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JUDICIAL WATCH, INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

JUDICIAL WATCH, INC., a foreign  
corporation,

Applicant,

v.

CLYDE W. NĀMU‘O, and STATE OF  
HAWAII NATIVE HAWAIIAN ROLL  
COMMISSION,

Respondents.

S.P. \_\_\_\_\_  
(Special Proceedings)

APPLICATION FOR AN ORDER  
ALLOWING INSPECTION OF PUBLIC  
RECORDS OF THE STATE OF HAWAII  
NATIVE HAWAIIAN ROLL COMMISSION;  
MEMORANDUM IN SUPPORT OF  
APPLICATION; EXHIBITS “A” – “H”;  
DECLARATION OF MICHAEL A. LILLY;  
DECLARATION OF ROBERT POPPER;  
NOTICE OF HEARING AND CERTIFICATE  
OF SERVICE

HEARING:  
DATE: \_\_\_\_\_  
TIME: \_\_\_\_\_  
JUDGE: \_\_\_\_\_

APPLICATION FOR AN ORDER ALLOWING INSPECTION OF PUBLIC RECORDS  
OF THE STATE OF HAWAII NATIVE HAWAIIAN ROLL COMMISSION

COMES NOW Judicial Watch, Inc. (“Judicial Watch”) and requests this Court for an order, pursuant to HRS, Section 92F-15, directing the State of Hawai`i Native Hawaiian Roll Commission (the “NHRC”) and its Executive Director, Clyde W. Nāmu‘o to make available these public records:

1. Copies of the complete enrollment list of Native Hawaiians, known as the Kana'iolowalu. *See* first request of August 8, 2014 (Exhibit "A").
2. Copies of the enrollment list of Native Hawaiians, known as the Kana'iolowalu, as it existed at any one point in time following your receipt of this request. *See* second request of September 5, 2014 (Exhibit "B").
3. Copies of all documents discussing the decision to reopen, in or about August 2014, registration for the Kana'iolowalu. *See* third request of September 5, 2014 (Exhibit "C").
4. The list of people who have registered with the NHRC.

The basis for this Application is that the NHRC and its Executive Director have failed and refused to permit Judicial Watch access to the foregoing records which, under Chapter 92F, are government records maintained by an agency of the State in written, electronic or other physical form.

Respondents refused for reasons not grounded in Chapter 92F and violated the spirit of that statute and the Office of Information Practices ("OIP") letter of October 8, 2014 (Exhibit "G") which advised NHRC that the statute "places the burden on the agency to establish justification for the nondisclosure of government records". Exhibit "G", citing HRS, §92F-(c) (2012). As such, Respondents' inaction severely infringed upon the public's right to know, entitling Applicant to an order directing disclosure of the requested records and reimbursement of its reasonable attorney fees and costs under § 92F-15(d).

This Application is based on HRS, Chapter 92F, the declarations of Michal A. Lilly and Robert Popper, the attached Memorandum of Law, and Exhibits "A" through "H".

DATED: Honolulu, Hawai'i \_\_\_\_\_.

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MICHAEL A. LILLY  
Attorney for Applicant  
JUDICIAL WATCH, INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

JUDICIAL WATCH, INC., a foreign  
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CLYDE W. NĀMU‘O, and STATE OF  
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MEMORANDUM IN SUPPORT OF  
APPLICATION

MEMORANDUM IN SUPPORT OF APPLICATION

**I. INTRODUCTION.**

As a member of the public, Judicial Watch has a right to review government records maintained by an agency of the State in written, electronic or other physical form.

Specifically, Judicial Watch is entitled to an Order directing Respondent to produce the following records:

1. Copies of the complete enrollment list of Native Hawaiians, known as the Kana'iolowalu. *See* first request of August 8, 2014 (Exhibit "A").
2. Copies of the enrollment list of Native Hawaiians, known as the Kana'iolowalu, as it existed at any one point in time following your receipt of this request. *See* second request of September 5, 2014 (Exhibit "B").
3. Copies of all documents discussing the decision to reopen, in or about August 2014, registration for the Kana'iolowalu. *See* third request of September 5, 2014 (Exhibit "C").
4. The list of people who have registered with the NHRC.

