IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

OAHU PUBLICATIONS, INC., Plaintiff, vs. NEIL ABERCROMBIE, Defendant.	CIVIL NO. 11-1-1871

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE KARL K. SAKAMOTO, Judge, First Division, presiding on Monday, November 14, 2011; to wit, Plaintiff's motion for summary judgment and Defendant's motion for summary judgment.

Reported by: Theresa A. Reese, CSR 428
Official Court Reporter
First Circuit Court
State of Hawaii

A P P E A R A N C E S:

For the Plaintiff:

ROBERT THOMAS
DIANE HASTERT

For the Defendant:

CHARLEEN AINA

P R O C E E D I N G S

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THE BAILIFF: Calling Calendar No. 1, Civil No. 1CC 11-1-1871, Oahu Publications, Inc., versus Neil Abercrombie for Plaintiff's motion for summary judgment and for Defendant's motion for summary judgment.

Appearances, please.

MR. THOMAS: Good morning, your Honor. Robert Thomas for the plaintiff, the Star-Advertiser, and with me at counsel table is Diane D. Hastert. And, also, for the record, your Honor, I'd like to introduce Mr. Frank Bridgewater, who is the editor of the Star-Advertiser, who is present in the courtroom today.

THE COURT: Good morning.

MR. THOMAS: Good morning, your Honor.

MS. AINA: Good morning, your Honor. Deputy Attorney General Charleen Aina for the Governor.

THE COURT: Good morning.

MS. AINA: Good morning.

THE COURT: You know, we'll go with the party that filed first, and that would be Mr. Thomas.

MR. THOMAS: Yes, your Honor. Thank you.

MS. AINA: Judge Sakamoto, if I may --

THE COURT: Yes.

MS. AINA: -- before the plaintiffs argue the motion for summary judgment, this morning we received a copy of a non-hearing motion from the plaintiff asking that a portion of the defendant's reply memo be struck. Before we proceed to the argument on the merits, may we understand how the Court would proceed? Should we argue the -- all of the provisions of the reply memo, or given the pendency of the motion to strike that section is the Court going to say that no argument should be had, and we would continue dependent upon the disposition of the non-hearing motion?

THE COURT: I think you should assume and the Court is prepared to rule on all issues brought before it.

MS. AINA: I'm sorry?

THE COURT: The Court is going to rule on all issues brought before it.

MS. AINA: This morning?

THE COURT: Yes.

MS. AINA: Okay. Thank you.

MR. THOMAS: We're prepared to argue that as well, your Honor.

Your Honor, 16 years of routine public disclosure by two governors and two chief justices of

names of lawyers honored with one of the covenant spots on the JSC list shows one thing, if nothing else, that the process has not been frustrated. And this case is -- presents a legal question of statutory interpretation; namely, under HRS 92F-13(3) whether JSC lists are government records -- and this is the key language -- that by their nature must be kept confidential in order to avoid the frustration of a legitimate government function. And they are not because, as the Hawaii Supreme Court held in the *Pray* case, the process cannot be frustrated by disclosure as a matter of law because no reasonable lawyer really can rely on confidentiality. And if that's the case, then confidentiality really plays no part in anyone's decision as a matter of law whether they can -- whether they want to apply to the JSC hopefully in the chance of them becoming -- being deemed qualified and put on the JSC list.

So that's the simple way to take care of this case, and that cuts off any questions about anything else. As a matter of law, confidentiality is not required and in fact cannot be guaranteed by anyone under the *Pray* case because, as the Court held at 75 Hawaii, page 350, that Article VI does not expressly mandate that the list remain confidential nor that they

be disclosed publicly, and there is no -- and this is the key language -- there is no constitutional obligation imposed on a governor or a chief justice either to disclose or to keep them confidential. So that really disposes of the question under Article VI of the Constitution.

The second thing that *Pray* held is that JS -- the JSC rules simply don't apply to the appointing authorities, the governors and -- the governor and the chief justice. They're not bound by those. And once you get that part of it, your Honor, that really takes care of a majority, in fact, the only remaining issue that the Governor has raised. It's really sort of a roundabout way of rearguing the *Pray* case.

And if that alone does not cut off sort of the inquiry, then the argument then becomes one of statutory interpretation. And since the Legislature did not provide a list of records that must be kept confidential and really did not define what it meant by frustrate a government function, the Court simply goes through the same rules of statutory construction that the Court did, say, in the *Kaapu* case, the only other case in which the Hawaii Supreme Court has addressed the frustration exemption.

And they say first, if you don't have any

sort of express language -- we do -- we always do in statutes -- you look at the legislative history. And if you look at the legislative history and especially the key portions where the Legislature says, well, we're not going to put forth a list of what we think are government records. We're going to leave it for the courts to decide. But here's a list of nine things that we think are close, and if it can be analogized to those, then it may. And the list shows that the term "frustrate" as used by the Legislature meant really to defeat the government function. It's simply not a question of making it a little better or little worse, maybe. It's a question of actually breaking down the process.

Second, you look at how courts -- the Hawaii Supreme Court and the ICA has interpreted the term or used the term "frustrate" in its cases over the years both in common language and in other -- in interpreting other statutes, and in those cases it's pretty clear that they don't mean frustrate simply to be sort of a little bit of here, little bit of there. It really means potentially to thwart the entire process.

And then finally, and I think this is probably the most important for this case, is you have to look at the Legislature special rule of statutory

interpretation as applicable to UIPA, and that's broken down into sort of three parts.

So, first, in order for the Governor to prevail, he must show that it's absolutely clear that the release of the JSC list will frustrate the judicial appointment process. Argue, he can't do that.

