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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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KILAKILA ʻO HALEAKALĀ, Petitioner/Appellant-Appellant,

vs.

BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE CASE, in her official capacity as Chairperson of the Board of Land and Natural Resources, and UNIVERSITY OF HAWAIʻI,
Respondents/Appellees-Appellees.

SCWC-13-0003065

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0003065; CIV. NO. 12-1-3070)

OCTOBER 6, 2016

DISSENTING OPINION BY POLLACK, J.,
IN WHICH WILSON, J., JOINS AS TO PARTS IA AND II

When an administrative agency acting in a quasi-judicial capacity makes or receives (1) substantive ex parte communications, (2) procedural ex parte communications that have the potential to influence the agency adjudicator, or (3) ex parte contacts with interested persons or parties in the case, due process under the Hawaiʻi Constitution requires disclosure of

the communications. Due process also prohibits the insertion of external political pressure into a quasi-judicial administrative proceeding. The state of the record in this case prevents this court from fulfilling its responsibility to independently review whether inappropriate ex parte communications affected the validity of the Advanced Technology Solar Telescope (ATST)[1] permit issued by the Board of Land Natural Resources (BLNR). Similarly, the record is inadequate for this court to conclude that external political pressure was not made an ingredient in the BLNR Chair's decisionmaking process. In order for this court to resolve these issues, this case should be temporarily remanded to BLNR for a detailed disclosure of certain ex parte communications that occurred in this case and an adversarial hearing regarding the matters disclosed, instead of relying, as the majority does, on a decidedly incomplete record.

The consequences of the majority's decision should not be understated. It means that during the decisional phase of contested case proceedings, the decisionmakers can meet in private with interested persons strongly supporting one side or a particular outcome in the case. These interested persons can be representatives of a United States Senator or the Governor,

[1] The ATST has since been renamed as The Daniel K. Inouye Solar Telescope. Daniel K. Inouye Solar Telescope, http://dkist.nso.edu/ (last visited July 25, 2016).

members of advocacy groups, or employees of companies that may gain an economic advantage by the decision. Neither the existence nor the substance of the meeting needs to be disclosed to any other party in the case if the meeting is characterized by the decisionmakers of the contested hearing as a meeting related to procedural matters. If by some fortuitous circumstance the existence of the meeting is discovered by another party in the case, then the decisionmakers need only state that the meeting was procedural in nature to obviate the need for further disclosure. Lacking any other information about the meeting, courts will be unable to independently review the "procedural" characterization offered by the agency. Consequently, as the majority has done in this case, the agency's characterization will be accepted without any objective analysis and despite indications pointing to a contrary conclusion. Because I believe that our law provides a higher degree of procedural fairness in contested case proceedings, I respectfully dissent.

## I. Ex Parte Contacts and Due Process

### A. Disclosure of Ex Parte Communications Is Warranted by Constitutional Due Process and the Hawaiʻi Administrative Procedure Act

#### 1. Due Process

A cornerstone of administrative law is the principle of record exclusivity, which requires quasi-judicial

administrative decisionmaking to be based "solely on the evidence adduced at the hearing." Bernard Schwartz, Administrative Law § 7.13, at 367 (2d ed. 1984); HRS § 91-9(g); see generally Sandy Beach Def. Fund v. City Council of Honolulu, 70 Haw. 361, 391, 773 P.2d 250, 268 (1989) (Nakamura, J., dissenting). Record exclusivity is an integral component of constitutional due process, in that the right to a contested case hearing is rendered meaningless if an agency strays from the properly introduced evidence and considers in its lieu (or in addition to) information gathered through ex parte contacts. See Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 300 (1937) (holding that the agency violated due process by relying on statistical information not introduced into evidence and by depriving the party of the opportunity for rebuttal); Schwartz, supra, § 7.13, at 367—68. Three purposes are served by the rule of record exclusivity: "First, it helps to ensure that the agency does not make decisions that have no adequate basis in fact; second, it gives opposing parties the opportunity to challenge the agency's reasoning process and the correctness of the decision; and third, it affords reviewing courts the opportunity to evaluate the decision." City of Fairbanks v. Alaska Pub. Utils. Comm'n, 611 P.2d 493, 495 (Alaska 1980); accord Schwartz, supra, § 7.13, at 368.

Thus, when agency decisionmaking is influenced by facts extraneous to the record, such as those introduced through ex parte communications, elementary precepts of due process guaranteed by both the state and federal constitutions are offended. See Mauna Kea Power Co. v. Bd. of Land & Nat. Res., 76 Hawaiʻi 259, 263, 874 P.2d 1084, 1088 (1994) (intimating that due process would have been denied had the ex parte communications not been disclosed and the hearing reopened to allow the opposing party to respond to the contents of the ex parte communications); Guenther v. Comm'r., 939 F.2d 758, 760-61 (9th Cir. 1991) (reasoning that due process under the Fifth Amendment is violated when ex parte communications result in unfair prejudice to a party). As aptly explained by the D.C. Circuit, "[w]here agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among 'conflicting private claims to a valuable privilege,' the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved." Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981) (footnote omitted). Injection of ex parte communications into the quasi-judicial decisionmaking process of an administrative agency is inconsistent "with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of

our administrative law." Home Box Office, Inc. v. FCC, 567 F.2d 9, 56 (D.C. Cir. 1977).

It follows that when ex parte communications are introduced into an agency adjudication, due process may require their disclosure. Two distinct interests are served by disclosure: (1) "to prevent the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record" and (2) to allow parties to "respond effectively and ensure that [their] position is fairly considered." Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth. (PATCO v. FLRA II), 685 F.2d 547, 563-64 (D.C. Cir. 1982). In addition, disclosure of ex parte communications would permit appellate courts to independently and effectively determine whether such communications provide grounds for the invalidation of an agency's decision. Cf. id. at 564 n.32 (reasoning that "effective judicial review may be hampered if ex parte communications prevent adversarial decision of factual issues by the agency"). In determining whether an ex parte communication must be disclosed under due process principles, one must ask whether the communication would produce an appearance of impropriety or prevent parties from meaningfully responding to the contents of the communication; if so, then disclosure is mandatory. Id. at 563 ("When the[] interests of openness and opportunity for response are threatened by an ex

parte communication, the communication must be disclosed."). "It matters not whether the communication comes from someone other than a formal party or if the communication is clothed in the guise of a procedural inquiry." Id. Only when an ex parte communication "does not threaten the interests of openness and effective response" would disclosure not be necessary. Id.

Substantive ex parte communications and ex parte communications involving parties or interested persons bear the highest potential of infringing upon the due process interests of openness and opportunity to respond. Substantive ex parte communications from anyone, even those exchanged with disinterested persons, possess a significant potential of giving rise to the appearance of impropriety. In such instances, the agency would appear to be considering outside, off-the-record information or that it is somehow beholden to or influenced by the predilections of the persons with whom the ex parte communications were exchanged.

