasing names? will he release them after he makes his choice? also, when did he get the list?

thanks, donalyn.

From: Donalyn.DelaCruz@hawaii.gov [Donalyn.DelaCruz@hawaii.gov]

Sent: Thursday, January 20, 2011 5:27 PM

To: Ken Kobayashi

Subject: Re: hi, donalyn. i'm following up from last week: did the governor get the list of candidates

Hi Ken. The Governor will not be releasing the list. Will get you his choice when it is ready.

Mahalo,

Donalyn Dela Cruz
Press Secretary
Office of the Governor
415 S. Beretania St.
Honolulu, HI 96813
(808) 586-0012
donalyn.delacruz@hawaii.gov
<http://hawaii.gov/gov>

Connected to Microsoft Exchange

Office Outlook Web Access Type here to search This Folder Address Book Options Log Off

RE: hi, donalyn. i'm following up from last week: did the governor get the list of candidates

Donalyn.DelaCruz@hawaii.gov [Donalyn.DelaCruz@hawaii.gov]

You replied on 1/21/2011 1:58 PM.

Sent: Friday, January 21, 2011 1:21 PM

To: Ken Kobayashi

Hi Ken,

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.

Donalyn

Donalyn Dela Cruz
Press Secretary
Office of the Governor
415 S. Beretania St.
Honolulu, HI 96813
(808) 586-0012
donalyn.delacruz@hawaii.gov
<http://hawaii.gov/gov>

From: Ken Kobayashi <KKobayashi@staradvertiser.com>
To: "Donalyn.DelaCruz@hawaii.gov" <Donalyn.DelaCruz@hawaii.gov>
01/21/2011 10:04 AM
Subject: RE: hi, donalyn. i'm following up from last week: did the governor get the list of candidates

i left you a voice message, but i do want to know the reasons for the not releasing the names, and whether it will be released after the appointment is made. also, when did you folks get the list?

of course, if the appointment will be made today, please let me know.

thanks, donalyn.

From: Donalyn.DelaCruz@hawaii.gov [Donalyn.DelaCruz@hawaii.gov]
Sent: Friday, January 21, 2011 8:58 AM
To: Ken Kobayashi
Subject: RE: hi, donalyn. i'm following up from last week: did the governor get the list of candidates

Ken - I need to discuss this with him today and will get back to you.

Donalyn Dela Cruz
Press Secretary
Office of the Governor
415 S. Beretania St.
Honolulu, HI 96813
(808) 586-0012
donalyn.delacruz@hawaii.gov
<http://hawaii.gov/gov>

Connected to Microsoft Exchange

Office Outlook Web Access Type here to search This Folder Address Book Options Log Off

this is ken kobayashi, star-advertiser reporter.

Ken Kobayashi

You forwarded this message on 8/16/2011 11:42 AM.

Sent: Thursday, January 27, 2011 2:49 PM

To: oip@hawaii.gov

To Cathy Takase:

The Star-Advertiser requests an opinion on whether the appointing authority must release the names of judicial candidates from the Judicial Selection Commission.

The OIP 2003 on this issue suggests that the names can remain confidential until the appointment.

But in view of the practice of Gov. Linda Lingle of releasing the names once she got the lists, as well as the practice of former Chief Justice Ronald Moon who did the same, can the appointing authority keep the lists confidential after the appointment? (Chief Justice Mark Recktenwald's office says he will follow Moon's practice.).

Thank you for your consideration, and do you know when an opinion would be released?

(I submitted a request for the names to the governor's office today, and left a copy with Lorna Aratani (please forgive me if the spelling is incorrect)).

Connected to Microsoft Exchange



NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oiip@hawaii.gov
www.hawaii.gov/oiip

CATHY L. TAKASE
ACTING DIRECTOR

February 3, 2011

VIA EMAIL: KKobayashi@staradvertiser.com

Mr. Ken Kobayashi, Reporter
Honolulu Star-Advertiser

Re: CORR 2011-0203-01

Dear Mr. Kobayashi:

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 at HRS § 92F-13(3), because of the potential for injection of undue influence in or politicizing of a selection process carefully established by 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.