Second, you take a look at the statute itself and even the UIPA manual that's published by the OIP and how that agency and how state agencies should apply the UIPA, and it says that the UIPA must be interpreted to promote open government. So that's -- that's another rule of statutory interpretation that the courts need to apply in UIPA cases, always keeping that in mind. It's right there in the first part of UIPA, 92F I think 1 or 2, where it says the purpose of this is to foster open government, to allow people to have records, and then finally -- and this is sort of the key one, your Honor -- that any doubt regarding disclosure of a record should be resolved in favor of access. So if it's even a close call, the rule says interpret the statute to allow for public access.

So, ultimately, what the Governor asks this Court to agree is with him that both Governors Cayetano and Lingle and Chief Justices Moon and Recktenwald, who -- who are the appointing authorities

for district judges, essentially frustrated the process for 16 years, and I don't think we can get there.

You look at Governor Abercrombie's contrary theory of frustrate, and I think it -- this is the quote. He said could reasonably be expected to interfere with the judicial selection process, and that was in the reply memo. And ultimately there's three reasons why that doesn't work.

First of all, it doesn't cite any authority for it except two federal cases, one of which, your Honor, when we tried to find it, we couldn't because the citation was wrong. So it's actually not 1993 Westlaw. When you -- you or your judicial clerk look it up, it's actually 1995 Westlaw, and that will give you the federal case under *Lin v. United States* (phonetic).

And those are questions under FOIA, the federal difference, which is slightly different because it involves what's called the deliberative process and the law enforcement records which operate under what the DOJ has classified as a significantly more relaxed standard, first of all, of course, because the language of FOIA is different. They don't use the term "frustrate". And then Congress probably 10 or 15 years ago amended FOIA to make it significantly more

relaxed in favor of the government.

So those cases -- those federal cases cited by the Governor in his reply brief simply don't apply, so he has no authority that frustrate means could reasonably be expected to interfere.

Secondly, goes to legislative history. There really isn't any that helps us in his favor explain what frustrate means in -- to only mean could reasonably be expected to interfere with the judicial selection process, and, in fact, if you look at the Con-Con records, the only concern really that the founders or the drafters of the 1978 constitutional amendments that added this whole process was with keeping the JSC insolated from political concerns.

And it was assumed that JSC lists would become public at some point after their transmission to either the governor or the chief justice, and the *Pray* court cited it at page 344. A -- one of the standing committee reports said it was felt the confidentiality should be preserved, at least as to the name of initial applicants and the deliberations, meaning of the JSC, thereafter. The six names once they are selected would be made public and the list then submitted to the governor or chief justice. So we're talking about the founding fathers and mothers of the 1978 Con-Con

envisioned release of the JSC lists well before the stage where we are at now. In fact, once they were transmitted to the governor.

And so, finally, the third reason why the government -- Governor's theory of frustrate doesn't hold water is even assuming that lawyers who did not -- or did not apply to sufficient -- in sufficient numbers -- and that's a fact that hasn't been established -- the Governor can't make the required causal link between confidentiality or lack thereof and a hypothetical but reasonable lawyer who's considering applying but then decides not to because, as our papers point out, there's -- I mean, we could sit here all day to try to figure out why lawyer -- a lawyer in private practice and government service or on the judiciary might not want to apply for an open position on the bench. So the Governor's theory really cuts against the strong public policy of disclosure and transparent government that UIPA if it's clear on nothing else is very clear on that.

And he's saying that secrecy -- I think the basis of his whole theory is that secrecy might -- and that's a strong word -- make the process better, maybe. Then the records as a matter of law must be kept confidential. And -- but we might say that this could

be true, your Honor, of nearly any situation involving the government function, that operating behind closed doors and in secret might be more efficient, conceivably. It might make the function a little bit better than it is. But, you know, democracy is not a -- necessarily a pretty process, and UIPA -- the Legislature or the people of Hawaii through their Legislature and UIPA has made the choice of transparency and disclosure over secrecy and closed doors.

So with that, I'm willing to or available to answer any questions the Court might have, but we ask that the Court enter three judgments. First, the Star-Advertiser and in this case, more importantly, the public is entitled to an order requiring Governor Abercrombie to disclose the JSC list. Secondly, a declaratory judgment that governors must release JSC lists. And then, of course, finally, the one that flows from that is that a judgment that the Governor failed to timely disclose the list after the Star-Advertiser's request.

THE COURT: Thank you.

MR. THOMAS: You're welcome, your Honor. Thank you.

And I'll be -- if anything raised by -- with respect to the late filed argument, I'll -- I can

come back and answer -- respond to those as need be, your Honor.

THE COURT: Okay. Thanks.

MR. THOMAS: Thanks.

THE COURT: Good morning.

MS. AINA: May it please the Court. Thank you.

The plaintiffs are relying on one exception or are arguing that frustration is not applicable to the Judicial Selection Commission -- Commission's list. They have argued this consistently both as to their motion for summary judgment as well as in opposition to the Governor's motion for summary judgment. But the Governor's basis, justification, and reason -- reasons for withholding the Judicial Selection Commission's nominations list include other exceptions.

The most compelling and clearest as far as the Governor is concerned is that the lists are confidential. What he receives from the Judicial Selection Commission are -- is a confidential list. That confidentiality pursuant to the Judicial Selection Commission's rules doesn't transfer to him from the Judicial Selection Commission. We acknowledge that. But what the Legislature has done when it said that the general rule is disclosure, except if a law restricts or

limits disclosure, what the Legislature has done is as a matter of policy said in two places, 92F-13(4) and 92F-19(b). In those two places the Legislature has made the policy call and said if an agency -- and the Governor is an agency for purposes of 92F -- if an agency receives a confidential document, then the agency is obliged to maintain that confidentiality. And it's very clear both from 92F-13(4) as well as 92-19(b).