The bases upon which Judicial Watch requests these records as a member of the public are soundly rooted in law. Public scrutiny of public records serves to: permit the public to decide whether government action is proper; improve government operations; reduce distrust by the

public of the government; maintain the public's interest in open government; and improve the integrity of government operations.

As the Hawaii Supreme Court noted, the “public has a legitimate interest in knowing whether our ... laws are being properly enforced by governmental agencies....” Painting Industry v. Alm, 69 Hawai‘i 449, 746 P.2d 79, 81 (1987). Conversely, maintaining a veil of secrecy over the native Hawaiian roll trivializes the Legislature’s mandate that “[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.” H.R.S., § 92F-2. Indeed, it is the policy of Chapter 92F to ensure that “the discussions, deliberations, decisions, and action of government agencies ... be conducted as openly as possible.” *Id.* Only through open government can one ensure “governmental accountability.” H.R.S., § 92F-2(3).

Because “[a]ll government records are open to public inspection unless access is restricted or closed by law,” (SHOPO v. Soc. of Professional Journalists, 83 Hawai‘i 378, 390, 927 P.2d 386 (1996)), Judicial Watch is entitled to the requested records and an award of attorney fees and costs for bringing this matter to court.

## **II. STATEMENT OF FACTS.**

The State of Hawai‘i NHRC was created by the State Legislature during the 2011 Legislative Session to, *inter alia*, prepare and maintain a roll of native Hawaiians. *See* Section 2, Act 195. The five-member commission was placed within the Office of Hawaiian Affairs for administrative purposes only. *Id.* Members of the commission were selected by the Governor of Hawai‘i as follows:

In selecting the five members from nominations submitted by qualified Native Hawaiians and qualified Native Hawaiian membership organizations, the governor shall appoint the members as follows:

- 1) One member shall reside in the county of Hawai‘i;
- 2) One member shall reside in the city and county of Honolulu;
- 3) One member shall reside in the county of Kauai;
- 4) One member shall reside in the county of Maui; and
- 5) One member shall serve at-large.

*Id.*

The NHRC established its own website: <http://www.kanaiolowalu.org/> . According to its website, the registration ended over a year ago with the exception of a short “special extension” that ended May 1, 2014 and a reopening “until further notice”:

The registration commenced on July 20, 2012, and ended on January 19, 2014. A special extension from March 17 to May 1, 2014 was approved by the Commission to accommodate Hawaiians wishing to sign on to the roll following the announcement of a Fall 2014 election of delegates to a convention, or ‘Aha. Since the election of delegates has been pushed back to 2015, the Commission reopened the roll until further notice.

The “Home” page of its website states, as of February 2, 2015, that 125,631 persons have “registered” with the NHRC. Declaration of Michael A. Lilly. Registrants are, at any time, able to check on their registration status by clicking where indicated. *Id.* Registration procedures can be found at this site: <http://www.kanaiolowalu.org/about/procedures/>. The website further states:

- “As of May 30, 2014, the current Kana‘iolowalu Native Hawaiian Roll stands at over 125,000. ...
- “Over 80% of the Roll comprised residents of Hawai‘i. ...
- \* \* \*
- In July 2012, the first on-line indigenous registry in the nation was opened. The registration campaign is known as Kana‘iolowalu.
- The registry was open for 18 months, officially closing on January 19, 2014.
- In just 19 months of registration, over 40,000 Native Hawaiians signed on to Kana‘iolowalu.
- 87,000 Native Hawaiians were transferred to Kana‘iolowalu from three OHA lists: Kau Inoa, Hawaiian Registry, and Operation ‘Ohana....

