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FOREST & WILDLIFE
STATE OF HAWAII

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RECEIVED

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

A Contested Case Hearing Re Final Habitat
Conservation Plan and Incidental Take License
for the Na Pua Makani Wind Energy Project
by Applicant Na Pua Makani Power Partners,
LLC; Tax Map Key Nos. (1) 5-6-008:006 and
(1) 5-6-006:018, Ko'olaupia District, Island of
O'ahu, Hawai'i

Case No. BLNR-CC-17-001

APPLICANT NA PUA MAKANI POWER
PARTNERS, LLC'S **OBJECTION TO
KEEP THE NORTH SHORE
COUNTRY'S MOTION FOR
EXTENSION OF DEADLINE FILED
AUGUST 23, 2017**; EXHIBITS 1 & 2;
DECLARATION OF COUNSEL;
CERTIFICATE OF SERVICE

**APPLICANT NA PUA MAKANI POWER PARTNERS, LLC'S
OBJECTION TO KEEP THE NORTH SHORE COUNTRY'S
MOTION FOR EXTENSION OF DEADLINE FILED AUGUST 23, 2017**

Applicant NA PUA MAKANI POWER PARTNERS, LLC, through counsel, submits this
Objection to *Keep the North Shore Country's Motion for Extension of Deadline*, filed August 23,
2017 ("**Motion**"). This Objection is made pursuant to Hawai'i Administrative Rules ("**HAR**") §
13-1-32(c), -32(d) and 34, and as set forth below.

I. INTRODUCTION

Keep the North Shore Country's ("**KNSC**") Motion seeks a three-week extension of the
September 8, 2017 deadline to file its Proposed Findings of Fact, Conclusions of Law, and

Decision and Order, and Closing Brief, citing its inability to immediately obtain transcripts from the Division of Forestry and Wildlife ("**DOFAW**"). Motion at 1-2. KNSC claims that DOFAW has impermissibly restricted KNSC's rights under Hawai'i Revised Statutes ("**HRS**") § 92F-12(a) and HAR § 13-1-9(a) and (b) by making the transcripts from this contested case proceeding available to KNSC on September 6, 2017 – two days before the deadline. Motion at 2.

Additionally, KNSC – perhaps aware that HAR § 13-1-32(d) requires parties to pay for copies of transcripts prepared by court reporters – opines that forcing it to pay for transcripts violates due process. Motion at 2-3 ("Given DOFAW's obstinacy, [KNSC] must request that the deadline be extended so that its due process rights are not impacted. There is no justifiable reason that [KNSC] should be forced to pay exorbitant rates to a court reporter to preserve its due process rights.").

KNSC fails to provide the Hearing Officer or the Board with any discernible reason why either DOFAW providing access to transcripts in compliance with HRS Chapter 92F or requiring parties to pay for copies of the court reporter's transcript entitles KNSC to a three-week extension. For the reasons discussed below, Applicant asks that the Motion be denied.

II. ARGUMENT

This contested case proceeding is governed by HRS Chapter 91 and the Board's rules of practice and procedure, HAR Title 13, Chapter 1. Neither HRS Chapter 91 nor the Board's rules require the Hearing Officer or DOFAW to provide a party with free copies of hearing transcripts. In fact, the relevant rules and law do not even require that a transcript be prepared. HRS § 91-9(f) ("It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review."). However, when transcripts are prepared, the rule is clear that parties "may obtain a certified transcript of the proceedings *upon payment of the fee established by law for a copy of the transcript.*" HAR § 13-1-32(d). Hawai'i circuit and appellate courts also require

parties, including *pro se* parties, to pay for transcripts of proceedings. *See* Rules of the Circuit Courts of the State of Hawai'i Rule 25 (requiring prepayment for transcripts and providing that "[a] reporter need not commence preparation of the transcript until the required prepayment is or deposit has been made"); Hawai'i Rules of Appellate Procedure Rule 10(b)(1)(B) and (C).

KNSC cites to HRS § 92F-12(a) and HAR § 13-1-9(a) and (b) in support of its contention that DOFAW's refusal to "promptly" make the transcripts available is "arbitrary and petulant." Motion at 2. KNSC also cites to two opinions of the Office of Information Practices ("**OIP**"), OIP Opinion Letter Nos. 95-22 and 96-1, for the general proposition that the public has the right to get free copies of transcripts prepared in the course of a contested case hearing. *Id.* at 2, 3.

OIP opinion letters are not binding legal authorities and should not be cited as such; they have no precedential significance, but are merely persuasive. While their purpose is to provide guidance to agencies and courts when interpreting an OIP governing statute, the courts are at liberty to disregard them in favor of their own interpretation. *See Peer News LLC v. City & Cnty. of Honolulu*, 138 Hawai'i 53, 66-7, 376 P.3d 1, 14-15 (2016) (holding that OIP's analysis in its Opinion Letter was "palpably erroneous" and thus did not inform the court's interpretation). Thus, the Hearing Officer is not bound by the conclusions set forth in either OIP Opinion Letter No. 95-22 or 96-1.