Very truly yours,

Cathy L. Takase
Acting Director

CLT:dms

cc: The Honorable Neil Abercrombie

EXHIBIT "F"

REQUEST TO ACCESS A GOVERNMENT RECORD

DATE: Feb. 16, 2011
TO: Gov. Neil Abercrombie
FROM: Ken Kobayashi - Honolulu Star Advertiser
Name or Alias KKobayashi@standvertiser.com
Contact Information ph: 529-4363

Although you are not required to provide any personal information, you should provide enough information to allow the agency to contact you about this request. The processing of this request may be stopped if the agency is unable to contact you. Therefore, please provide any information that will allow the agency to contact you (name or alias, telephone or fax number, mailing address, e-mail address, etc.).

I WOULD LIKE THE FOLLOWING GOVERNMENT RECORD:

Describe the government record as specifically as possible so that it can be located. Try to provide a record name, subject matter, date, location, purpose, or names of persons to whom the record refers, or other information that could help the agency identify the record. A complete and accurate description of the government record you request will prevent delays in locating the record. Attach a second page if needed.

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.

I WOULD LIKE: (please check one or more of the options below)

- ☒ To inspect the government record.
☒ A copy of the government record: (Please check one of the options below.) See the back of this page for information about fees that you may be required to pay for agency services to process your record request. Note: Copying and transmission charges may also apply to certain options.

- ☐ Pick up at agency (date and time): _____
☐ Mail
☐ Fax (toll free and only if available)
☐ Other, if available (please specify): _____

- ☐ If the agency maintains the records in a form other than paper, please advise in which format you would prefer to have the record.

☐ Electronic ☐ Audio ☐ Other (please specify): _____

- ☐ Check this box if you are attaching a request for waiver of fees in the public interest (see waiver information on back).

SEE BACK FOR IMPORTANT INFORMATION

cc: Ken Kobayashi

Feb. 16, 2011

o: Cathy Takase, acting director, Office of Information Practices

In view of your letter to me dated Feb. 3, 2011 (attachment 1) and the state Senate earlier today confirming Sabrina McKenna to the Hawaii 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.

Thank you for your cooperation.

A handwritten signature in black ink, appearing to read 'Ken Kobayashi'.

Ken Kobayashi

Honolulu Star Advertiser

NOTICE TO REQUESTER

(Use multiple forms if necessary)

TO: Ken Kobayashi, Star Advertiser
 FROM: Donalyn Dela Cruz, Office of the Governor, 586-0012
 (Agency name & telephone number of contact person at agency)

DATE REQUEST RECEIVED: February 16, 2011
 DATE OF THIS NOTICE: March 3, 2011

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

1 List of nominees submitted by the Judicial Selection Commission to Gov. Neil Abercrombie in January 2011 to fill the vacancy on the Hawaii Supreme Court (see attached request).

NOTICE IS PROVIDED TO YOU THAT YOUR REQUEST:

- ☐ Will be granted in its entirety.
☐ Cannot be granted because
- ☐ Agency does not maintain the records. Agency believed to maintain records _____
 - ☐ Agency needs a further description or clarification of the records requested. Please contact the agency and provide the following information: _____
 - ☐ Request requires agency to create a summary or compilation from records not readily retrievable.
- ☒ Is denied in its entirety ☐ Will be granted only as to certain parts
 based upon the following exemption provided in HRS § 92F-13 and/or § 92F-22 and other laws cited below (portions of records that agency will not disclose should be described in general terms).

RECORDS OR
INFORMATION WITHHELD
 List of nominees

APPLICABLE
STATUTES
 HRS § 92F-13(3)

AGENCY
JUSTIFICATION
 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.

REQUESTER'S RESPONSIBILITIES

You are required to (1) pay any lawful fees assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed below; and (3) provide the agency any additional information requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to process your request, you may be liable for any fees incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.

