No. SCWC-13-0000127

IN THE SUPREME COURT OF THE STATE OF HAWAII

OAHU PUBLICATIONS, INC., *dba* Honolulu *Star-Advertiser*, Petitioner/Plaintiff-Appellee, vs. NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawaii, Respondent/Defendant-Appellant.	ON APPLICATION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS 1. Order (Jan. 6, 2014) 2. Order Granting in Part Plaintiff-Appellee's Motion for Reconsideration or Clarification of Order Denying Fees and Costs (Jan. 24. 2014) 3. Order (Feb. 24, 2014) 4. Judgment on Appeal (Mar. 3, 2014) Circuit Court (First Circuit) Civil No. 11-1-1871-08-KKS Hon. Karl K. Sakamoto Final Judgment: Feb. 8, 2013

APPLICATION FOR A WRIT OF CERTIORARI

APPENDICES 1–3

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APPLICATION FOR A WRIT OF CERTIORARI

Petitioner/Plaintiff-Appellee Oahu Publications, Inc., *dba* Honolulu *Star-Advertiser* (*Star-Advertiser*) respectfully seeks a writ of certiorari to correct grave errors by the Intermediate Court of Appeals (ICA), which concluded that $1,810 was the reasonable attorneys' fees and expenses assessed against Respondent/Defendant-Appellant Neil Abercrombie (Governor Abercrombie) under the Uniform Information Practices Act (UIPA) for the *Star-Advertiser* prevailing in the ICA. The UIPA requires courts to award the complainant fees and costs incurred "in the litigation" when an agency denies access to public records. Haw. Rev. Stat. § 92F-15(d). The issue in this case is whether a complainant who successfully pierces the veil of government secrecy must request fees and expenses at every intermediate step of the litigation, or may do so when the action is finally resolved in its favor on the merits.

The *Star-Advertiser* successfully compelled Governor Abercrombie to publicly disclose the list of nominees provided to him by the Judicial Selection Commission (JSC list), and the circuit court assessed $67,849 in attorneys' fees and $1,178 in costs. Governor Abercrombie let stand the order compelling disclosure of the JSC list, but appealed the fee and cost assessment. However, after the parties filed their briefs, the ICA dismissed the appeal as premature and lacking appellate jurisdiction because the circuit court's judgment did not reflect the court's intent that it was a final judgment. The parties returned to circuit court, which amended the judgment to include the necessary finality language. Governor Abercrombie filed a second notice of appeal. After resubmission of the briefs that had been filed earlier, the ICA affirmed, holding the circuit court correctly assessed Governor Abercrombie all of the *Star-Advertiser*'s attorneys' fees, and all but $564 in copying costs. Governor Abercrombie agreed the *Star-Advertiser* prevailed on appeal, but when the *Star-Advertiser* submitted an application for fees and costs incurred in the ICA, the court denied 93% of the request "with prejudice" solely because it concluded the *Star-Advertiser*'s application was untimely. The ICA held the *Star-Advertiser* must have requested fees and costs upon the earlier jurisdictional dismissal of Governor Abercrombie's first attempt to appeal.

QUESTION PRESENTED

Are attorneys' fees incurred in an earlier phase of appellate litigation—which the ICA dismissed for lack of a final circuit court judgment, but which did not resolve the action—recoverable by the prevailing complainant under Haw. Rev. Stat. § 92F-15(d) after the ICA rules in its favor on the merits?

PRIOR PROCEEDINGS AND STATEMENT OF THE CASE

I. THE CIRCUIT COURT ASSESSED GOVERNOR ABERCROMBIE FEES AND COSTS.

This case began as an action under the UIPA to compel Governor Abercrombie to cease withholding the JSC list from the public. Governors Cayetano and Lingle routinely released JSC lists during their respective tenures (*see* Dkt 21 at pdf 86-152; Dkt 23 at pdf 44-118; Dkt 25 at pdf 37-93), but despite repeated requests from the *Star-Advertiser*, Governor Abercrombie refused to release the JSC list from which he appointed Justice McKenna to this Court. He advanced several theories, but 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 thus "frustrate" the government function of nominating and appointing judges. Dkt 23 at pdf 219-224. The Office of Information Practices (OIP) had issued an opinion contradicting his claim. Dkt 21 at pdf 215 (Once the Senate confirms an appointee, "[t]he frustration upon which [OIP Op. Ltr. No. 03-03] is based would end."). On March 31, 2011, Governor Abercrombie sacked the Director of the OIP. He publicly proclaimed that he would not disclose the JSC list unless a court ordered him to do so. Dkt 21 pdf at 224.

The *Star-Advertiser* brought suit. *See* Complaint (Aug. 23, 2011) (Dkt 21 at pdf 11-24). The circuit court granted the *Star-Advertiser* summary judgment, and denied Governor Abercrombie's cross-motion for summary judgment. Dkt 27 at pdf 130. The UIPA requires the court to charge the non-disclosing agency reasonable fees and expenses incurred by a prevailing complainant, and the circuit court, as required by section 92F-15(d), assessed Governor Abercrombie $67,849 in attorneys' fees and $1,178 in expenses. Dkt 27 at pdf 332; Dkt 29 at pdf 47-49. On June 29, 2012, the court entered its Final Judgment in Favor of Plaintiff Oahu Publications, Inc., *dba* Honolulu Star-Advertiser.

