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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR). This is a memorandum decision and will not be relied upon as precedent by OIP in the issuance of its opinions or decisions but is binding upon the parties involved.

**MEMORANDUM DECISION**

**Requester:** Ronald Heller, Esq.  
**Agency:** Department of Taxation, State of Hawaii  
**Date:** October 29, 2019  
**Subject:** Audit Files, Partially Denied (APPEAL 17-28)

Ronald Heller, Esq. (Requester), seeks a decision as to whether the Department of Taxation (TAX) properly denied his request made on behalf of his client, Linkin Consulting, Inc. (Taxpayer), for access to records of the audit and assessment of Hawaii General Excise Taxes against Taxpayer.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's letters to OIP dated December 28, 2016 and May 9, 2019, with attached materials; OIP's Notice of Appeal to TAX dated January 6, 2017; OIP's letters to TAX dated May 20, 2019 and June 25, 2019; and letters from TAX to OIP dated February 13, 2017, June 12, 2019, and July 10, 2019.

**Decision**

OIP does not accept TAX's contention that the confidentiality provided by section 237-34(b), HRS, overrides OIP's statutory power to examine records of other agencies. See HRS § 92F-42(5), -(9) (2012). Nonetheless, despite not being provided with records for *in camera* review, OIP was able to make a determination in this case and finds that TAX properly withheld the records in Taxpayer's audit file under the exception to disclosure of records, which by their nature, must be

confidential in order for the government to avoid the frustration of a legitimate government function. See HRS § 92F-13(1) (2012). However, TAX’s description of the withheld records as simply “those that fall within the exception to the government records disclosure provision set forth in section 92F-13(3), HRS” was inadequate. While it was not required to list and describe each individual record being withheld, TAX should at least have listed types or categories of records that were in the file and were being withheld. See HAR § 2-71-14(b)(1).

### **Statement of Reasons for Decision**

Taxpayer, through its attorney, sought access to TAX’s records of the audit and assessment of Hawaii General Excise Taxes against Taxpayer, communications between TAX and Taxpayer, and references/documents relied upon by TAX. TAX granted Taxpayer’s request as to certain parts, as stated in TAX’s Notice to Requester:

The Department of Taxation will provide certain records from the audit file, except for those that fall within the exception to the government records disclosure provision set forth in section 92F-13(3), HRS. Release of such records would frustrate the Department’s ability to perform its tax compliance function as the records have been prepared in anticipation of civil litigation.

Requester then submitted this appeal to OIP on behalf of his corporate client for the records TAX withheld.

### **I. Documents for *In Camera* Review**

TAX declined to provide the withheld records for OIP’s *in camera* review as requested in OIP’s letters to TAX of May 20 and June 25, 2019. OIP addressed TAX’s position in another Memorandum Decision, U MEMO Number 18-07 (U MEMO 18-07), in which Requester represented another taxpayer. As in U MEMO 18-07, TAX argued here that if it provided the withheld records to OIP, it would be in violation of section 237-34(b), HRS,<sup>1</sup> a confidentiality statute making

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<sup>1</sup> The applicable language states:

(b) All tax returns and return information required to be filed under this chapter, and the report of any investigation of the return or of the subject matter of the return, shall be confidential. It shall be unlawful for any person or any officer or employee of the State, including the auditor or the auditor’s agent with regard to tax return information obtained pursuant to section 23-5(a), to intentionally make known information imparted by any tax return or return information filed pursuant to this chapter, or any report of any investigation of the return or of the subject matter of the return, or to wilfully permit any return, return information, or report so made, or any copy thereof, to be seen or examined by any person; provided that for tax purposes

unauthorized disclosure of tax return information a class C felony, as well as section 92F-17(a), HRS, a UIPA provision making it a misdemeanor to intentionally disclose records or information explicitly described by a confidentiality statute. HRS § 92F-17(a) (2012).

OIP's statutory powers and duties include the power to examine the records of any agency and to enforce that right in court. HRS § 92F-42(5), -(9) (2012). Consistent with that statutory provision and the agency's burden of proof, in a UIPA appeal to OIP, an agency must provide the relevant records for *in camera* review, when so requested, to demonstrate that a claimed exception applies. HAR §§ 2-73-14(4) and -15(c) see also HRS § 92F-15(c) (2012).

