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BOARD OF LAND AND NATURAL RESOURCES 2017 JUL 10 A 10:42

STATE OF HAWAI'I

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

IN THE MATTER OF)	CASE NO. BLNR-CC-16-002
)	
Contested Case Hearing Re Conservation District)	MINUTE ORDER NO. 89
Use Application (CDUA) HA-3568 for the)	(ORDER DENYING MAUNA KEA
Thirty Meter Telescope at the Mauna Kea Science)	ANAINA HOU ET AL.'S MOTION
Reserve, Ka'ohē Mauka, Hamakua, Hawai'i)	FOR RECONSIDERATION, FILED
TMK (3) 4-4-015:009)	MAY 20, 2017 [DOC. 643], AND
)	RELATED DOCUMENTS [DOC.
)	652, 653]; EXHIBIT "A";
)	CERTIFICATE OF SERVICE
)	

MINUTE ORDER NO. 89

(ORDER DENYING MAUNA KEA ANAINA HOU ET AL.'S MOTION FOR RECONSIDERATION, FILED MAY 20, 2017 [DOC. 643])

Kealoha Pisciotta ("Pisciotta") filed a Motion for Reconsideration on behalf of Mauna Kea Anaina Hou, Kealoha Pisciotta, and Paul Neves (collectively, the "Movants") on May 20, 2017 [Doc. 643]. TMT International Observatory, LLC's ("TIO") and the University of Hawai'i at Hilo ("University"), filed an opposition and joinder, respectively. [Doc. 652, 653].

The Board of Land and Natural Resources ("Board") elects to decide the motion without oral argument.

The Movants seek reconsideration of Minute Order No. 49 [Doc. 637] which denied their motion for the Board to "produce the transcript of this proceeding online, in a searchable form, that can be cut and pasted to all parties" because they "do not consider the access provided by the placement of hard copy transcripts in the public libraries to be adequate nor to satisfy the legal requirements for facilitating public participation in a contested case" [Doc. 622].

A motion for reconsideration should not be “a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding.” *Sousaris v. Miller*, 92 Hawai‘i 505, 513, 993 P.2d 539, 547 (2000). The Movants do not present any new evidence or arguments that were not previously raised or that could not have been raised.

The Movants claim that by not publishing the contested case hearing transcripts in a searchable electronic format on its website, the Board’s actions violate the Uniform Information Practices Act (“UIPA”), chapter 92F, Hawai‘i Revised Statutes. A letter from the Office of Information Practices to Ms. Pisciotta, dated June 8, 2017, states that “UIPA does not require, prohibit, or place conditions upon the publication of government records on an agency website.” See attached Exhibit “A”.

The motion is HEREBY DENIED.

DATED: Honolulu, Hawai‘i, July 10, 2017.

Suzanne D. Case

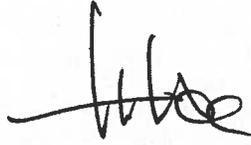
SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

STANLEY H. ROEHRIG, Member

Keone Downing

KEITH “KEONE” DOWNING, Member

JAMES A. GOMES, Member



THOMAS OI, Member



SAMUEL "OHU" GON III, Member

Christopher Yuen

CHRISTOPHER YUEN, Member



DAVID Y. IGE
GOVERNOR

STATE OF HAWAII
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CHERYL KAKAZU PARK
DIRECTOR

June 8, 2017

VIA E-MAIL

Ms. Kealoha Pisciotta

Re: Online Searchable Access to TMT Contested Case Hearing Transcripts
(CORR 2017- 0608-01)

Dear Ms. Pisciotta:

The Office of Information Practices (OIP) received your e-mail messages dated May 5, 8, 9, 10, 12, and 23, 2017, June 3 and 7, 2017, regarding the above referenced matter. OIP also received e-mail messages from Cindy Freitas, Clarence Kukauakahi Ching, Deborah J. Ward, Harry Fergerstrom, Lanny Sinkin, William Freitas, and Mehana Kihoi (Requesters) providing their respective consents to be part of your request to OIP.

