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In behalf of Pisciotta,
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BOARD OF LAND AND NATURAL RESOURCES
FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Application (CDUA) (HA-) **MAUNA KEA ANAINA HOU ET AL.**
3568) The Thirty Meter Telescope at the.) **MOTION FOR RECONSIDERATION**
Mauna Kea Science Reserve, Kaohe Mauka,) **;EXHIBIT 1; COS**
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

MAUNA KEA ANAINA HOU ET AL. MOTION FOR RECONSIDERATION

NOW COMES Mauna Kea Anaina Hou, Kealoha Pisciotta and Paul Neves ("MKAH et al"). Due process depends on the ability to have reasonable access to government records. Under the law, parties to the proceeding should have the right to reasonably access transcripts provided by the agency, Department of Land and Natural Resources (DLNR.) If parties cannot participate in a contested case hearing due to obstruction of access to government records based on financial discrimination, decisions by both the agency and the freelance court reporter will then have hindered and readily defeated the comprehensive and uniform scheme established by the Uniform Information Practices Act (UIPA.)

MEMORANDUM IN SUPPORT OF MOTION

The DLNR through contract with a freelance court reporter, has placed undue burden on the public that biases the public, parties and forces parties to pay a private contractor for public information which was already paid for by the State. Furthermore, the unreasonable fees set forth not by law, but by the freelance court reporter/s demonstrate financial discrimination against the parties and violate the laws of public disclosure.

Transcripts of quasi-judicial proceedings are necessary for parties to form arguments for findings of fact and conclusions of law. Parties prohibited from participation by lack of access may be forced to default and are therefore unable to achieve the purpose of a contested case which is to find facts and form conclusions in the interest of justice.

Parties unable to afford transcripts face a barrier which obstructs the purpose and spirit of a contested case. Cost-prohibitive determinations by the agency and freelance court reporters do not comport with existing law and work against the public's interest.

There is nothing supporting a freelance court reporter to prohibit access of quasi-judicial transcripts or to control the public or party's right to information. Chapter 606 does not apply to a freelance court reporter who may be providing services to a State agency.

Nor is the BLNR or any freelance court reporter providing services to a State or county agency free to determine arbitrary fees which defeat the specific requirements of law.

This contested case conducted in 2016 and 2017 uses electronic filings, as one would commonly expect in a modern proceeding. Access to electronically filed, searchable documents hosted online is a key pillar in the administration of this contested case. It is reasonable that parties have requested the transcripts be made available electronically, supported by the online, digital library of electronically filed documents for this proceeding. Especially given that there is no cost which should be automatically applied for a digital upload to the parties which would omit the unsustainable, unnecessary waste of paper and resources required to create hard copies. Restricting the parties access to hard copies at specific locations is outdated, inconvenient, expensive and a time-consuming, inefficient manner of transmission which requires excessive additional effort which continued to burden the Parties.

The DLNR failed to fulfill its duties again when it directed the library hosts of the hard copies held at specific library locations inaccessible to some parties, to prevent parties from making copies and to instead direct parties to the freelance court reporter. (see attached Exhibit 1). This decision is contrary to the OIP opinion which recognizes transcripts prepared by a freelance court reporter lack sufficient originality to give rise to a copyright interest, and therefore the agency would not be infringing upon any copyright

by making the transcript available for duplication by the public (see OIP opinion 95-22 previously submitted).

Parties to this case reside on multiple islands and requirements that parties travel to a specific location in order to view public information necessary for their participation, is additionally cost-prohibitive and in no way convenient. In addition, the libraries where hard copies are currently held are only open for summer hours when it can be reasonably understood that pro se parties generally need to work to earn a living.

Parties representing themselves pro se have devoted countless, unpaid hours seeking findings of fact and conclusions of law over the course of this rehearing which lasted numerous months. This decision by the agency gives rise to an outstanding bias against the public considering the parties which cannot afford attorneys and represent the public interest, have already devoted at minimum months of time and effort to hearings during business hours. Outside of hearing hours, unpaid, pro se parties have already engaged in countless, unpaid hours of necessary preparation in an attempt to comply with the rapid timelines of the proceedings set by the presiding officer.

