

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAI'I

_____ )		
JUDICIAL WATCH, INC., )		
	)	
Plaintiff, )		
v. )		S.P. No.
	)	15-1-0059 (JHC)
CLYDE W. NAMU'O and STATE OF HAWAII )		
NATIVE HAWAIIAN ROLL COMMISSION, )		
	)	
Defendants. )		
_____ )		

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE JEANNETTE H. CASTAGNETTI Judge,  
Fifth Division, presiding, on Wednesday, June 3, 2015.

APPLICATION FOR AN ORDER INSPECTING PUBLIC RECORDS

APPEARANCES:

MICHAEL LILLY, ESQ.  
For the Plaintiff

STELLA KAM, ESQ.  
Deputy Attorney General  
For CLYDE NAMU'O AND THE STATE OF HAWAII  
NATIVE HAWAIIAN ROLL COMMISSION

REPORTED BY:  
NIKKI BEAVER CHEANG, CRR, CSR-340  
OFFICIAL COURT REPORTER  
STATE OF HAWAI'I

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

\* \* \* I N D E X \* \* \*

Page

Argument by Mr. Lilly .....	3
Argument by Ms. Kam .....	5
Rebuttal .....	9
Ruling by the Court .....	10

1                   \* \* \* P R O C E E D I N G S \* \* \*

2   Wednesday, June 3, 2015

3

4                   THE CLERK:   Calling SP No. 15-1-0059,  
5   Judicial Watch, Inc. versus Clyde W. Namu'o, et al. for  
6   application for an order allowing inspection of public  
7   records of the State of Hawaii Native Hawaiian Roll  
8   Commission.

9                   Appearances, please.

10                  MR. LILLY:   Good morning, Your Honor.  
11   Michael Lilly for the applicant.

12                  THE COURT:   Good morning.

13                  MS. KAM:    Good morning, Your Honor.   Stella  
14   Kam, Deputy Attorney General, on behalf of Clyde Namu'o  
15   and the Native Hawaiian Roll Commission.

16                  THE COURT:   Okay.   Mr. Lilly, it's your  
17   application.   Is there anything further you wanted to  
18   argue at this time?

19                  MR. LILLY:   Couple of things.   I'm not  
20   going to belabor what we've already submitted.   The  
21   State, the Native Hawaiian Roll Commission does not deny  
22   that it's a state agency, so therefore,  
23   Chapter 92(f) applies to the agency.

24                  By their own admission, they don't deny  
25   that they have lists of people who have signed up.

1                   They don't deny, as their web site states,  
2 that three lists from OHA has been transferred to  
3 augment that list.

4                   They've said in their web site that that  
5 list has over 125,000 names, and I was interested this  
6 morning. I looked at their web site, and they have an  
7 information block that tells people who are interested  
8 in signing up what information they require, and they  
9 call it what information is on this pre-certified list.

10                   They're identifying these lists that they  
11 have, that haven't been certified yet as  
12 pre-certification lists, which is exactly what we've  
13 asked for, and they said each entry on this list that  
14 they have has a name, has an ID number that:

15                   "Each registrant has been assigned a unique  
16 identification."

17                   So the Native Hawaiian Roll Commission  
18 maintains the list. It has lists by names, and it has  
19 an identifying number for each of those people. These  
20 are lists that are maintained by the Native Hawaiian  
21 Roll Commission. Under 92(f) we're entitled to these  
22 documents.

23                   THE COURT: Okay. So what you want is the  
24 list?

25                   MR. LILLY: Pardon me?

1 THE COURT: You want the list?

2 MR. LILLY: I want the list.

3 THE COURT: Thank you very much.

4 Okay. Ms. Kam.

5 MS. KAM: Your Honor, there are two  
6 different lists. One is the enrollment list, which  
7 contains the people who are deemed qualified under the  
8 statute to be placed on the enrollment list, and then  
9 there's the applicant list, which Mr. Lilly was speaking  
10 of that NHRC did get from OHA, as well as people logging  
11 in to the web site.