It thus appears there may be a conflict of laws between section 237-34, HRS, and section 92F-42, HRS, that potentially puts TAX in an untenable position. If it fails to provide records for *in camera* review in an appeal to OIP of its denial of a UIPA request, based on a confidentiality statute that arguably applies, it may fail to meet its burden to establish that the claimed exception applies and lose the appeal for that reason; yet if the confidentiality statute applies, the power to authorize TAX to provide records to OIP rests with the requester bringing the appeal, who has no incentive to help TAX to prove its case.

As was the case in U MEMO 18-07, the issue is moot given the broad nature of the exception TAX ultimately claimed, because as discussed below, OIP has sufficient information from the factual background TAX provided to determine the applicability of the exception without review of the specific records withheld. Nevertheless, OIP does not accept TAX's contention that the confidentiality statute overrides OIP's statutory power to examine records of other agencies, and in a future case OIP may find that TAX has failed to meet its burden to demonstrate the applicability of a claimed exception or may go to court to enforce its right to examine the records at issue.

## II. Frustration Exception Under Part II

In its Notice to Requester, TAX asserted that the requested records could be withheld from disclosure under the UIPA's exception for records whose disclosure

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only, the taxpayer, the taxpayer's authorized agent, or persons with a material interest in the return, return information, or report may examine them.

...

Any violation of this subsection shall be a class C felony.

HRS § 237-34(b) (2017).

would frustrate a legitimate government function. See HRS § 92F-13(3). TAX asserted that the release of such records would frustrate TAX's ability to perform its tax compliance function as the records have been prepared in anticipation of civil litigation.

In U MEMO 18-07, TAX similarly argued that the undisclosed records from Requester's client's audit file were exempted from disclosure by the personal record exemption for investigative reports and materials relating to an upcoming, ongoing, or pending civil, criminal, or administrative proceeding against the individual. HRS § 92F-22(4) (2012). In support of this argument, TAX asserted that the records "pertain[ed] to a civil investigation into [Requester]'s compliance with the tax laws of the State of Hawaii and for which [TAX] is preparing a final assessment."

The present file involves a government record request under Part II of the UIPA rather than a personal record request under Part III of the UIPA, which has different exemptions to disclosure. However, because records relating to an open investigation are protected from disclosure as government records under the UIPA's frustration exception at section 92F-13(3), HRS, and as personal records under the investigative exemption at section 92F-22(4), HRS, the same analysis applies to disclosure of tax investigation records of a corporation or personal tax records of an individual. OIP Op. Ltr. No. 09-03 at 2-3.

Based on the factual background provided by TAX, the requested records were part of an open investigative file that could lead to a civil proceeding against Requester's client. Even when narrowly construed as required by the UIPA, the open investigation form of the frustration exception is a broadly applicable one and generally applies to an entire investigative file, with the exception of material provided by the Taxpayer or previously provided to the Taxpayer and public records such as court records. OIP Op. Ltr. No. 09-03 at 3-4. Here, consistent with that opinion, TAX provided Requester with records that had been prepared by the auditor but reflected only information from Requester's client's own tax returns. Because of the broad applicability of the open investigation exemption to personal record disclosure, and because TAX did disclose those records that contained only information already known to Requester's client, OIP finds it unnecessary to review the withheld records *in camera* in this limited instance and concludes based on the factual background that their release would frustrate TAX's ability to perform its tax compliance function, as the records were prepared as part of an investigation in anticipation of civil litigation, and that TAX properly withheld them. See HRS § 92F-13(3); OIP Op. Ltr. No. 09-03.

### III. Description of Withheld Records

Requester argued, and OIP agrees, that TAX did not meet its obligation under OIP's rules to specify what records it was withholding in its response to Requester's request. See HAR § 2-71-14(b)(1) (agency's notice must describe "[t]he specific record or parts of the record that will not be disclosed"). TAX's description of the withheld records as simply "those that fall within the exception to the government records disclosure provision set forth in section 92F-13(3), HRS" was inadequate. While it was not required to list and describe each individual record being withheld, TAX should at least have listed types or categories of records that were in the file and were being withheld. If Requester still would like to obtain a more detailed description of the records TAX withheld, Requester should so advise TAX within ten business days of the date of this letter, and TAX should then provide a description of the withheld records consistent with the requirements of section 2-71-14(b)(1), HAR.

#### Right to Bring Suit

Requester is entitled to seek assistance from the courts when Requester has been improperly denied access to a government record. HRS § 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d), (f) (2012).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This decision constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

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

**OFFICE OF INFORMATION PRACTICES**



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APPROVED:



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