<http://www.kanaiolowalu.org/news/story/?id=49> . Its blog states that “since re-opening the

official Roll on March 17, 2014, more than 125,631 Native Hawaiians have signed up. As of May 1[, 2014], the Roll is closed....” <http://kanaiolowalu.tumblr.com/>

On August 8, 2014, after the Roll had exceeded 125,000 registrants, Judicial Watch requested that the NHRC provide it with “the complete enrollment list of Native Hawaiians, known as the Kana’iolowalu.” *See* first request of August 8, 2014 (Exhibit “A”).

In response, its Executive Director, Mr. Nāmu‘o, refused production of the requested list because its work “is continuing and the complete enrollment list of Native Hawaiians you requested does not exist at this time.” *See* September 4, 2014 letter, Exhibit “D”. Exhibit “D” was transmitted to Judicial Watch by email from Raynette Suganuma-Carlson of the NHRC. Exhibit “E”. Ironically, that email admits that Ms. Suganuma-Carlson was “one of the 125,000 who registered and ready to Holomua.”<sup>1</sup> [Sic.]To that extent, Judicial Watch has, at least, one of the names on the enrollment list.

On September 5, 2014, Judicial Watch refined its request with two supplemental requests seeking copies of the “enrollment list of Native Hawaiians, known as the Kana’iolowalu, as it existed at any one point in time following your receipt of this request” (Exhibit “B”) and copies of “all documents discussing the decision to reopen, in or August 2014, registration for the Kana’iolowalu” (Exhibit “C”).

On September 25, 2014, Mr. Nāmu‘o again refused production of the requested documents because 1) “Kana’iolowalu have never ceased” and thus “there is no need for documentation to administratively reopen the registration roll” and 2) “our registration work is ongoing and a certified enrollment list of Native Hawaiians does not exist at this time”. Exhibit “F”.

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<sup>1</sup> *Holomua* stands for “progress” or “to improve”.

Neither constitutes a justifiable reason, under the UIPA, to deny the requested government documents.

Judicial Watch subsequently filed an appeal to the OIP which is pending. Popper Declaration. In its letter of October 8, 2014 to the NHRC, the OIP reiterated that the burden was on the NHRC to “establish justification for nondisclosure of public records.” Exhibit “G”, at 1. It also stated that Judicial Watch “need not wait for OIP’s decision” on its appeal before filing this Application.

The NHRC responded to OIP with a letter dated October 16, 2014, which reiterated the non-sensical bases asserted to Judicial Watch for denying its requested documents. Exhibit “H”.

### **III. ARGUMENT.**

#### **A. THE STATE OF HAWAII NATIVE HAWAIIAN ROLL COMMISSION CONSTITUTES AN “AGENCY” UNDER THE UIPA.**

The State of Hawai‘i Native Hawaiian Roll Commission is an “agency” under the Uniform Information Practices Act (“UIPA”).

The UIPA provides that, “[e]xcept as provided in section 92-F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours.” Section 92-F11(b). The term “agency” includes:

[A]ny unit of government in this State, any county, or any combination of counties, department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State.

Section 92F-3. In OIP Op. Ltr. No. 05-03, the OIP concluded that the functionally similar Hawaiian Sovereignty Advisory Commission was an agency:

Similarly, the Commission in the present case was created to advise the Legislature on issues of self-determination and selfgovernance for Hawaiians, and the Commission was placed administratively within the Office of State Planning. Based upon these factors, and the definition of "agency" provided in section 92F-3, Hawaii Revised Statutes, we believe that the Commission constitutes an "agency" for purposes of the UIPA.

OIP Op. Ltr. No. 05-03, at 6.

Section 4 of Act 195 directed that “Funding for the Native Hawaiian roll commission shall be provided by the office of Hawaiian affairs”, itself a state agency.

Accordingly, the State of Hawai`i NHRC is a state “agency” for purposes of the UIPA.

**B. THE REQUESTED DOCUMENTS ARE PUBLIC RECORDS WHICH ARE NOT EXEMPT FROM DISCLOSURE UNDER CHAPTER 92F**

The requested documents from NHRC are public records which are not exempt from disclosure under Chapter 92F. Nor has NHRC articulated a rational basis, grounded in the UIPA, to support its nondisclosure or overcome its affirmative burden to demonstrate why the requested documents should not be disclosed.