II. THE ICA DISMISSED GOVERNOR ABERCROMBIE'S APPEAL FOR LACK OF APPELLATE JURISDICTION BECAUSE THE CIRCUIT COURT'S JUDGMENT WAS NOT FINAL.

Governor Abercrombie appealed to the ICA, limiting the issues to the order assessing fees and costs, while allowing the circuit court's ruling compelling disclosure of the JSC list to stand. *See Oahu Publications v. Abercrombie*, No. CAAP-12-0000625. Governor Abercrombie submitted the jurisdictional statement without objection by the *Star-Advertiser*, or response by the ICA. But

after the parties filed their Opening, Answering, and Reply Briefs, the ICA dismissed the appeal for lack of appellate jurisdiction because the circuit court's order and judgment lacked the required finality language. *See* Order Dismissing Appeal for Lack of Jurisdiction, *Oahu Publications v. Abercrombie*, No. CAAP-12-0000625 (Dec. 27, 2012) (Dkt 29 at pdf 60-63) (citing Haw. Rev. Stat. § 641-1(a); Haw. R. Civ. P. 58; *Jenkins v. Cades Schutte Fleming & Wright*, 76 Haw. 115, 119, 869 P.2d 1334, 1338 (1994)). Governor Abercrombie sought reconsideration—a motion which the *Star-Advertiser* supported because there was no question the circuit court intended its judgment to be final and appealable, and the missing finality language was a correctable clerical oversight—and requested leave from the ICA to allow the circuit court to amend its judgment to reflect that the court intended to dispose of all claims against all parties. *See* Joinder of Plaintiff-Appellee in Defendant-Appellant Governor Abercrombie's Motion for Reconsideration of Order Dismissing Appeal for Lack of Jurisdiction Filed December 27, 2013 [sic]), *Oahu Publications v. Abercrombie*, No. CAAP-12-0000625 (Jan. 7, 2013). The ICA denied reconsideration. *See* Order Denying January 6, 2013 HRAP Rule 40 Motion for Reconsideration of December 27, 2012 Order Dismissing Appeal for Lack of Jurisdiction, *Oahu Publications v. Abercrombie*, No. CAAP-12-0000625 (Jan. 10, 2013).

III. THE CIRCUIT COURT AMENDED THE FORM OF THE JUDGMENT AND THE ICA AFFIRMED THE AWARD OF FEES.

When asked by the *Star-Advertiser* whether he intended to refile the Notice of Appeal, Governor Abercrombie responded affirmatively. *See* Dkt 72 at pdf 3. The parties jointly submitted to the circuit court a Second Amended Final Judgment, which the court entered. *See* Dkt 29 at pdf 72-74. Governor Abercrombie filed another Notice of Appeal. Dkt 1. This case was given a different appeal number by the appellate clerk, No. CAAP-13-0000127. Dkt 29 at pdf 67. The parties agreed to "file the Opening, Answering, and Reply Briefs which they filed in Appeal No. CAAP-12-0000625 (with updated references to the Record on Appeal in [CAAP-13-0000127]), and in accordance with" an accelerated filing schedule. *See* Dkt 13 at pdf 1-2 (Stipulation Regarding Filing of Briefs). The ICA endorsed the stipulation and entered a confirming order. *Id*. After the parties resubmitted the same briefs they had filed in CAAP-12-0000625, the ICA affirmed the circuit court's fee assessment in a Summary Disposition Order (SDO), and all but $564 in copying costs. Dkt. 56 at pdf 7. It remanded to the circuit court to allow the *Star-Advertiser* to seek the copying costs, if desired. *Id*.

IV. ICA: *STAR-ADVERTISER* SHOULD HAVE SOUGHT APPELLATE FEES AND COSTS AFTER THE EARLIER JURISDICTIONAL DISMISSAL.

When the *Star-Advertiser* sought $25,626 in fees and costs it had incurred in the course of Governor Abercrombie's unsuccessful appellate challenges to the circuit court's judgment, the ICA denied the request:

> IT IS HEREBY ORDERED that the request for attorneys' fees and costs is denied. Attorneys' fees and costs related to CAAP-12-0000625 are denied with prejudice. All other requested attorneys' fees and costs are denied without prejudice. Appellee may submit an amended request for attorneys' fees and costs, in compliance with HRAP Rule 39(d), within 10 days from the date of this order. An objection and Reply to an amended request may be filed in accordance with HRAP Rule 39(d)(4).

Dkt 75 at pdf 2 (App. 1). The ICA's Order gave no reason for denying the request for fees and costs related to CAAP-12-0000625, or why the application was denied with prejudice.[1]

The *Star-Advertiser* resubmitted its request for fees and expenses associated with CAAP-13-0000127, totaling $1,810, which the ICA awarded *in toto*. Dkt. 95 at pdf 2 (App. 2). Concurrently,

