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TMT INTERNATIONAL OBSERVATORY, LLC

BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568 for
the Thirty Meter Telescope at the Mauna Kea
Science Reserve, Ka'ohē Mauka, Hāmākua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

**TMT INTERNATIONAL OBSERVATORY,
LLC'S OPPOSITION TO PARTIES'
PETITION TO THE BOARD FOR ONLINE
ACCESS TO THE TRANSCRIPTS [DOC.
NO. 622]; DECLARATION OF ROSS T.
SHINYAMA, ESQ.; EXHIBITS "1"- "2";
CERTIFICATE OF SERVICE**

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

2017 MAY 10 A 11:06

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

**TMT INTERNATIONAL OBSERVATORY, LLC'S OPPOSITION
TO PARTIES' PETITION TO THE BOARD FOR ONLINE ACCESS TO THE
TRANSCRIPTS [DOC. NO. 622]**

TMT INTERNATIONAL OBSERVATORY, LLC ("TIO"), by and through its counsel, hereby submits its Opposition to Parties'¹ Petition to the Board for Online Access to the Transcripts [Doc. No. 622] ("Petition"). The Petition requests that the "Board of Land and Natural Resources ["BLNR"] produce the transcript of this proceeding online, in searchable form, that can be cut and pasted to all parties." Id. at 1. The Petition is meritless and should be denied as discussed fully below.

I. RELEVANT BACKGROUND

The Hearing Officer issued Minute Order No. 43 [Doc. No. 552] on April 19, 2017 and advised all parties that hard copies of the "transcripts of all post-remand proceedings pertaining to this matter" were available for review at five (5) different locations – four (4) on the Island of Hawai'i and one (1) on Oahu.² See id. at 1-2. The hearing transcripts – which included over 50 volumes³ – were made available at all locations except the UH-Hilo Library as of April 18, 2017. See id. The hearing transcripts were made available at the UH-Hilo Library as of April 22, 2017. See id.

¹ Petitioner Kealoha Pisciotta ("Pisciotta") claims that the Petition is being brought on behalf of Mauna Kea Anaina Hou, Pisciotta, Paul Neves, Temple of Lono, Flores-Case Ohana, Hank Fergstrom, the Freitas, Deborah J. Ward, Clarence Ching, Mehana Kihoi, and J. Leina'ala Sleightholm (collectively "Petitioning Parties"). Other than Pisciotta, however, none of the Petitioning Parties have signed the Petition. None of the Petitioning Parties have filed a joinder to the Petition.

² The four locations on the Island of Hawai'i are Hilo Public Library, Thelma Parker Memorial Public and School Library, Kailua-Kona Public-Library, and the Edwin H. Mookini Library (UH-Hilo Library). The one location on Oahu is the Hawaii State Library. See id.

³ See Memorandum on Contested Case Transcripts; Index to transcripts for Contested Case HA-16-02 [Doc. No. 551].

In addition to making the transcripts available, the Hearing Officer advised the parties on March 2, 2017 that they could purchase entire transcripts or select pages directly from the Court Reporter at a rate of one dollar per page. See Transcript of Contested Case Hearing, dated May 2, 2017, at 292:6-19, attached hereto as Exhibit “1” to the Declaration of Ross T. Shinyama, Esq.

On May 5, 2017, the Petitioning Parties filed this Petition requesting that “[BLNR] produce the transcript of this proceeding online, in searchable form, that can be cut and pasted to all parties.” Id. at 1. The “primary opinion” that the Petition is based upon is Opinion Letter No. 95-22 from the Office of Information Practices (“OIP”).⁴ See Petition at 2.