When an adjudicating agency engages in undisclosed ex parte communications with a party, the agency has effectively authorized off-the-record communications, giving rise to the impression that the agency is predisposed towards the interests of that party. The same is true if ex parte communications are made to or received from an interested person, defined under federal law as "any individual or other person with an interest

in the agency proceeding that is greater than the general interest the public as a whole may have." Portland Audubon Soc'y v. Endangered Species Comm'n, 984 F.2d 1534, 1544 (9th Cir. 1993) (quoting H.R. Rep. No. 94-880, pt. I, at 19-20 (1976), reprinted in 1976 U.S.C.C.A.N. 2183, 2201). An individual's interest "need not be monetary" in order to be considered as an "interested person," and "[t]he term includes, but is not limited to, parties, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated." Id. Excluded from this term are "member[s] of the public at large who make[] a casual or general expression of opinion about a pending proceeding." PATCO v. FLRA II, 685 F.2d at 562. In instances involving the exchange of ex parte communications between an adjudicating agency decisionmaker and an interested person, the decisionmaker would appear to be improperly considering materials or information not properly introduced in the record. Worse, the agency might be viewed as adjudicating in accordance with the preferences of interested persons instead of the applicable law.

There may in fact be situations in which ex parte communications from interested persons will have a more influential effect on an agency's substantive decisionmaking than ex parte communications from parties in a contested case.

This court has recognized as much, when it previously reasoned that statements by the Governor regarding a pending contested case before an agency may constitute improper pressure, given the Governor's "obvious position of influence" over administrative agencies headed by individuals who may be a member of the Governor's cabinet. In re Water Use Permit Applications (Waiāhole I), 94 Hawaiʻi 97, 124, 9 P.3d 409, 436 (2000); see also Portland Audubon, 984 F.2d at 1545 ("No ex parte communication is more likely to influence an agency than one from the President or a member of his staff. No communication from any other person is more likely to deprive the parties and the public of their right to effective participation in a key governmental decision at a most crucial time."). Just as public statements by the Governor have the potential to improperly pressure an agency acting in a quasi-judicial capacity in contravention of constitutional due process, so too the Governor's ex parte communications directly conveyed to that agency. See Waiāhole I, 94 Hawaiʻi at 124-25, 9 P.3d at 436-37 (intimating that the Governor's general statements about his views on the contested case before the agency, if directly communicated with the decisionmakers, could have been sufficient to demonstrate the requisite nexus between the pressure and the decisionmakers and could have been grounds

for the invalidation of the agency decision on due process grounds).

To effectuate the guarantees of state constitutional due process, the need to disclose ex parte communications originating from interested persons may thus be more crucial than disclosing the same communications from a party. The contrary conclusion of the deputy attorney general for BLNR in this case--that there was no need to disclose the ex parte communications that Steven Jacobson, the first hearing officer, received from government officials because they did not originate from UHIfA's counsel--is incorrect.

Disclosure of ex parte communications between an agency adjudicator and parties or interested persons is critical because the adverse impacts of these communications to due process interests are present regardless of whether the content of the ex parte communications is procedural or substantive. If the content is substantive, the agency would have in front of it information outside of the record that, if not disclosed, the parties to the contested case would have no opportunity to address or rebut. If the content is procedural, the fact that the agency has permitted that party or interested person to engage in undisclosed communications off the record--an allowance not enjoyed as a matter of right by all of the other parties to a contested case--raises a shadow of impropriety.

More importantly, ex parte communications concerning a facially procedural subject matter could nonetheless subtly influence the substantive decisionmaking process of the adjudicating agency. See PATCO v. FLRA II, 685 F.2d at 563 (explaining that ex parte communications concerning requests for information on the procedural status of a proceeding "may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings."). In such cases, the due process right to respond would be inhibited by nondisclosure.

For example, Jacobson stated that, as a result of the communications initiated by the chiefs of staff of the Governor and Senator Inouye, he was required to "make daily reports to both the Health Department and the Board's Chair as to how soon [he] contemplated finishing, what else [he] thought [he] needed to do, why [he] thought [he] had to do it, etc." Consequently, Jacobson concluded that his "initial report and recommended decision . . . were filed as a result of 'or else' pressure." Although Jacobson averred that he "was not asked to recommend a particular result," "the result Senator Inouye's office wanted from the Board was clear." Thus, even if it were assumed that the contacts initiated by the chiefs of staff of the Governor and Senator Inouye were versed facially as procedural inquiries, their effects made clear to Jacobson what sort of result Senator

Inouye's office wanted BLNR to reach.[2] It follows that ex parte communications from parties and interested persons may affect the due process interests of fairness and opportunity to respond regardless of whether such communications have a substantive or procedural content; hence, due process requires disclosure of these communications. See PATCO v. FLRA II, 685 F.2d at 563.

This principle parallels Rule 2.9 of the Hawaiʻi Revised Code of Judicial Conduct (RCJC). Hawaiʻi state judges are generally not permitted to "initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending[] or impending matter." RCJC Rule 2.9(a) (2008). Even when the "circumstances require . . . an ex parte

[2] Also of note are the emails from Senator Inouye's chief of staff to the Governor's chief of staff, reiterating UHIfA's fears of losing funding and that it would "be bad if we lose" the project. If these concerns were then conveyed to Aila, Jacobson, or Jacobson's superiors at DOH, it is not improbable that the facially procedural inquiries had the potential to influence the decisionmaking process of Jacobson and BLNR. See PATCO II, 685 F.2d at 568 (reasoning that the call from the Secretary of Transportation to FLRA members, communicating a possibility of settlement regarding a case before the FLRA and a desire for a speedy decision, "may be a subtle effort to influence an agency decision").

Accordingly, requiring disclosure of ex parte procedural inquiries made by parties or interested persons is crucial in order to allow all of the parties to address or object to their contents if they believe that the inquiries have a tendency to affect the substantive decisionmaking of the adjudicating agency. See id. (even if the FLRA members contacted by the Transportation Secretary "concluded in good faith that the communications were not improper, . . . it would have been preferable for them to heed Congress' warning, to assume that close cases like these are improper, and to report them on the public record.").

communication for scheduling, administrative, or emergency purposes that does not address substantive matters," RCJC Rule 2.9(a)(1)--an exception to the general prohibition against ex parte communications--a judge is still required "promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond," RCJC Rule 2.9(a)(1)(B); see also RCJC Rule 2.9(a)(2) (requiring disclosure of a judge's written consultation with a disinterested expert on the law and the opportunity for the parties to respond). Thus, even though the RCJC does not prohibit procedural ex parte communications, it still requires judges to disclose them. See RCJC Rule 2.9(a)(1)(B), (a)(2). Further, it is notable that RCJC Rule 2.9 does not limit its proscription against ex parte communications to parties or their agents. RCJC Rule 2.9. Except for specifically delineated exceptions, see RCJC Rule 2.9(a)(2)—(3), RCJC Rule 2.9 generally prohibits ex parte communications regardless of the source.