12 UIPA request did not ask for the applicant  
13 list, it asked for th enrollment list.

14 THE COURT: So why haven't you folks  
15 produced that?

16 MS. KAM: Because we follow exactly what  
17 the UIPA request asks for, which is the enrollment list.

18 THE COURT: So why hasn't that been  
19 produced?

20 MS. KAM: That's the record that's not  
21 completed yet. See, there's the --

22 THE COURT: You have a list, though; right?

23 MS. KAM: We have a list of applicants.

24 THE COURT: So why hasn't the list been  
25 produced under the UIPA?

1 MS. KAM: Because that -- there's two  
2 documents; right?

3 THE COURT: I understand there's two.

4 MS. KAM: So the enrollment list is not  
5 completed yet. Some of those --

6 THE COURT: Where is there a requirement  
7 that the list has to be completed?

8 MS. KAM: Well --

9 THE COURT: You have a list; right?

10 MS. KAM: Well see, that's the thing.  
11 There's a bunch of people in a database, but I don't  
12 know that -- I'm -- and I can't say, you know, at what  
13 point it is, but it's not completed yet.

14 It's somewhat akin to that UIPA opinion  
15 letter that I cited to and Mr. Lilly attached. The  
16 minutes in that situation or the reports were being  
17 drafted.

18 Similarly, the enrollment list is being  
19 compiled, but it's not complete yet. So the NHRC is  
20 reluctant to give it up. It will become a public  
21 document. It has to be by statute.

22 But at this point, it is -- it is kind of  
23 amorphous because it's in the database.

24 THE COURT: So what's the definition of a  
25 government record? Doesn't it include electronic

1 information maintained by an agency?

2 MS. KAM: It does, but at this point the  
3 record is not complete, and so when we go -- our  
4 position is that the enrollment list is a record, and so  
5 we --

6 THE COURT: That's kept by the agency.

7 MS. KAM: Right, but it's not complete yet.  
8 It's a draft.

9 THE COURT: Okay. Did you argue it was a  
10 draft in your opposition paper?

11 MS. KAM: No. I argued that the enrollment  
12 list is not completed yet as a record, as a government  
13 record, and, therefore, we don't even get to whether  
14 it's withheld or not because it doesn't technically  
15 exist under the definition of government record as under  
16 the UIPA.

17 THE COURT: Well, what about Mr. Lilly's  
18 argument that on the web site, he keeps saying yours,  
19 but the agency's web site or the NHRC's web site is that  
20 there's 125,000 people who are registered, or more than  
21 125,000.

22 MS. KAM: Those are the applicants, that's  
23 the applicant list.

24 THE COURT: Okay.

25 MS. KAM: They haven't been screened yet.

1 THE COURT: Okay.

2 So you're making a distinguishment, then,  
3 between the enrollment list and the applicant list?

4 MS. KAM: Correct.

5 THE COURT: Okay.

6 MS. KAM: We can give over, I guess, I  
7 think we can give over the applicant list.

8 THE COURT: Okay.

9 MS. KAM: But then again, to -- I'm  
10 wondering also, now that I'm thinking about it, those  
11 are applicants, and I don't know that they all qualify  
12 under the statute.

13 I don't know whether there might be some  
14 privacy issues as to whether -- I guess, whether they  
15 qualify for the quantum, and also the -- well, not  
16 quantum, but according to the statute, that they need to  
17 be the descendant, as well as they need to meet the  
18 ancestry requirements.

19 So there may be some issues with that, but  
20 he didn't ask for that. He asked for the enrollment  
21 list, which implies that it has already passed through  
22 all of these -- passed through the screening.

23 THE COURT: Okay. I know I interrupted you  
24 by peppering you with some questions, so I didn't mean  
25 to break up your train of thought.



1                   So if you want to continue with your  
2 argument.

3                   MS. KAM: No. I think that that pretty  
4 much is it.

5                   THE COURT: Okay.

6                   MS. KAM: So we don't even get to the  
7 exceptions under the UIPA because we stopped at whether  
8 there was a government record that we could disclose.