In addition, the Governor disagrees with the characterization of the frustration exception -- the plaintiff's characterization of the frustration exception. Much of the time -- much of the -- much of the memorandum in opposition as well as the memorandum in support of the motion for summary judgment by the plaintiff focuses on causal connection, factual basis to conclude that there's frustration, but the frustration test is not a factual test per se. What it is is a basis to anticipate for a reasonable -- a reasonable expectation on the part of government that a clearly established function could be interfered with, could be undercut if disclosure is made.

And contrary to Plaintiff's argument this morning, the Legislature -- the legislative history makes very clear that the lists of nine things that the Legislature cited to in its legislative history as to

what constitutes or -- frustration is simply a list of examples, a non-exhaustive list of examples of what could constitute frustration.

Here, if you will, frustration incorporates the confidentiality of the Judicial Selections Commission itself. In the last exemption in that list of nine examples in the legislative history -- and we attached a copy of the Senate Standing Committee report that includes that list -- encompasses this confidentiality.

There's a degree of redundancy in 92F-13. The redundancy appears in the frustration. It's basically saying if a -- if an item's confidentiality is lifted, such as, for instance, in the instance of national security -- I mean, this being the example from the federal -- FOIA -- the FOIA itself from which our 92F was fashioned -- that that in and of itself is frustration.

But we're arguing that it's reasonable to expect because the Constitutional Convention even recognized when it -- when it conferred confidentiality on the Judicial Selection Commission's deliberations, they anticipated and they articulated the anticipation that some lawyers may just not apply, that there was concern in the community. They heard concerns from the

community that some lawyers may not apply.

THE COURT: What is the legitimate government function we're talking about specifically?

MS. AINA: The legitimate government function is the appointment of the judges and justices to our appellate and circuit courts. The appointment function is shared under the Constitution, Article VI, Section 4 -- is shared -- I'm sorry, Article VI, Section 3, is shared between the Judicial Selection Commission which basically does all of the leg work for the appointment process. It advertises vacancies. It reviews applications. It can even under its rules solicit applications. But it -- it is -- it vets the general pool. And then under the Constitution and the Judicial Selection Commission's rules transfers a list of no more than -- of no fewer than four and no more than six to the Governor. The Governor appoints someone from the list, and the Senate confirms. The appointment process is the legitimate government function that we're talking about.

THE COURT: So, in other words, you're saying it's irrelevant that the subsequent and actual appointments have performed legitimately their governmental functions as judges, so you're saying it's just a procedural process of appointments that has been

affected not the actual result?

MS. AINA: The legitimate government function to which -- for which the Governor invokes the exception is not to assure that the judges who are appointed pursuant to the appointment process do their job. What the function -- the function the Governor is pointing to is the appointment process that the Constitution has said there are three actors for purposes of the appointment process, the Judicial Selection Commission, the Governor, and the Senate. The function that we are referring to is the function described in Article VI, Section 3, of the State Constitution, how -- how judges and justices of the appellate and circuit courts are appointed.

And at this point I should point out, your Honor, that while Plaintiffs make -- while they cite both to the Chief Justice's appointing authority and the Governor, I'm here to argue the Governor's reasons or understanding of what his obligations are under 92F with respect to the Judicial Selection Commission's list. I cannot and do not speak for the Chief Justice.

But the analysis is with respect to frustration, which is only one of three exceptions that the Governor has raised as justification for

nondisclosure, the legitimate government function is the process of appointing judges for the State of Hawaii that the Governor is required to participate in under the Constitution.

The third exception that the Governor relies upon is the one that the plaintiffs say is foul ball and on the Governor's behalf -- or for the Governor to make, and that is whether the exception in 92F-13(1) was asserted in the answer as well as in the motion for -- the Governor's motion for summary judgment. At the very end, there is no question that the paragraph the plaintiffs cite to, paragraph one of the answer, does not include a citation to 92F-13(1); however, the exception is conferred in 92F-11 and is actually in our view subsumed within, as I said earlier, the frustration.

The argument with respect to frustration that the plaintiffs make as to why it's not available is to say that there's no expectation on the part of nominees or applicants, judicial applicants, to nondisclosure, that they cannot expect to have confidentially -- confidentiality maintained by the governor. And that's a privacy argument. It's an -- when you look at the constitutional history with respect to the judicial selections confidentiality requirements,

it's rooted in privacy. It's rooted in a balance between whether someone who applies for public office ought to have confidentiality as against the public's interest in knowing what the applicant is about, what the applicant believes.

The balance was tipped by the delegates in 1978 to making everything the Judicial Selection Commission does confidential. The balance was tipped in that direction because attorneys came to the convention and said, Things happen in my law firm, and I may not apply. I've heard of things happening in my law firm, and people have applied and suffered consequences. That is clearly on the -- in the constitutional record. Misgivings were presented to the Constitutional Convention's delegates. When the delegates debated in the committee of the whole, they acknowledged that they heard these things from people who came, and they concluded there needs to be confidentiality in the deliberations.

What they couldn't decide upon and they ended up delegating to the Judicial Selection Commission to do was to in fact articulate the extent and scope of that confidentiality. One year later the Judicial Selection Commission adopted what is now Rule 5, Section 2, and said everything is confidential.

In *Pray*, the Supreme Court said everything is confidential while it's before the Judicial Selection Commission, but the Judicial Selection Commission as a matter of separation of powers is not the legislature. It cannot tell another branch of government what to do by way of its rule. And so the Court concluded there's a vacuum here, and the appointing authority have discretion. That's the holding in *Pray*. No question.