Patterning procedures governing ex parte communications in agency contested cases from those already applied by Hawaiʻi judges is consistent with the majority opinion in Mauna Kea Anaina Hou v. Board of Land and Natural Resources, which noted that "[a] contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and

witnesses are subject to cross-examination." 136 Hawaiʻi 376, 380, 363 P.3d 224, 228 (2015). As such, a contested hearing "provides a high level of procedural fairness and protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process." Id. Analogously, a hearing officer presiding over a contested case hearing should follow procedures akin to those that govern judges with regard to ex parte communications. Applying these procedures is an integral component of the "high level of procedural fairness and protections" provided for in a contested hearing, id., that are designed to ensure that decisions are based on the factual record before the agency and not influenced by off-the-record communications.

In addition to their procedural similarity to court hearings, agencies in contested cases are "often in the position of deciding issues that affect multiple stakeholders and implicate constitutional rights and duties," as recognized by a separate majority of this court in Mauna Kea. Id. at 413-14, 363 P.3d at 261-62 (Pollack, J., concurring). These issues commonly surpass, in importance and magnitude, those present in a typical court case. See, e.g., Mauna Kea, 136 Hawaiʻi 376, 363 P.3d 224 (involving a permit to build an astronomical observatory on the summit of Mauna Kea and implicating the constitutionally guaranteed right of Native Hawaiians to

exercise traditional and customary practices); Waiāhole I, 94 Hawaii 97, 9 P.3d 409 (contested case involving the collection of fresh water and dike-impounded ground water, water use permits, and water reservations affecting various classes of users); Pele Def. Fund v. Puna Geothermal Venture, 77 Hawaiʻi 64, 66, 881 P.2d 1210, 1212 (1994) (contested cases involving permit applications to construct geothermal exploratory and developmental wells and a power plant).

Given the importance of the issues and rights involved in agency contested cases, it is logical and fair to hold agency officials involved in quasi-judicial decisionmaking to the same or a similar standard that governs judges with regard to ex parte communications. Not doing so would result in a situation where ex parte conduct that would otherwise be prohibited had the contested case been litigated in a court, to be permitted in the agency adjudication. This is an anomalous result, given that agency contested cases are similar to a trial before a judge, and, as such, the parties to an agency contested case should be afforded the same due process protections as those enjoyed by trial litigants in court.[3]

[3] As in trial court cases, an agency in a contested case is required to provide an opportunity for a hearing, HRS § 91-9(a) (2012), to allow parties to present evidence and argument on all issues, HRS § 91-9(c), and to decide the issues based on the record, HRS § 91-9(e)—(g). The agency is also mandated to follow evidentiary principles similarly applied by trial court judges, including "the exclusion of irrelevant, immaterial, or unduly

(continued . . .)

### 2. Hawaiʻi Administrative Procedure Act

Disclosure of substantive ex parte communications and procedural ex parte communications that bear the potential to influence the substantive decisionmaking of an adjudicating agency is also required by the Hawaiʻi Administrative Procedure Act (HAPA). In every contested case, HAPA provides that "[n]o matters outside the record shall be considered by the agency in making its decision," HRS § 91-9(g) (2012), and that "[n]o official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters

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(. . . continued)
repetitious evidence." HRS § 91-10(1) (2012). Just like judges, agency adjudicators are required to "give effect to the rules of privilege recognized by law," HRS § 91-10(1) (2012), and they are authorized to "take notice of judicially recognizable facts," HRS § 91-10(4). In addition, similar to parties at a trial, parties to a contested case have the right to conduct cross-examination and to submit rebuttal evidence. HRS § 91-10(3).

Agency adjudicators are also required to apply the preponderance of the evidence burden of proof in contested cases, like trial judges in civil cases. HRS § 91-10(4). And like a trial order, an agency order in a contested case must be supported by "reliable, probative, and substantial evidence." HRS § 91-10(1). Finally, adjudicating agencies, like trial courts, are required to include "separate findings of fact and conclusions of law" in their decisions. HRS § 91-12 (2012); see Ka Paʻakai O Kaʻ Aina v. Land Use Comm'n, 94 Hawaiʻi 31, 47, 7 P.3d 1068, 1084 (2000) (noting that the agency was required to "make specific findings and conclusions" regarding certain factors "[i]n order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible").

Given that agency adjudicators are already bound by rules and legal principles that parallel those governing trial court judges, it would be a minimal burden to require agency adjudicators to apply in contested cases a similar disclosure standard for ex parte communications as that followed by Hawaiʻi judges. See infra Part I.A.3.

authorized by law," HRS § 91-13 (2012).[4] Relatedly, HRS § 91-9(c) directs agencies to afford opportunities to "all parties to present evidence and argument on all issues involved." HRS § 91-9(c). Further, HRS § 91-10(3) (2012) provides every party "the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence."

Substantive ex parte communications and procedural ex parte communications that may subtly affect the decisionmaking of an agency adjudicator are, by their nature, "outside the record," such that the quasi-judicial decisionmaker of an agency may not consider them in the decisional process without giving notice and the opportunity for all parties to participate; otherwise, HRS §§ 91-9(g) and 91-13 are necessarily offended. See Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan, 87

[4] The sole exception contemplated by HRS § 91-13 involves those instances where legal authority exists for a decisionmaker to decide an ex parte matter. See, e.g., HRS § 584-6 (a)(4) (Supp. 2013) (allowing parties entitled to file a paternity action to submit an ex parte motion requesting the family court to appoint a personal representative); Hawaiʻi Rules of Penal Procedure Rule 44(c) (2012) (allowing court-appointed counsel to request for expenses under seal through an ex parte motion); Hawaiʻi Family Court Rules Rule 41(e)(1) (2015) (allowing a party to set aside a dismissal for want of service or prosecution by ex parte motion); see also Hawaiʻi Circuit Court Rules Rule 7.2(f) (2014) (providing requirements for parties filing a motion entitled to be heard ex parte).

A contested case hearing is not an "ex parte matter[] authorized by law," HRS § 91-13, as this type of proceeding is adversarial in nature and involves notice to parties, introduction of evidence, the right of cross-examination, presentation of arguments, and decisionmaking based on the record. See HRS §§ 91-9 to 91-13; supra note 3. No legal authority permits contested cases before agencies to be resolved on an ex parte basis.