[1] The Order also stated that some of the *Star-Advertiser*'s time entries were "block billed," and the application did not conform precisely to Form 8 in the Appendix of Forms. Dkt 75 at pdf 1-2. The Order did not specify which time entries were objectionable. There should have been no issues with the time entries. First, they did not reflect the lawyers entering "the *total daily time* spent working on a case, rather than itemizing the time expended on specific tasks." *Hawaii Adventures v. Otaka*, 116 Haw. 465, 475, 173 P.3d 1122, 1132 (2007) (emphasis added). Rather, the *Star-Advertiser* segregated the time spent for each discrete task, sufficient to allow Governor Abercrombie to object (which he did not). Second, block billing is not absolutely prohibited, and does not alone lead to the conclusion that the time incurred is not compensable. The problem with block billing is that in cases which involve multiple claims—some of which may be subject to fee and cost shifting, and some of which may not be—block billing does not allow an opposing party or reviewing court to distinguish compensable time from noncompensable time. *See id*. at 478, 173 P.3d at 1135. This case involved only compensable claims under the UIPA, so even if block billed, the time should have been reimbursed. Third, it was not grounds to deny a fee and expense application for not "substantially" conforming to Form 8 when the request provided the court with more information than suggested in Form 8. *See* Haw. R. App. P. 39(d)(1) ("Requests for non-indigent attorney's fees and costs allowed by statute or contract shall be submitted in a form that *substantially complies* with Form 8 in the Appendix of Forms.") (emphasis added). Moreover, the *Star-Advertiser*'s fee request mirrored a request which the *Star-Advertiser*'s counsel had submitted to this Court in an earlier reported case, which this Court had approved. *See Cnty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 120 Haw. 400, 407, 208 P.3d 713, 720 (2009) (the Court approved a request for fees and costs incurred by the prevailing party on appeal, submitted in exactly the same format as the *Star-Advertiser*'s application here). Rather than seek review of these rulings, however, the *Star-Advertiser*'s resubmission for CAAP-13-0000127 fees addressed the ICA's concerns, and the court granted the $1,810 requested.

the *Star-Advertiser* sought reconsideration of the denial of fees and costs related to CAAP-12-0000625, or alternatively, clarification of the Order to set forth the reason for the denial, on the grounds that "it is essential for the *Star-Advertiser* to understand those reasons to permit it to evaluate whether to seek further review. Moreover, should review be accepted, the Supreme Court must also understand this court's reasons for denying the request for fees and costs with prejudice." Dkt. 77 at pdf 2. The ICA declined to reconsider the denial with prejudice, but clarified that it rejected the fees and costs incurred in CAAP-12-0000625 solely because the application was "untimely" under Haw. R. App. P. 39(d)(2). Dkt. 88 at pdf 2 (App. 3). There was no question the *Star-Advertiser*'s request was timely as measured from the ICA's disposition on the merits, but in the court's view, the *Star-Advertiser* was required to have submitted its request upon the earlier denial of Governor Abercrombie's motion asking the court to reconsider its dismissal of CAAP-12-0000625 for lack of appellate jurisdiction, and it could not wait for resolution of Governor Abercrombie's appeal on the merits in CAAP-13-0000127.

ARGUMENT

This Court should accept certiorari and hold that a request by the complainant for appellate fees and costs incurred in a UIPA case is timely under Rule 39 of the Rules of Appellate Procedure if it is timely filed pursuant to Rule 39(d)(2) after the appellate court has finally determined the merits in the complainant's favor, even if an earlier appeal was dismissed for lack of appellate jurisdiction. This case presents the Court with an opportunity to confirm the vital role section 92F-15's fees-and-expense recovery requirement plays in ensuring government transparency. By holding that the *Star-Advertiser* must have requested fees upon the dismissal of CAAP-12-0000625 for lack of appellate jurisdiction, and could not await the resolution of the merits in CAAP-13-0000127, the ICA ignored the plain language of the statute, which required the court to assess Governor Abercrombie the fees and costs incurred by the *Star-Advertiser* "in the litigation." The ICA seriously undermined the UIPA's core purpose of encouraging public challenges to government secrecy. Instead of "remov[ing] barriers to judicial enforcement of the UIPA," *State of Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ. of Haw. Chapter*, 83 Haw. 378, 393, 927 P.2d 386, 401 (1996), the ICA's denial of 93% of the appellate fees incurred, and its conclusion that $1,810 represents the "reasonable attorney's fees and all other expenses reasonably incurred in the litigation" on appeal has the opposite effect: without full reimbursement for the fees and expenses which Governor Abercrombie's appellate challenges to the circuit court's fee assessment forced the *Star-Advertiser*

to incur, the ICA's cursory analysis sends the unmistakable message the public need not bother.

I. THE PLAIN TEXT OF THE UIPA REQUIRES ASSESSMENT OF ALL FEES AND COSTS INCURRED "IN THE LITIGATION," MEANING WHEN THE MERITS ARE RESOLVED.

Rule 39(d) of the Hawaii Rules of Appellate Procedure establishes the time when the entitled prevailing party must seek fees and costs incurred on appeal:

> A request for fees and costs or necessary expenses must be filed with the appellate clerk, with proof of service, no later than 14 days after the time for filing a motion for reconsideration has expired or the motion for reconsideration has been decided. An untimely request for fees and costs or necessary expenses may be denied.