The NHRC does not assert that the requested documents are confidential or private or otherwise exempt under any provision of the UIPA. Rather, it merely quibbles with the words used in the requests. Judicial Watch twice asked for the enrollment list as it exists along with documents regarding the reopening of registration, while NHRC irrationally responds that no such “certified” list exists and there is no “need” for documentation. Judicial Watch never asked for a “certified” list – just the list as it exists. IT is also entitled to all documents relating to the decision to reopen. There certainly is such a list, as its website states that it currently has over 125,000 registrants, and such documentation regarding the reopening of registration.

The names of individual citizens maintained in lists held by government agencies have been repeatedly held disclosable under the UIPA. In OIP Op. Ltr. No.89-4, the OIP held that a list of Homestead applicants were subject to public inspection and copying since the applicants’



privacy interest was outweighed by the public interest in disclosure. In OIP Op. Ltr. No. 93-5, OIP held that a list of individuals who applied for positions with a private ambulance company, a successful bidder for emergency medical services, must be available for inspection and copying. Similarly, in OIP Op. Ltr. No. 93-1, the Office of Hawaiian Affairs was required to make available the name, business address, loan amount, loan purpose and loan status of recipients of the Native Hawaiian Revolving Loan Fund:

We believe that the disclosure of the names of individuals who are NHRLP recipients, and the loan amounts, purposes, and statuses would shed substantial light on OHA's performance of its statutory purposes. Specifically, one of the duties of OHA is "[t]o apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians." Raw. Rev. Stat. § 10—6(a)(8) (1985).

\* \* \*

Consequently, we find that the public interest in the disclosure of the names of NERLF recipients and the amounts, purposes, and statuses of their NHRLF loans would outweigh the individual recipients' privacy interest in this information. Thus, in our opinion, the disclosure of this information would not constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes. Cf. *Miami Herald Publishing Co. v. United States Small Business Administration*, 670 F.2d 610 (5th Cir. 1982); *Buffalo Evening News, Inc. v. Small Business Administration*, 666 F. Supp. 467 (W.D.N.Y. 1987) (cases finding that identities of individual recipients of SBA loans and advances, and the amounts and statuses of the SBA loans and advances received, did not fall within the "clearly unwarranted invasion of personal privacy" exemption under the federal Freedom of Information Act).

OIP Op. Ltr. No. 93-1, at 9-10.<sup>2</sup> See also OIP Op. Ltr. No. 91-1 (allowed disclosure of lessee names contained in Hawaiian Home Lands' Lessee Data File and Lessee Ledger Trial Balance).

It is noteworthy that Section 5 of Act 195 required the NHRC to report to the Legislature and the Governor the "status of the preparation of the roll":

The Native Hawaiian roll commission, in cooperation with the office of Hawaiian affairs, shall report to the governor and the legislature no later than twenty days prior to the convening of the regular session of 2012, on the status of the

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<sup>2</sup> That opinion also ruled that the Office of Hawaiian Affairs was "intended to assume the status of a state agency" and thus concluded it was an "agency" for purposes of the UIPA.

preparation of a roll of qualified Native Hawaiians, expenditures related to the responsibilities of the Native Hawaiian roll commission, and any concerns or recommendations as deemed appropriate by the Native Hawaiian roll commission.

In a previous matter, the OIP noted that where the submission of information to the State is, as in this case, mandatory, its disclosure “will not impair the government’s ability to obtain necessary information in the future....” OIP Op. Ltr. No. 90-21, at 11.

The requested documents are public records for which are not exempt from disclosure by the UIPA.