METHOD & TIMING OF DISCLOSURE:

Records available for public access in their entireties must be disclosed within a reasonable time, not to exceed 10 business days, or after receipt of any prepayment required. Records not available in their entireties must be disclosed within 5 business days of this notice or after receipt of any prepayment required. If incremental disclosure is

OIP4 (rev. 7/2/10)

REQUEST FOR ASSISTANCE TO THE OFFICE OF INFORMATION PRACTICES

GOVERNMENT RECORDS

DATE: Mar. 7, 2011

FROM: Ken Kobayashi (Star-Advertiser)
Name or Alias
529-4363 or kkobayashi@staradvertiser.com
Contact Information

You are not required to provide any personal information; however, you should provide enough information to allow the Office of Information Practices ("OIP") to contact you about this request (name or alias, telephone or fax number, mailing address, e-mail address, etc.). If the OIP is unable to contact you, the OIP will stop processing this request.

I HAVE REQUESTED THE FOLLOWING GOVERNMENT RECORD:

Attach a copy of your written request to the agency; or describe the government record and your request as specifically as possible, including record name, subject matter, date, location, purpose, or names of persons to whom the record refers, or other descriptive information, and the date of your request and how it was made. Attach a second page if needed.

See attached

I MADE THE RECORD REQUEST TO THE FOLLOWING HAWAII STATE OR COUNTY GOVERNMENT AGENCY:

MY REQUEST WAS:

- ☒ To inspect the government record.
- ☒ For a copy of the government record. (Please specify the format you requested, if any, such as electronic form, audio, video tape, etc.)

TEN BUSINESS DAYS HAVE PASSED, AND MY REQUEST WAS:

- ☐ Not answered.
- ☒ Denied. Please attach a copy of the agency's written denial. If the denial was verbal, please provide the name and contact information of the agency employee who denied access.

I REQUEST FROM THE OIP:

- ☒ An opinion on whether this denial was legal, or
- ☒ Assistance in obtaining access to the requested record(s).

NOTE: Issues regarding copying fees under section 92-21, Hawaii Revised Statutes, are outside the OIP's jurisdiction and will not be addressed. Denials or granting of fee waivers in the public interest under section 2-71-32, Hawaii Administrative Rules, are at the discretion of the agency receiving a record request and will not be addressed.

OIP 2 (rev. 02/04)

NOTICE TO REQUESTER

(Use multiple forms if necessary)

TO: Ken Kobayashi, Star Advertiser
 FROM: Donalyn Dela Cruz, Office of the Governor, 588-0012
 (Agency name & telephone number of contact person at agency)

DATE REQUEST RECEIVED: February 16, 2011
 DATE OF THIS NOTICE: March 3, 2011

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):
 1. List of nominees submitted by the Judicial Selection Commission to Gov. Neil Abercrombie in January 2011 to fill the vacancy on the Hawaii Supreme Court (see attached request).

NOTICE IS PROVIDED TO YOU THAT YOUR REQUEST:☐ **Will be granted in its entirety.**☐ **Cannot be granted because**

- ☐ Agency does not maintain the records. Agency believed to maintain records _____
☐ Agency needs a further description or clarification of the records requested. Please contact the agency and provide the following information: _____
☐ Request requires agency to create a summary or compilation from records not readily retrievable.

X Is denied in its entirety ☐ **Will be granted only as to certain parts**
 based upon the following exemption provided in HRS § 92F-13 and/or § 92F-22 and other laws cited below (portions of records that agency will not disclose should be described in general terms).

RECORDS OR
INFORMATION WITHHELD
 List of nominees

APPLICABLE
STATUTES
 HRS § 92F-13(3)

AGENCY
JUSTIFICATION
 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.

REQUESTER'S RESPONSIBILITIES

You are required to (1) pay any lawful fees assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed below; and (3) provide the agency any additional information requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to process your request, you may be liable for any fees incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.