But the *Pray* court never addressed because it was never asked to address the Uniform Information Practices Act which wasn't in effect. The *Pray* court --

THE COURT: Do you see an analogy to that? I mean --

MS. AINA: No. It's an -- it's an independent basis for the Governor's reason -- for the Governor not to disclose.

THE COURT: Well, they basically interpreted the JSC Rule 5 or 7 arising from the Constitution in the matter involving separation of powers analysis, and now you're saying under the UIPA statute, it's a statute that it would be different analytically?

MS. AINA: What the Governor is saying is

that the Legislature is the branch of government that makes law, that while the *Pray* court concluded that the Judicial Selection Commission had sole authority to regulate itself by its rule, but not to regulate the chief justice in the judicial branch or the governor in the executive branch. What the *Pray* court did not say was the Legislature was similarly foreclosed. What the -- there was no discussion as to the power of the Legislature under the -- under the Doctrine of Separation of Powers as to whether the UIPA was constitutional.

I mean, if the Court is suggesting that the *Pray* court's decision foreclosed Legislature from making exceptions because of the Doctrine of Separation of Powers, then the Doctrine of Separation of Powers is being misapplied. Under Article III, the Legislature makes the laws. The Legislature made the policy decision that when a confidential document reaches the hands of certainly an executive branch official or agency, that agency or official must maintain the confidentiality of that document. It passed two provisions to ensure that, 92F-13(4) and 92F-19(b). There's no question that the Legislature is fully authorized under the State Constitution to pass those two laws. There's also no question that in the *Pray*

court, the *Pray* court said the JSC's rule is constitutional. It is a proper rule for the JSC to adopt in order or pursuant to the State Constitution.

So what you have here is, for instance, if this Court were to order a -- or to seal a document, that document is sealed if the attorney general -- if the attorney general were present in a proceeding and the Court sealed the document, that document is sealed as to the attorney general and any other law enforcement agency that the attorney general would give the document to for purposes of that law enforcement agency's execution of its duties. So a seal, for instance, on confidential records in a criminal proceeding is not going to keep the records from being transferred to those who need the document in order to do their job, but that second agency under the UIPA cannot lift the confidentiality of this Court's order. Only the Court can lift the confidentiality.

So when a statute confers confidentiality on a document or a rule confers confidentiality on a document, which is the case here with Judicial Selection Commission Rule 5, 2, then the receiving agency is obliged under 92F-13(4) and 92F-19(b) to maintain the confidentiality of that record. There's no judgment call in the receiving agency. The Legislature has said

specifically no disclosure, and that's the restriction that 92F-11 recognizes to the general rule and the general policy in 92F-2 that the people be allowed to look at government records so they can participate in government.

THE COURT: Tough issues.

MS. AINA: Thank you.

THE COURT: Thank you.

MR. THOMAS: Your Honor, I'd like to take a few minutes to respond to those arguments.

THE COURT: Yes.

MR. THOMAS: Thank you.

First of all, your Honor, the Legislature didn't do what the Governor is now arguing that it does, that once an agency treats a document as confidential, that it must remain forever confidential. I mean, that's certainly not what Section 92F-19 says, and we'll walk through that in a minute.

And second of all, I think there's a -- by trying to analogize it to -- the JSC list to a document that's been placed under seal by a court, I think that highlights the Governor's misapprehensions about what the duties of an agency are under the UIPA that court sealing documents is a world apart from saying an agency -- and of course the Court is not an

agency under UIPA, is not subject to UIPA -- has the obligation to disclose. I mean, the courts are under no obligation to disclose things. Of course we all act in public, but when the situation requires, the Court has the inherent power to go off -- go off the public record, something that certainly that the Governor does not, especially in light of the UIPA.

Secondly, and let's take a look at Section 19. It doesn't say what the Governor says it does. It's a prohibition under 19A of disclosure from one agency to another. So it's expressly limited to the Governor can't -- or an agency can't disclose to another, not the public. Here, the public is certainly not an agency that's -- it's the receiving entity. The public itself is the receiving entity, not another agency. And of course it doesn't apply to the JSC since the JSC discloses the list to the Governor pursuant to the Constitution. So if there's any question, of course the constitutional powers of the JSC take precedence over 92F-19(a). So, again, the prohibition is on the disclosure to other agencies. And so the Governor is not being asked to disclose it to another agency. He's being asked to disclose it to the public.

Second -- and I think this is what really kicks in -- an agency receiving government records

pursuant to subsection A shall be subject to the same restrictions on disclosure of the records as the originating agency. Again, that -- that whole section isn't even applicable here because it's the public that's getting the records, your Honor, and not an agency. And even if it could be construed to apply to the Governor, he did not receive the JSC list pursuant to subsection A. So I think that as a matter of statutory interpretation is sort of the -- the way that you deal with that argument.

And if that doesn't do it for you, you can go back and take a look at the Governor's claim that the lists themselves somehow are confidential, and that's a misapprehension of the nature of these things. Now, the lists can be confidential while the JSC has them, and the Supreme Court has ruled that's the case. But government records essentially can change their nature to go from confidential documents to public documents, and so the Governor's obligation is to disclose those unless he can prove those things, that it's either confidential under the exceptions that he relies upon, and let's deal with those sort of seriatim here.

First of all, I'm not so sure that on the waiver issue whether the Governor should have raised

this issue to give us notice so we could at least be here arguing on a complete record of the privacy claims that we got hit on with the reply on Thursday is the question of whether 92F-11 is sort of the catch-all and doesn't obligate the Governor to give us a little better notice than that than in the reply brief.