I. Publication of Transcripts in a Searchable Form on DLNR's Website

OIP understands that you wish to appeal the Board of Land and Natural Resources' (BLNR) denial of your request for records made under Part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA). You made a written request to BLNR for access to an electronic copy of the 51 volumes of transcripts of BLNR's contested case hearing entitled "IN THE MATTER OF A Contested Case Hearing Re Conservation District Use Application (CDUA) (HA-3568) for The Thirty Meter Telescope at Mauna Kea Science Reserve, Kahohe Mauka, Hamakua District, Island of Hawaii, TMK (3) 4-4-015:00" (TMT Contested Case). More specifically, you asked that an online copy of the transcripts for the TMT Contested Case be posted on the website for this proceeding maintained by the Department of Land and Natural Resources (DLNR) in a searchable format. You made your written request to BLNR in a Petition for Online Access to Transcripts (Petition) dated May 5, 2017. Although this was not a typical record request under the UIPA, based on what transpired subsequently OIP has treated the Petition as your written request under the UIPA.

OIP was provided with a copy of BLNR's Minute Order No. 49 (Minute Order) in response to the Petition. The Minute Order states that BLNR "made this happen," meaning, it caused the TMT Contested Case to be transcribed "for the parties' convenience and the benefit of the public." The Minute Order acknowledged that BLNR currently has electronic copies of volumes 8, 9, 27, 28, 32, 33, and 40 of the transcripts. Finally, the Minute Order asserted that neither the law governing

EXHIBIT "A"

contested cases, chapter 91, HRS, nor the UIPA, requires that the transcripts be made available online, nor that copies be made available in "searchable form, that can be cut and pasted to all parties."¹ DLNR then provided you with a Notice to Requester (NTR) dated May 22, 2017, which indicated that it could not grant your request for transcripts based on the Minute Order.

DLNR subsequently provided an Amended NTR dated May 24, 2017,² which advised that the request for online access to transcripts would be granted in part. The Amended NTR explained that DLNR currently maintains 7 volumes of the transcripts (volumes 8, 9, 27, 28, 32, 33, and 40) in "digital" format, and that a digital copy would be "transcribed to disc and provided to requestor." The Amended NTR further stated that DLNR does not have digital or hard copies of the other volumes, and noted again that a complete set is available at five libraries or may be ordered directly from the court reporter. The Amended NTR also imposed postage and copying costs and required prepayment thereof as allowed by chapter 2-71, Hawaii Administrative Rules (HAR).

Your e-mail message to OIP dated June 7, 2017, stated "[t]o be clear, our request is for BLNR to upload the transcripts on the BLNR Documents and evidentiary library. We are not seeking a disk. . . ." Based on this, OIP understands that the issue you wish to appeal to OIP is whether BLNR is required under the UIPA to have DLNR publish the TMT Contested Case transcripts in searchable electronic format on its website. In OIP Opinion Letter Number 10-03,³ the Honolulu Ethics Commission had asked OIP, among other things, whether the UIPA would require or permit it to publish its advisory opinions on its website. The Opinion, at page 1 note 1, stated that the "UIPA does not require, prohibit, or place conditions upon the publication of government records on an agency website." Please understand that the issue as phrased in your June 7 message has already been found in a formal OIP opinion to be something that is not covered by, and not required by, the UIPA. Should you wish to proceed with an appeal of the DLNR's denial of your request that it provide the transcripts in a searchable format on its website, it does not appear likely you will prevail.

II. Fees for Copies

The Minute Order noted that paper copies of the 51 volumes of transcripts have been made available at one public library on Oahu and four on Hawaii Island, and the Minute Order advised that parties could obtain copies directly from the court reporters for a negotiated discounted rate of one dollar per page, or BLNR will provide a copy at the cost of \$1.00 per page for the 6,735 pages. The Minute Order also stated that the cost for the transcripts, either hard or electronic, will be what is normally charged for UIPA requests. The Minute Order further stated that BLNR currently had no hard copies of the transcripts, but that it would be obtaining a paper copy from one of the libraries in

¹ You filed Mauna Kea Anaina Hou Et Al. Motion for Reconsideration of the Minute Order on May 20, 2017. As of the date of this letter, OIP is unaware as to whether BLNR has ruled on the motion.