Hawaiʻi 217, 241, 953 P.2d 1315, 1339 (1998) (reasoning that the Director of the Honolulu Department of Land Utilization violated HRS § 91-13 by considering a book concerning Buddhism that was not made part of the record and by consulting an unidentified qualified individual regarding the Buddhist belief system). In the event that such ex parte communications are not timely disclosed to allow the parties to respond, the right of parties to present evidence and argument on all issues involved is contravened. HRS § 91-9(c); see Town v. Land Use Comm'n, 55 Haw. 538, 548-49, 524 P.2d 84, 91-92 (1974). By the same token, nondisclosure of these ex parte communications precludes parties from conducting cross-examination and from submitting rebuttal evidence concerning their contents. HRS § 91-10(3); see Town, 55 Haw. at 548-49, 524 P.2d at 91-92. Thus, by proscribing the consideration of off-the-record materials and by guaranteeing parties certain procedural rights during contested case hearings, it is inherent in HAPA that substantive ex parte communications and procedural ex parte communications that have the potential to affect the substantive decisionmaking of an agency adjudicator must be disclosed.

### 3. Summary of the Procedure on Disclosure of Ex Parte Communications

Undisclosed ex parte communications pose a substantial risk on the reality and appearance of fairness in agency

adjudications, have the potential to inhibit fair and objective agency decisionmaking based on the evidentiary record, present a danger to effective and objective judicial review, and are inconsistent with the strictures of HAPA. Consequently, disclosure and placement in the record of ex parte communications are required if they (1) involve substantive matters, (2) are facially phrased as a procedural inquiry but bear the potential to subtly affect the substantive decisionmaking of an agency adjudicator, or (3) are made to or received from a party or an interested person, regardless of whether the subject is substantive or procedural.[5] See Mauna Kea Power Co., 76 Hawaiʻi at 262—63, 874 P.2d at 1087—88. Disclosure would allow the parties to challenge or respond to the contents of such ex parte communications, see id., and permit courts to effectively review the implications of the communications to the validity of the agency decision, see PATCO v. FLRA II, 685 F.2d at 564 n.32.

[5] It follows that ex parte communications to or from disinterested persons involving a request for information regarding the procedural status of a proceeding need not be disclosed because such communications possess only a slight effect on the due process interests of openness and opportunity to respond. See PATCO v. FLRA II, 685 F.2d at 563 (concluding that it is unnecessary to disclose an ex parte communication that "does not threaten the interests of openness and effective response"). However, in situations when it is too close to call whether the ex parte communication is substantive or procedural, it is best for the agency to err on the side of caution and disclose. See id. at 568.

Further, in order for disclosure to effectively serve the values protected by due process and HAPA, the contents of the disclosure should be sufficiently detailed to allow the parties to adequately respond to the ex parte communications and to permit the courts to independently review the nature and substance of the communications. Mauna Kea Power Co., 76 Hawaiʻi at 261, 874 P.2d at 1086; PATCO v. FLRA II, 685 F.2d at 564 n.32 (observing that "effective judicial review may be hampered if ex parte communications prevent adversarial decision of factual issues by the agency"). Therefore, in all instances where an adjudicating agency decisionmaker must disclose ex parte communications, see supra, the disclosure should include (a) any written ex parte communication, (b) any writing memorializing the nature, character, or substance of an oral communication, and (c) any response to the ex parte communication.

This approach enhances the integrity of administrative adjudication, safeguards the parties' interests subject to an agency's adjudication, and insures against the appearance of impropriety. See Sandy Beach Def. Fund v. City Council of Honolulu, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989) (reasoning that "the probable value, if any, of additional or alternative procedural safeguards" should figure in the determination of the kind of procedures that must be afforded in a proceeding). Further, given that the rights and interests involved in many

contested cases are profoundly important, this approach is necessary to adequately protect and implement those rights and interests. See id. (stating that the interests affected by a governmental act is a relevant consideration in deciding what procedural protections are warranted by due process).

If the approach described herein is not adopted, the same type of ex parte communications that occurred in this case would likely recur in future contested proceedings no matter how ardent the majority's entreaty that agencies should be more open under similar circumstances. The risk that off-the-record information would influence the decisionmaking process of an agency adjudicator would remain open, and the possibility that individuals would be deprived of important rights and interests would remain high. See id. (holding that "the risk of erroneous deprivation" of individual interests through the procedures used should be considered in deciding whether certain procedures are mandated by due process). Further, a rule that comes short of requiring disclosure of substantive ex parte communications and ex parte communications exchanged with parties or interested persons would preclude courts from meaningfully reviewing the validity of agency adjudications. See PATCO v. FLRA II, 685 F.2d at 564 n.32. Likewise, a conclusory disclosure as to the nature and content of ex parte communications would inhibit a reviewing court's duty to independently review the outcome of

agency adjudications and would cause the court to summarily accept the agency's explanation as true and dispositive.

Finally, the additional burden that may accrue to an adjudicating agency of complying with the disclosure principles discussed in this opinion is very slight. Given that agencies are already required to effectuate the Hawaiʻi Constitution, see Mauna Kea, 136 Hawaiʻi at 413—15, 363 P.3d at 261—63 (Pollack, J., concurring), and the various statutory mandates of HAPA, see supra note 3, obligating agencies to adhere to procedures regarding ex parte communications that parallel those that apply to courts will not be unduly burdensome. See Sandy Beach Def. Fund, 70 Haw. at 377, 773 P.2d at 260 (noting that the burden on the government of certain procedural protections is relevant to whether such protections should be imposed).

And any additional burden that may befall agencies is overwhelmingly outweighed by the benefits of the disclosure procedures discussed. See id. (noting that the "probable value" of additional procedural protections should be balanced against the burden on the government in determining what process is due). Not only will these disclosure procedures guard against the appearance of impropriety that could result in the invalidation of an agency decision, see Mauna Kea, 136 Hawaiʻi at 399, 363 P.3d at 247 (vacating a permit that BLNR issued because the proceedings produced the appearance of impropriety), but

they will also ensure that the proceedings are conducted in compliance with the values embodied by due process and HAPA.

Accordingly, substantive ex parte communications, procedural ex parte communications that bear the potential of influencing an agency adjudicator's decisionmaking process, and ex parte communications exchanged between adjudicating agencies and parties and interested persons must be disclosed consistent with due process.[6]

## B. Ex Parte Communications Has the Potential to Render Voidable an Agency Decision

The introduction of ex parte communications into a quasi-judicial administrative decisionmaking does not automatically invalidate the agency's decision. If the ex parte communications are disclosed and the parties are given the opportunity to respond to the contents of the communications, this court has held that due process is not denied. In Mauna Kea Power, the parties' attorneys, after the contested case hearing had concluded, "made several written ex parte

[6] Nothing precludes agencies from comporting their practices with the procedures and principles consistent with due process as set forth in this opinion. Doing so would provide greater integrity to agency adjudications and would be consistent with the general position of this court on ex parte communications: the majority "caution[ing] public officials and other parties that contacts of the type involved here carry significant risk of creating the appearance of impropriety, and . . . of having an effect on the process," Majority at 46, the concurrence not "condon[ing] meetings and discussions with administrative adjudicators," Concurrence at 7, and this dissenting opinion explicitly holding that such contacts contravene HAPA and have the potential to violate constitutional due process.

communications to members of the BLNR, sending them copies of news articles, reports, and a community petition against the project." 76 Hawaiʻi at 261, 874 P.2d at 1086. Subsequently, BLNR reopened the contested case hearing in order to address, among other things, the propriety of the ex parte communications that the parties' attorneys conveyed to members of BLNR after the hearing had closed. Id. In concluding that Mauna Kea Power was afforded due process, this court reasoned that the reopening of the contested case hearing, together with the disclosure of the ex parte communications, provided Mauna Kea Power with the opportunity to effectively respond to the contents of the ex parte communications. Id. at 263, 874 P.2d at 1088. Thus, the dispositive factors that this court considered in Mauna Kea Power as rectifying any prejudicial effect flowing from the ex parte communications were the disclosure of the ex parte communications and the opportunity for the opposing parties to respond to the contents of the ex parte communications through the reopening of the hearing. Id.