METHOD & TIMING OF DISCLOSURE:

Records available for public access in their entireties must be disclosed within a reasonable time, not to exceed 10 business days, or after receipt of any prepayment required. Records not available in their entireties must be disclosed within 5 business days of this notice or after receipt of any prepayment required. If incremental disclosure is

OIP 4 (rev. 7/2/10)

NEIL ABERCROMBIE
GOVERNOR



DAVID M. LOUIE
ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

May 3, 2011

Ms. Cheryl Kakazu Park
Director, Office of Information Practices
No. 1 Capitol District Building, Suite 107
250 South Hotel Street
Honolulu, Hawaii 96813

Dear Ms. Park:

Re: Appeals 11-20 (Ken Kobayashi, Honolulu Star-Advertiser) and 11-21 (Michael Levine, Honolulu Civil Beat) – Request to Governor for Access to Judicial Selection Commission's List of Nominees to Fill Vacancy on Hawaii Supreme Court Filled by Associate Justice Sabrina McKenna

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.

Because Mr. Kobayashi's and Mr. Levine's February 16, 2011 requests for access ("Requests") both seek access to the same information, and the Governor's March 3, 2011 Notices to Request ("Notices") denying access to each of them were virtually identical, we have taken the liberty of responding to OIP's invitations by this single submission. Thank you for the opportunity to supplement the Governor's March 3, 2011 Notices.

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:

EXHIBIT "K"

1. As already asserted, disclosure would frustrate the judicial nomination and appointment process set out article VI, Sections 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.

DISCUSSION

The stated purpose of the Uniform Information Practices Act ("UIPA") is to protect the public's interest by "opening . . . government['s] processes to public scrutiny and participation" by "conducting government business as openly as possible," while recognizing that the "right of the people to privacy" is protected by article I, section 6 of the State Constitution. Haw. Rev. Stat. § 92F-1. In furtherance of this purpose, Haw. Rev. Stat. § 92F-11 (a) expressly provides that "[a]ll government records are open to public inspection" but also expressly recognizes that access may be "restricted or closed by law."

The Governor asserts that Haw. Rev. Stat. § 92F-13(3) and (4), the confidentiality requirement in article VI, section 4 of the State Constitution and Rule 5, Section Two, A of the JSC's Rules, and the Supreme Court's decision in Pray, leave it solely to him to determine whether the lists of nominees he receives from the JSC should be disclosed. He firmly believes that public disclosure "is detrimental to attracting prospective judicial applicants" and that "confidentiality" is critical to assuring that both he and the JSC receive applications from the most willing and capable individuals otherwise qualified to serve as our judges, in the community. See Exhibit E.

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

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

and

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 "once a nominee is confirmed by the Senate" because that was when the "frustration" upon which non-disclosure hinged in that opinion, "would end."

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

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

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

The Governor understands that the drafters of the State Constitution declared it to be the State's policy that the judicial nomination process be conducted confidentially, and precludes any other state official from declaring otherwise. The Governor also understands that JSC Rule 5 effects that policy, and allows, if not requires him to withhold the identify of the nominees on the lists he receives from the JSC in order to assure the effectiveness of the judicial nomination process prescribed by article VI, section 4, and maintain the confidentiality expressly imposed upon the lists by JSC Rule 5.²

He also understands the Supreme Court's holding in Pray to confer "the power and duty squarely upon the JSC and the [Governor]" to "select the best candidate for judicial office," 75 Haw. at 353, 861 P.2d at 732, and to have "sole discretion" to determine whether, if at all, he should disclose the contents of the JSC's lists, 75 Haw. at 355, 861 P.2d at 733.

I. Disclosure Would Frustrate the Judicial Nomination and Appointment Process

Article VI, Section 3 of the State Constitution makes the JSC and the Governor responsible for appointing the justices and judges of the State's Supreme Court and circuit courts. The Governor believes that disclosing the names of the JSC nominees who are not appointed would reduce the number, and limit the range of experience of those who are willing to apply and serve as justices and judges of the State's courts.