Even if the Hearing Officer is inclined to accept the guidance of OIP Opinion Letter Nos. 95-22 and 96-1, neither of them support the proposition for which they were cited. Contrary to KNSC's representation that these letters "establish that the public has the right to copies of transcripts prepared in the course of a contested case hearing" (Motion at 2), OIP's actual conclusions were much narrower. OIP Opinion Letter No. 95-22 provides only that "a transcript of [the proceeding] . . . must be made available for public inspection and copying under the

UIPA." Exhibit 1. Likewise, OIP Opinion Letter No. 96-01 states that "computer diskettes containing real time captioning . . . must be made available for public inspection and copying upon request." Exhibit 2. Nowhere in the opinion is the conclusion that parties are entitled to copies of transcripts – much less *free* copies of transcripts. In fact, OIP Opinion Letter No. 95-22 notes that copies of documents obtained from the agency are still subject to the State's copy fee statute as set forth in HRS § 92-21. Exhibit 1.

Moreover, it is undisputed¹ that DOFAW is making the transcripts available for inspection and copying upon KNSC's request. There are no allegations that DOFAW is preventing KNSC from viewing the transcripts or otherwise impermissibly restricting KNSC's access. Therefore, even if the Hearing Officer defers to OIP's opinion as stated in its letters, DOFAW is in compliance with OIP's interpretation and HRS Chapter 92F.

Although the term "promptly" – or similar language – does not appear in either the cited statutes or the OIP opinion letters, KNSC inexplicably reads this requirement into the law. Motion at 2 ("DOFAW, upon the advice of its attorney general, is requiring that [KNSC] wait ten days until after its written request before it can review the transcript. . . . DOFAW's refusal to make the transcripts available promptly is arbitrary and petulant."). KNSC's interpretation of HRS § 92F-12(a) and HAR § 13-1-9(a) and (b) runs afoul of the permitted agency response time, which provides that the record must be disclosed "within a reasonable time not to exceed 10 business days." HAR § 2-71-13(a). By KNSC's own admission, DOFAW is both making the transcript available for viewing and doing so within the time period required by statute. Accordingly, there is no basis to grant the Motion for an extension of time.

¹ Applicant has no knowledge of the discussions between DOFAW and KNSC on this matter and therefore accepts the factual representations made in KNSC's Motion as true for purposes of this Objection.

KNSC requested this contested case hearing. KNSC also requested 30 days to submit its proposed findings of fact, conclusions of law, and decision and order, even though the Board's rules provide for 10 days, and agreed to the September 8, 2017 deadline. If KNSC had no intention to pay for a copy of the transcript in the normal course (i.e., by paying for them), KNSC should have filed its request for access to the transcript much earlier. At the close of the evidentiary hearing on August 8, 2017, the Hearing Officer informed the parties, including KNSC, that the deadline for the court reporter to complete the transcript was one week after the close of the hearing, being on or about August 15, 2017. Decl. ¶ 7. KNSC has failed to demonstrate it cannot or should not pay the necessary fees to obtain a copy. The prejudice claimed by KNSC was of its own doing and does not justify a three-week extension of the deadline to file proposed findings, conclusions of law, and decisions and orders. Any further delay in these proceedings unfairly prejudices Applicant.

III. CONCLUSION

KNSC has offered no reason for its refusal to pay the required fee to obtain a copy of the transcript other than it does not want to. No legal basis exists to support such a refusal. Whatever dispute KNSC has with DOFAW or the process to obtain the transcript, and however DOFAW and KNSC resolves this issue, further delay in the timely completion of this process should not be compromised by such claims. Applicant's due process rights are prejudiced by further delay in these proceedings. In sum, the Motion should be denied and the September 8, 2017 deadline stand.

DATED: Honolulu, Hawai'i, August 25, 2017.



JOHN P. MANAUT
PUANANIONAONA P. THOENE

Attorneys for Applicant
NA PUA MAKANI POWER PARTNERS,
LLC

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

A Contested Case Hearing Re Final Habitat Conservation Plan and Incidental Take License for the Na Pua Makani Wind Energy Project by Applicant Na Pua Makani Power Partners, LLC; Tax Map Key Nos. (1) 5-6-008:006 and (1) 5-6-006:018, Ko'olauloa District, Island of O'ahu, Hawai'i

Case No. BLNR-CC-17-001

DECLARATION OF COUNSEL;
EXHIBITS 1 AND 2

DECLARATION OF COUNSEL

I, JOHN P. MANAUT, declare:

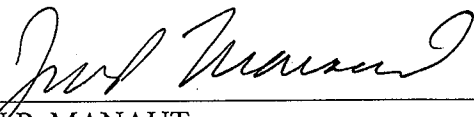
1. I am an attorney with Carlsmith Ball LLP, counsel for Applicant Na Pua Makani Power Partners, LLC in the above-captioned matter.
2. I am authorized and competent to testify to the matters set forth herein, and unless otherwise indicated, I make this declaration based upon personal knowledge.
3. I attended the evidentiary hearing in the above-captioned matter on August 7 and 8, 2017.
4. Attached hereto as **Exhibit 1** is a true and correct copy of Opinion Letter No. 95-22 from the Office of Information Practices, obtained from <http://oip.hawaii.gov/laws-rules-opinions/opinions/formal-opinion-letter-summaries-and-full-text/> on August 22, 2017.
5. Attached hereto as **Exhibit 2** is a true and correct copy of Opinion Letter No. 96-01 from the Office of Information Practices, obtained from <http://oip.hawaii.gov/laws-rules-opinions/opinions/formal-opinion-letter-summaries-and-full-text/> on August 22, 2017.

6. The highlighting included in these exhibits were added by our law firm for ease of reference.

7. Upon my notes and recollection of the proceedings, the Hearing Officer informed the parties that the transcripts of the proceedings would be available one week after the close of the evidentiary hearing.

This declaration is made upon personal knowledge. I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, August 25, 2017.