Haw. R. App. P. 39(d)(2). The ICA concluded the *Star-Advertiser* must have submitted its request not later than 14 days after the court denied Governor Abercrombie's motion for reconsideration of the dismissal of CAAP-12-0000625 for lack of appellate jurisdiction. However, as this Court instructed in *Cnty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 120 Haw. 400, 208 P.3d 713 (2009), Rule 39 must be read in conjunction with the statute which allows the prevailing party to be awarded fees and costs. *Id*. at 405-06, 208 P.3d at 718-19 (Rule 39's procedures read in light of statute authorizing fee-shifting). Section 92F-15(d) provides:

> If 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) (emphasis added). As always, analysis begins with the statute's plain language. *Ah Mook Sang v. Clark*, 130 Haw. 282, 290, 308 P.3d 911, 919 (2013) (quoting *State v. Silver*, 125 Haw. 1, 4, 249 P.3d 1141, 1144 (2011)). Section 92F-15(d) is phrased very plainly and very broadly: "an action" and "the litigation" includes both Governor Abercrombie's extrajurisdictional attempt to appeal—which the ICA dismissed without reaching the merits because he had not made sure the circuit court's judgment was final and appealable—and the second attempt which was jurisdictionally compliant, but a failure on the merits.

The statute uses the terms "action" and "litigation" interchangeably, and these terms are so plain in meaning the legislature did not find it necessary to define them in section 92F-3, the UIPA's definitional statute, despite the terms being used throughout section 92F-15. Thus, the legislature presumably used "action" and "litigation" in their common meaning to describe the events in the course of a lawsuit. *See, e.g.*, Black's Law Dictionary 952 (8th ed. 2004) ("Litigation" means "[t]he process of carrying on a lawsuit . . . [a] lawsuit itself."). The statutory command must also be

read in light of this Court's instruction that fees and costs should be sought from the court in which they were incurred. *See, e.g.*, *Coupe*, 120 Haw. at 405-06, 208 P.3d at 718-19; *S. Utsunomiya Enters., Inc. v. Moomuku Country Club*, 76 Haw. 396, 402, 879 P.2d 501, 507 (1994) (fees should generally be requested from the court in which they were incurred). Thus, section 92F-15(d) requires an appellate court to assess the losing government agency the fees and expenses incurred by the complainant on appeal.[2] If the legislature desired to constrain the timing of the assessment of fees and costs in UIPA cases in the manner determined by the ICA, it would not have phrased the statute so broadly, and could have drafted narrower language. *Cf.* Haw. R. App. P. 39(a) ("Except in criminal cases or as otherwise provided by law, if an *appeal or petition is dismissed* . . .") (emphasis added).[3] But it didn't. It specified "in the litigation," and required assessment of all fees and costs incurred by a successful complainant in the course of a legal "action" that forces a government agency to cease withholding documents from the public.[4] The term "litigation" means that a claim-

[2] *See, e.g.*, *Marks v. Koch*, 284 P.3d 118, 124 (Colo. App. 2011) ("Marks has prevailed on appeal and has stated a proper basis on which fees may be awarded to her[,]" citing Colo. Rev. Stat. § 24-72-204(5), which is analogous to section § 92F-15(d), and Colo. App. R. 39.5, which is analogous to Haw. R. App. P. 39); *Gendler v. Batiste*, 274 P.3d 346, 355 (Wash. 2012) ("[a]ttorney fees incurred on appeal are included in this provision," even though Rev. Code Wash. § 42.56.550(4) provides only that the plaintiff "shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.") (quoting *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 884 P.2d 592, 608 (Wash. 1994)); *Belth v. Garamendi*, 283 Cal. Rptr. 829, 833 (Cal. App. 1991) (applying Cal. Gov. Code § 6259(d) which provides that "[t]he court shall award such costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation," the court "remanded with directions to vacate the order and enter an order awarding Belth costs and reasonable attorney fees in the writ proceeding and on appeal.").

[3] Rule 39(a) did not require the *Star-Advertiser* to request appellate costs upon the jurisdictional dismissal of CAAP-12-0000625. The rule states, "[e]xcept in criminal cases *or as otherwise provided by law*, if an appeal or petition is dismissed, costs shall be taxed against the appellant or petitioner upon proper application unless otherwise agreed by the parties or ordered by the appellate court[.]" Haw. R. App. P. 39(a) (emphasis added). Section 92F-15(d) "otherwise provide[s]" by requiring the appellate court to award fees and costs incurred when a complainant prevails "in the litigation," and not merely upon a jurisdictional dismissal. However, if Rule 39(a) is read to have required the *Star-Advertiser* to submit its request for costs before final disposition of CAAP-13-0000127 on the merits, the statute controls. Haw. Rev. Stat. § 602-11 ("Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations."); *In re Doe Children*, 94 Haw. 485, 486, 17 P.3d 217, 218 (2001) (per curiam) ("There appears to be a conflict between HRAP Rule 4(a)(3) and HRS § 571-54, but the statute, and not the rule, is controlling.").

[4] Section 92F-15(d)'s use of the term "litigation" is consistent with fee-shifting statutes in other

ant such as the *Star-Advertiser* must be made as economically whole as possible when it successfully wins a legal action to compel an agency or official to disclose public records it has wrongfully kept secret. That is accomplished only upon the court determining that "the complainant prevails in an action brought under this section," meaning when any appellate litigation ended successfully for the *Star-Advertiser* on the merits. Thus, only when the ICA issued its ruling on the merits in CAAP-13-0000127 did the *Star-Advertiser* "prevail" in the "action," and only then could it seek its fees and expenses.