In Korean Buddhist, the Director of the Honolulu Department of Land Utilization considered a book concerning Buddhism that was not made part of the contested case record and consulted an unidentified qualified individual regarding the Buddhist belief system. 87 Hawaiʻi at 241, 953 P.2d at 1339. In reviewing the decision, this court reasoned that a violation of

HAPA does not result in the invalidation of the agency's decision if the violation is "harmless" in that the violation did not prejudice the "substantial rights" of a party in the contested case. Id. Because the Director's consultation of evidence outside the record did not affect the Temple's substantial rights, this court concluded that the Director's decision must be affirmed despite the HAPA violation. Id. at 245, 953 P.2d at 1343.

Thus, under both constitutional due process and HAPA, only when the inappropriate ex parte communication at issue had prejudiced the complaining party would the invalidation of the agency decision be warranted. In light of this standard, the following email communications are relevant to the issue of whether the discussion at the March 21, 2012 meeting necessitates further disclosure from BLNR in order for this court to determine whether the discussion at the meeting constituted improper ex parte communications that could potentially invalidate the ATST permit on due process grounds:

- January 30, 2012 at 4:02 p.m. (from the UHIfA associate director to Senator Inouye's chief of staff): "I know you've talked with Aila [the then BLNR Chairperson], but as previously mentioned, Steve Jacobsen [sic] doesn't work for Aila he works for Fuddy [the Director of the Hawaiʻi Department of Health]. Would it be possible for you or someone to talk with Fuddy to see if it could be clarified that Steve's work priority is to complete the Finding of Facts, Conclusions of Law and Recommendation in the ATST Contested Case?" "By mid-March, the project will have burned through $4M and will bleed $.5M each month after

that." "In order to keep from losing the project, we may have to start construction whether Jacobsen [sic] files or not."

- January 30, 2012 at 6:43 p.m. (Senator Inouye's chief of staff to Governor's chief of staff): "This will be bad if we lose it. Can we do this – if you all can't get a handle on this guy by mid-week, can you call a meeting with uh, me, and your depts. – dlnr, health and ag. We need a plan b – we need to review our options before we get notified that we are losing the moneis [sic] – I think it's been 14 weeks!"

- January 30, 2012 at 10:42 p.m. (from the Governor's chief of staff to Senator Inouye's chief of staff): "I will speak with [Fuddy]. I also spoke with [Aila] and asked to please help."

- January 31, 2012 at 9:25 a.m. (from the UHIfA associate director to Senator Inouye's chief of staff): "UH can't meet with DLNR until after the Board acts on the Hearing Officers [sic] recommendation or it could jeopardize the Contested Case. What do you think about Tony attending the meeting rather than UH? The NSF is not a party in the Contested Case."

- January 31, 2012 at 11:20 a.m. (from Senator Inouye's chief of staff to the UHIfA associate director): "I can carry the message and I can also carry the uh message."

- February 21, 2012 at 9:52 a.m. (Gary Gill to the Governor's chief of staff, the DOH Director, Aila, and Senator Inouye's chief of staff): giving advance notice to the recipients that "Steve Jacobson, hearings officer, will serve the Haleakala ATST contested case recommended decision today. This morning he is adding some photos to illustrate the location of historic sites and ahupuaa boundaries. He tells me that so long as the approximately 200 page document is in the mail by midnight it will be considered served today. He is confident it will be done. I have seen the document and discussed it briefly with him. He has been keeping me informed every day over the weekend of his progress." (This email was thereafter forwarded by Senator Inouye's chief of staff to the UHIfA associate director.)

- March 21, 2012 at 12:13 p.m. (from Tracy Kubota to the Governor's chief of staff): "[Senator Inouye's chief of staff] requested a meeting today at 3 p.m. to discuss the telescope, hearings officer and funding issue. AG will be coming in and Chair Aila is pending."

- March 21, 2012 at 12:37 p.m. (from Susan N. Richey to Tracy Kubota): "Chairman Aila will attend todays [sic] 3 p.m. meeting on the Maunakea Telescope"[7]

As it now stands, the record is inadequate for this court to make an informed ruling as to whether the March 21, 2012 meeting constituted improper ex parte communication that prejudiced Kilakila and, consequently, whether Kilakila's due process rights were violated to such an extent as to require the invalidation of the ATST permit. See Mauna Kea Power Co., 76 Hawaiʻi at 263, 874 P.2d at 1088 (reasoning that an agency decision need not be invalidated if the ex parte communications to parties were harmless). While BLNR disclosed that the "sole topic of discussion" at the March 21, 2012 meeting "was when the final decision in this contested case would be issued[]--in light of Minute Order No. 14, filed on March 19, 2012,"[8]-- the email from Kubota to the Governor's chief of staff indicated

[7] It was later clarified that the March 21, 2012 meeting would concern the ATST on Haleakala instead of the observatory project on Mauna Kea.

[8] Minute Order No. 14 contained BLNR's disclosure of Jacobson's ex parte email to UHIfA's counsel. In that order, BLNR noted that Jacobson's ex parte contact called into question his impartiality and that, as a result, BLNR was considering alternatives to rectify the effects of the ex parte contact.

that the purpose of the March 21, 2012 meeting was "to discuss the telescope, hearings officer and funding issue."[9] This is inconsistent with BLNR's post hoc disclosure that the sole topic of discussion was when the final decision of BLNR was going to issue. Given this inconsistency, there is at least a legitimate and substantial question as to whether the discussion that transpired at the March 21, 2012 meeting violated HAPA and the due process guarantees of both the State and federal constitutions. Relatedly, because of BLNR's cursory and unsubstantiated description of what occurred in the March 21, 2012 meeting, Kilakila was deprived of a meaningful opportunity to respond to the contents of the March 21, 2012 ex parte communications. Cf. id.

The majority, however, reasons that the March 21, 2012 meeting between Aila, the Governor's office, the Attorney General's office, and Senator Inouye's office was not an impermissible ex parte communication because (1) none of the participants was a party or a party's employee, representative or agent and (2) even assuming that the Governor's office or

[9] BLNR's original disclosure stated that the subject of the March 21, 2012 meeting "was when the recommended decision in this contested case would be issued by the hearing officer, Steven Jacobson." After Kilakila pointed out that this could not have been the case, as Jacobson already issued his recommended decision about a month before the meeting, BLNR amended its previous disclosure and stated that the meeting actually discussed when its final decision would issue.

