

DOUGLAS S. CHIN 6465
Attorney General of Hawai'i

HARVEY E. HENDERSON, JR. 929
Deputy Attorney General
425 Queen Street
Honolulu, Hawai'i 96813
Tel. No.: (808) 586-1219
harvey.e.hendersonjr@hawaii.gov

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

2016 AUG -8 P 1:29

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Attorneys for the
Honorable DAVID Y. IGE,
and BLNR Members SUZANNE CASE
and STANLEY ROEHRIG

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF

A Contested Case Hearing RE:
Conservation District Use Permit (CDUP)
HA-3468 for the Thirty Meter Telescope at
the Mauna Kea Science Reserve, Kahoe
Mauka, Hamakua District, Island of
Hawai'i, TMK (3) 4-4-015:009.

Case No. BLNR-CC-160002

MOTION FOR PROTECTIVE ORDER
FOR THE HONORABLE DAVID Y. IGE,
SUZANNE CASE AND STANLEY
ROEHRIG; MEMORANDUM IN
SUPPORT OF MOTION; CERTIFICATE
OF SERVICE

MOTION FOR PROTECTIVE ORDER FOR THE
HONORABLE DAVID Y. IGE, SUZANNE CASE AND STANLEY ROERIG

DAVID Y. IGE, Governor of Hawai'i, SUZANNE CASE, Chairperson of the Board
of Land and Natural Resources ("BLNR"), and STANLEY ROEHRIG, a member of the
BLNR, by and through their counsel, Deputy Attorney General Harvey E.
Henderson, Jr., hereby move for a protective order protecting them from testifying as
witnesses in the above-entitled matter.

This motion is brought pursuant to BLNR Administrative Rule § 13-1-34 and is based on the doctrines of Executive Privilege and Absolute Quasi-Judicial Immunity, the memorandum in support attached hereto, the records and files herein, and such further argument as may be made at the hearing on this motion.

DATED: Honolulu, Hawai'i, August 8, 2016.



HARVEY E. HENDERSON, JR.
Deputy Attorney General

Attorney for the Honorable DAVID Y. IGE,
and BLNR Members SUZANNE CASE
and STANLEY ROEHRIG

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

A Contested Case Hearing RE:
Conservation District Use Permit (CDUP)
HA-3468 for the Thirty Meter Telescope at
the Mauna Kea Science Reserve, Kahoe
Mauka, Hamakua District, Island of
Hawai'i, TMK (3) 4-4-015:009.

Case No. BLNR-CC-160002

MOTION FOR PROTECTIVE ORDER
FOR THE HONORABLE DAVID Y. IGE,
SUZANNE CASE AND STANLEY
ROEHRIG; MEMORANDUM IN
SUPPORT OF MOTION; CERTIFICATE
OF SERVICE

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION.

The Governor of Hawai'i, DAVID Y. IGE, the Chair of the Board of Land and Natural Resources ("BLNR"), SUZANNE CASE, and BLNR board member STANLEY ROEHRIG have been named by Petitioners as witnesses to testify in this proceeding. According to Petitioners' witness list filed on August 1, 2016, Governor IGE will be called to testify on the "10 point plan for Mauna Kea management and other related issues." SUZANNE CASE's testimony will be concerning "BLNR management and administration" and STANLEY ROEHRIG is listed to testify on "[c]onflict of interest and voting on issues with P.U.E.O, Inc. Representatives."

The Doctrine of Executive Privilege requires that a protective order be issued to protect Governor IGE from being required to testify as a witness in this case. This qualified privilege protects high-ranking government officials from being kept away from the performance of their important duties and also protects them from having to testify on matters about which others are capable of testifying. BLNR members SUZANNE

CASE and STANLEY ROEHRIG, as board members presiding over a quasi-judicial proceeding, enjoy absolute quasi-judicial immunity which bars efforts to seek their testimony in a matter pending before them.

II. ARGUMENT.

A. THE GOVERNOR AND CHAIR CASE ARE PROTECTED BY EXECUTIVE PRIVILEGE.

Governor IGE and Chair CASE enjoy immunity from testifying absent extraordinary circumstances. Warzon v. Drew, 155 F.R.D. 183 (E.D. Wis. 1994).

The party summoning a high-ranking government official to testify has the burden of establishing that only the official can provide the information sought. The party must also demonstrate that there is no alternative source of that information. The Warzon court stated:

In general, high ranking government officials enjoy limited immunity from being deposed in matters about which they have no personal knowledge. The immunity is warranted because such officials must be allowed the freedom to perform their tasks without the constant interference of the discovery process. Before the involuntary depositions of high ranking government officials will be permitted, the party seeking the depositions must demonstrate that the particular official's testimony will likely lead to the discovery of admissible evidence and is essential to that party's case. In addition, the evidence must not be available through an alternative source or via less burdensome means.