²Moreover, Haw. Rev. Stat. § 92F-19(b) expressly directs that "[a]n agency receiving government records pursuant to subsection (a) shall be subject to the same restrictions on disclosure of the records as the originating agency."

We know from the press releases included in Exhibit C, that with only two exceptions, during the eight years in which Governor Lingle opted to disclose the names of JSC nominees before making the appointments listed in Exhibit A, only 10 individuals, 8 of whom were already judges, were nominated for appointment to fill vacancies on the Hawaii Supreme Court, and 17 individuals, of whom 9 were already judges, and 6 were employed by federal, state or county agencies were nominated to fill vacancies on the Intermediate Court of Appeals ("ICA"). Only 5 attorneys in private practice were included among the appellate court nominees, 2 for the Supreme Court and 3 for the ICA.

The press releases relating to nominations and appointments to the circuit court similarly seem to indicate that the pools of applicants for those vacancies were also small because the names of the same individuals appear on multiple lists, and the lists were not representative of the Bar as a whole. Again, most of the nominees were already judges, or were employed by government agencies. More than 60 individuals applied for the 17 vacancies in the circuit courts during the 2003 – 2010 period. 15 nominees were already judges, and more than half of them applied for multiple vacancies. 23 nominees were employed by government agencies, and many of them applied for more than one vacancy. Of the 23 nominees in private practice; only 3 were from firms with more than 20 attorneys.

As former Circuit Judge Hifo noted in her guest editorial, see Exhibit D, the JSC appears to have had to publish multiple notices to extend application deadlines, for several vacancies. In the case of the Chief Justice's vacancy, 4 notices were published -- the initial notice was published on September 8, 2009, with three extensions noticed thereafter, through May 19, 2010. Applicants were allowed until June 1, 2010 to submit completed applications to the JSC.

While this is certainly not dispositive of the effect that disclosure might have had on the size of the applicant pools or the number of applications the JSC actually received, the facts seem to suggest that disclosure could have had an adverse effect on who was willing to submit an application to serve as a state judge in that period.³

II. Reliance on OIP Op. Ltr. No. 03-03 to Dispose of the Requests is Inappropriate

OIP Op. Ltr. No. 03-03's conclusion that attorneys will not be deterred from applying to serve as justices or judges of the State's appellate and circuit courts was based on OIP Op. Ltr. No. 93-13, and the Hawaii Supreme Court's opinion in Pray. Wholesale reliance on OIP Op. Ltr. No. 03-03 to address the Requests here is inappropriate for at least three reasons.

³Our request for statistical information, including the number of applicants the JSC received to fill vacancies before and after OIP Ltr. Op. No. 03-03 was published was denied by the JSC's acting chairperson. We submit that a dispositive determination of deterrence can only be made with information of that kind.

First, Op Ltr. No. 93-13 was written in response to a request to identify the two individuals who had been nominated for gubernatorial appointment to the State Ethics Commission. It analyzed three issues and concluded that (1) the public interest in reviewing how the member was nominated and appointed outweighed the nominees' privacy interest, (2) the deliberative process privilege did not except the nominations from disclosure, and (3) "disclosure of the nominees' identities before the Governor made his appointment would not frustrate the legitimate government function of obtaining impartial and qualified applicants for Commission vacancies" because "no evidence to suggest that revealing the identities of the two nominees would deter qualified individuals from applying for vacancies on the [Ethics] Commission," OIP Op. Ltr. No. 93-13 at 13. OIP Op. No. 03-03 incorporated this last conclusion without qualification or additional facts to support it, and despite the facts set out in section I above.

Second, Op. Ltr. No. 03-03 adopted the reasoning of Op. Ltr. No. 93-13 that "most individuals and the general community" would view consideration for appointment to the Ethics Commission "as an honor" and not be deterred from applying by the possibility that their nominations would be publicly disclosed without according any consideration to the possibility that an attorney who applied to serve as a full-time judge risked losing his or her current job, if the JSC's list of nominees were disclosed after an appointment of someone else was confirmed. The attached guest editorials of 1978 President-Elect of the Hawaii State Bar Association, Daniel Case, and former State Circuit Court Judge Eden Elizabeth Hifo, suggest, as the OIP itself noted, that the distinction needs to be considered. See Exhibit D.