The *Star-Advertiser*'s action did not morph into a new, separate litigation or action simply because the clerk assigned Governor Abercrombie's second appeal a different case number. Assignment of an appellate case number is a purely ministerial duty of the appellate clerk. Haw. R. App. P. 45(b) ("The appellate clerk, upon receipt of the initial document in any appeal or original proceeding, shall assign to it a number."). *See, e.g.*, *People v. Barros*, 148 Cal. Rptr. 3d 105, 116 (Cal. App. 2012) ("We do not see how the assignment of a single case number can be determinative either. The assignment of case numbers is a clerical administrative matter that reflects only the manner in which the prosecution presents the initiating pleadings to the court."). Thus, CAAP-12-0000625 and CAAP-13-0000127 were not two separate litigations, merely one premature appeal that was a legal nullity, and one valid appeal, both of which occurred "in the litigation" and the "action."[5] This means the ICA's jurisdictional dismissal of CAAP-12-0000625 did not resolve "the litigation" or "action" in the *Star-Advertiser*'s favor for two reasons, one grounded in law and the other in fact.

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parts of Hawaii law, which use broad, encompassing terms to describe legal actions. *See, e.g.*, Haw. Rev. Stat. § 101-27 (the property owner in a failed eminent domain action "shall be entitled, in such *proceedings*, to recover from the plaintiff all such damage . . . including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses[.]") (emphasis added).

[5] It might be a different case had the ICA dismissed CAAP-12-0000625 for a reason other than lack of appellate jurisdiction. *See, e.g.*, *In re Marn Family Litigation*, No. CAAP-10-0000181, 129 Haw. 269, 297 P.3d 1125 (Haw. App. Mar. 28, 2013) (SDO), *vacated*, 132 Haw. 165, 319 P.3d 1173 (2014). There, the ICA dismissed the appeal because the appellant's brief was woefully deficient. This operated as a judgment on the merits because it terminated the appeal, and there was no chance to remedy the problem that caused the dismissal. This is much different than a jurisdictional dismissal for lack of a final judgment, which gives the appellant the opportunity to amend the circuit court judgment to reflect finality, and try again.

First, the ICA did not dismiss CAAP-12-0000625 on the merits, merely for lack of appellate jurisdiction because Governor Abercrombie failed to confirm that the circuit court's order was in the proper form before filing his Notice of Appeal. As the party challenging the circuit court's ruling, it was Governor Abercrombie's burden to ensure the judgment was final and appealable, and to properly invoke the ICA's appellate jurisdiction. *See, e.g.*, *Dung v. Ah New Chun*, 35 Haw. 423, 425 (Terr. 1940) ("It is incumbent upon the appellant to take and perfect the appeal."); *Colquhoun v. Swab*, 797 N.W.2d 121, 126 (Iowa App. 2011) ("The rules of appellate procedure place a duty on the appellant to perfect an appeal."). By dismissing for lack of appellate jurisdiction, the ICA obviously did not rule in the *Star-Advertiser*'s favor on Governor Abercrombie's claim that the circuit court abused its discretion when it assessed him fees and expenses incurred in that court. It only determined that without the circuit court first having entered a final judgment in the proper form, the ICA had no statutory authority to consider Governor Abercrombie's arguments. The ICA's dismissal meant only that the circuit court still had jurisdiction, as reflected by the lack of a remand to the circuit court; the ICA simply dismissed the appeal. Accordingly, until the circuit court entered a final appealable judgment and Governor Abercrombie filed the Notice of Appeal in CAAP-13-0000127, the appellate phase of the litigation had not properly commenced, much less been concluded in the *Star-Advertiser*'s favor. Contrary to the ICA's implicit conclusion, the *Star-Advertiser* would have been premature had it requested section 92F-15(d) fees and expenses upon the jurisdictional dismissal of CAAP-12-0000625, because it had not yet succeeded in "the [appellate] litigation." *See, e.g., Hawaiian Ass'n of Seventh-Day Adventists v. Wong*, 130 Haw. 36, 39, 305 P.3d 452, 455 (2013) (under the rules of "prevailing party," assessment of fees and expenses by an appellate court is only ripe after a winner has been determined on the merits). This happened only after the ICA determined in CAAP-13-0000127 that the circuit court's assessment of the *Star-Advertiser*'s fees and expenses was correct, which ripened its request for appellate fees and costs under section 92F-15(d).[6]

Second, when asked by the *Star-Advertiser*, Governor Abercrombie responded that the

[6] The situation here is no different than when an appeal results in a remand for further proceedings, followed by another appeal (under a new appeal number) which resolves the merits. Only in the latter case is a request for fees for the litigation—including the first appeal—ripe. *See id.* at 39, 305 P.3d at 455 ("we also, however, vacate the ICA's order awarding costs on appeal to SDA because a prevailing party has yet to be determined"). *See also id*. at 50, 305 P.3d at 466 ("[W]e conclude that neither party has prevailed on appeal.").

ICA's dismissal of CAAP-12-0000625 did not end his efforts to overturn the circuit court's assessment of fees and costs, but that he would ask the circuit court to amend the form of the judgment, after which he would file another Notice of Appeal and try again at the ICA. He did just that, and the parties—with the approval of the ICA—simply refiled in CAAP-13-0000127 the same briefs they had submitted in CAAP-12-0000625. This agreement was designed to speed up resolution of the litigation, and to avoid the expense of having the *Star-Advertiser* needlessly redraft its brief (which, ultimately, preserved the public treasury, which bears the final responsibility for fees and costs under the UIPA even though it was Governor Abercrombie's withholding of the JSC list and his insistence on being sued that forced the litigation). It also prevented Governor Abercrombie from revising his CAAP-13-0000127 Opening Brief's arguments in light of the full preview of the *Star-Advertiser*'s arguments and authorities he obtained in CAAP-12-0000625.