JOHN P. MANAUT

September 12, 1995

Honorable Bert M. Tomasu
Chairperson
Hawaii Labor Relations Board
590 Halekauwila Street, Second Floor
Honolulu, Hawaii 96813

Dear Mr. Tomasu:

Re: Public Availability of a Transcript of an HLRB Prohibited
Practice Proceeding

This is in reply to your letter to the Office of Information Practices ("OIP") requesting an opinion concerning the above-referenced matter. In your letter, you stated that a party to a proceeding before the Hawaii Labor Relations Board ("HLRB") requested to inspect and copy a transcript of the proceeding.

The transcript was prepared by a freelance court reporter retained by HLRB. The HLRB permitted the person making the request to inspect the transcript. Relying upon section 606-13, Hawaii Revised Statutes, the court reporter who prepared the transcript informed the HLRB that copies of the transcript must be obtained directly from the court reporter. As such, HLRB initially denied the person's request for a copy of the transcript; however, after consulting again with the court reporter, the HLRB informed the requester that a copy of the transcript would be made available upon the requester's payment of the copying fees set forth in section 92-21, Hawaii Revised Statutes.

Nevertheless, since this question is likely to arise again, the HLRB requested an opinion concerning whether transcripts of HLRB proceedings that are open to the attendance of the public must be made available for inspection and copying under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"). Additionally, by letter dated November 17, 1993, the person who requested to copy the transcript also requested an advisory opinion from the OIP concerning this matter.

ISSUE PRESENTED

Whether, under the UIPA, the HLRB must permit a requester to inspect and copy a transcript prepared in connection with a prohibited practice proceeding under section 89-14, Hawaii Revised Statutes, when: (1) the HLRB maintains, or possesses a

OIP Op. Ltr. No. 95-22

EXHIBIT 1

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copy of the transcript, and (2) pursuant to sections 89-14, 89-16 and 377-9, Hawaii Revised Statutes, the HLRB prohibited practice proceeding was open to the attendance of the public.

BRIEF ANSWER

Section 92F-12(a)(16), Hawaii Revised Statutes, provides that "[a]ny provision to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours . . . [i]nformation contained in or compiled from a transcript . . . of a proceeding open to the public." [Emphasis added.]

Section 89-14, Hawaii Revised Statutes, provides that any controversy concerning prohibited practices may be submitted to the HLRB "in the same manner and with the same effect" as provided in section 377-9, Hawaii Revised Statutes. Section 89-16, Hawaii Revised Statutes, provides that complaints, orders, and testimony relating to a proceeding instituted by the HLRB under section 377-9, shall be public records and be available for inspection and copying, and proceedings pursuant to section 377-9, Hawaii Revised Statutes, "shall be open to the public."

Accordingly, despite the fact that under section 92-6(a)(2)(A), Hawaii Revised Statutes, the adjudicatory functions of the HLRB are exempted from the State's public meetings law, we find that under sections 89-14, 89-16, and 377-9, Hawaii Revised Statutes, the HLRB's prohibited practice proceeding was "open to the public" for purposes of section 92F-12(a)(16), Hawaii Revised Statutes. Furthermore, applying the commonly understood definition of the term "proceeding," the OIP finds that the HLRB's prohibited practices proceeding was a "proceeding" for purposes of section 92F-12(a)(16), Hawaii Revised Statutes.

Accordingly, it is the OIP's opinion that under section 92F-12(a)(16), Hawaii Revised Statutes, a transcript maintained by the HLRB relating to a prohibited practices proceeding must be made available for public inspection and copying upon request.

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Also, for the reasons set forth below, the OIP concludes that the copying fees authorized by section 606-13, Hawaii Revised Statutes, to be charged by a court reporter for transcripts of testimony do not apply to copies of transcripts prepared by a freelance court reporter under contract with the HLRB. The OIP further concludes that as a transcript of testimony prepared by a freelance court reporter lacks sufficient originality to give rise to a copyright interest, the HLRB would not be infringing upon any copyright by making the transcript available for duplication by the public. Therefore, the OIP concludes that the HLRB correctly provided the requester in this case with a copy of the transcript of its prohibited practices proceeding.

Finally, the OIP suggests that the HLRB consult with the Attorney General concerning copying fees that may be assessed for copying transcripts of its proceedings, as section 92-21, Hawaii Revised Statutes, permits an agency to assess a fee for reasonable cost of reproducing a copy of any government record that is open to the inspection of the public.

FACTS

By letter dated November 4, 1993 to the HLRB, an individual requested to review and duplicate all documents contained in the record of consolidated case numbers CU-03-93 and CU-03-183, for the purpose of preparing an appeal, including a transcript of the proceeding possessed by the HLRB, that was prepared by a freelance court reporter. The person making the request was a party to the proceeding, having filed separate prohibited practices complaints with the HLRB, under section 89-14, Hawaii Revised Statutes.

The HLRB contracted with the freelance court reporter to prepare a transcript of the proceeding, and according to Ms. Valri Kunimoto, HLRB's Executive Officer, HLRB paid the court reporter an appearance fee of \$50.00 per half-day. See Haw. Rev. Stat. § 377-9(c) (1985). Under its agreement with the court reporter, the reporter provided HLRB with the transcript at a cost of \$4.00 per page.

The HLRB permitted the requester to inspect the transcript; however, it contacted the freelance court reporter who either denied or objected to HLRB making a copy of the transcript available to the requester, relying upon section 606-13, Hawaii Revised Statutes, which provides "fees for transcripts ordered by a party shall be paid by the party ordering the same"

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In your letter requesting an advisory opinion, you noted that HLRB's administrative rules provide:

An official reporter shall make the only official transcript of such proceeding. Copies of the official transcript shall not be provided by the board.