Third, Pray does not require the Governor to disclose the identities of the rest of the nominees on a JSC list, once a nominee is confirmed by the Senate. The Supreme Court simply said: "we also hold that it is within the sole discretion of the appointing authorities [i.e., the Governor and the Chief Justice] whether to make public disclosure of the JSC's lists of judicial nominees." 75 Haw. at 355; 861 P.2d at 733.

III. Until a Court Holds Otherwise, Haw. Rev. Stat. § 92F-13(4) Authorizes the Governor To Withhold the Names of Nominees on the JSC's Lists.

In addition to the provisions of the State Constitution, JSC Rule 5, and Haw. Rev. Stat. § 92F-13(4) quoted above, the legislative history accompanying the enactment of the UIPA in 1988 makes clear that Haw. Rev. Stat. § 92F-13's list of exceptions to disclosure is not exhaustive, and was provided only to broadly describe what may be withheld by an agency. Ultimately, exceptions were to be determined by the courts, and the common law.

In Standing Comm. Rept. No. 2580, Haw. S.J. 1093, 1095 (1988), the Senate Committee on Government Operations expressly provided a list of "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function, and noted that

[r]ather than list specific records in the statute, at the risk of being over- or under-inclusive, your Committee prefers to categorize and rely on the developing common law. The common law is ideally suited to the task of balancing competing interest in the grey areas and unanticipated cases, under the guidance of the legislative policy.

The report lists nine examples of frustration, to "assist the Judiciary in understanding the [Legislature's] intent." Id.

Again, the opinion in Pray only concluded that the "separation of powers" doctrine did not require the Governor to disclose or to withhold the names of nominees included on a JSC list after a judge or justice was appointed. It did not analyze whether Haw. Rev. Stat. § 92F-13(4) allowed the Governor or the Chief Justice to withhold the names of the names of the JSC nominees who were not appointed.

CONCLUSION

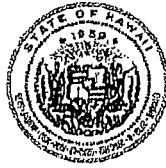
Accordingly, until a court, with the benefit of a full evidentiary record determines that the Governor is mistaken in his understanding that the JSC's lists are confidential, and more importantly that disclosure will not frustrate the JSC's and his responsibility to nominate and appoint the justices 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.

Very truly yours,



Charleen M. Aina
Deputy Attorney General

c: The Honorable Neil Abercrombie
Ken Kobayashi
Michael Levine



NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.hawaii.gov/oip

CHERYL KAKAZU PARK
DIRECTOR

May 13, 2011

VIA EMAIL: kkobayashi@staradvertiser.com

Mr. Ken Kobayashi
Star Advertiser

VIA EMAIL: mlevine@civilbeat.com

Mr. Michael Levine
Civil Beat

Re: Appeal from Denial of Access to Judicial Nominee Names
(APPEALS 11-20 and 11-21)

Dear Messrs. Kobayashi and Levine:

The Office of Information Practices (OIP) has reviewed the letter dated May 3, 2011, from Deputy Attorney General Charleen Aina, responding on behalf of Governor Neil Abercrombie to the above-referenced appeals. By that letter, the Governor has indicated that he will not disclose the records that are the subject of the appeals, even in the event of an OIP decision requiring disclosure. Specifically, the letter stated that "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." We note that both of you likewise understood the Governor to be saying that he will not disclose the requested records unless ordered to by a court, regardless of any determination made by OIP. See Ken Kobayashi, No need to air judicial nods, state says, Honolulu Star-Advertiser, May 05, 2011, online at http://www.staradvertiser.com/news/20110505_No_need_to_air_judicial_nods_state_says.html; Michael Levine, Gov Willing To Fight For Judge Secrecy In Court, Honolulu Civil Beat, May 4, 2011, online at

Mr. Ken Kobayashi
Mr. Michael Levine
May 13, 2011
Page 2

<http://www.civilbeat.com/posts/2011/05/04/10740-gov-willing-to-fight-for-judge-secrecy-in-court/>.