And so assuming -- let's even assume that privacy was raised as an affirmative defense properly under the notice pleading rules to give us proper notice under Rule 8. Governor still hasn't addressed why it only sort of crops up in a reply brief on the last day before the -- literally before the hearing when we don't have an opportunity to respond, and, in fact, our only remedy is to file a motion to strike. The ICA has ruled in an unpublished case that we couldn't even seek additional briefing. So even a surreply brief or something to that effect is an improper procedure, so we couldn't have even asked for that. The Court is -- the only remedy that we can ask the Court for is the motion to strike, which we filed. And so it's not in the motion for summary judgment. Only shows up in a reply. The Governor hasn't really addressed why under this Court's -- the Circuit Court Rule 8 it's pretty clear that you're not supposed to raise arguments in a reply for the first time.

And so, you know, what it really gets down to -- and I think this is sort of the heart of the Governor's argument -- that, you know, I've heard things happening in my law firm. Even if we get over the double and sort of triple hearsay that that might be -- and it is offered for its truth, your Honor. Let's make no mistake about that -- that there's really no basis for this Court to find that the process has been frustrated as a matter of law.

If those misgivings were presented to the Constitutional Convention, as the Governor argues, let's look at what the Constitutional Convention did with those misgivings. First of all, it did nothing to the governor. It did not tie his or her hands. It did not tie chief justice's hands. So in reaction to those quote/unquote misgivings, even assuming they were proveable, the Con-Con did nothing, and, in fact, later on except delegate it to the JSC. What did the JSC do? It adopted rules which the Hawaii Supreme Court said in *Pray* were limited only to the JSC, which makes a lot of sense because it's the JSC's rule to determine its own procedures under the Constitution, and it's the Legislature's function to determine what government records once it leaves the JSC are subject to public disclosure. And in that case, the Legislature has made

it quite clear that any kind of close calls, let's go with disclosure.

On the privacy issue, if the Court is inclined to address that, it's an immense burden on the Governor's part. I mean, it's simply not a balancing between, oh, is there some privacy interests, and what's the public? It's a clearly unwarranted invasion of privacy, and that's a very high standard.

And secondly, let's look at what the Court said in the SHOPO case. It said it must be a significant privacy interest, and it's the name alone -- and we would argue, your Governor, that -- or, your Honor, that someone's name alone, if it's a privacy interest at all, it's very -- I won't say inconsequential, but it's not the type of things when we look in the statute and the legislative history that the Legislature was trying to protect with the privacy interest, things like social security numbers. You know, it's another thing if -- if the JSC list included everybody's resume and background check, for instance. That might be another question. But here, it's literally just limited to their name, and the name alone is not significant. Compare that to the list that we see in the statute.

And then, finally, if it's not

significant, as the Court said in SHOPO, a mere scintilla -- and that's, as we all know, a very extremely low bar to cross over -- a mere scintilla of public interest will overcome that, and here, in this case, this is an argument that the Governor makes now that even his own OIP has rejected in Opinion 0303, said the public interest clearly outweighs any -- any minimal interest someone might have in essentially their name showing up on a list for government employment.

And if that's the case, if the Court is inclined to rule on that issue, we suggest -- we argue that there's -- this is not even a close call, that the public interest clearly outweighs in -- in knowing who might be on those lists and who the other candidates or who the other nominees were who the Governor did not choose to appoint clearly outweighs the minimal privacy interest, if there is one at all, in someone's name.

And, your Honor, if you have any questions, I'd be happy to answer them, but other than that, I think we've responded to every question or every issue that's been raised by the Governor.

THE COURT: Thank you.

MR. THOMAS: Thank you.

MS. AINA: Your Honor, one thing for the record, please. On Friday the plaintiff's attorneys

raised with us that -- the concern about whether the privacy interest had or exception had been raised for the first time on reply. We did -- and I say this only for the record. We did invite them and indicate to them that we would have no objection to their requesting time to file a surrebuttal or rebuttal to that -- to the -- what they believed was argument presented for the first time. So just for the record I would indicate that.

I would also want just two other things, to direct the Court's attention to the excerpts with respect to what was presented to the Constitutional Convention in 1978, to the excerpts from the -- from the constitutional proceedings at page 7 and 8 of the reply -- of the Governor's reply brief.

And, finally, I would like to say that this is really the first time that these three exceptions have been presented to a court. There's no question that OIP has addressed them twice, once in a 1993 written opinion, which is included in the exhibits to, I think, both of our pleadings and then again in 0303 -- Opinion 0303 to which counsel just cited. But the courts -- the courts have not addressed these issues. They've not addressed whether, at least in the -- particularly in the context of the Judicial Selection Commission's list, which is of interest to

everyone, the courts have not addressed which, if any, exceptions apply to the general rule of disclosure. And so a complete record, consideration to all of the applicable exceptions ought to be given in this Court, and, if necessary, because this is important, by the -- by the Supreme Court of the state of Hawaii. Thank you.

THE COURT: Thank you. These are complicated issues, and it will take me a while to go through our findings and conclusions, so let me start at the end.

Basically, the Court believes public disclosure is public interest. In that light, the Court would grant Oahu Publications' motions here. The Court believes that the defendant has not shown that exceptions apply in this case.

The Court begins with the Uniform Information Practices Act as codified in Chapter 92F. HRS 92F-11, affirmative agency disclosure responsibilities, expressly mandates disclosure in subsection A stating all government records are open to public inspection unless access is restricted or closed by law.