The agency stipulation that in order to access information which is critical to representation, parties unable to purchase transcripts must afford the cost of travel to view transcripts in-person, and without even permission to copy such transcripts appears to readily defeat the comprehensive and uniform scheme established by the UIPA.

Furthermore, any party which can afford the fees set forth by the agency and freelance court reporters for the cost of time spent printing, copying, and mailing transcripts will have expended resources needlessly and with minimal relevance in the digital age where proceedings can and do rely on searchable, electronically filed documents. Any attempt to charge parties or receive funds for transcripts which readily defeats the comprehensive and uniform scheme of UIPA, whether digital or otherwise may be considered invalid.

This is particularly troublesome when reviewing this case in which the publicly funded University of Hawaii (UH) party has presumably purchased transcripts in accordance with fees set forth by the agency and freelance court reporter, thereby using public dollars unnecessarily to pay amounts which far exceed those defined by the law.

A publicly funded institution such as UH has access to government records for these proceedings by means of public dollars, while members of the public who have become petitioners party to this case are denied transcripts due to lack of monetary ability.

The State already paid for the transcripts by paying the freelance court reporter. The provision of transcripts for a government record by a freelance court reporter lacks sufficient claim to give rise to copyright by the freelance court reporter.

As many parties in this case also served as witnesses in the proceeding, the freelance court reporter and agency enable withholding public record including the parties' own intellectual property and that of the witnesses, unless they can afford to purchase their own statements back from the freelance court reporter who was never authorized to own or withhold them under law. Such decision making by this agency is a violation of due process for the public and against the public interest.

If the public or a publicly funded institution such as UH also paid for the transcripts, the State then paid twice for the same service using public funds. Furthermore, the State and freelance court reporter/s intentionally prevented reasonable access to government records for those parties with a financial disadvantage or inability to pay. This wasteful use of public money is completely unnecessary and contrary to the comprehensive and uniform scheme of the UIPA and thereby may subject such fees to invalidation.

There is no support for a State agency to withhold access to quasi-judicial transcripts in this proceeding as defined under Chapter 92. For the purpose of this this MOTION and complaint the BLNR is the same as the other state agency ("HLRB") identified in the related OIP Op. Ltr. 95-22, which reads in reads as follows:

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. (Emphasis added)

The agency, BLNR, must maintain a transcript which must be made available for public inspection and copying. The opinion goes on to read:

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. (OIP Op. Ltr. 95-22 Sec.

III)(Emphasis added)

However, the freelance court reporter was found by OIP to be initially incorrect. The court reporter/s contracted for this case are freelance court reporters, contracted by the DLNR for the purposes of transcribing the contested case proceedings. The opinion goes on to read:

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. . . (OIP Op. Ltr. 95-22 p. 3)(Emphasis 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 county agency not connected with a case or proceeding within the circuit or district courts

(OIP Op. Ltr. 95-22 Sec. III)(Emphasis added)

This contested case is a rehearing, remanded by the Supreme Court and is therefore **may not be considered a case proceeding within circuit or district courts.**

OIP Op. Ltr. 95-22 continues:

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. (OIP Op. Ltr. 95-22 p. 2)(Emphasis added)

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 (OIP Op. Ltr. 95-22 Sec. II)(Emphasis added)

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.(Emphasis added)

The OIP has concluded that insofar as any of the agency's administrative **rules restrict access to government records** under 92F those **rules are invalid.**

The **agency's own rules regarding government records** in HAR §13-1-9 (b) state:

(b) Government records printed or reproduced by the board in quantity shall be given to any person requesting the same by paying the fees established by law. Photocopies of government records shall be made and given by the chairperson to any person upon request and upon payment of the fees established by law. Certified copies of extracts from government records shall also be given by the chairperson upon payment of the fees established by law. . . . (Emphasis added)

. . . .

§13-1-32 Conduct of hearing.