OIP has previously spoken to the general issue of whether, and when, the names of judicial nominees must be disclosed. OIP Op. Ltr. 03-03. The Governor, however, has argued that OIP's previous opinion on this topic has no precedential value because it lacked factual or legal foundation, and necessary information was not provided by the Judicial Selection Commission. Additionally, as previously noted, the Governor has stated that he would not be required to disclose the records in question based on an OIP decision, but only based on a court order. Further, since the Hawaii Supreme Court's 2009 affirmation of the Intermediate Court of Appeals' decision in County of Kauai v. Office of Information Practices, 120 Haw. 34, 200 P.3d 403 (2009), OIP has been issuing advisory opinions, rather than determinations, to more effectively utilize its limited resources.

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. 4

Very truly yours,

Cheryl Kakazu Park

Cheryl Kakazu Park
Director

CKP:cy

cc: Honorable Neil Abercrombie
Charleen Aina, Esq.

May 18, 2011

Cheryl Kakazu Park
Director, Office of Information Practices
250 South Hotel St., suite 107
Honolulu, Hi. 96813

Dear Ms. Park,

Please consider this letter a formal request for reconsideration of your decision of May 13 declining to issue an opinion on the Honolulu Star-Advertiser's appeal of Gov. Neil Abercrombie's refusal to disclose the names of judicial candidates.

As the office that administers the state open records law, we believe the Office of Information Practices has a duty to render an opinion on the appeal. The Uniform Information Practices Act, HRS 92f-42 §92F-42, states that the director "shall, upon request, review and rule on an agency denial of access to information or records."

In your letter, you state that the reason for the denial is that it would be "futile" to issue an opinion because the governor has said he won't release the name until he is directed to do so by the courts, even though no lawsuit has been filed in the matter. This suggests that any state agency could avoid having your office issue an opinion by simply saying it won't release records until a court rules otherwise. We believe this sets a bad precedent enabling state officials to avoid scrutiny by your office.

Your position also places an obstacle for the public seeking disclosure. It will require the expense of hiring lawyers to pursue court action. OIP's position on the issue would be helpful in letting the public know whether it has grounds to file a lawsuit seeking disclosure. The law also recognizes that OIP's opinion might be helpful to the courts. HRS 92f-15.3 specifically says your office "may intervene in the (court) action."

On the merits of the appeal, we note that HRS 92f-15 places on the agency "the burden of proof to establish justification for nondisclosure" in a court case. We don't believe that the letter by Attorney General Charleen Aina stating the governor's position met that burden. In fact, the letter acknowledges a "dispositive determination" that the release of the names will deter applicants can only be made with information that the Judicial Selection Commission is not disclosing. The information would include the number of applicants for judicial positions.

We submit that the statistics in the letter about the backgrounds of judicial candidates also does not establish that the release of names limits the types of applicants. The statistics were based on the names of judicial candidates submitted to Gov. Linda Lingle

by the Judicial Selection Commission. They do not include the backgrounds or number of attorneys who actually applied for the position.

We submit that even if the number of applicants declined when the names of judicial candidates were released in the past, there are other compelling reasons why lawyers hesitate from applying that are unrelated to their names being disclosed as finalists for the position. These other reasons include the pay, which is considered among the lowest in the nation, and the sacrifices that judges must make to uphold judicial independence.

Again, we believe the burden is on the agency to establish the exception.