In sum, "the litigation" does not mean only a discrete appellate case number, as the ICA concluded when it denied the *Star-Advertiser*'s application for fees and costs associated with CAAP-12-0000625 solely because it had not been filed within 14 days of the court's rejection of Governor Abercrombie's motion for reconsideration of the jurisdictional dismissal. The fees and costs incurred by the *Star-Advertiser* in CAAP-12-0000625 were not somehow incurred *outside* "the litigation" merely because of a jurisdictional dismissal for a technical defect, and then, once the parties cooperated to correct that defect, Governor Abercrombie immediately refiled the Notice of Appeal and the clerk assigned a different appellate case number.

II. THE PURPOSE OF THE UIPA REQUIRES A "LIBERAL" READING OF "ACTION" AND "IN THE LITIGATION."

Even if the plain meaning of "in the litigation" and "action" were not clear enough, the ICA gravely erred because the legislature stated that the UIPA requires a broad reading in favor of those who take on the responsibility of mounting a legal challenge to government secrecy. Although the legislature did not provide legislative history to further explain section 92F-15—which in itself supports the conclusion that the meaning of "litigation" and "action" is so plain that those terms need no exposition—the UIPA expressly requires a broad construction, noting that "[t]his chapter shall be applied and construed to promote its underlying purposes and policies[.]" Haw. Rev. Stat. § 92F-2. The legislature left no doubt about its policy:

> Therefore the legislature declares that it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of government agencies—shall be conducted as openly as possible.

Id. It also gave government agencies—and the courts, if an agency fails to conform to the State's policy—details about those policies and how to accomplish them:

> Promote the public interest in disclosure; Provide for accurate, relevant, timely, and complete government records; Enhance governmental accountability through a general policy of access to government records; Make government accountable to individuals in the collection, use, and dissemination of information relating to them.

Id.[7] As this Court reminded, enforcement of the attorneys' fees and expenses requirement is a crucial component in fulfilling the UIPA's purpose of open and transparent 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 Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ. of Haw. Chapter, 83 Haw. 378, 393, 927 P.2d 386, 401 (1996).

Similarly, this mandates a "liberal" interpretation of the terms "in the litigation" and "action" in section 92F-15 to allow a complainant to wait until resolution of the merits appeal, even if an earlier attempted appeal was dismissed for lack of appellate jurisdiction. The ICA's crabbed reading of the statute hardly "lower[ed] barriers to judicial enforcement of the UIPA," but perversely *raised* them by erecting unnecessarily technical obstacles to full recovery of fees and costs. It created a trap for complainants who, as here, are induced to wait for resolution of the merits by the language of the statute, the statements of the agency, and the orders of the court. Moreover, the ICA's *de minimis* assessment of $1,810 as the "reasonable attorney's fees and all other expenses reasonably incurred in the [appellate] litigation," hardly serves as a realistic deterrent to government agencies wrongfully withholding public documents, or as an encouragement for citizens to challenge agencies if they do. Instead, it results in capricious incentives: government agencies appealing adverse UIPA rulings have no reason to try and get the form of the circuit court's order correct, and

[7] This Court's liberal rule of construction is the mainstream view of courts interpreting open records statutes. *See, e.g*., *Chandler v. City of Sanford*, 121 So. 3d 657, 660 (Fla. App. 2013) ("courts must construe the public records law liberally in favor of openness" (internal quotation marks omitted) (quoting *Rameses, Inc. v. Demings*, 29 So. 3d 418, 421 (Fla. App. 2010)); *Sage Info. Servs. v. Humm*, 977 N.E.2d 895, 901 (Ill. App. 2012) ("It is our duty to liberally construe the [Illinois] FOIA in favor of ease of access to public records on the part of any interested citizen.").

complainants have no motivation to try and save fees and expenses by avoiding duplicate work. Consequently, the ICA's ruling fails to promote governmental transparency, which the legislature and this Court have determined is essential to a functioning democracy. To the contrary, the ICA's ruling "defeat[ed] that intent." *State of Haw. Org. of Police Officers*, 83 Haw. at 393, 927 P.2d at 401. This Court's mandate of a liberal application of the UIPA refutes the ICA's overly restrictive and unnecessarily technical interpretation of "in the litigation" and "action" to deny recovery of fees and expenses that were absolutely essential to the *Star-Advertiser* prevailing on the merits in the appellate litigation, simply because they were recorded under a different appeal number.

CONCLUSION

This Court should accept certiorari and vacate the ICA's orders rejecting the *Star-Advertiser*'s request for UIPA fees and expenses with prejudice (Dkt. 75), and motion for reconsideration (Dkt 88). The case should be remanded to the ICA for full consideration of the *Star-Advertiser*'s timely request for all fees and expenses incurred in the appellate litigation.

DATED: Honolulu, Hawaii, May 2, 2014.

Respectfully submitted.