155 F.R.D. 183, 185 (citations omitted).

The need for controlling the use of subpoenas against high government officials was recognized by the United States Supreme Court in U.S. v. Morgan, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941). Because "[h]igh ranking government officials have greater duties and time constraints than other witnesses . . . [they] 'should not, absent

extraordinary circumstances, be called to testify regarding their reasons for taking official actions." In re United States (Kessler), 985 F.2d 510, 512 (11th Cir. 1993) (quoting Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985)). If other persons can provide the information sought, the subpoena should be quashed. Id. at 513. See also, Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982) (disallowing depositions of the Governor because the same information could be obtained from other officials). Extraordinary circumstances must exist before the involuntary depositions of high government officials are permitted. In re Office of Inspector General, 933 F.2d 276 (5th Cir. 1991).

It is Petitioners' burden to demonstrate the relevance and necessity of the testimony, and to show the prejudice, injustice or other compelling reason why the testimony of the Governor should be required. Detoy v. City & County of San Francisco, 196 F.R.D. 362, 369 (N.D.Cal. 2000); California State Board of Pharmacy v. Superior Court, 78 Cal. App. 3d 641, 644-45, 144 Cal. Rptr. 320, 322-323 (1978); Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.D.C. 1964).

Here, there has been no demonstration that the Governor's possible testimony would lead to admissible evidence, is essential to Petitioners' case, or that the information sought from the Governor and Chair CASE is not available from other sources. Consequently, a protective order protecting the Governor and Chair CASE from a subpoena compelling their attendance and testimony is appropriate.

B. THE DOCTRINE OF ABSOLUTE QUASI-JUDICIAL IMMUNITY BARS PETITIONERS FROM CALLING BOARD MEMBERS SUZANNE CASE AND STANLEY ROEHRIG AS WITNESSES.

The doctrine of absolute quasi-judicial immunity confers on officials exercising their quasi-judicial authority all of the immunities that a judge possesses under the doctrine of absolute judicial immunity. Grant v. Shalala, 989 F.2d 1332 (3rd Cir. 1993) (Administrative law judge is functionally comparable to that of a judge and an attempt to probe the thought and decision making processes of judges and administrators is generally improper.) As the Court noted in United States v. Morgan, 313 U.S. 409, 422 (1941), "examination of a judge [regarding a judicial proceeding over which the judge presided] would be destructive of judicial responsibility." In Morgan, Justice Frankfurter stated unequivocally "it was not the function of the court to probe the mental processes of the Secretary [of Agriculture]'. Just as a judge cannot be subjected to such a scrutiny. . . . so the integrity of the administrative process must be equally respected." (Citations omitted). The rule which prevents parties from examining a judge as to his or her thought processes or intentions is well-founded, for without such a rule, "the judiciary would be open to frivolous attacks upon its dignity and integrity, and . . . interruption of its ordinary and proper functioning." U.S. v. Dowdy, 440 F. Supp 894, 896 (W.D.Va 1977), quoting U.S. v. Valenti, 120 F. Supp 80 (D.N.J. 1954). Moreover, as the Court concluded in Fayerweather v. Ritch, 195 U.S. 276, 306-307 (1904), a judge is not competent to testify to matters passed upon and considered in rendering a judicial opinion, order or judgment:

A judgment is a solemn record. Parties have a right to rely upon it. It should not be lightly disturbed, and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.

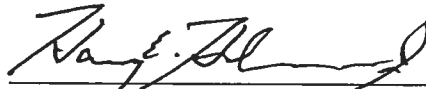
Id. at 307; cf. United States v. Dowdy, 440 F. Supp. 894 (D.Va. 1977). See generally, Annot., 22 ALR3d 1198, 1202.

Judges and other officials who exercise quasi-judicial functions possess **absolute** immunity. Absolute means having no restriction, exception or qualification. It means under all circumstances. A judge's immunity is not limited to immunity from liability for judicial actions but is immunity from suit. Mireles v. Waco, 502 U.S. 9, 11 (1991) (Judicial immunity is an immunity from suit, not just from the ultimate assessment of damages). Therefore, any attempt by Petitioners to make the Respondents testify in this action or to try to probe the basis for a board or commission member exercising quasi-judicial authority in a contested case under Haw. Rev. Stat. chapter 91 cannot be allowed.