One final point is that your office has already issued an opinion in 2003 on the disclosure. And your predecessor Cathy Takase has already written us a letter dated Feb. 3, 2011, on the question of whether the names must be released after the appointment of a judicial nominee. Takase cited the 2003 opinion and concluded: "The frustration upon which that opinion is based would end once a nominee is confirmed by the Senate." Your letter cites the governor's argument that the earlier opinion on the issue did not have a "factual or legal foundation." Does this mean your position is that the 2003 opinion and Takase's position are invalid? If so, we would disagree.

Your office serves an important function in advocating the disclosure of records under the law. Even if the opinion might be disregarded by the agency, OIP serves a valuable public purpose in outlining the public's rights in seeking those documents and information. It also might be helpful in serving as a guideline for agencies and the public in future disputes. We believe those are the reasons why the law requires your office to issue opinions and we encourage you to reconsider.

Sincerely,

Ed Lynch
Managing Editor/News
Honolulu Star-Advertiser



NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
DEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 588-1400 FAX: (808) 588-1412
E-MAIL: oip@hawaii.gov
www.hawaii.gov/oip

CHERYL KAKAZU PARK
DIRECTOR

FAX TRANSMITTAL

DATE: June 9, 2011

TO: Mr. Ed Lynch
Managing Editor/News
Honolulu Star-Advertiser

FAX: 529-4898

FROM: Cheryl Kakazu Park
Director

TOTAL
NO OF PAGES: 3

RE: Judicial Nominee Disclosure
Request for Reconsideration
(APPEAL 11-20)

TRANSMITTED HERewith IS/ARE THE FOLLOWING:

- Letter dated June 9, 2011 to Star-Advertiser from the Office of Information Practices

☐

Original is being hand delivered to you.

☒

Original will NOT be mailed to you, unless requested.

WARNING: This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged or confidential. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original to us at the above address via the U.S. Postal Service. Thank you.



NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813

Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oiip@hawaii.gov
www.hawaii.gov/oiip

CHERYL KAKAZU PARK
DIRECTOR

June 9, 2011

VIA FACSIMILE: 529-4898

Mr. Ed Lynch
Managing Editor/News
Honolulu Star-Advertiser
500 Ala Moana Boulevard, Suite 7-500
Honolulu, Hawaii 96813

RE: Judicial Nominee Disclosure
Request for Reconsideration
(APPEAL 11-20)

Dear Mr. Lynch:

The Office of Information Practices declines your request to reconsider the May 13, 2011 decision to not provide another advisory opinion as to whether the Governor is required to disclose the names of unsuccessful judicial nominee candidates.

I understand that this issue is important to the Star-Advertiser, but I must use OIP's resources fairly and efficiently to address competing priorities and the many issues that come before our office from other requesters as well. OIP's small staff and limited resources were severely taxed during the appeal of the decision in County of Kauai v. OIP, 120 Haw. 34, 200 P.3d 403 (2009), when the county successfully challenged OIP's authority to require disclosure of certain government records. Our office is still working to clear a large backlog of cases and other matters that arose before and during those judicial proceedings. Additionally, we continue to work on current matters, such as a recent request by Star-Advertiser reporter Rob Perez, who was able to obtain an agency's voluntary disclosure of information with OIP's assistance. Moreover, as you may have seen from our recent press releases, OIP is moving forward on other priorities, such as new training materials to help OIP obtain boards' and agencies' voluntary compliance as well as possible legislative proposals to modernize the open government laws and to clarify OIP's appeals rights and responsibilities.

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

Mr. Ed Lynch
June 9, 2011
Page Two

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).

OIP continues to value the media's important role in keeping the citizenry fairly and accurately informed. We want to work with you to maintain a vibrant democracy with an open, accountable, and efficient government that encourages public participation while protecting personal privacy rights. Instead of emphasizing OIP's inability to enforce its rulings and thereby indirectly encouraging agencies to ignore OIP's advice, I hope that your organization will support our efforts to obtain government agencies' voluntary compliance and to fairly and effectively use our limited resources.

Sincerely,



Cheryl Kakazu Park
Director

CKP:cy

cc: The Honorable Neil Abercrombie
Charleen M. Aina, Esq., Department of the Attorney General