Haw. Adm. Rules § 12-42-8(f) (1981).

The HLRB's administrative rules provide that hearings under section 89-14, Hawaii Revised Statutes, shall be governed by title 12, chapter 42, subchapter 1 of the Hawaii Administrative Rules, "[e]xcept as otherwise provided in this subchapter, and insofar as it is not inconsistent with section 377-9, Hawaii Revised Statutes." Section 12-42-49(a), Hawaii Administrative Rules.

After further consultations between the HLRB and the freelance court reporter who prepared the transcript at issue, the reporter informed the HLRB that it may make a copy of the transcript available to the requester, and the HLRB subsequently did so. Nevertheless, HLRB requests an opinion from the OIP concerning whether, under the UIPA, it must permit persons to inspect and copy transcripts prepared by freelance court reporters of HLRB proceedings that are open to the attendance of the public.

DISCUSSION

I. INTRODUCTION

The UIPA, the State's public records law, states "[e]xcept as provided in section 92F-13, each agency shall make government records available for inspection and copying¹ upon request by any person." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record," means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992); Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 376 n.10 (1993). Copies of transcripts possessed by the HLRB are government records for

¹Section 92F-11(d), Hawaii Revised Statutes, provides, "[e]ach agency shall assure reasonable access to facilities for duplicating records and for making memoranda and abstracts thereof."

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purposes of the UIPA. See OIP Op. Ltr. No. 93-17 at 8 (October 8, 1993) ("maintain" is defined to sweep as broadly as possible and means "to hold, possess, preserve, retain, store, or administratively control").

II. GOVERNMENT RECORDS THAT ARE PUBLIC, ANY PROVISION TO THE CONTRARY NOTWITHSTANDING

In addition to the UIPA's general rule that all government records are public except as provided in section 92F-13, Hawaii Revised Statutes, in section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of government records (or information contained therein) that must be available for public inspection and copying during an agency's regular business hours "[a]ny provision to the contrary notwithstanding." The Legislature stated that "[a]s to these records, the exceptions such as for personal privacy and for frustration of legitimate government purpose are inapplicable . . . [t]his list merely addresses some particular cases by unambiguously requiring disclosure." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

Section 92F-12(a)(16), Hawaii Revised Statutes, provides:

92F-12 Disclosure required. (a) Any provision to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

-
- (16) Information contained in or compiled from a transcript, minutes, report, or summary of a proceeding open to the public.

Haw. Rev. Stat. § 92F-12(a)(16) (Supp. 1992) (emphases added).

Thus, in resolving the issue presented, the OIP must determine whether: (1) a prohibited practice proceeding before the board is a "proceeding" and (2) such proceeding is "open to the public" within the meaning of section 92F-12(a)(16), Hawaii Revised Statutes.

A. Whether a Prohibited Practice Proceeding Before the HLRB is a "Proceeding"

In determining the meaning of the term "proceeding" as used in section 92F-12(a)(16), Hawaii Revised Statutes, our foremost duty "is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." Crosby v. State Dept. of Budget & Finance, 76 Hawai'i 332, 340 (1994). "The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." Haw. Rev. Stat. § 1-14 (1985); see also Ross v. Stouffer Hotel Co. (Hawai'i) Ltd., Inc. 76 Hawai'i 454, 461 (1994) ("we give the operative words their common meaning, unless there is something in the statute requiring a different interpretation").

Black's Law Dictionary (5th Ed. 1979) defines the term "proceeding" in pertinent part as follows:

In a general sense, the form and manner of conducting juridical business before a court or judicial officer . . . Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like.

. . . .
. . . A "proceeding" includes action and special proceedings before judicial tribunals as well as proceedings pending before quasi-judicial officers and boards.

Black's Law Dictionary at 1083 (5th Ed. 1979).

Webster's Third New International Dictionary of the English Language Unabridged (1967) defines "proceeding" in part as "the course of procedure in a judicial action or in a suit in litigation," or as "a particular action at law or case in litigation"

As the OIP has previously noted in several OIP opinion letters, many of the government records described in section 92F-12, Hawaii Revised Statutes, were included by the Legislature in response to recommendations set forth in the Report of the Governor's Committee on Public Records and Privacy (1987)

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("Governor's Committee Report"). The Governor's Committee Report contains a discussion about a proposal to require the preparation of transcripts of public agency meetings and hearings. Vol I. Governor's Committee Report 154-155 (1987).²

²The Governor's Committee Report states:

The second issue was raised by Kelly Aver (I(H) at 2) and James Smith (I(H) at 3-7) and involves the requirement that there be transcripts of public hearings. Essentially the recommendation appears to be that verbatim transcripts be made for each public hearing or meeting. This would, in Aver's view, create a more accurate record of the meeting and, therefore, a more effective Sunshine Law. In Smith's view, it would assist those who were not there to learn exactly what transpired as that meeting or hearing.

As Hawaii's law is currently structured, boards and commissions prepare minutes and contested case hearings are the subject of transcripts. Public hearings can run the spectrum in terms of formality and thus the type of record prepared.

There can be no doubt that if transcripts were prepared of each meeting and hearing, the records would be the best possible. There can also be no question that the costs of such a requirement would be substantial. Additionally, for every meeting or hearing in which there is a strong public interest, there are probably ten or even a hundred that are routine and uneventful. An across-the-board transcript requirement would, however, mean the ten or the hundred would have to be transcribed and stored in order to get at the one critical transcript. The resulting stack of paper is arguably a very wasteful effort.