II. DISCUSSION

This contested case hearing is governed by the Hawai‘i Administrative Procedures Act, Hawai‘i Revised Statutes (“HRS”) Chapter 91 (“HRS Chapter 91”), and the Rules of Practice and Procedure for the Department of Land and Natural Resources, Hawai‘i Administrative Rules (“HAR”), Title 13, Chapter 1, Subchapter 1 (“Rules of Practice and Procedure”). See HAR § 13-1-32(a) (providing that “[c]ontested case hearings shall be conducted in accordance with this subchapter, and chapter 91, HRS”). Notably, neither HRS Chapter 91 nor the Rules of Practice and Procedure require the Hearing Officer or BLNR to make the hearing transcripts of the contested case hearing available online. They do not require that the hearing transcripts be made

⁴ The Petitioning Parties continue their attempts to unduly delay this contested case proceeding through the untimely filing of the Petition. Indeed, the Petitioning Parties, specifically the Temple of Lono and its “representative”, Lanny Sinkin, have been aware of OIP Opinion Letter No. 95-22, which is the “primary opinion” they base the Petition on, since at least the close of the testimony portion of the evidentiary hearing on March 2, 2017. See id. at 294:22-25, attached as Exhibit “1” to the Shinyama Dec. However, and despite the fact that it remained active in this contested case proceeding, filing five (5) motions in March 2017 alone, including one to the BLNR, the Temple of Lono (nor any of the other Petitioning Parties for that matter) did not file the Petition until May 5, 2017, two (2) months after the Hearing Officer advised them of where the transcripts would be available and that they would not be available online. See id. at 291:8-16. The Petitioning Parties do not explain their lack of diligence and delay in bringing this Petition.

available in “searchable form, that can be cut and pasted to all parties.” Petition at 1. They also do not require that parties be allowed to make copies of the available hearing transcripts at no cost. Indeed, the Petitioning Parties do not cite to anything in the Rules of Practice and Procedure or HRS Chapter 91 to support the Petition or their request for online access.

Instead, the Rules of Practice and Procedure only require the Hearing Officer to ensure that “a verbatim record of the evidence” is taken. HAR § 13-1-32(d). There is no requirement that “a verbatim record of the evidence” even be prepared. HRS § 91-9(f) provides that “[i]t shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.” *Id.* 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).

Notwithstanding that there was no requirement to do so under HRS Chapter 91 or the Rules of Practice and Procedure, the Hearing Officer and BLNR paid for the hearing transcripts to be prepared and made hard copies of the hearing transcripts available at 5 different locations, 4 of them being on the Island of Hawai‘i where all the Petitioning Parties reside. The Hearing Officer and BLNR also coordinated with the Court Reporter to charge a rate of one dollar per hearing transcript. See infra.

Despite all of the above, the Petitioning Parties still argue in the Petition that the hearing transcripts should be made available online. They do not cite to any provision from HRS Chapter 91 or the Rules of Practice and Procedure to support their request. Instead, the Petitioning Parties rely upon OIP Opinion Letter No. 95-22, which opines on an agency’s obligations to disclose government records under the Uniform Information Practices Act (“UIPA”). See Exhibit “2” to the Shinyama Dec. OIP Opinion Letter No. 95-22, however, and assuming it even applies here, merely requires that the hearing transcripts “be made available for

public inspection and copying under the UIPA.” Id. The opinion letter does not dictate how a transcript should be made available for public inspection under UIPA. It does not state or even suggest that transcripts shall be made available online. It also does not state or even suggest that transcripts shall be made available “in searchable form, that can be cut and pasted.” Petition at 1. Instead, OIP Opinion Letter No. 95-22 states that transcripts are to be made available under the UIPA. The Hearing Officer and BLNR have made the hearing transcripts of the contested case hearing available at 5 different locations at no cost to the Petitioning Parties. Nothing more is required under the UIPA. The Petitioning Parties’ claims to the contrary are completely meritless and the Petition should be denied.

OIP Opinion Letter No. 95-22 also does not state that copying of transcripts is to be made available at no cost to the requesting party. Instead, it states the complete opposite. See OIP Opinion Ltr. No. 95-22 at 12 (noting that the request to copy under the UIPA “is subject to the payment of copying fees authorized by section 92-21, Hawaii Revised Statutes”).⁵ HRS § 92-21 provides that “[t]he cost of reproducing a government record . . . shall not be less than 25 cents per page, sheet, or fraction thereof.” The copying cost of one dollar per page complies with HRS § 92-21.⁶

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⁵ The appellate and circuit courts of the State of Hawai‘i also require parties, including pro se parties, to pay for transcripts of proceedings. See Rule 25 of the Rules of the Circuit Courts of the State of Hawaii (requiring pre-payment for transcripts) and Rule 10(b)(1)(B) and (C) of the Hawaii Rules of Appellate Procedure (same).