Senator Inouye's office was acting as a representative or an agent for one of the parties, the subject matter of the meeting related solely to the procedural status of the contested case and was therefore allowed under HAR § 13-1-37(b)(2).

HAR § 13-1-37 contains a general prohibition on ex parte communications:

> (a) No party or person petitioning to be a party in a contested case, nor the party's or such person's [sic] to a proceeding before the board nor their employees, representatives or agents shall make an unauthorized ex parte communication either oral or written concerning the contested case to the presiding officer or any member of the board who will be a participant in the decision-making process.
>
> (b) The following classes of ex parte communications are permitted:
>
> > (1) Those which relate solely to matters which a board member is authorized by the board to dispose of on ex parte basis.
> >
> > (2) Requests for information with respect to the procedural status of a proceeding.
> >
> > (3) Those which all parties to the proceeding agree or which the board has formally ruled may be made on an ex parte basis.

HAR § 13-1-37 (2007).

As an initial matter, HAR § 13-1-37, which does not prohibit substantive ex parte communications from nonparties, is inconsistent with the demands of HAPA. As discussed, supra, HAPA proscribes an agency's consideration of substantive information outside of the record regardless of the source. See HRS §§ 91-9(g), 91-13. Thus, by not prohibiting substantive ex

parte communications from nonparties and interested persons, HAR § 13-1-37 is at variance with HAPA.[10]

Even assuming that HAR § 13-1-37 is consistent with HAPA, contrary to the majority's conclusion, the state of the record in this case is such that it precludes this court from determining whether the Governor's office or Senator Inouye's office was acting as a representative or an agent of UHIfA. "A 'representative' is defined as an 'agent, deputy, substitute, or delegate usually being invested with the authority of the principal.'" Olelo: The Corp. for Cmty. Television v. Office of Info. Practices, 116 Hawaiʻi 337, 350, 173 P.3d 484, 497 (2007) (quoting Webster's Third New International Dictionary at 1926-27) (emphasis omitted). There is no indication in the record that the attendees at the March 20, 2012 meeting from the respective offices of the Governor and Senator Inouye were not serving as an agent, deputy, substitute, or delegate for one of the parties. See id.

[10] Substantive ex parte communications from nonparties are not expressly allowed by HAR § 13-1-37(b), but at the same time HAR § 13-1-37(a) does not explicitly disallow such communications. Thus, HAR § 13-1-37 is ambiguous at best. One can argue that the allowed classes of ex parte communications enumerated in HAR § 13-1-37(b) is exhaustive, but this would render HAR § 13-1-37(a)'s prohibition relating to a "party or person petitioning to be a party" and "their employees, representatives or agents" superfluous, a result that should be avoided under settled principles of statutory construction. See Lopez v. Bd. of Trs., Emps.' Ret. Sys., 66 Haw. 127, 129, 657 P.2d 1040, 1042 (1983) (noting "that a statute ought upon the whole be so constructed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant" (quoting In re City & Cty. of Honolulu Corp. Counsel, 54 Haw. 356, 373, 507 P.2d 169, 178 (1973))).

Indeed, the record establishes that Senator Inouye's chief of staff, in her January 31, 2012 email to the UHIfA associate director, offered to "carry the [UH] message" for UHIfA since the UHIfA associate director could not attend a planned meeting. In what manner and the extent to which Senator Inouye's chief of staff carried the UH "message" during the March 21, 2012 meeting are unclear, and, therefore, whether Senator Inouye's chief of staff acted as an agent or representative for UHIfA cannot be determined.[11] The Governor's chief of staff previously talked to the Director of the Department of Health and asked Aila for "help." As to what kind of "help" the Governor's chief of staff requested, and on whose behalf, is unclear. Hence, there is a material question as to what roles the chiefs of staff of the Governor and Senator Inouye assumed at the March 21, 2012 meeting. In short, without a deeper exploration into what the topics of conversation were between the participants at the March 21, 2012 meeting, without knowing what role the chiefs of staff of the Governor and

[11] One can assume, as the concurrence does, that the message that Senator Inouye's chief of staff offered to carry was the urgent need for issuance of the first hearing officer's preliminary report. Because that preliminary report was already issued before the March 21, 2012 meeting, it can be contended that there remained no message for Senator Inouye's chief of staff to carry on behalf of UHIfA. However, there is nothing in the record that indicates what exactly the UHIfA message was that Senator Inouye's chief of staff offered to "carry" or whether there was continuing cooperation between the UHIfA associate director and the senator's chief of staff, and this court should not engage in speculation.

Senator Inouye assumed during that meeting, and without knowing what was actually said between the participants at the meeting, this court cannot determine whether the chiefs of staff of the Governor and Senator Inouye were acting as representatives or agents for one of the parties. Deprived of such information, this court is left to speculate on the roles that the chiefs of staff of the Governor and Senator Inouye played during the March 21, 2012 meeting. Thus, the conclusion reached by the majority--that neither the Governor's office nor Senator Inouye's office was UHIfA's agent or representative--is premature and not supported by the record.[12]

The majority further concludes that the ex parte communication during the March 21, 2012 meeting was permissible because the topic of the discussion was the expected issuance date of BLNR's final decision following the contested case hearing. For this conclusion, the majority relies solely on the conclusory statement made by BLNR in the minute order it issued granting in part and denying in part Kilakila's motion for reconsideration. It cannot be the case that a post-hoc, conclusory statement regarding the subject matter of an ex parte

[12] Under the disclosure procedures discussed in this opinion, see supra Part I.A., ex parte communications from the chiefs of staff of the Governor or Senator Inouye to BLNR adjudicators must be disclosed because the chiefs of staff are "interested persons." Thus, under these disclosure procedures, it would not matter whether the chiefs of staff of the Governor or Senator Inouye acted as an agent or a representative of UHIfA.

communication is in itself sufficient to establish that the communication is permissible. If after-the-fact, unsubstantiated explanations are sufficient to demonstrate the procedural nature of an ex parte communication, BLNR and any other agency can engage in substantive ex parte communications and then, when those communications are brought to light, provide a post-hoc explanation that the subject of the communication was procedural. An appellate court, as the majority does in this case, would then just summarily accept the agency's explanation as true and dispositive without engaging in an independent and objective inquiry on a complete record into whether the communication in fact constituted a request for a procedural status of a contested case.