III. CONCLUSION.

For the foregoing reasons Governor IGE and BLNR members CASE and ROEHRIG respectfully submit that Petitioners' attempt to have them testify as witnesses in this case must be stopped and that a protective order must be issued preventing any future attempts to challenge the Executive Privilege and absolute quasi-judicial immunity that the Respondents enjoy.

DATED: Honolulu, Hawai'i, August 8, 2016.



HARVEY E. HENDERSON, JR.
Deputy Attorney General

Attorney for the Honorable DAVID Y. IGE,
and BLNR Members SUZANNE CASE
and STANLEY ROEHRIG

Board of Land & Natural Resources, State of Hawai'i; In the Matter of A Contested Case Hearing RE: Conservation District Use Permit (CDUP) HA-3468 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kahohe Mauka, Hamakua District, Island of Hawai'i, TMK (3) 4-4-015.009; Memorandum in Support of Motion [Motion for Protective Order for the Honorable David Y. Ige, Suzanne Case and Stanley Roehrig].

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Case No. BLNR-CC-160002

A Contested Case Hearing RE:
Conservation District Use Permit (CDUP)
HA-3468 for the Thirty Meter Telescope at
the Mauna Kea Science Reserve, Kahoe
Mauka, Hamakua District, Island of
Hawai'i, TMK (3) 4-4-015:009.

MOTION FOR PROTECTIVE ORDER
FOR THE HONORABLE DAVID Y. IGE,
SUZANNE CASE AND STANLEY
ROEHRIG; MEMORANDUM IN
SUPPORT OF MOTION; CERTIFICATE
OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached motion was duly served on the
following parties by electronic mail (e-mail) unless indicated otherwise:

J. DOUGLAS ING, ESQ.

douging@wik.com

ROSS T. SHINYAMA, ESQ.

rshinyama@wik.com

Watanabe Ing LLP

Counsel for TMT INTERNATIONAL
OBSERVATORY, LLC

RICHARD NAIWIEHA WURDEMAN, ESQ.

rnwurdeman@rnwlaw.com

Counsel for Petitioners MAUNA KEA ANA'INA
HOU; CLARENCE KUKAUAKAHI CHING;
FLORES-CASE OHANA; DEBORAH J.
WARD; PAUL K. NEVES; and KAHEA: THE
HAWAIIAN ENVIRONMENTAL ALLIANCE

JOSEPH KUALII LINDSEY CAMARA

kualiic@hotmail.com

MICHAEL CAIN

Office of Conservation & Coastal Lands

1151 Punchbowl Street, Room 131

Honolulu, HI 96813

michael.cain@hawaii.gov

Custodian of the Records

(original + digital copy)

LINCOLN S. T. ASHIDA, ESQ.

lisa@torkildson.com

NEWTON J. CHU, ESQ.

njc@torkildson.com

Torkildson Katz Moore

Hetherington & Harris

Counsel for PERPETUATING

UNIQUE EDUCATIONAL

OPPORTUNITIES (PUEO)

RICHARD L. DELEON

kekaulike@msn.com

HARRY FERGERSTROM
P. O. Box 951
Kurtistown, HI 96760
hankhawaiian@yahoo.com
(via e-mail & USPS Mail)

CINDY FREITAS
hanahanai@hawaii.rr.com

WILLIAM FREITAS
pohaku7@yahoo.com

C. M. KAHO'OKAHI KANUHA
kahookahi@gmail.com

TIFFNIE KAKALIA
tiffniekakalia@gmail.com

KALIKOLEHUA KANA ELE
akulele@yahoo.com

BRANNON KAMAHANA KEALOHA
brannonk@hawaii.edu

MEHANA KIHUI
uhiwai@live.com

GLEN KILA
makakila@gmail.com

MAELANI LEE
maelanilee@yahoo.com

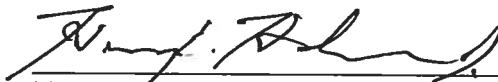
JENNIFER LEINA'ALA SLEIGHTHOLM
leina.ala.s808@gmail.com

STEPHANIE-MALIA TABBADA
stabbada@hawaiiantel.net

LANNY ALAN SINKIN, ESQ.
lanny.sinkin@gmail.com
Representative for the Temple of Lono

DWIGHT J. VICENTE
2608 Ainaola Drive
Hilo, HI 96720-3538
(via USPS Mail)

DATED: Honolulu, Hawai'i, August 8, 2016.



HARVEY E. HENDERSON, JR.
Deputy Attorney General

Attorney for the Honorable DAVID Y. IGE,
and BLNR Members SUZANNE CASE
and STANLEY ROEHRIG