The existing minutes format should provide the crucial information in useful form at a substantial less cost.

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The discussion in the Governor's Committee Report indicates that the Governor's Committee considered whether a new State public records law should include a provision requiring agencies to prepare transcripts of "public" agency meetings, hearings, and proceedings. When the Legislature adopted the UIPA, it did not include a requirement that State and county agencies prepare transcripts of public agency meetings, hearings, and proceedings. It did, however, include a requirement that where such transcripts are prepared by the agency, that they be made available for inspection and duplication any provision to the contrary notwithstanding.

Accordingly, based upon the common definition of the term "proceeding," and the legislative history of the UIPA, it is the OIP's opinion that the term "proceeding," as used in section 92F-12(a)(16), Hawaii Revised Statutes, includes both agency meetings that are open to the public, as well as agency contested case hearings that are open to the attendance of the public.³

Therefore, we concluded that a prohibited practice proceeding under section 89-14, Hawaii Revised Statutes, is a "proceeding" for purposes of section 92F-12(a)(16), Hawaii Revised Statutes.

(..continued)

Nonetheless, a transcript requirement could be imposed and if the resources were provided, all agencies would no doubt comply.

Vol. I Governor's Committee Report 154-155 (1987) (boldface in original, emphases added).

³The OIP does not believe, however, that the Legislature intended this term to encompass transcripts of judicial proceedings to which an agency is a party.

B. Whether Prohibited Practice Proceedings are Open to the Public

In determining whether prohibited practices proceedings before the HLRB are open to the public, we observe at the outset that under the State's public meetings law, part I of chapter 92, Hawaii Revised Statutes, the adjudicatory functions of the HLRB are exempt from the State's open meetings law. See Haw. Rev. Stat. § 92-6(a)(2) (1985).

However, the HLRB's Executive Officer, Valri Kunimoto, advised the OIP that, except for impasse proceedings before the HLRB, HLRB hearings have been open to the public by HLRB custom. The OIP's research indicates that by law, prohibited practice proceedings before the HLRB must be open to the public. Specifically, section 89-14, Hawaii Revised Statutes, provides that "[a]ny controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9." [Emphasis added.] Further, section 89-16, Hawaii Revised Statutes, provides:

§89-16 Public records and proceedings.

The complaints, orders, and testimony relating to a proceeding instituted by the board under section 377-9 shall be public records and be available for inspection and copying. All proceedings pursuant to section 377-9 shall be open to the public.

Haw. Rev. Stat. § 89-16 (1985) (emphasis added.)

Accordingly, despite the fact that the adjudicatory functions of the HLRB are exempt from the State's public meetings law, under section 89-16, Hawaii Revised Statutes, unfair labor practices proceedings before the HLRB must be open to the public.⁴ Also, because controversies concerning prohibited practices shall be submitted to the HLRB in the same manner and with the same effect of unfair labor practice proceedings under section 377-9, Hawaii Revised Statutes, prohibited practices proceedings before the HLRB must also be open to the public, in

⁴It is a cardinal rule of statutory construction that where there is a conflict between a general and a specific statute concerning the same subject matter, the specific statute shall be favored. See Richardson v. City and County of Honolulu, 76 Hawai'i 46, 55 (1994).

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light of the commandments of section 89-16, Hawaii Revised Statutes.

Accordingly, it is the opinion of the OIP that a prohibited practice proceeding before the board is a proceeding that is open to the public, for purposes of section 92F-12(a)(16), Hawaii Revised Statutes, which requires that any provision to the contrary notwithstanding, the transcript of such a proceeding be available for public inspection and copying.⁵

III. WHETHER DUPLICATION OF THE HLRB TRANSCRIPT IS SUBJECT TO THE PAYMENT OF FEES PROVIDED BY SECTION 606-13, HRS

The freelance court reporter who prepared the transcript of the HLRB's proceedings initially asserted that under chapter 606, Hawaii Revised Statutes, the requester must seek a copy of the transcript directly from the reporter, rather than from the HLRB. We shall now turn to an examination of this chapter and its provisions.

Chapter 606, Hawaii Revised Statutes, entitled "Clerks, Reporters, Interpreters, Etc.," provides that the judge of the circuit court of each judicial circuit, or the administrative judge thereof, as the case may be, may appoint one or more interpreters, and one or more court reporters. Haw. Rev. Stat. § 606-9 (1985). All "duly appointed court reporters of the courts in the State may take depositions and administer oaths relative to the taking of depositions." Id. Sections 606-10, 606-12, and 606-13, Hawaii Revised Statutes provide, in pertinent part:

§606-10 Reporters, assignment. The court reporters shall be sworn officers of the court . . . [and] one reporter shall be assigned, . . . to each division of the court and be subject to the orders of the presiding

⁵The OIP has previously opined that an agency may not, through rulemaking, restrict access to government records that must be made available for public inspection and copying, since a contrary conclusion would permit agencies to readily defeat the comprehensive and uniform scheme established by the UIPA. See OIP Op. Ltr. No. 92-3 at 12 n.2 (March 19, 1992); OIP Op. Ltr. No. 93-7 at 5 (July 27, 1993). Thus, the OIP concludes that, insofar as the Board's administrative rules restrict access to government records that must be made available for public inspection and copying under section 92F-12(a)(16), Hawaii Revised Statutes, those rules are invalid.