An exception to this rule is provided in subsection B which states except as provided in Section 92F-13. Under 92F-13, entitled government

records; exceptions to general rule, it states in pertinent part as follows. It states this part shall not require disclosure of, as relevant to the arguments raised here, subsection 1, government records which if disclosed would constitute a clearly warranted invasion of personal privacy; subsection 3, government records that by their nature must be confidential for the government to avoid the frustration of a legitimate government function; and subsection 4, government records which pursuant to state or federal law, including an order of any state or federal court, are protected from disclosure.

Thus, the burden is on Defendant to show that his refusal to disclose the list -- nominee list falls within an exception either under HRS 92F-13(3) or 92F-13(4). As stated, Defendant has failed to meet the requirements for an exception under 92F-13(3).

HRS Section 92F-13(3) provides that disclosure is not required where the government record is of such a confidential nature that disclosure will result in a frustration of a legitimate government function. Article VI, Section 4, of the state Constitution created the JSC to compile a list of judicial nominees. The defendant here argues disclosure of the nominee list will frustrate an application

process -- appointment process as it will chill potential applicants from submitting their names.

However, based on the *Pray* case, Article VI, Section 4, cannot serve as a basis for requiring confidentiality. In *Pray*, a radio talk show host sought public access to various judicial nominee lists. The JSC denied that request citing JSC Rule 7, which is now JSC Rule 5, which requires that the Commission's proceedings be confidential. *Pray* argued that Rule 7 conflicted with Article VI, Section 4, of the Constitution which only required that JSC's deliberations be confidential. The Supreme Court agreed with *Pray* holding that the term "deliberations" encompasses only those acts, processes, or considerations undertaken prior to final choice or decision. For present purposes, it is the list of judicial nominees that represents the JSC's final choice of decisions. The list itself is not part of JSC's deliberations.

Thus, the Supreme Court concluded that Article VI, Section 4, of the Constitution neither expressly mandates that list containing the names of JSC's judicial nominees remain confidential or that they be publicly disclosed. This holding was specifically extended to the governor as the Supreme Court reasoned.

It follows that there's no express constitutional obligation imposed on the governor or the chief justice either to disclose the names or to keep them confidential.

As the Supreme Court has expressly held that Article VI, Section 4, does not impose any constitutional obligation on the governor either to disclose the names or to keep them confidential, it cannot be said that the judicial nominee list is by its nature something that must be kept confidential. Likewise, Defendant has not adequately shown how disclosure of the list will frustrate the proceedings of the JSC.

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

chilling effect is speculative and cannot support a judicial determination that disclosure of nominee lists will frustrate the selection process as a matter of law.

Accordingly, as the Supreme Court has ruled that disclosure of the judicial nominee list is discretionary and given that Defendant has failed to show any real evidence of frustration of a legitimate government function, 92F-13(3) does not apply.

Defendant has raised an applicable defense under HRS 92F-19(4). However, this defense is distinguishable, the Court believes, based on the unique facts of this case. Together, 92F-13(4) and HRS 92F-19(b) would permit Defendant to withhold access to the judicial nominee list. Under 92F-13(4), government records that are protected from disclosure pursuant to state or federal law are exempted from the requirements of HRS 92F-19(11). Thus, if any other statute or law prevents disclosure of judicial nominee lists, then 92F-13(4) would provide an exception to the general disclosure requirements found in 92F-11.

92F-19, limitations on disclosure of government records to other agencies, deals with disclosure of government records among government agencies. Subsection B states that any agency receiving government records shall be subject to the same

restrictions on disclosure of the records as the originating agency.

JSC is bound by the JSC rules which it promulgates pursuant to Article VI, Section 4. JSC Rule 5, Section 2, states under the Constitution of the State of Hawaii, the Commission's proceedings must be confidential. Accordingly, because the JSC, as the originating agency, is bound by the confidentiality requirement of JSC Rule 5 under 92F-19(b), the same should apply to Defendant as the receiving agency.

However, the special circumstances here allow for an exception, the Court believes, to 92F-19(b) in this case. Requiring the Governor's office to comply with JSC's rules would directly conflict with the holding in *Pray*. In *Pray*, the Supreme Court also specifically examined whether the confidentiality requirement of Rule 7 applied to the Governor and Chief Justice of the Supreme Court after the JSC submitted its list of nominees for selection of judicial appointments or appointees. In finding that the constraints of JSC Rule 7 do not extend to the appointing authorities, the Supreme Court noted that the 1978 Constitutional Convention Committee of the Whole Report No. 10 states that the JSC would have power by way of its own rules to determine its boundaries and limits on the

confidentiality of its actions. Thus, the Supreme Court concluded the plain language of the committee report suggests that the framers intended only that the JSC have the power to gag itself and such other persons as might participate in its proceedings.

Accordingly, the actions of the Governor and Chief Justice affecting confidentiality and taken after the lists are received would logically fall outside the scope of JSC's rules, and it therefore follows that such actions would be unconstrained by the confidentiality provisions of Rule 7.

Furthermore, the Supreme Court held that requiring the Governor or Chief Justice to follow JSC Rule 7 would violate the Separation of Powers Doctrine. Such authority would literally transform the JSC into a fourth coequal and quasi-legislative branch of state government empowered to control and object to its coercive influence, the independent functions, and prerogatives of the heads of the executive and judicial branches. It stated further, it is inconceivable to us that the 1978 Constitutional Convention without comment could have intended such a result. We therefore hold in that *Pray* case that the confidentiality requirement of Rule 7 does not apply to the Governor of the -- or the Chief Justice after the JSC has submitted its list of

judicial nominees for consideration, and that it is within the sole discretion of the appointing authorities whether to make public disclosure of the JSC's list of judicial nominees.

