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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: Mr. Jake Fergus
Agency: Department of Taxation
Date: August 28, 2019
Subject: Tax Revenue Estimate Records (U APPEAL 20-1)

Requester seeks a decision as to whether the Department of Taxation (TAX) properly denied his request for tax revenue estimate records under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's emails to OIP dated July 5, 2019, and attached materials; OIP's email to Requester dated July 8, 2019; TAX's email and letter to OIP dated July 22, 2019, and attached materials; Requester's email to OIP dated July 27, 2019; OIP's email to Requester dated July 30, 2019; and Requester's email to OIP dated July 31, 2019.

Decision

Following the precedent set in OIP Opinion Letter Number F19-05 (Opinion F19-05) and for the reasons stated therein, OIP concludes that TAX has not established that the records at issue may be withheld under either (1) the UIPA's exception for records whose disclosure would frustrate of a legitimate government function or (2) the

UIPA's exception for working papers of "legislative committees." See HRS § 92F-13(3) and (5) (2012). TAX is therefore required by the UIPA to provide the requested records to Requester.

Statement of Reasons for Decision

This appeal concerns a request for "the worksheets, assumptions, estimates, and calculations for tax revenue estimates used by [TAX] for its testimony" on specified bills. Opinion F19-05 previously concluded that under the UIPA, TAX could not withhold the underlying assumptions, source data and documents, and computations that it used to create revenue estimates presented in legislative testimony on the grounds that its disclosure would frustrate TAX's legitimate function of producing objective and independent revenue estimates or on the grounds that the records were inchoate and draft working papers of a legislative committee.¹ See HRS § 92F-13(3) and (5). As TAX asserted in its position statement, the request at issue here "is substantially similar to the request addressed by [Opinion F19-05]." OIP's *in camera* review of the records at issue here likewise indicates no significant differences that would distinguish them from the records already addressed by OIP in Opinion F19-05.

TAX's position is that it denied access to the records at issue here because TAX's appeal to the First Circuit Court of Opinion F19-05 is currently pending and thus TAX considers disclosure "inappropriate at this time." See In Re OIP Opinion Letter No. F19-05, S.P. No. 19-1-0191.

OIP recognizes that TAX has appealed Opinion F19-05 to court and that TAX's position herein is consistent with its position in that appeal. However, TAX's appeal of Opinion F19-05 does not bar OIP from following its existing precedent as set forth in Opinion F19-05 while TAX's appeal is pending, nor has OIP refrained in the past from treating an OIP formal opinion as a citable precedent based on an agency's ongoing appeal of that opinion.² E.g., OIP Op. Ltr. No. F19-03 at 9 n. 9 (citing OIP Op. Ltr.

¹ Although the records at issue in Opinion F19-05 did not include individual taxpayer information subject to a confidentiality statute, OIP noted in Opinion F19-05 that "to the extent the responsive records include information actually protected by a confidentiality statute, TAX may withhold that information. OIP Op. Ltr. No. F19-05 at 5 n. 2. The records at issue here, as provided by TAX for *in camera* review, do not include individual taxpayer information

² When an unsettled question is raised by both a pending appeal to OIP and a pending litigation, OIP will generally refrain from issuing a decision in the pending appeal until the litigation potentially affecting it has been resolved. This appeal does not raise unsettled questions; OIP has previously addressed the questions it raises in Opinion F19-05, which involved substantially similar records.

No. F15-02, then under appeal to the First Circuit Court in In Re OIP Opinion Letter No. F15-02, S.P. No. 14-1-0543). Thus, given the direct applicability of the precedent set by Opinion F19-05 to this appeal, OIP concludes that the appropriate course is for OIP to make a determination in this appeal consistent with that precedent, which TAX can appeal in turn if it so chooses.

Following the precedent set in Opinion F19-05 and for the reasons stated therein, OIP concludes that TAX has not established that the records at issue may be withheld under either (1) the UIPA's exception for records whose disclosure would frustrate a legitimate government function or (2) the UIPA's exception for working papers of "legislative committees." See HRS § 92F-13(3) and (5). TAX is therefore required by the UIPA to provide the requested records to Requester.

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).

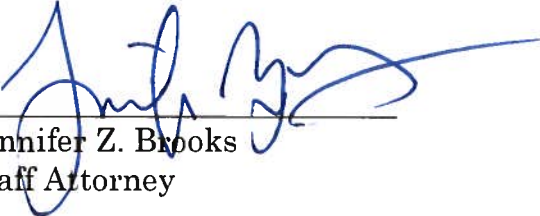
For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

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 appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES



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APPROVED:



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