The minute order upon which the majority relies states that "[d]uring the meeting, the sole topic of discussion was when the final decision in this contested case would be issued." No further elaboration or supporting document substantiates this conclusory statement. The majority takes BLNR at its word and accepts as dispositive BLNR's after-the-fact and unsubstantiated explanation as to the subject matter of the March 21, 2012 meeting. This post-hoc disclosure is insufficient for purposes of due process because it precludes parties from effectively responding to the contents of the ex parte communications and prevents a reviewing court from independently assessing the

propriety of such communications. See Mauna Kea Power Co., 76 Hawaiʻi at 262—63, 874 P.2d at 1087—88; PATCO v. FLRA II, 685 F.2d at 564 n.32.

BLNR's disclosure is also inconsistent with the email from Kubota to the Governor's chief of staff; this email was explicit that the topic of the March 21, 2012 meeting included the telescope, funding, and the hearing officer, none of which can be considered procedural. Thus, there is a substantial question as to the substance and subject of the discussions that occurred at the March 21, 2012 meeting.

Even assuming that the "discussion" at the March 21, 2012 meeting solely involved when the Board would issue its final decision, the "discussion" would still not qualify as a request "for information with respect to the procedural status of a proceeding," which is an allowable ex parte communication under HAR § 13-1-37. This is because a "discussion" about when BLNR would issue its final decision was specifically stated by BLNR to be "in light of Minute Order No. 14, filed on March 19, 2012." This order outlined the alternatives that BLNR was considering to remedy the effects of Jacobson's ex parte communications to UHIfA's counsel. Given that BLNR was still considering how to address Jacobson's ex parte communications, the "discussion" during the March 21, 2012 meeting necessarily implies that it may have involved discussions as to whether and

when Jacobson would be removed, the appointment process for a new hearing officer, whether there would be a complete rehearing, and whether new findings of fact and conclusions of law would be issued. These topics go far beyond what is contemplated as "[r]equests for information with respect to the procedural status of a proceeding" because they touch upon substantive issues concerning procedural due process and the agency's interpretation of its administrative rules.[13] HAR § 13-1-37.

In addition, if the March 21, 2012 meeting was a request for a procedural status on the contested case involved in this case, it has been recognized that procedural ex parte communications "may in effect amount to an indirect or subtle effort to influence the substantive outcome of the proceedings." PATCO v. FLRA II, 685 F.2d at 563 (quoting S. Rep. No. 94-354, at 37 (1975); Government in the Sunshine Act—S.5 (Public Law 94-409) Sourcebook: Legislative History, Texts, and other Documents 232 (Jt. Comm. Print 1976)). In such instances, "[t]he judgment will have to be made whether a particular communication could

[13] Given that Jacobson's fate and the consequences of his ex parte communications were pending issues when the meeting occurred, an innocuous request for a procedural status of this case could have been quickly addressed. For instance, Aila could have appropriately responded, "I am not sure when a final decision will be issued, given what has recently come into the attention to the Board" or something similar. If so, then the meeting should have been very brief.

affect the agency's decision on the merits." Id. Said another way, an ex parte communication whose subject matter is procedural on its face may in fact influence the substance of the administrative proceedings. Hence, a reviewing court should not be hasty in proclaiming that an ex parte communication is procedural in nature simply because the agency says so, for there are instances in which a procedural communication could influence the substance of the proceedings. Elec. Power Supply Ass'n v. FERC, 391 F.3d 1255, 1259 (D.C. Cir. 2004); see, e.g., PATCO v. FLRA II, 685 F.2d at 568. The relevant inquiry "is not the label given the communication, but rather whether there is a possibility that the communication could affect the agency's decision in a contested on-the-record proceeding." Elec. Power Supply Ass'n, 391 F.3d at 1259.[14] It follows that a court must

[14] The majority seems to conclude that procedural ex parte communications exchanged between an adjudicating agency and a party or an interested person need not be disclosed and that, if an agency chooses to disclose them upon the request of a party in a contested case, appellate review of the propriety and extent of disclosure is governed by the abuse of discretion standard. Majority at 30, 43—46. As noted, however, due process requires the adjudicating agency decisionmakers to disclose substantive ex parte communications, procedural ex parte communications that can influence the decisionmaking process of an agency adjudicator, and ex parte communications to or from parties or interested persons. Additionally, the manner and extent of the disclosure must enable the parties to respond to the content of the communications and allow the court to independently review the agency's compliance with due process principles, see supra.

Thus, the sufficiency of the disclosure of an ex parte communication is not a matter of agency discretion; because the adequacy of the disclosure of ex parte communications has the potential to violate constitutional due process, it is a question of law that this court should review de novo. See Save Sunset Beach Coal. v. City & Cty. of Honolulu, 102

(continued . . .)

take a more careful and critical look at the nature and character of the communication that transpired, together with the surrounding circumstances and the purpose of the participants in the ex parte communication, in order to ensure that the ex parte communication in fact concerned procedural issues and did not affect the manner in which the administrative proceeding was decided. See id.

## II. Political Pressure and Due Process

Apart from ex parte communications, a distinct due process basis for the invalidation of an agency's decision is external political pressure. In re Water Use Permit Applications (Waiāhole I), 94 Hawaiʻi 97, 123, 9 P.3d 409, 435 (2000). In assessing whether external political pressure runs afoul of due process, the focus is "on the nexus between the pressure and the actual decision maker"; that is, "the relation between the communications and the adjudicator's decisionmaking

(. . . continued)
Hawaiʻi 465, 474, 78 P.3d 1, 10 (2003) ("We review questions of constitutional law de novo, under a right/wrong standard.").

Even if I were to agree that an abuse of discretion standard governs this court's review of the manner and extent of an agency's disclosure of procedural ex parte communications, as discussed, the majority's characterization of the subject of the March 21, 2012 meeting as procedural is based solely on BLNR's post hoc disclosure and not on the court's independent analysis of what exactly was exchanged during the meeting, the role that the participants played, and all of the relevant circumstances surrounding the meeting. Because the permissibility of the communications at the March 21, 2012 meeting is unclear, it is premature both to conclude that the meeting exclusively involved a request for a procedural status and to review the nature and extent of BLNR's disclosure as an exercise of its discretion.

process." Id. at 123-24, 9 P.3d at 435-36 (quoting ATX, Inc. v. U.S. Dept. of Transp., 41 F.3d 1522, 1527 (1994)). The majority concludes that no improper political pressure was effectuated in this case because, while there was direct contact between Aila and the respective chiefs of staff of the Governor and Senator Inouye at the March 21, 2012 meeting, there is no indication "that they discussed anything other than the timing of BLNR's final decision following the contested case hearing." Majority at 41—42. However, the record does not enable this court to determine the exact role played by the chiefs of staff of the Governor and Senator Inouye at the March 21, 2012 meeting, what was said by the participants during that meeting, or the potential effect on Aila of what the chiefs of staff said. In short, because it cannot be gleaned from the record whether Aila was politically influenced by the participants in the March 21, 2012 meeting, there is insufficient information that would allow this court to conclude that due process was not affronted by external political pressure.