The presiding officer shall provide that a verbatim record of the evidence presented at any hearing is taken unless waived by all the parties. Any party may obtain a certified transcript of the proceedings upon payment of the fee established by law for a copy of the transcript. (Emphasis added)

The **fees** for a copy of the transcript **are to be established by law not by a freelance court reporter nor by arbitrary rule making** which readily defeats the comprehensive and uniform scheme of the UIPA. The verbatim record (if any) in this case was provided to the DLNR by a freelance court reporter rendering a service to the State agency. Additionally, all parties did not waive their rights to a verbatim record nor were they consulted. (Emphasis added)

We will now examine related rules relating to state proceedings provided under HAR §13-1-68 regarding record of contested case hearing under the administrative rules of the agency.

§13-1-68 Record of contested case hearing.

(a) The administrator shall retain an audio, video or stenographic record of all proceedings in a CRVS contested case for a period of not less

than two years after the case is concluded. (Emphasis added)

To our knowledge, no audio or video record was retained by the administrator from the first date of proceedings in Honolulu. However, a freelance court reporter providing stenographic service to the State agency was present from the first public proceeding. A freelance court reporter continued to be present and transcribing from the beginning to the end of the proceedings with one exception - the testimony of J. Kalani Flores which was later transcribed from video per the presiding officer and will be addressed below. Therefore, **the only record of all proceedings required by the administrator is the stenographic record. There is no audio or video record of all proceedings.** (Emphasis added)

§13-1-68 goes on to read:

(b) Any party may obtain a certified copy of the audio or video record

upon a payment of \$10 per copy.(Emphasis added)

There is no certified audio or video record of the contested case because no such record is complete or official. Video recordings by Na Leo TV did not begin until after the pre-conference hearings wherein motions were granted or denied and orders were given. Na Leo TV provided more accessible means for the public than the agency, by live

streaming and archiving most hearings online and local television and we are grateful to Na Leo TV for what it could document. (Emphasis added)

However, the video recordings are unofficial, incomplete and portions of some videos are intermittent due to technical difficulties and therefore may not be wholly relied upon either. Regardless, given the time constraints of this administrator's due dates and lack of official transcripts, the concept that the value of public information within those recordings could possibly be gleaned by pro se parties is untenable, inaccurate, irrelevant, incomplete, unaccountable and fails to uphold the public interest in disclosure.

Audio recordings if they exist on behalf of the State, have not been made available to the parties and were not identified as formal, official or complete record in this proceeding and face similar hurdles to reasonable access of government records for an agency proceeding. This proceeding relies on the verbatim record of the freelance court reporter/s which is being unreasonably withheld by the agency and freelance court reporter/s.

In addition, the public and parties were forbidden from recording audio or video in the proceedings.

Therefore, there are no certified audio or video records, and **only** the stenographic record may be considered a **“true” and complete copy which may be certified**. The rule does not indicate audio and video records should be accessible if in existence, but instead implies both must be made certified and available to parties. **In this, the State has failed to comply with §13-1-68 (b).** (Emphasis added)

The reasonable difference in cost between the stenographic record and the audio or video record may lie in the fact that a digital or physical video or audio record does not bear the same monetary burden as the cost of hard copies and/or photo copies. It could be commonly argued then that under the intent of the law and in the interest of public disclosure and agency duties under Chapter 92, this same \$10 fee should then apply to the digital, online, searchable copy of the only verbatim record which is “true” and complete and therefore may be certified, and which does not require the cost of copying, paper and mailing.

Regardless if true and complete certified audio or video were available, it is unreasonable to suggest that parties should have no other record than audio or video in a case with at least 12,000 pages of transcription. Under the administration of these proceedings, **parties are unable to obtain a copy of the transcripts at a reasonable cost. Parties are also unable to obtain a usable copy of the transcripts at a reasonable cost. Parties are unable to make copies of transcripts which are held at inconvenient locations during limited business hours on two islands for parties residing at various**

locations on multiple islands. Parties are unable to obtain a searchable, digital copy of the transcripts despite the fact proceedings were conducted using a searchable, digital online document library. One is unable to obtain a complete certified copy of audio or video record at all. (Emphasis added)

Anything transcribed from audio or video by anyone other than the authorized/verified stenographer is unofficial, and subject to challenge by another party thus impeding progress of the quasi-judicial proceeding subjecting agency efforts to additional and unnecessary challenges while expending public funds in the extended address of records which are intended to be help for public inspection and copying.