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judge thereof ;

§606-12 Duties of reporters. The duties of each court reporter shall be to attend upon the court and write down all testimony of witnesses in shorthand . . . and any other matter which the court may require the reporter to report

Each reporter shall file the reporter's shorthand notes . . . and, when requested by any party to a cause and so directed by the court, or by the court on its own motion, shall, . . . furnish a certified transcript of the reporters' notes The reporter may furnish a transcript of any of the reporter's notes, where the same is not intended for the purposes of an appeal to the supreme court, upon the request of any party, without the order of the judge therefor first obtained

§606-13 Salary and perquisites of reporters. Each reporter shall receive for his services as prescribed in section 606-12 the salary that may be appropriate from time to time as compensation for his services in court. He may also charge for his services a fee not to exceed \$1.50 per twenty-five line page for the original ribbon copy of transcripts of testimony and proceedings and 60 cents per twenty-five line page for each carbon copy thereof made at the same time when such transcripts are prepared in their regular order for the purposes of appeal to the supreme court and a fifty per cent additional fee for expedited service when transcripts are prepared during the course of a trial. . . .

Haw. Rev. Stat. §§ 606-10, 606-12 and 606-13 (1985) (emphases added).

The OIP believes that it is evident from the express provisions of the foregoing statutes, that chapter 606, Hawaii Revised Statutes, applies to duly appointed or "official" reporters of the circuit or district courts, and not to freelance court reporters who may be providing reporting services to a State or

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county agency not connected with a case or proceeding within the circuit or district courts.

The case Territory v. Court of Land Registration, 20 Haw. 699 (1911), supports this conclusion by implication. In the Land Registration case, the attorney general sought a copy of a transcript of a court of land registration proceeding free of cost. The record before the court contained no indication that the stenographer was assigned any duties in the court of land registration by the judges of the circuit court. Distinguishing In re Andrews, 16 Haw. 483 (1905), in which the court held that one of the duties of an official stenographer of a circuit court is to furnish the attorney general with transcripts free of charge, the court reasoned:

A regularly appointed stenographer of the circuit court is under no obligation to perform duties as stenographer of the court of land registration, and only voluntarily would he act as stenographer in that court unless the duty to so act should be assigned to him pursuant to section 1692 of the Revised Laws. The question must be decided as though the judge of the court of land registration was not a circuit judge, and as though the stenographer employed in the case was not an official stenographer of the circuit court.

Land Registration, 20 Haw. at 701-02 (emphasis added).

Accordingly, the OIP concludes that chapter 606, Hawaii Revised Statutes, which pertains to official circuit court or district court reporters, does not affect the conclusion herein that under section 92F-12(a)(6), Hawaii Revised Statutes, a State or county agency must permit any person to inspect and copy a transcript of a proceeding that is open to the attendance of the public. While a requester's duplication of the HLRB transcript is not conditioned upon the payment of fees under section 606-13, Hawaii Revised Statutes, it is subject to the payment of copying fees authorized by section 92-21, Hawaii Revised Statutes.

IV. A TRANSCRIPT DOES NOT PRESENT SUFFICIENT ORIGINALITY SO AS TO GIVE RISE TO A COPYRIGHT INTEREST

The OIP's research indicates that a court reporter may not claim a copyright interest in a transcript of testimony.
1 Nimmer on Copyright § 5.06[C] at 5-61 (1994) ("insofar as the

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transcript is an accurate statement of the testimony of others, the court reporter can claim no originality in the work"); accord Lipman v. Commonwealth of Massachusetts, 475 F.2d 565 (1st Cir. 1973) ("since a transcript is a verbatim recording . . . there can be no originality in the reporter's product"). Thus, it does not appear that the HLRB would be infringing any copyright interest by making a transcript prepared by a freelance court reporter available for both inspection and duplication.

V. WHETHER THE HLRB MAY ASSESS COPYING FEES FOR COPIES OF TRANSCRIPTS

The OIP concluded above, that the HLRB must make transcripts of its prohibited practices proceedings available for public inspection and copying⁶, and that chapter 606, Hawaii Revised Statutes, does not govern the fees that may be assessed for copies of such transcripts. The UIPA does not govern the fees that may be assessed by an agency for providing copies of government records, rather, it regulates only whether such records must be available for inspection and copying.

The State's copy fee statute is set forth in section 92-21, Hawaii Revised Statutes, and provides that an agency may assess a fee for the reasonable cost of reproducing any government record that is open to the inspection of the public, but such fee shall not be less than 25 cents per page. Because the application of section 92-21, Hawaii Revised Statutes, is not within the OIP's jurisdiction, we recommend that the HLRB consult with the Attorney General on this matter.

CONCLUSION

Under section 92F-12(a)(16), Hawaii Revised Statutes, each agency must make available for inspection and copying "[i]nformation contained in or compiled from a transcript . . . of a proceeding open to the public." As under sections 89-14, 89-16 and 377-9, Hawaii Revised Statutes, prohibited practice proceedings before the HLRB must be open to the public, and because the OIP concludes that such hearings involve a "proceeding" within the meaning of section 92F-12(a)(16), Hawaii Revised Statutes, the OIP is of the opinion that a transcript of a prohibited practice proceeding maintained by the HLRB must be made available for public inspection and copying under the UIPA.

⁶Section 92F-11(d), Hawaii Revised Statutes, provides that each "agency shall assure reasonable access to facilities for duplicating records and for making memoranda or abstracts."