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Diane D. Hastert
DIANE D. HASTERT
ROBERT H. THOMAS
MARK M. MURAKAMI
CHRISTOPHER J.I. LEONG

Attorneys for Petitioner/Plaintiff-Appellee
OAHU PUBLICATIONS, INC.,
dba HONOLULU *STAR-ADVERTISER*

Appendix 1

NO. CAAP-13-0000127

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

OAHU PUBLICATIONS, INC., doing business as Honolulu Star-Advertiser, Plaintiff-Appellee, v. NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawaiʻi, Defendant-Appellant, and DOE GOVERNMENTAL AGENCIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1871-08 KKS)

ORDER

(By: Fujise, Presiding Judge, Leonard and Ginoza, JJ.)

Upon consideration of the Request for Fees and Expenses by Diane D. Hasert, counsel for Plaintiff-Appellee Oahu Publications, Inc., filed on November 10, 2013, the Errata to Defendant-Appellant Governor Abercrombie's Memorandum in Opposition to Plaintiff-Appellee's Request for Fees and Expenses, and the attachments thereto, the request for appellate attorneys' fees and costs is denied.

Attorneys' fees and costs related to CAAP-12-0000625 are denied with prejudice.

"Requests for non-indigent attorney's fees and costs allowed by statute or contract shall be submitted in a form that substantially complies with Form 8 in the Appendix of Forms." Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 39(d)(1). Appellee's request does not substantially conform to Form 8. The request is also incorrectly calculated in that it requests two different amounts for attorneys' fees.

It further appears that some entries are block billed which is prohibited under Hawaii Adventures v. Otaka, 116 Hawai'i 465, 173 P.3d 1122 (2007).

The request for costs for photocopying and extra postage failed to specify the purpose for incurring the costs and the date the costs were incurred.

The State failed to identify specific entries that it objects to as excessive, redundant, or unnecessary. To the extent it objects to the request, the State should identify specific entries that it believes are excessive, redundant, or unnecessary.

Therefore,

IT IS HEREBY ORDERED that the request for attorneys' fees and costs is denied. Attorneys' fees and costs related to CAAP-12-0000625 are denied with prejudice. All other requested attorneys' fees and costs are denied without prejudice. Appellee may submit an amended request for attorneys' fees and costs, in compliance with HRAP Rule 39(d), within 10 days from the date of this order. An objection and Reply to an amended request may be filed in accordance with HRAP Rule 39(d)(4).

DATED: Honolulu, Hawai'i, **January 6, 2014.**

Diane D. Hastert, Esq.,
on the request.

Presiding Judge

Associate Judge

Associate Judge

Appendix 2

NO. CAAP-13-0000127

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

OAHU PUBLICATIONS, INC., doing business as Honolulu Star-Advertiser, Plaintiff-Appellee, v. NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawai'i, Defendant-Appellant, and DOE GOVERNMENTAL AGENCIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1871-08 KKS)

ORDER
(By: Fujise, Presiding Judge, Leonard and Ginoza, JJ.)

Upon consideration of the Amended Request for Fees by Diane D. Hastert, counsel for Plaintiff-Appellee Oahu Publications, Inc., dba Honolulu Star-Advertiser (Appellee), filed on January 15, 2014, the Memorandum in Opposition to Plaintiff-Appellee's Amended Request for Fees Filed January 15, 2014, filed on January 24, 2014, the Reply in Support of Amended Request for Fees by Appellee filed on January 31, 2014, the attachments thereto, and the files herein, the request for appellate attorneys' fees in the amount of $1,810.20 is granted.

IT IS HEREBY ORDERED that appellate attorneys' fees in the amount of $1,810.20 are awarded in favor of Plaintiff-Appellee Oahu Publication, Inc., dba Honolulu Star-Advertiser and against Neil Abercrombie, in his official capacity as Governor of the State of Hawai'i.

DATED: Honolulu, Hawai'i, February 24, 2014.

Diane D. Hastert, Esq.
on the request.

Presiding Judge

Associate Judge

Associate Judge

Appendix 3

NO. CAAP-13-0000127

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

OAHU PUBLICATIONS, INC., doing business as Honolulu Star-Advertiser, Plaintiff-Appellee, v. NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawaiʻi, Defendant-Appellant, and DOE GOVERNMENTAL AGENCIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1871-08 KKS)

ORDER GRANTING IN PART PLAINTIFF-APPELLEE'S MOTION FOR RECONSIDERATION OR CLARIFICATION OF ORDER DENYING FEES AND COSTS
(By: Fujise, Presiding Judge, Leonard and Ginoza, JJ.)

Upon consideration of the "Motion for Reconsideration or Clarification of Order Denying Fees and Costs (Jan. 6, 2014) (Dkt 75)" by Plaintiff-Appellee Oahu Publications, Inc., doing business as Honolulu Star-Advertiser (Plaintiff-Appellee), filed on January 15, 2014, the attachments thereto, and the files herein, the motion is granted in part and denied in part.

By an order dated January 6, 2014 (Order), this court denied Plaintiff-Appellee's requested attorney's fees and costs related to CAAP-12-0000625 with prejudice and denied requested attorney's fees and costs related to CAAP-13-0000127 without prejudice. This court allowed Plaintiff-Appellee to file an amended request for attorney's fees and costs within ten days from the date of that Order.

1. Plaintiff-Appellee moves this court to reconsider its denial with prejudice of attorney's fees and costs related to CAAP-12-0000625 or, in the alternative, to provide an explanation for the denial of attorney's fees and costs.