Thus, the *Pray* case stands in direct conflict with a strict application of 92F-19(b) in this particular case. As *Pray* appears to convey unfettered discretion to the Governor or Chief Justice regarding the disclosure of the nominee list, this would contradict with 92F-19(b) which requires the Governor as an agency receiving a government record to comply with the same restrictions regarding disclosure as the JSC originating agency. This would effectively render that portion of the UIPA illegal.

The Court believes there is an exception to 92F-19(b) from the *Pray* case so that the rule and the *Pray* case can be read harmoniously. It should be noted that UIPA is a statute that strongly promotes the public interest as it furthers public access to government records and the transparency in government. Additionally, the particular UIPA section in question, 92F-19, deals with disclosure among government agencies, and it is highly unlikely that its drafters contemplated an exchange with an agency that represented the highest decision making office of an entire branch of

government. Here, that would be the judicial branch and the executive branch making particular nominee decisions.

In the majority of cases, it is likely that 92F-19(b) can be implemented smoothly between agencies. What makes the application problematic in this case are the unique facts of this particular situation where we have an executive officer, the Chief Justice, or the -- I mean, the judicial officer being the Chief Justice and the executive officer being the Governor making its decisions -- nominee decisions. Such a situation is extremely rare, so to that extent, for the Court to invalidate the UIPA because of it would be judicially reckless.

It's more compelling that the Supreme Court did not have the UIPA before when it made its decision in *Pray*, as noted by Ms. Aina. Had the Supreme Court been presented with a conflict inherent in 92F-19(b) and its analysis regarding the JSC rules and the Separation of Powers Doctrine, it is unclear whether their ruling would be the same, so I don't know.

As the Supreme Court's ruling is binding case law, in order to effectuate a harmonious reading of both *Pray* and 92F-19(b), the Court would create a special exception where 92F-19(b) is applied against a

decision made by the Governor or Chief Justice as heads of their respective branches. Under this exception, if the receiving government agency is also again the highest decision maker of that respective branch of government, then 92F-19(b) and only 92F-19(b) requiring a receiving agency to adhere to the same disclosure rules as the originating agency would be inapplicable under the principles of separation of powers as set forth in the *Pray* case.

However, as the exception only applies to 92F-19(b), Defendant is still obligated to comply with the rest of UIPA. Such an exception addresses the concern, the Court believes, raised by Supreme Court regarding the scope of JSC's rules and possibility of violating the Separation of Powers Doctrine while simultaneously keeping UIPA intact, so it also comports with intentions of the UIPA drafters as it should be presumed that the Legislature did not intend an absurd result and to rigidly adhere to a narrow reading of 92F-19 which forced the finding that the UIPA statute was invalid under *Pray*.

Under this exception that the Court articulates, given the unique circumstances of this case and the Separation of Powers Doctrine, the requirement under 92F-19(b) that Defendant comply with JSC

confidentiality rule is obviated. As a result, Defendant cannot rely on 92F-19(b) as a basis for 92F-13(4) exception, and 92F-13(4) is no longer applicable.

Because Defendant no longer qualifies for any of the statutory exceptions provided under 92F-13, Defendant would be compelled to disclose the list pursuant to 92F-11.

Finally, the last and third exception raised by the Governor, the Court does not believe 92F-13(1) is applicable also in this case. The Court will begin by noting that Defendant's arguments regarding 92F-13(1) are inappropriately raised in its reply memorandum. Under Rule 7 of the Hawaii Rules of Circuit Court, a reply must respond only to arguments raised in the opposition.

In their opposition, Defendant's motions for summary judgment, Plaintiff does not even mention 92F-13(1). The statute is never cited nor does Plaintiff make any reference to any kind of argument regarding an unwarranted invasion of privacy. As a result, Defendant's argument regarding 92F-13(1) in his reply are against the Hawaii Rules of Civil Procedure Rule 7 and as well as Hawaii Rules of Civil Procedure 8(c) as Defendant failed to plead it as an affirmative

defense in the pleadings.

Now, it's true that Defendant has mentioned 92F-13(1) in its motion for summary judgment. This does not compel or did not compel Plaintiff to respond to it in its opposition. The Court, in reviewing Defendant's motion for summary judgment, notes that 92F-13(1) is only mentioned as part of its analysis of the entire UIPA statute, never as part of his actual argument applying the facts of this case.

Beyond passing references, Defendant's entire argument is broken down into JSC's list was validly withheld under 92F-13 as a frustration of its appointment process, and, two, 92F-13(4) and 92F-19 justify withholding JSC's lists because the list if confidential -- is confidential under JSC Rule 5. Clearly, none of the arguments are based on the exception provided under 92F-13(1). Similarly, nowhere in these arguments is there a discussion of significant privacy interest.

Now, assuming that Defendant properly raised the -- this privacy argument, the Court will analyze the final exception brought by the defendant. 92F-13 states that the disclosure of a government record is not required if it will result in unwarranted invasion of personal privacy. However, 92F-14(a)

clarifies that disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual.

Subsection B lists a number of examples where an individual has a significant privacy interest. Of these, Defendant has cited 92F-14(b)(4) which states that an individual has a significant privacy interest in information in an agency's personnel file or applications, nominations, recommendations, or proposals for public employment or appointment to a government position. In looking at 92F-14 as a whole as well as (b)(4), the Court notes that the language specifically relates to information relating to various topics, such as information relating to medical treatment, information identifiable as part of an investigation, information relating to eligibility for social services, information in an agency's personnel file or application, nomination, appointments. The Court finds that the intent of the statute is to protect the information of the individual.