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Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

HRJ:sc
c: Mr. Lewis W. Poe

Debra K. Chun
Hawaii Court Reporters Association

Hawaii Board of Certified Shorthand Reporters

Esther Ueda
Land Use Commission

June 18, 1996

The Honorable Andy Mirikitani
Councilmember, City Council
City and County of Honolulu
Honolulu Hale
Honolulu, Hawaii 96813

Dear Mr. Mirikitani:

Re: Real Time Captioning of City Council Meetings and
Committee Meetings

This is in reply to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the above-referenced matter.

ISSUE PRESENTED

You have requested the OIP to advise you whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), computer diskettes containing electronic transcripts of meetings of the City Council ("Council"), and committees of the Council ("committees"), must be available for public inspection and copying.

BRIEF ANSWER

Yes. Subject to the exceptions in section 92F-13, Hawaii Revised Statutes, the UIPA requires each agency to make government records available for public inspection and copying upon request. The term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993). Provided that computer diskettes containing real time captioning of public Council meetings are kept, stored, or retained by an agency of the City and County of Honolulu, the diskettes would be "government records" for purposes of the UIPA, since they contain information in some physical form.

Under the UIPA, each agency must disclose, notwithstanding the exceptions to mandatory disclosure in section 92F-13, Hawaii Revised Statutes, "[i]nformation contained in or compiled from a transcript, minutes, report, or summary of a proceeding open to the public." Haw. Rev. Stat. § 92F-12(a)(16) (1993) (emphases added).

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EXHIBIT 2

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For the reasons explained below, the OIP concludes that the computer diskettes containing transcripts of public Council meetings must be made available for public inspection and copying, upon request, under section 92F-12(a)(16), Hawaii Revised Statutes.

FACTS

Honolulu City Ordinance No. 94-37, effective June 8, 1994, provides for real time captioning of televised regular meetings of the Council and permits the real time captioning of any other televised meeting of the Council or its committees, at the discretion of the Council Chairperson.

The stated purpose of the ordinance is "to provide equal access to deaf and hard-of-hearing persons to council and committee meetings as part of the council's compliance with the Americans With Disabilities Act." Hon. Ord. No. 94-37, § 1.

Televised meetings of the Council and its committees are broadcast by Olelo, a community broadcasting cable television station. Real time captioning of Council or committee meetings is accomplished by a "captioner" who types the speaker's words into a computer during a Council or committee meeting. According to your letter to the OIP, the captioning is not only broadcast to viewers of Council meetings almost immediately, but also results in the production of a written transcript of the meeting that is stored on a computer diskette.

The Council issued a request for bids dated October 30, 1995 for an independent contractor to serve as "Director of Captioning Services" (hereinafter "Director"). The Director was to serve as a general contractor in hiring subcontractors to fulfill the personnel requirements of the request for bids. The scope of the job, as set forth in the request for bids, included "the production of proofed transcripts of all captioned broadcasts, in hard copy and/or diskette medium."

The Council's request for bids indicated that the City has purchased the Eclipse brand C.A.T. and online captioning software that will be used by the Director and the Director's subcontractors. According to Mr. David Roth, formerly of your office, diskettes prepared using this software that contain

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transcripts of Council and committee hearings, will be in ASCII¹ format and will not require proprietary software to read.

Mr. Hank Raymond, an aide with your office, informed the OIP on May 15, 1996, that the City rescinded its request for proposals after only one bidder submitted a responsive proposal, and after the City determined that the proposal was non-responsive. Mr. Raymond also informed the OIP that the City is in the process of revising a request for proposals for a contractor to serve as the Director for real time captioning of Council meetings. Furthermore, Mr. Raymond further explained that under an informal agreement between the City Council and the City Clerk, the computer diskettes containing the written transcripts of Council meetings will be stored with the City Clerk, and that you plan to upload the written transcripts to your Home Page on the Internet to promote public access to this information. Finally, Mr. Raymond stated that while the City is currently revising a request for proposals, for purposes of this opinion, the OIP should assume that the diskettes delivered to the City by the Director will be the property of the City, or "works made for hire."

DISCUSSION

I. INTRODUCTION

The UIPA requires each agency to make government records available for public inspection and copying unless those records are protected from disclosure by one of the exceptions in section 92F-13, Hawaii Revised Statutes. See Haw. Rev. Stat. § 92F-11(b) (1993). The term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993) (emphases added); Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 376 n.10 (1993).

Assuming that the computer diskettes containing the transcripts of Council meetings are stored with the City Clerk's Office as Mr. Raymond indicated, they would be "government records" for purposes of the UIPA because they contain information maintained by an agency in some physical form.

¹ASCII stands for American Standard Code for Information Exchange.

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See, e.g., OIP Op. Ltr. No. 93-17 at 8 (October 8, 1993)
("maintain" is defined to sweep as broadly as possible and means
"to hold, possess, preserve, retain, store, or administratively
control").

We now turn to an examination of whether the diskettes are
protected from disclosure under the UIPA.

II. GOVERNMENT RECORDS THAT ARE PUBLIC DESPITE OTHER PROVISIONS OF THE LAW

In section 92F-12, Hawaii Revised Statutes, the Legislature
set forth a list of government records (or information contained
therein) that must be available for public inspection and copying
during an agency's regular business hours "[a]ny provision to the
contrary notwithstanding."²

Section 92F-12(a)(16), Hawaii Revised Statutes, requires an
agency to make available for inspection and copying during
regular business hours:

- (16) Information contained in or compiled
from a transcript, minutes, report, or
summary of a proceeding open to the
public.