We grant Plaintiff-Appellee's request for an explanation for that part of the Order. Hawai'i Rules of Appellate Procedure (HRAP) Rule 39(a) provides, in pertinent part, "if an appeal or petition is dismissed, costs shall be taxed against the appellant or petitioner upon proper application unless otherwise agreed by the parties or ordered by the appellate court." (Emphasis supplied) HRAP Rule 39(d)(2) states,

> A request for fees and costs or necessary expenses must be filed with the appellate clerk, with proof of service not later than 14 days after the time for filing a motion for reconsideration has expired or the motion for reconsideration has been decided. An untimely request for fees and costs or necessary expenses may be denied.

In our Order, we denied Plaintiff-Appellee's request for fees and costs for CAAP-12-0000625 because it was untimely.

2. Plaintiff-Appellee also moves this court to reconsider its denial without prejudice of attorney's fees and costs related to CAAP-13-0000127. This portion of Plaintiff-Appellee's motion is denied.

Hawaii Revised Statutes (HRS) § 92F-15(d) provides for assessing "expenses reasonably incurred in the litigation." The information submitted was not sufficient to determine reasonableness of the requested expenses. Plaintiff-Appellee's request and the supporting declaration of counsel relied on "Exhibit 2" for detailing the requested costs. However, Exhibit 2 appears to contain information as to costs which is inconsistent with counsel's declaration and the costs request. Thus, the photocopying and extra postage charges were properly denied without prejudice. See Tortorello v. Tortorello, 113 Hawai'i 432, 444-45, 153 P.3d 1117, 1129-30 (2007) (requiring "receipt or proof of the amount being charged" or "any documentation for this court to conclude that the requested amounts . . . were reasonably and necessarily incurred in the appeal . . . ."). The information referenced in the court's prior order as to costs would assist the court in determining reasonableness of the requested costs.

HRAP Rule 39(d)(1) states Requests for non-indigent attorney's fees and costs allowed by statute or contract shall be submitted in a form that substantially complies with Form 8. The purpose of Form 8 is to apprise the court of the type or general nature of the work performed. It provides categories of work that is most common on appeal, (1) Correspondence, Interviews, and Conference, (2) Obtaining & Reviewing Records, (3) Legal Research, (4) Drafting, and (5) Other. Plaintiff-Appellee's first request for attorney's fees failed to categorize its work into any of the categories. Thus, it was not in substantial

compliance with Form 8 and the information submitted was not sufficient for this court to determine that the requested fees were reasonable.

Therefore,

IT IS HEREBY ORDERED that Plaintiff-Appellee's alternative relief as to CAAP-12-0000625 is granted as stated in this order. All other requested relief is denied.

DATED: Honolulu, Hawai'i, January 24, 2014.

Presiding Judge

Associate Judge

Associate Judge

No. SCWC-13-0000127

IN THE SUPREME COURT OF THE STATE OF HAWAII

OAHU PUBLICATIONS, INC., *dba* Honolulu *Star-Advertiser*, Petitioner/Plaintiff-Appellee, vs. NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawaii, Respondent/Defendant-Appellant.	ON APPLICATION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS 1. Order (Jan. 6, 2014) 2. Order Granting in Part Plaintiff-Appellee's Motion for Reconsideration or Clarification of Order Denying Fees and Costs (Jan. 24. 2014) 3. Order (Feb. 24, 2014) 4. Judgment on Appeal (Mar. 3, 2014) Circuit Court (First Circuit) Civil No. 11-1-1871-08-KKS Hon. Karl K. Sakamoto Final Judgment: Feb. 8, 2013

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Application for a Writ of Certiorari, Appendices 1-3 were served on the following parties as follows:

	JEFS ELECTRONICALLY	**U.S. MAIL**
DAVID M. LOUIE Attorney General	X	
ROBYN B. CHUN	X	
CHARLEEN M. AINA Deputy Attorneys General 425 Queen Street Honolulu, Hawaii 96813 Attorneys for Respondent/Defendant-Appellant	X	

DATED: Honolulu, Hawaii, May 2, 2014.

/s/ Robert H. Thomas
DIANE D. HASTERT
ROBERT H. THOMAS
MARK M. MURAKAMI
CHRISTOPHER J.I. LEONG

Attorneys for Petitioner/Plaintiff-Appellee
OAHU PUBLICATIONS, INC.,
dba HONOLULU *STAR-ADVERTISER*

NOTICE OF ELECTRONIC FILING

Electronically Filed
Supreme Court
SCWC-13-0000127
02-MAY-2014
04:45 AM

An electronic filing was submitted in Case Number SCWC-13-0000127. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: SCWC-13-0000127
Title: Oahu Publications, Inc., dba Honolulu Star-Advertiser, Plaintiff-Appellee, vs. Neil Abercrombie, in his official capacity as Governor of the State of Hawai'i, Defendant-Appellant, and Doe Governmental Agencies 1-10, Defendants.
Filing Date / Time: FRIDAY, MAY 2, 2014 04:45:02 AM
Filing Parties: Oahu Publications, Inc., dba Honolulu Star-Advertiser
Case Type: Appln for Writ of Certiorari
Lead Document(s): Application for Writ of Certiorari
Supporting Document(s): Exhibit

Exhibit	Exhibit
Certificate of Service	

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

This notification is being electronically mailed to:
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