This interpretation is supported by the fact that the purpose of 92F-14 is to protect against invasion of personal privacy. Accordingly, under 92F-14(b)(4), it is the personal information in the

file, application, nomination, appointment that is intended to be protected, not necessarily the fact that a nomination has been made. Here, the government record that Defendant seeks to protect, the judicial nominee list, to the extent that it does not contain any other personal information, the Court believes that wouldn't be unduly invasive. The judicial nominee list does not contain, as far as the Court understands, any private or personal information, such as addresses, phone numbers, social security, tax information, medical information. Accordingly, the Court finds that 92F-14 is inapplicable to this case as the disclosure of the judicial nominee list does not involve the type of personal information that was intended to be protected by that particular statute.

Furthermore, even outside of the examples of 92F-14(b), the Court does not believe that disclosure of the nominee list here would result in a general unwarranted invasion of privacy under 92F-13(1). The Court notes again that the individual privacy interest being weighed here are merely the disclosure of the nominee's names.

Additionally, the Court notes that each nominee has voluntarily submitted their name for consideration. In the past, governors and chief

justices have released the judicial nominee list. It's difficult to conclude that the applicants even had a reasonable expectation of privacy with that known fact.

Given the totality of circumstances, the Court does not find that disclosure of the judicial nominee list constitutes an unwarranted invasion of privacy. Thus, 92F-13(1) would not apply to Defendant in this situation.

Given that the defendant has failed to establish the various exceptions asserted, the general rule under 92F-11 applies, and all government records are open to public inspection. Thus, the Oahu Publication motion is granted. And there were three specific parts. To all three the Court would grant the subject motion.

MR. THOMAS: Thank you, your Honor.

MS. AINA: Your Honor --

THE COURT: Yes.

MS. AINA: -- may I orally request that the Court allow the Governor -- and I do not know at this point what the response of the Governor would be, but I would like to move for a stay of the Court's order given the importance of the issue, and like the bell, the proverbial bell in its ringing, I would ask that the Court stay the order that you've announced this

afternoon or this morning pending an appeal. And I will file a written motion to that effect as well.

THE COURT: Well, there is no signed order at this point, so --

MS. AINA: Not at this point, your Honor. I make the motion only so that the Court is aware or if the Court is willing to rule orally at this point on the oral motion. I make the motion again because the order when written and filed would be effective and -- and the proverbial bell will have been rung.

MR. THOMAS: On that, your Honor, we just -- we actually were going to ask that the Court order that the Governor disclose the list without any further delay. It's been quite a while now, and her remedies seek or the Governor's remedies at this point would be seeking a stay in the Court of Appeals or the Supreme Court, and this case has statutory preference there as well. So, you know, if the judges or justices of the ICA or Supreme Court wants to do that, they certainly can, but there's really no just cause for further delay.

THE COURT: I don't see an exigency existing that I depart from the normal procedures, so --

MS. AINA: Or -- or, your Honor, if the governor -- I mean, I'm sorry, if your Honor would

unequivocally announce denial of the oral motion so that we could proceed under Rule 62 because the Circuit Court has denied stay, then we would make the motion -- obviously, after the final judgment was filed, we would make the motion in the Supreme Court as the rule allows.

THE COURT: I think we can wait for the filing of your motion, and I guess it will -- it's a difficult issue, so it would take time to digest whatever it is we said today and --

MS. AINA: Well, I guess what I'm suggesting, your Honor, is that if the Court is not inclined to grant a motion to stay, and the Court unequivocally stated that, under Rule 62 we would be entitled to make a motion in the Hawaii Supreme Court or the Intermediate Court of Appeals, I suppose, to ask for the stay directly because we have been denied a stay before the Circuit Court. And that would more expeditiously allow this case to proceed to a final judgment as the -- as 92F contemplates.

MR. THOMAS: Not to be presumptuous, your Honor, but if such a motion is made, we'd appreciate the opportunity to respond to it, obviously, and perhaps that just takes us back to the Court's original suggestion of let's do this like the rules allow.

THE COURT: Right. Why don't you just

file the motions, and they'll have a chance to respond.

MS. AINA: Very well.

THE COURT: Thank you.

MR. THOMAS: Thank you, your Honor. And, I'm sorry, one -- we do note that the UIPA does require the issuance of -- or the reasonable attorney's fees, so we ask the Court retain jurisdiction over the case to consider that possibility of that motion.

THE COURT: And I guess I'll see a motion from you on that point too.

MR. THOMAS: We'll move on it forthwith, your Honor.

THE COURT: Okay. Thank you.

MS. AINA: Thank you.

THE COURT: Is there something else, Mr. Thomas?

MR. THOMAS: Your Honor, it sounds like you were reading from a written order. Any of the parties need to prepare anything, or would you like the plaintiffs to prepare an order or that sort of thing, order or judgment?

THE COURT: Yes. And you can follow the transcript. I guess that's what most do. It's pretty long.

MS. HASTERT: That's what I was going to

suggest, your Honor.

MR. THOMAS: Yes. We'll do that, your Honor.

THE COURT: Thank you.

MS. HASTERT: Thank you, your Honor.

MR. THOMAS: Thank you, your Honor.

(End of proceedings.)

STATE OF HAWAII)
)
CITY AND COUNTY OF HONOLULU)

I, Theresa A. Reese, CSR# 428, an Official Court Reporter for the First Circuit Court, State of Hawaii, do hereby certify that the foregoing represents, to the best of my ability, a full, true and correct transcription of proceedings taken down in computerized machine shorthand by me and thereafter reduced to print under my supervision.

Dated: November 14, 2011.

Theresa A. Reese, CSR# 428