Haw. Rev. Stat. § 92F-12(a)(16) (1993) (emphases added).

Even those transcripts which are prepared for the Council by
an independent contractor must be made available for inspection
and copying. In OIP Opinion Letter No. 95-22 (Sept. 12, 1995),
the OIP concluded that a transcript of a publicly conducted
Hawaii Labor Relations Board proceeding must be made available
for inspection and copying despite the fact that it was prepared
under contract by a free-lance certified court reporter. In that
opinion, the OIP observed that section 92F-12(a)(16), Hawaii

²The Legislature stated that "[a]s to these records, the
exceptions such as for personal privacy and for frustration of
legitimate government purpose are inapplicable . . . [t]his list
merely addresses some particular cases by unambiguously requiring
disclosure." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg.
Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88,
14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988).

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Revised Statutes, had its genesis in recommendations made to the Legislature in the Report of the Governor's Committee on Public Records and Privacy (1987).³ In light of these recommendations, the OIP concluded that in adopting section 92F-12(a)(16), Hawaii Revised Statutes, the Legislature did not intend to require agencies to prepare transcripts of their public meetings, but instead determined that if such transcripts are prepared, that they be available for inspection and copying, any provision to the contrary notwithstanding.

Turning to a consideration of whether computer diskettes containing real time captioning of Council or committee meetings are "transcripts" within the meaning of section 92F-12(a)(16), Hawaii Revised Statutes, in construing a statute, our foremost duty "is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." Crosby v. State Dept. of Budget and Finance, 76 Hawai'i 332, 340 (1994). "The words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." Haw. Rev. Stat. § 1-14 (1995); see also Ross v. Stouffer Hotel Co. (Hawai'i Ltd., Inc.), 76 Hawai'i 454, 461 (1994) ("we give the operative words their common meaning, unless there is something in the statute requiring a different interpretation").

Webster's Ninth New Collegiate Dictionary 1252 (1988) defines "transcript" as:

1 a : a written, printed, or typed copy; esp
: a usu. typewritten copy of dictated or
recorded material **b** : an official or legal
and often published copy <a court reporter's
~>;

Black's Law Dictionary 1342 (5th ed. 1979) defines "transcript" as:

That which has been transcribed. A copy of

³These recommendations are quoted at length in OIP Op. Ltr. No. 95-22 at 7.

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any kind, though commonly the term refers to a copy of the record of a trial, hearing or other proceeding.

. . . .

. . . . Word-for-word typing of everything that was said "on the record" during the trial. . . .

The pertinent City ordinance provides that the real time captioning provided for by the ordinance shall "transcribe the spoken words of each participant at the televised council or committee meeting; and . . . [b]e visible on all properly equipped televisions tuned to the televised council or committee meeting." Hon. Ord. No. 94-37, § 2(b).

Although the diskettes are not "transcripts," the diskettes hold "information contained in or compiled from a transcript . . . of a proceeding open to the public." In OIP Opinion Letter No. 92-13 (Aug. 13, 1992), in light of the commonly understood meaning of the term "transcript" the OIP found no reason to treat an audiotape recording of a public meeting of the State Commission on Memorials for Veterans of the Korean and Vietnam Conflicts any differently than a written "transcript" of such meeting. OIP Op. Ltr. No. 92-13 at 4. The OIP stated that given the broad definition of the term "government record" there was no reason "to believe that the Legislature would have intended section 92F-12(a)(16), Hawaii Revised Statutes, to result only in the disclosure of written or paper records of public proceedings" and "such a conclusion best effectuates the statutory requirements and legislative purposes underlying the UIPA." Id.

Accordingly, the OIP concludes that computer diskettes that contain a transcript of public meetings of the Council are transcripts within the meaning of section 92F-12(a)(16), Hawaii Revised Statutes.

Given our conclusion, it is not necessary for the OIP to examine whether any of the exceptions in section 92F-13, Hawaii Revised Statutes, would arguably protect the computer diskettes from disclosure,⁴ because the Legislature intended the records

⁴Given the public character of the transcripts, the OIP does not believe that the diskettes would be protected by any of the

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described by section 92F-12, Hawaii Revised Statutes, to be publicly available notwithstanding the UIPA's exceptions to required disclosure.

CONCLUSION

For the reasons explained above, the OIP believes that when kept, stored, or retained by a City agency, computer diskettes containing real time captioning of public meetings of the Council, or its committees, must be made available for public inspection and copying upon request. In particular, the OIP concludes that the computer diskettes contain "[i]nformation contained in or compiled from a transcript, minutes, report, or summary of a proceeding open to the public." Haw. Rev. Stat. § 92F-12(a)(16) (1993).

Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

HRJ:sc

exceptions in section 92F-13, Hawaii Revised Statutes.

OIP Op. Ltr. No. 96-1

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

A Contested Case Hearing Re Final Habitat Conservation Plan and Incidental Take License for the Na Pua Makani Wind Energy Project by Applicant Na Pua Makani Power Partners, LLC; Tax Map Key Nos. (1) 5-6-008:006 and (1) 5-6-006:018, Ko'olauloa District, Island of O'ahu, Hawai'i

Case No. BLNR-CC-17-001

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

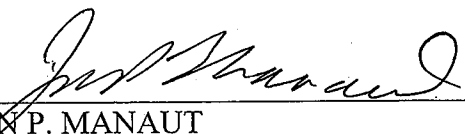
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DATED: Honolulu, Hawai'i, August 25, 2017.



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