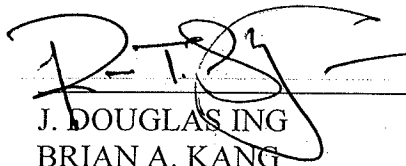
⁶ Similarly, and in comparison, an official court reporter can charge a copying cost of \$1.50 per page to a non-government entity or person and \$1.00 per page to a government entity. See Rule 19(b) of the Rules Governing Court Reporting in the State of Hawaii.

7

III. CONCLUSION

Based upon the foregoing, TIO respectfully request that BLNR deny the Petition.

DATED: Honolulu, Hawaii, May 10, 2017.



J. DOUGLAS ING

BRIAN A. KANG

ROSS T. SHINYAMA

SUMMER H. KAIWE

Attorneys for TMT INTERNATIONAL

OBSERVATORY LLC

BOARD OF LAND AND NATURAL RESOURCES
FOR THE STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568 for
the Thirty Meter Telescope at the Mauna Kea
Science Reserve, Ka'ohē Mauka, Hāmākua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

**DECLARATION OF ROSS T. SHINYAMA,
ESQ.; EXHIBITS "1"- "2"**

DECLARATION OF ROSS T. SHINYAMA, ESQ.

I, ROSS T. SHINYAMA, hereby declare and state as follows:

1. I am an attorney licensed to practice law in the State of Hawaii and am one of the attorneys representing TMT International Observatory LLC in the above-captioned proceeding.
2. I make this Declaration based upon my personal knowledge and upon reliance of the files and records maintained by my office and in the normal and regular course of business.
3. Exhibit "1" attached hereto are true and correct copies of pages 1, 291, 292, 294, and 305 of the Transcript of Contested Case Hearing, dated May 2, 2017.
4. Exhibit "2" attached hereto is a copy of Opinion Letter No. 95-22 from the Office of Information Practices. I printed Opinion Letter No. 95-22 from <http://oip.hawaii.gov/laws-rules-opinions/opinions/formal-opinion-letter-summaries-and-full-text/> on May 8, 2017.

I, ROSS T. SHINYAMA, declare under penalty of law that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Honolulu, Hawaii, May 10, 2017.


ROSS T. SHINYAMA

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

IN THE MATTER OF) CASE NO. BLNR-CC-16-002
)
)
 Contested Case Hearing Re)
 Conservation District Use)
 Application (CDUA) HA-3568)
 For the Thirty Meter)
 Telescope at the Mauna Kea)
 Science Reserve, Ka'ohe)
 Mauka, Hamakua, Hawaii) VOLUME 44
 TMK (3)4-4-015:009)
)

08:49:24

08:49:24 10

TRANSCRIPT OF CONTESTED CASE HEARING

Taken at the Grand Naniloa Hotel, Crown Room,
 93 Banyan Drive, Hilo, Hawaii, 96720 commencing at
 9:00 a.m., on Thursday, March 2, 2017.

08:49:24 15

08:49:24 20

REPORTED BY: CAROL E.M. SUGIYAMA, RPR, CSR NO. 295

EXHIBIT "1"

18:19:38 1 but she thinks maybe five to six weeks from now, from
2 today. And, of course, there were a couple of other
3 court reporters who also provided services. And so
4 she'll have to work with them and try to get all the
18:19:54 5 transcripts pulled together. The estimate now is 50
6 volumes. That's enormous. So -- and the State of
7 Hawaii will be paying for an original copy. It runs
8 about \$6 to \$7 a page. They will also -- the State of
9 Hawaii will also make copies, and they will put them
18:20:19 10 into the Hawaii State Library on Oahu, the University
11 library here in Hilo, the Hilo public library, the
12 Waimea public library, and the Kona public library. And
13 I've asked that the libraries have check in and check
14 out sheets. Because I don't want you folks to go there
18:20:41 15 and wonder what happened to volume 34. That's not okay.
16 We have to protect that for everybody.

17 Mr. Fergerstrom, do you have a question?

18 MR. FERGERSTROM: Yes. You said the
19 transcripts will be in the Hilo library, didn't you also
18:20:55 20 say before, the University was going to allow us to have
21 them.

