



DAVID Y. IGE
GOVERNOR

STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

CHERYL KAKAZU PARK
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.oip.hawaii.gov

January 29, 2020

VIA EMAIL

Ms. Deborah Kwan
Department of Taxation

Re: CORR 2020-0123-02

Dear Ms. Kwan:

The Office of Information Practices (OIP) received your email dated January 23, 2020, in which you asked for clarification regarding OIP memorandum opinion U MEMO 20-4.

In U MEMO 20-4, OIP found that the Department of Taxation (TAX) could withhold confidential taxpayer information under section 92F-13(4), HRS, because it is protected from disclosure by a confidentiality statute. Page 5 of U MEMO 20-4 affirmed the decision rendered in U MEMO 20-1 and incorporated that decision, except as it applies to the spreadsheet titled "HB 075-a.sc[.]" Specifically, OIP found that the five rows of that spreadsheet under the section titled, "Income of REITS with no tax deductions <5%" may be withheld from disclosure under section 92F-13(4), HRS.

U MEMO 20-4 inadvertently failed to note that seven rows, not five, could be redacted prior to disclosure. They include: 5 rows under the section titled, "Income of REITS with no tax deductions <5%," one row titled, "subtotal" and one row titled, "Behavior adjusted taxable." This information was provided by TAX in its request for reconsideration of U MEMO 20-1, was considered by OIP for the issuance of U MEMO 20-4, and was unintentionally not fully described in U MEMO 20-4. I apologize for this oversight and any inconvenience it may have caused. This letter of clarification will be attached as a cover sheet to OIP's copies of U MEMO 20-4 to avoid any future confusion as to the decision in U MEMO 20-4.

If you have any questions concerning this matter, please contact OIP.

Very truly yours,

Carlotta Amerino
Staff Attorney

CMA:za

Cc: Mr. Jake Fergus



STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

DAVID Y. IGE
GOVERNOR

CHERYL KAKAZU PARK
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oiip@hawaii.gov
www.oiip.hawaii.gov

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: January 7, 2020
Subject: Tax Review Estimate Records (U RECON 20-1)

Requester sought 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. OIP rendered a decision in U MEMO 20-1, and this decision addresses TAX's request that OIP reconsider the decision in U MEMO 20-1. A copy of U MEMO 20-1 is attached hereto.

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; Requester's email to OIP dated July 31, 2019; TAX's email to OIP dated September 9, 2019, with two letters to OIP dated September 6, 2019, attached; records for *in camera* review received on September 11, 2019; OIP's letter with enclosure to Requester and TAX dated September 17, 2019; and a letter from TAX dated December 17, 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 which, if disclosed, would frustrate a legitimate government function, or (2) the UIPA's exception for working papers of "legislative committees." HRS § 92F-13(3) and (5) (2012). TAX is therefore required by the UIPA to provide the requested records to Requester with the exception of confidential taxpayer information which may be withheld under section 92F-13(4), HRS, as it is protected under a confidentiality statute.

Statement of Reasons for Decision

In response to an appeal (U APPEAL 20-1) filed by Requester after TAX denied him access to records, OIP issued a memorandum opinion, U MEMO 20-1. That appeal concerned 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 HRS § 92F-13(3) and (5).

For U APPEAL 20-1, TAX asserted, and OIP agreed in U MEMO 20-1, that the request at issue "is substantially similar to the request addressed by [Opinion F19-05]." OIP's *in camera* review of the records at issue showed no significant differences that would distinguish them from the records already addressed by OIP in Opinion F19-05.