**C. UNDER § 92F-15(D), JUDICIAL WATCH IS ENTITLED TO RECOVER ITS ATTORNEY FEES AND COSTS FOR HAVING TO BRING THIS ACTION TO OBTAIN THE REQUESTED INFORMATION**

Under § 92F-15(d), Judicial Watch is entitled to recover its attorney fees and costs for having to bring this action:

(d) If the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney’s fees and all other expenses reasonably incurred in the litigation.

In this case, Judicial Watch requested the documents in three letters – Exhibits “A” – “C”. The NHRC’s denials quibble only with the words used in those requests without asserting a single basis grounded in a UIPA exemption for denial of the requested documents. While the appeal to OIP is pending, it is noteworthy that OIP cautioned the NHRC that the burden is on them to “establish justification for nondisclosure of public records.” Exhibit “G”, at 1.

NHRC has no justifiable excuse for non-compliance. First, if it had a justification grounded in the UIPA, one would have been provided to Judicial Watch. None was. Second, assuming the request involves administrative burden (an excuse not offered by NHRC), that is no excuse. SHOPO, 83 Hawai’i at 395 (“[a]dministrative burden does not excuse compliance”).

Judicial Watch is entitled to its attorney fees and costs in pursuing this matter.

**IV. CONCLUSION.**

For the foregoing reasons, Judicial Watch requests that this Court GRANT this Application and order the following:

1. That Respondents be ordered to produce the following records:
  - Copies of the complete enrollment list of Native Hawaiians, known as the Kana'iolowalu.
  - Copies of the enrollment list of Native Hawaiians, known as the Kana'iolowalu, as it existed at any one point in time following your receipt of this request.
  - Copies of all documents discussing the decision to reopen, in or about August 2014, registration for the Kana'iolowalu.
  - The list of people who have registered with the NHRC.
  
2. That Respondents be ordered to reimburse Judicial Watch's reasonable attorney fees and costs; and
  
3. That Judicial Watch be granted such other relief as shall be appropriate.

DATED: Honolulu, Hawai'i \_\_\_\_\_.

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MICHAEL A. LILLY  
Attorney for Applicant  
JUDICIAL WATCH, INC.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

JUDICIAL WATCH, INC., a foreign  
corporation,

Applicant,

v.

CLYDE W. NĀMU‘O, and STATE OF  
HAWAII NATIVE HAWAIIAN ROLL  
COMMISSION,

Respondents.

S.P. \_\_\_\_\_  
(Special Proceedings)

DECLARATION OF MICHAEL A. LILLY

DECLARATION OF MICHAEL A. LILLY

I, MICHAEL A. LILLY, declare as follows:

1. I am an attorney duly licensed to practice law in the State of Hawaii, and am a partner in the law firm of Ning, Lilly & Jones, attorneys for Judicial Watch (“Judicial Watch”), Applicant herein.

2. I make this declaration of my own personal knowledge and would be competent to testify to the facts thereto.

3. The NHRC established its own website: <http://www.kanaiolowalu.org/>. All the references to that website contained in the foregoing Application are true and correct quotations acquired by me from its website. The “Home” page of its website states, as of February 2, 2015, that 125,631 persons have “registered” with the NHRC.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY INFORMATION AND BELIEF.

Executed this \_\_\_ day of \_\_\_\_\_, 2015, at Honolulu, Hawaii.

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MICHAEL A. LILLY

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

JUDICIAL WATCH, INC., a foreign  
corporation,

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v.

CLYDE W. NĀMU‘O, and STATE OF  
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COMMISSION,

Respondents.

S.P. \_\_\_\_\_  
(Special Proceedings)

DECLARATION OF ROBERT POPPER

DECLARATION OF ROBERT POPPER

I, ROBERT POPPER, declare as follows:

1. I am an attorney duly licensed to practice law in the State of New York and Senior Counsel for Judicial Watch (“Judicial Watch”), Applicant herein.
2. I make this declaration of my own personal knowledge and would be competent to testify to the facts thereto.
3. As a member of the public, I believe Judicial Watch has an absolute right to review government records requested by this Application.
4. Exhibit “A” is a true and correct copy of my Request to Access a Public Record dated August 8, 2014 in which I requested that the State of Hawai‘i Native Hawaiian Roll Commission (“NHRC”) provide me with the complete enrollment list of Native Hawaiians, known as the Kana‘iolowalu.
5. Exhibit “B” is a true and correct copy of my Request to Access a Public Record dated September 5, 2014, in which I requested that the NHRC provide me with the enrollment list of Native Hawaiians, known as the Kana‘iolowalu, as it existed at any one point in time following their receipt of the request.
6. Exhibit “C” is a true and correct copy of my Request to Access a Public Record dated September 5, 2014 in which I requested that the NHRC provide me with all documents discussing the decision to reopen, in or about August 2014, registration for the Kana‘iolowalu.

7. Exhibit “D” is a true and correct copy of a letter from Clyde W. Nāmu‘o of NHRC to me on September 4, 2014.

8. Exhibit “E” is a true and correct copy of an email by Raynette Suganuma-Carlson of the NHRC dated September 4, 2014 by which she transmitted Exhibit “E” to me.

9. Exhibit “F” is a true and correct copy of a September 25, 2014 letter from Mr. Nāmu‘o to me again refusing production of the requested documents because 1) “Kana’iolowalu have never ceased” and thus “there is no need for documentation to administratively reopen the registration roll” and 2) “our registration work is ongoing and a certified enrollment list of Native Hawaiians does not exist at this time”.

10. Judicial Watch subsequently appealed the denial of records to the Office of Information Practices (“OIP”).

11. Exhibit “G” is a true and correct copy of the October 8, 2015 letter from the OIP to the NHRC which was copied to me.

12. Exhibit “H” is a true and correct copy of a letter dated October 16, 2014 from the NHRC to OIP which was copied to me.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY INFORMATION AND BELIEF.

Executed this \_\_\_ day of \_\_\_\_\_, 2015, at \_\_\_\_\_, \_\_\_\_\_.

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ROBERT POPPER

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

JUDICIAL WATCH, INC., a foreign  
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CLYDE W. NĀMU‘O, and STATE OF  
HAWAII NATIVE HAWAIIAN ROLL  
COMMISSION,

Respondents.

S.P. \_\_\_\_\_  
(Special Proceedings)

NOTICE OF HEARING AND CERTIFICATE  
OF SERVICE

NOTICE OF HEARING

TO: CLYDE W. NĀMU‘O, and  
STATE OF HAWAII NATIVE HAWAIIAN ROLL COMMISSION  
1960 Naio St  
Honolulu, HI 96817  
- and -  
P.O. Box 3201  
Honolulu, Hawaii 96801

Donald H. Amano, Esq.  
State of Hawaii  
Office of the Lieutenant Governor  
OFFICE OF INFORMATION PRACTICES  
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250 South Hotel Street, Suite 107  
Honolulu, Hawaii 96813

Russell Suzuki, Esq.  
Attorney General of Hawai`i  
425 Queen Street  
Honolulu, Hawai`i 96813



NOTICE IS HEREBY GIVEN that the APPLICATION FOR AN ORDER ALLOWING INSPECTION OF PUBLIC RECORDS OF THE STATE OF HAWAII NATIVE HAWAIIAN ROLL COMMISSION shall come on for hearing before the Honorable \_\_\_\_\_, Judge of the above-entitled Court, in his/her courtroom on the 4<sup>th</sup> floor, 777 Punchbowl Street, Kaahumanu Building, Honolulu, Hawaii, on \_\_\_\_\_, 2015, at \_\_\_\_\_ .m. or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawai'i \_\_\_\_\_.

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MICHAEL A. LILLY  
Attorney for Applicant  
JUDICIAL WATCH, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document will be served on the above-identified parties at their respective addresses by depositing the same in the United States first-class mail, postage prepaid on \_\_\_\_\_.

DATED: Honolulu, Hawai'i \_\_\_\_\_.

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MICHAEL A. LILLY  
Attorney for Applicant  
JUDICIAL WATCH, INC.