§13-1-68 goes on to read:

(c) Any party to a proceeding conducted under this subchapter may rely

upon the audio or video record in producing a transcript of the proceeding or any part thereof. Unless the transcription is 1-49

performed and attested by a stenographer certified by the

administrator, a transcript produced from the audio or video record

shall be deemed unofficial and shall not be considered as part of the

record. A citation of an unofficial transcript in a subsequent

proceeding conducted under this chapter shall be admissible, subject to

any challenges by other parties and the authentication by the administrator. (Emphasis added)

Rather than providing parties with an official digital copy of transcripts which are necessary to party participation, the State may find itself expending additional time and funds to accommodate challenges by other parties regarding authentication of unofficial copies transcribed from audio or video.

As parties and the public were expressly forbidden from recording proceedings, only a portion of the proceedings are available via unofficial and incomplete video. Furthermore, as established in discussion of §13-1-68 (a) there is no official audio or video record of such proceedings and **the only record of all proceedings is that which was made by the freelance court reporter/s.**

(Emphasis added)

If unofficial stenographers not certified by the administrator were to transcribe from audio or video considered admissible but subject to challenge and authentication, how the administrator would authenticate approximately 12,000 pages of transcriptions, is unclear if not untenable.

We will now consider the rule in the matter of the testimony of J. Kalani Flores in this contested case, which lacked the presence of an official stenographer. The presiding officer indicated his testimony would be transcribed from the video provided by Na Leo TV.

However, as the video recording by Na Leo TV began after numerous proceedings had taken place, and the video includes technical difficulties resulting in intermittent recording, the **video can be considered neither official nor complete and therefore may not qualify as video record**. This raises the concern that even a **court reporter certified by the administrator is unable to produce an official transcript using incomplete, unofficial, uncertified audio or video recording** and therefore calls into question the validity of the transcripts and ability to certify the existing transcripts.

(Emphasis added)

§13-1-68 goes on to state:

- (d) A hearing officer may grant a motion for stenographic recording of a proceeding conducted under this subchapter, provided that the cost shall be borne by the proposing party or allocated among parties by the hearing officer, and a deposit of \$200 for the stenographer's service shall be tendered to the administrator at the time when the motion is

granted. [Eff and comp 2/27/09] (Auth: HRS §199D-1) (Imp: HRS §199D-1)

In this case, the presiding officer made the decision to produce a stenographic record of the proceeding which would be reasonably pertinent in a rehearing remanded from the Supreme Court. Parties were not consulted about this decision nor were motions filed requesting stenographic record, a freelance court reporter was already in attendance beginning the first proceeding date. Thereby, the proposal came from the agency itself represented by the hearing officer and therefore, the cost of the transcriptions for the most comprehensive record of all proceedings should be paid by the agency.

The agency has already paid the freelance court reporter for the service and State copies of the transcripts using public dollars. Neither the public nor parties should be subjected to unreasonable fees in order to obtain the only official record deemed necessary by the State, which has already been paid for by the agency. (Emphasis added)

The allocation of fees among parties therefore is impossible in this case, and access is biased in favor of those with financial standing or use of public funds to cover unreasonable fees ranging from approximately **\$5.75 per page for triple-spaced transcripts to \$8.25 per page for expedited copies for transcripts of more than 12,000 pages which would total a minimum of \$69,000.** This decision-making by the

agency has allowed a freelance court reporter to withhold public information from parties without thousands of dollars to pay for transcripts, those parties are thereby unable to participate without access to necessary government records.

Furthermore, the fees set forth for government records are arbitrarily applied and have been shown to fluctuate throughout the time after the proceedings concluded and at different amounts for different parties, demonstrating **these fees are not set forth by law but instead dictated by a freelance court reporter who lacks standing to copyright and has no right to withhold government records.**

Further injury is caused by the agency which fails to uphold reasonable standards and fees for access to transcripts, and directs parties and the public to the freelance court reporter for payment of fees, rather than providing access to the parties. This redirection of parties to a freelance court reporter by DLNR was found to be incorrect for a State agency according the OIP Op. Ltr. 95-22.