22 HEARINGS OFFICER AMANO: Yeah. The University
23 offered, and we thought -- I think I brought it up
24 earlier, everybody was good with that because of the
18:21:08 25 hours are longer.

18:21:09 1 MR. FERGERSTROM: Right.

2 HEARINGS OFFICER AMANO: At the University's
3 library.

4 MR. FERGERSTROM: So it will be in the
18:21:13 5 University, as well as the Hilo library?

6 HEARINGS OFFICER AMANO: Yes. So the Hilo
7 public library and the University at Hilo College
8 library. We've tried to make it as available as
9 possible. Now, I also asked Jean, because someone asked

18:21:31 10 yesterday, how do we get the copies we want, the pages
11 that we want? First of all, let me give you her e-mail
12 address. And it is M-J-E-A-N-M-C-M-A-N-U-S at AOL.com.
13 So it's M. Jean McManus -- Oh, sorry. After McManus
14 it's 804. So, I'll say it again.

18:22:15 15 M-J-E-A-N-M-C-M-A-N-U-S-8-0-4 at AOL.com. And please
16 provide the following information, so she can get you
17 exactly what you need. You need the volume number, the
18 date of the testimony, the witness' name, and the pages,
19 beginning and end. And she will charge a dollar a page.

18:22:51 20 So, everyone is trying to cooperate, and I'm
21 glad you people have asked so we can do this.

22 Okay. I think that's the last piece I wanted
23 to tell you.

24 Oh, pardon. I am going to give you 30 days

18:23:18 25 after the filing of the transcripts. It's going to be

18:24:58 1 understand. So the State will be buying a --

2 HEARINGS OFFICER AMANO: Hard copy transcript.

3 MR. SINKIN: A hard copy transcript, not an
4 electronic transcript?

18:25:08 5 HEARINGS OFFICER AMANO: I don't know what
6 they're buying, but I know they have to provide a hard
7 copy transcript, I think, for the record.

8 MR. SINKIN: And here's where I was going with
9 that. If they are buying an electronic transcript, that
18:25:18 10 is searchable. And if they could make that available in
11 any way in the libraries, it would make a huge
12 difference.

13 HEARINGS OFFICER AMANO: I've been trying for
14 seven months.

18:25:28 15 MR. SINKIN: Okay.

16 HEARINGS OFFICER AMANO: Really, I've asked.

17 And for whatever reasons you -- there's an issue and
18 there always have been as far as knowing that they're
19 going -- about who owns the transcripts. And so, I

18:25:40 20 don't believe the Supreme Court or it's Court Reporter
21 Committee have made clear decisions about that.

22 MR. SINKIN: I think the office of OIP has
23 made clear that if it's a private transcriber, there is
24 no copyright. I think they have made that clear in

18:25:57 25 their opinions. But we'll just cover that...

18:37:27 1

2

C E R T I F I C A T E

3

STATE OF HAWAII

)

4

) SS.

COUNTY OF HONOLULU

)

18:37:27 5

6

I, CAROL E.M. SUGIYAMA, C.S.R., do hereby

7

certify:

8

That on March 2, 2017, at 9:00 a.m., the

9

proceedings contained herein was taken down by me in the

18:37:27 10

11

machine shorthand and was thereafter reduced to

typewriting under my supervision; that the foregoing

12

represents, to the best of my ability, a true and

13

correct copy of the proceedings had in the foregoing

14

matter.

18:37:27 15

16

I further certify that I am not of counsel

for any of the parties hereto, nor in any way interested

17

in the outcome of the cause named in this caption.

18

19

DATED: March 27, 2017

18:37:27 20

21

S/S Carol E.M. Sugiyama

22

CAROL E.M. SUGIYAMA, C.S.R., #295
Certified Shorthand Reporter

23

24

18:37:27 25

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 "2"

Honorable Bert M. Tomasu
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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.

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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 at 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.

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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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568
for the Thirty Meter Telescope at the Mauna
Kea Science Reserve, Ka'ohē Mauka,
Hāmākua, Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-002

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

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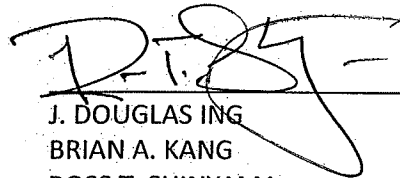
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