9                   THE COURT: Okay, all right. Thank you.  
10                   Mr. Lilly.

11                   MR. LILLY: We asked for the list. We,  
12 even in our petition, we asked for a list of all the  
13 people who have registered with them.

14                   They have said in their web site that they  
15 have registered over 125,000 people. They have these  
16 lists, that's what we want. That's what we're entitled  
17 to.

18                   Not only has she not argued in opposition  
19 any privacy interest, but I cited all the case law that  
20 show the list of names that are kept by an agency are  
21 not private.

22                   THE COURT: Okay. Well, what about, can  
23 you clarify for me, I mean, their argument, they're  
24 saying there's two lists, an enrollment list and an  
25 applicant. So can you shed any light on your response

1 to that?

2 MR. LILLY: From the beginning when we  
3 asked for these lists, and that's what they had, and  
4 that's what they said in opposition to the request, that  
5 there's no certified list. They haven't certified the  
6 list yet.

7 So we asked for the enrollment list, the  
8 people who have signed up as it existed at any point in  
9 time, and we weren't limiting it to certify the list,  
10 and now they're making some kind of distinction between  
11 someone who's registered or enrolled. There are  
12 125,000-plus people who have registered. That's what we  
13 asked for, and that's what we requested in this  
14 application.

15 THE COURT: Okay. All right.

16 So since they registered, they enrolled,  
17 and it basically means the same thing?

18 MR. LILLY: Yes, Your Honor.

19 THE COURT: All right. Thank you.

20 Okay. Well first, let me note, after  
21 reviewing Chapter 92(f), which is Hawaii's Uniform  
22 Information Practices Act, or UIPA, the Legislature  
23 declared that it's the policy of the State of Hawaii  
24 that the formation and conduct of public policy, the  
25 discussions, deliberations, decisions and action of

1 government agencies shall be conducted as openly as  
2 possible.

3 And the policy of conducting government  
4 business as openly as possible must be tempered by a  
5 recognition of right of the people to privacy as  
6 embodied in Section 6 and 7 of the Hawaii Constitution.

7 Further, as expressly stated by the  
8 Legislature, UIPA law shall be applied and construed to  
9 promote its underlying purposes and policies, which  
10 include: Promoting the public interest in disclosure,  
11 providing for accurate, relevant, timely and complete  
12 government records, enhancing government accountability  
13 through a general policy of access to government  
14 records, balancing the individual privacy interests and  
15 the public access interest, allowing access unless it  
16 would constitute a clearly unwarranted invasion of  
17 personal privacy.

18 Now, in looking at the motion, and the  
19 arguments that have been raised and also the lack of  
20 arguments that have been raised and the record before  
21 the Court, it's clear that NHRC, the Native Hawaiian  
22 Roll Commission, is an agency as defined by UIPA.

23 And the UIPA also makes it clear that all  
24 government records are open to public inspection, unless  
25 access is restricted or closed by law. That's

1 HRS Section 92 F-11 A.

2 A government record means information  
3 maintained by an agency in written, auditory, visual,  
4 electronic or other physical form. That's HRS  
5 Section 92 F-3.

6 The agency in this case, the Native  
7 Hawaiian Roll Commission, has the burden of proof to  
8 establish justification for non-disclosure, but  
9 UIPA does not require disclosure of government records  
10 which, if disclosed, would constitute a clearly  
11 unwarranted invasion of personal privacy; or

12 Records that by their nature must be  
13 confidential in order for the government to avoid the  
14 frustration of a legitimate government function, or  
15 government records which, pursuant to state or federal  
16 law, including an order of any state or federal court,  
17 are protected from disclosure, and that's set forth in  
18 HRS Section 92 F-13.