The concurrence underscores the status of Aila as a member of the Governor's Cabinet and posits that Aila should be free to respond to the Governor and the community regarding the procedural status of BLNR proceedings. Concurrence at 5. Although this is accurate, even procedural inquiries by the Governor's office about pending contested case proceedings

before BLNR carries the potential to subtly influence the substantive decisionmaking of the recipient of the inquiry. Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth. (PATCO v. FLRA II), 685 F.2d 547, 563 (D.C. Cir. 1982). Further, while the Governor, as the head of the executive branch, should have some leeway in overseeing the business of the various state administrative agencies, there is no gubernatorial "prerogative to influence quasi-judicial administrative agency proceedings through behind-the-scenes lobbying." Portland Audubon Soc. v. Endangered Species Comm'n, 984 F.2d 1534, 1546 (9th Cir. 1993). As the Supreme Court has pronounced, "there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control." Myers v. United States, 272 U.S. 52, 135 (1926). The same limitation circumscribes the manner in which the Governor must manage state agencies. This court reaffirmed this legal principle in Waiāhole I: "We do not take lightly the governor's legitimate supervisory interest and role with respect to [administrative agencies]. At the same time, we cannot emphasize strongly enough that all adjudicative proceedings conducted by [administrative agencies] must conform to the same exacting standards of fairness, impartiality, and

independence of judgment applicable in any court of law." Waiāhole I, 94 Hawaiʻi at 124, 9 P.3d at 436.

The concurrence notes that Kilakila did not request that Aila be disqualified in light of the March 21, 2012 meeting. However, disqualification is a remedy for bias and impartiality, and ex parte communications to an administrative decisionmaker, without more, do not provide sufficient grounds for disqualification. See Sussel v. City & Cty. of Honolulu Civil Serv. Comm'n, 71 Haw. 101, 107, 784 P.2d 867, 870 (1989) ("[N]o one would argue seriously that the disqualification of [decision-makers] on grounds of actual bias . . . prevents unfairness in all cases. So 'our system of [justice] has always endeavored to prevent even the probability of unfairness.'" (first quoting State v. Brown, 70 Haw. 459, 467, 776 P.2d 1182, 1187 (1989), and then quoting In re Murchison, 349 U.S. 133, 136 (1955))). Thus, the remedy for improper ex parte communications is distinct from that demanded in cases involving a biased or impartial decisionmaker. The mere existence of improper ex parte communications does not automatically result in disqualification of an adjudicating agency decisionmaker; "due process requires disqualification where 'circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on [the adjudicator's] impartiality.'" Liberty Dialysis-Haw., LLC v. Rainbow Dialysis, LLC, 130 Hawaiʻi 95, 110-

11, 306 P.3d 140, 155-56 (2013) (quoting State v. Ross, 89 Hawaiʻi 371, 377, 974 P.2d 11, 17 (1998)). Indeed, if a party to an administrative proceeding could disqualify a decisionmaker for receiving improper ex parte communications, there is nothing to inhibit parties from employing such communications as a tool to "eliminate unfavorable decisionmakers." 32 Charles Alan Wright & Charles H. Koch, Jr., Federal Practice & Procedure Judicial Review § 8260 (1st ed. 2006).

In addition, Kilakila could not have requested that Aila be disqualified because BLNR never disclosed sufficient information in response to Kilakila's multiple requests regarding ex parte communications involving Aila. Without any additional information as to what was said during the March 21, 2012 meeting, what roles the attendees played, and the possible effect on Aila of what was discussed, Kilakila was never in a position to reasonably assess whether there were adequate grounds to seek Aila's disqualification. Further, Kilakila's motion for reconsideration of BLNR's repeated refusals to disclose information that could support a disqualification request was denied the same day that the ATST permit was issued, effectively preventing any attempt at disqualifying Aila or other Board members.

## III. The Proper Remedy is a Temporary Remand for Record Supplementation

It has been said that an incomplete record is no more than a "fictional account of the actual decisionmaking process." Home Box Office, Inc. v. FCC, 567 F.2d 9, 54 (D.C. Cir. 1977). Because the record in this case prevents this court from reviewing the propriety of the ex parte communications that transpired during the March 21, 2012 meeting, from determining whether Kilakila was deprived of due process, and from concluding whether to invalidate the ATST permit, this case should be temporarily remanded to BLNR for record supplementation. See Portland Audubon Soc. v. Endangered Species Comm., 984 F.2d 1534, 1548—50 (9th Cir. 1993); Pub. Power Council v. Johnson, 674 F.2d 791, 794 (9th Cir. 1982); Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth. (PATCO v. FLRA I), 672 F.2d 109, 113 (D.C. Cir. 1982). Just as in Portland Audubon, the proper remedy is to order a temporary "remand for a 'vigorous and thorough' adversarial, evidentiary hearing," with the aid of a specially appointed hearing officer, to determine what was said by the participants in the March 21, 2012 meeting, what roles each participant played and whether any of the participants acted as a representative of any of the parties, what influence, if any, the discussion may have had on Aila and his decisionmaking

process, and whether any of the participants in the meeting exerted political pressure on Aila. See Home Box Office, Inc., 567 F.2d at 58-59 (quoting PATCO v. FLRA I, 672 F.2d at 113). The parties would be allowed to participate in the evidentiary hearing. Id. At the conclusion of the hearing, the hearing officer should prepare written findings of facts and conclusions of law to supplement the record in this case. Id.[15]

## IV. Conclusion

Due process, as guaranteed by the Hawaiʻi Constitution, places upon BLNR the affirmative duty to disclose all substantive ex parte communications, procedural ex parte communications that can influence the decisionmaking process of an agency adjudicator, and all ex parte communications received from or made to parties or interested persons. Complementary to this duty is BLNR's constitutional obligation to provide a meaningful opportunity to the parties to respond to the content of such communications. BLNR's deficient disclosure in this case precludes this court from independently determining whether the March 21, 2012 meeting constituted improper ex parte communications that may invalidate the ATST permit on due

[15] I do not reach the prejudgment issue at this time because of the incomplete state of the record and because information that will be gleaned from additional proceedings on temporary remand to BLNR may also be relevant in determining the prejudgment issue. Further, given that remand to BLNR for additional proceedings is necessary, I do not reach the merits of BLNR's decision to grant the permit pursuant to HAR § 13-5-30.

process grounds. The majority simply accepts BLNR's post hoc characterization that the March 21, 2012 meeting concerned a procedural matter despite considerable indicia pointing to the contrary.

The record in this case also prevents this court from assessing in an informed manner whether the March 21, 2012 meeting improperly influenced Aila's decisionmaking process, in violation of elementary notions of due process. Thus, the state of the record significantly impairs this court's ability to accurately resolve the issues presented in this case without resorting to speculation. Because the majority decides the important due process issues raised in this case on an incomplete record, I respectfully dissent.

/s/ Richard W. Pollack

I join in Parts IA and II of this dissenting opinion.

/s/ Michael D. Wilson