² In an e-mail message to OIP dated June 7, 2017, you stated that you never received the Amended NTR from DLNR. OIP provided you with a copy by e-mail that same day.

³ A copy of OIP Opinion Letter Number 10-03 is enclosed.

the future. And, the Minute Order noted that the Office of Hawaiian Affairs (OHA) will make a copy of the transcripts available to the parties online via a secure Dropbox.

The Amended NTR advised that you could have electronic access to the 7 volumes of transcripts that DLNR currently maintains. The Amended NTR imposed these costs: postage \$1.40, and \$7.00 per compact disc.

With regard to fees and costs for access to the transcripts, your message to OIP dated June 7 stated, "Contested Case Hearings are a normal part of the Governmental process and no one should need to pay for their case information when the BLNR has already done so. . . ."

While issues regarding the cost of copies of government records are outside of OIP's jurisdiction (see HRS §§ 92-1.5 and 92F-42 (2012), which set forth OIP's powers and duties), OIP notes that section 92-21, HRS, provides generally that copies of government records shall be charged at the rate of no less than five cents per page. If DLNR will be charging more than the minimum amount set forth in section 92-21, HRS, it should have statutory or regulatory authority to do so. In addition, the UIPA's administrative rules, chapter 2-71, HAR, allow agencies to charge fees and costs associated with preparation of public records, and allow agencies to charge 50% of fees for search, review, and segregation time and 100% of anticipated copying fees and other costs in advance. OIP notes that DLNR's Amended NTR did not indicate that any time based fees would be charged, but only postage and copying costs. Should you wish in the future to obtain access the transcripts by means of the discs offered in the Amended NTR, you should comply with the instructions therein, and you may contact OIP if issues arise with regard to those fees and costs. However, please bear in mind that OIP will not decide that DLNR must provide you with copies of the transcripts for free if it has incurred costs to process your requests.

III. Right to Sue

You have previously been advised that a record requester need not wait for OIP's decision on issues of access to government records. You may file a lawsuit for access within two years after an agency denial. HRS § 92F-15 (2012). Because you have indicated time is of the essence for you in obtaining copies of the transcripts, you have the option of filing a lawsuit for access. Other options include filing appropriate motions in the TMT Contested Case, and, as stated in the Minute Order, you may seek free access from OHA. While obtaining a copy from OHA, or making a record request to any other Hawaii State or county agency that may have a searchable electronic copy of the transcripts does not relieve DLNR of its obligations under the UIPA, these other options may provide you with more timely access to the transcripts. If you do indicate that you instead prefer to proceed with an OIP appeal, please understand that OIP is currently operating with a significant backlog of cases, and that it could be quite some time before your appeal is resolved. Further, an OIP appeal will not affect any deadlines imposed on you for the TMT Contested Case.

While OIP is sympathetic to your situation, if you feel you are being denied due process with regard to the TMT Contested Case because you do not have access to a searchable copy of the transcripts online, an appeal to OIP will not resolve that for you. OIP's jurisdiction in this matter is only over the UIPA's requirements, not due process considerations or other aspects of the TMT

EXHIBIT "A"

Ms. Kealoha Pisciotta
June 8, 2017
Page 4

Contested Case. You must consider other options within the contested case process to address your due process concerns.

This letter also serves as notice that OIP is not representing anyone in this matter. OIP's role herein is as a neutral third party.

I hope this information is helpful.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Carlotta Amerino', with a large, stylized flourish at the end.

Carlotta Amerino
Staff Attorney

CMA:za

Enclosure

cc: Cindy Freitas
Clarence Kukauakahi Ching
Deborah J. Ward
Harry Fergerstrom
Lanny Sinkin
William Freitas
Mehana Kihoi

EXHIBIT "A"

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

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,
Hāmakua, Hawai'i, TMK (3) 4-4-015:009

BLNR Contested Case HA-16-02
Document title: **Minute Orders 88 & 89**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above referenced documents were served upon the following parties by email (when indicated) on July 10, 2017 and by regular mail on July 10, 2017:

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Signature:

Name: Michael Cain

Date:

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July 10, 2017