19 And it's important, I think, and  
20 significant to note here that in opposing the  
21 application for inspection of the records, the Native  
22 Hawaiian Roll Commission does not make any argument that  
23 any of the information requested would constitute a  
24 clearly unwarranted invasion of personal privacy, that  
25 the records must be kept confidential to avoid

1 frustration of a legitimate government function, or that  
2 any state or federal law protects the information from  
3 disclosure. Those arguments have not been made by the  
4 NHRC.

5 Here, the list of names registered for the  
6 roll and compiled by the Native Hawaiian Roll Commission  
7 is a government record, insofar as, it is information  
8 that is maintained by an agency.

9 Although the executive director of the  
10 Native Hawaiian Roll Commission declared that the roll  
11 was not yet certified and, therefore, not complete and  
12 subject to disclosure, this assertion does not comply  
13 with the Native Hawaiian Roll Commission's burden to  
14 establish sufficient justification for non-disclosure.

15 The UIPA requires disclosure of government  
16 records, not the disclosure of published records.  
17 The clear and unambiguous language of the statute, which  
18 the Court must follow, requires disclosure of  
19 information maintained by an agency in written,  
20 auditory, visual, electronic or other physical form.

21 Now, let me also just state, then, that  
22 based on that, Court does order that the list of record  
23 of registered names, the list of enrollees must be  
24 disclosed, as it is a government record as that term is  
25 defined under HRS Chapter 92(f).

1                   With respect to the second portion, I  
2 guess, of the request 'cause really there's two  
3 requests, the list, but then also any documents  
4 regarding discussion for reopening the -- Mr. Lilly, you  
5 really didn't argue that point.

6                   They have produced minutes and have said  
7 that that's the only record that exists. Are you pretty  
8 much satisfied with that?

9                   MR. LILLY: The only dissatisfaction I have  
10 with it is that when we asked for it last year, they  
11 said they didn't have anything to produce, and then they  
12 produced it, what, about two weeks ago.

13                   THE COURT: Okay.

14                   MR. LILLY: And so since your Court is  
15 granting the application anyway, we're going to be  
16 asking that we submit our prayer for attorney fees based  
17 on the declaration to be added to the order.

18                   THE COURT: Okay.

19                   MR. LILLY: And as far as any further  
20 documents, we have no reason to believe there are any  
21 further documents that are responsive to that request.

22                   THE COURT: Now so given that that  
23 information has been disclosed, I'm not going to grant  
24 the petition as far as the second part of your request  
25 goes.

1           As for the request for attorney's fees,  
2 HRS 92 F-15 D does say that if the complainant prevails  
3 in an action brought under Chapter 92(f), the Court  
4 shall assess, against the agency, reasonable attorney's  
5 fees and all other expenses reasonably incurred in the  
6 litigation.

7           So, Mr. Lilly, you may submit a non-hearing  
8 motion for attorney's fees, all right, setting forth by  
9 affidavit the attorney's fees incurred in the  
10 litigation, but file it as a non-hearing motion so that  
11 way it stays calendared.

12           MR. LILLY: I understand.

13           THE COURT: And then that will give the  
14 NHRC an opportunity to respond.

15           MR. LILLY: Thank you.

16           THE COURT: And I'll ask you, Mr. Lilly, if  
17 you could please prepare the order.

18           MR. LILLY: Okay.

19           THE COURT: All right.

20           MS. KAM: Your Honor.

21           THE COURT: Yes.

22           MS. KAM: Could I get a clarification,  
23 because the NHRC's position is there are two separate  
24 lists, the applicant list, as well as the enrollment  
25 list. We're unclear, or I'm unclear right now which

1 list is being ordered disclosed.

2 See, because there's a group of people, I  
3 guess, who have gone through the screening process.

4 THE COURT: Okay.

5 MS. KAM: That's what we call the  
6 enrollment list, and then there's the people who are  
7 just on a list that they want to be considered to be  
8 placed on the final list, after -- after the NHRC  
9 determines whether they have met all the qualifications  
10 under the statute.

11 THE COURT: Isn't this pretty much the same  
12 thing as somebody's asking to be considered, and  
13 somebody's registered, isn't that the same thing?