(Emphasis added)

In addition, comparison between video and transcripts held at inconvenient, specific library locations on just two islands during restricted summer hours has shown **numerous inaccuracies in the stenographic record. Errors in the transcripts by the freelance court reporter/s raise serious concerns as to whether or not the only official record of the proceedings are remotely accurate, relevant or complete** and further violate UIPA requirements.

Inaccurate, incomplete, untimely failure to disclose these government records makes public participation in the process of a contested case impossible to complete and demonstrates violation of due process. (Emphasis added)

The purpose of the UIPA is as follows:

[§92F-2] Purposes; rules of construction. In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the legislature declares that it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of government agencies—shall be conducted as openly as possible. . . (Emphasis added)

As openly as possible in the 21st century means the agency needs to upload searchable, digital copies online for the parties and the public in an accurate, timely,

relevant and complete manner. The administrator has conducted these proceedings using an uploaded, searchable, digital library online. There is no reasonable prevention of party access to pertinent records of the contested case such as official transcripts. Therefore the agency has failed to uphold UIPA and has allowed a freelance court reporter and board members to readily defeat the comprehensive and uniform scheme of the UIPA. (Emphasis added)

[§92F-2] goes on to state:

. . . The policy of conducting government business as openly as possible must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii.

This chapter shall be applied and construed to promote its underlying purposes and policies, which are to:

(1) Promote the public interest in disclosure;

(2) Provide for accurate, relevant, timely, and complete government records;

(3) Enhance governmental accountability through a general policy of access to government records;

(4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and

(5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy. [L 1988, c 262, pt of §1]

CONCLUSION

Every party to this case should have a copy of the official record of these proceedings. What the administrator, agency and freelance court-reporter has allowed is the requirement of money for access to the documents required to participate in a contested case.. The fees are not set forth by law but by the freelance court reporter/s who lacks originality to give rise to copyright and bears no rights to withhold government records from the public. The State agency continues to violate its own administrative rules while attempting to readily defeat the UIPA by failing to provide accurate, relevant, timely and complete government records. These actions by the agency, administrator and freelance court reporter constitute a significant failure to uphold rights to public information and violates our rights to due process. (Emphasis added)

Dated: May 20, 2017

_____/s/_____

Kealoha Pisciotta

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 Building, 1250 Punchbowl Street (corner of Beretania and
 Punchbowl Streets)
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DAVID GOVE

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Linda Sueyoshi
 Hawai'i Public Library
 478 South King Street
 Honolulu, Hawai'i 96813

Re: *Mauna Kea Thirty Meter Telescope Contested Case Hearings Transcripts*

Aloha Ms. Sueyoshi,

Earlier today, all 51 volumes of the transcripts from the Mauna Kea Thirty Meter Telescope Contested Case Hearings were delivered to the Hawai'i State Library. It has been requested that all instructions regarding how these transcripts are to be handled be delivered in writing so the entire staff understands what is expected.

HP policy is
 to hold ID
 for ref items
 so just ask for
 i.d. and have
 them sign log

1. A binder with an index of all the transcripts and a sign in sheet will be provided. Please have anyone who would like to view the volumes sign in with their name, volume number, check out time, and return time.
2. If anyone refuses to sign in, I understand it is library policy to ask for a form of identification before allowing people to view material. Please fill out the sign in sheet with the pertinent information.
3. If anyone asks for copies of the transcripts, they should be told that they need to contact the court reporter for their own personal copies.
listed on document
4. If there are any additional questions, please call Michael Cain from the Dept. of Land and Natural Resources at (808) 587-0048.

Thank you for your cooperation in this matter.

Kealoha Pisciotta
On behalf of
Kealoha Pisciotta
Mauna Kea Anaina Hou
And
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BOARD OF LAND AND NATURAL RESOURCES

FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation)
District Use Permit (CDUP) HA-3568 for) **CERTIFICATE OF SERVICE**
The Thirty Meter Telescope at the Mauna)
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of "MKAH et al., MOTION FOR RECONSIDERATION OF BLNRS DENIAL OF ONLINE ACCESS TO TRANSCRIPTS."

was served on the following parties by email on May, 20, 2017:

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Dated: May 20, 2017

_____/s/_____
KEALOHA PISCIOTTA