14 MS. KAM: No. Well, I mean, I guess,  
15 they're not enrolled. They won't be part of the final  
16 roll that goes -- that is certified. They may not meet  
17 qualifications.

18 THE COURT: Okay.

19 MS. KAM: So there's one list, which is a  
20 much larger list, which would be those who have applied  
21 to be considered, and then there's the group that the  
22 NHRC has screened, and that will be the certified list  
23 later.

24 THE COURT: Well, then, I think what I hear  
25 Mr. Lilly asking for is this list of 125,000-plus



1 individuals, and that's the list he's requesting.

2 So that list is what, the enrollees?

3 MS. KAM: I would have to check, but I  
4 think those might be the applicants.

5 MR. LILLY: Your Honor, it's a distinction  
6 without difference. They say they have a roll that's  
7 over 125,000 that they say are registered, and that's  
8 what we asked. Whether they want to call them  
9 enrollees, one are called applicants. It's a  
10 distinction without a difference. We want the entire  
11 list.

12 There's people who have applied. There are  
13 people that they've augmented the list by these -- or a  
14 list that comprises these 125,000. That's what we want.

15 THE COURT: Okay. Those who are considered  
16 to be registered.

17 MR. LILLY: Yes, Your Honor.

18 MS. KAM: So that 125,000?

19 THE COURT: Yes.

20 MS. KAM: Okay.

21 THE COURT: Does that clarify it for you?

22 MS. KAM: Yes.

23 THE COURT: What I'll also note is, maybe,  
24 Mr. Lilly, you can clarify. You want a list of names --

25 MR. LILLY: Yes, Your Honor.

1 THE COURT: -- even though the NHRC hasn't  
2 argued this point, telephone numbers, dates of birth,  
3 home addresses, et cetera, it's a list of names.

4 MR. LILLY: Yes, Your Honor.

5 THE COURT: That's the only thing that my  
6 expectation is going to be produced, because that  
7 information, I think you would agree, should be -- is  
8 personal, confidential and could be subject to some sort  
9 of objection that this is a personal privacy interest  
10 and so forth.

11 MR. LILLY: I'm not asking for that other  
12 information.

13 THE COURT: Just the list of names.

14 MS. KAM: Also whether Mr. Lilly is  
15 requesting it in hard-copy format or in electronic.

16 THE COURT: I believe what I saw in their  
17 original request was electronic.

18 MR. LILLY: Electronic is okay.

19 THE COURT: But, Mr. Lilly, do you want to  
20 clarify?

21 MR. LILLY: I'm happy with electronic. I'm  
22 happy with hard copy, either way.

23 THE COURT: Okay.

24 So whatever is easiest, I would assume, for  
25 NHRC.

1                   MR. LILLY: So shall I prepare the order?  
2 It's an order granting in part, denying in part, because  
3 you are denying the second part.

4                   THE COURT: Well, I guess the thing is,  
5 they produced the minutes, but they produced the minutes  
6 after the application had been filed.

7                   MR. LILLY: Fine.

8                   THE COURT: The application's granted.

9                   MR. LILLY: Okay.

10                  THE COURT: But to the extent they've  
11 already produced the minutes, they don't need to  
12 reproduce them. Does that clarify it?

13                  MR. LILLY: That clarifies it.

14                  THE COURT: All right. Thank you, folks.

15                  (Proceedings concluded at 9:20 a.m.)

16   --o0o--

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

STATE OF HAWAII )  
CITY AND COUNTY OF HONOLULU )  
\_\_\_\_\_ )

I, NIKKI BEAVER CHEANG, RPR, CRR, CSR-340, an  
Official Court Reporter for the First Circuit Court,  
State of Hawaii, hereby certify that the foregoing  
comprises a full, true and correct transcription of my  
stenographic notes taken in the above-entitled cause.

Dated this 8th day of June, 2015.

OFFICIAL COURT REPORTER

/s/ Nikki Beaver Cheang  
NIKKI BEAVER CHEANG, CRR, CSR-340