TAX's position in U APPEAL 20-1 was 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. On November 19, 2019, the First Circuit Court (Circuit Court) issued its Order Affirming Office of Information Practices Decision and Ordering Compliance (Order). In the Order, the Circuit Court found that TAX failed to demonstrate that Opinion F19-05 was palpably erroneous and ordered TAX to comply with Opinion F19-05. Final judgment in favor of OIP and Ray Kamikawa and against TAX was entered by the Circuit Court

¹ 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. In the underlying appeal, U APPEAL 20-1, OIP was informed that the records provided for *in camera* review did not include individual taxpayer information. As explained infra, that information was incorrect.

on December 20, 2019. It was not known as of the date of this decision whether TAX would appeal the Circuit Court Order.²

OIP then concluded in U MEMO 20-1 that, following the precedent set in Opinion F19-05, TAX had not established that the records at issue may be withheld under either (1) the UIPA's exception to disclosure for records which, if disclosed, would frustrate a legitimate government function or (2) the UIPA's exception to disclosure for working papers of "legislative committees." HRS § 92F-13(3) and (5). OIP further found that TAX is therefore required by the UIPA to provide the requested records to Requester.

After U MEMO 20-1 was issued, TAX timely sought and OIP granted partial reconsideration of U MEMO 20-1. Although an agency's own failure to timely provide justification for its nondisclosure of records does not generally provide it a basis to request reconsideration of an unfavorable OIP opinion, OIP found that other compelling circumstances justified granting reconsideration. HAR § 2-73-19(d).

OIP granted limited reconsideration of U MEMO 20-1 based on TAX's argument that section 92F-13(4), HRS, allows it to withhold a small portion of the requested records because it contains confidential taxpayer information protected under section 235-116, HRS:

§235-116 Disclosure of returns unlawful; penalty. All tax returns and return information required to be filed under this chapter shall be confidential, including any copy of any portion of a federal return that may be attached to a state tax return, or any information reflected in the copy of the federal return. 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 make known intentionally information

² OIP recognized in U MEMO 20-1 that TAX had appealed Opinion F19-05 to court and that TAX's position in the court appeal was consistent with its position in the OIP appeal. OIP noted that TAX's court appeal of Opinion F19-05 did not bar OIP from following its existing precedent in Opinion F19-05 while TAX's court 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. E.g., OIP Op. Ltr. No. F19-03 at 9 n. 9 (citing OIP Op. Ltr. 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). Given the direct applicability of the precedent in Opinion F19-05, OIP concluded in U MEMO 20-1 that it was appropriate for OIP to make a determination consistent with precedent, which TAX could appeal to the court in turn if it chose. OIP also noted that, 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 until the litigation potentially affecting it has been resolved, but that U APPEAL 20-1 did not raise unsettled questions.

imparted by any income tax return or estimate made under sections 235-92, 235-94, 235-95, and 235-97 or wilfully [sic] to permit any income tax return or estimate so made or copy thereof to be seen or examined by any person other than the taxpayer or the taxpayer's authorized agent, persons duly authorized by the State in connection with their official duties, the Multistate Tax Commission or the authorized representative thereof, except as otherwise provided by law. Any offense against the foregoing provisions shall be punishable as a class C felony.

HRS § 235-116 (2017).

Specifically, TAX now asserts that the spreadsheet titled "HB 0475-a.sc" that TAX had submitted for OIP's *in camera* review in U APPEAL 20-1 contains confidential taxpayer information protected under section 235-116, HRS. Although specific taxpayer identities were not contained in the responsive records, TAX stated that it had belatedly discovered that the number of Real Estate Investment Trusts (REIT) upon which the revenue estimates were based was small enough to significantly increase the likelihood that the data could be associated with or attributed to specific taxpayers, and thus TAX now believes that disclosure of the unredacted spreadsheet would violate section 235-116, HRS. TAX now argues that section 235-116, HRS, requires redaction of five rows under the section titled, "Income of REITS with no tax deductions <5%."

TAX's letter to OIP dated September 6, 2019, asserted that its policy is to not release state level statistics of fewer than ten observations, and this policy conforms with the Internal Revenue Service, Statistics of Income Division Policy for the tabulation of observations at the state level. However, in a letter dated December 17, 2019, TAX clarified that it actually relied on IRS Publication 1075 (September 2016) titled "Tax Information Security Guidelines for Federal, State, and Local Agencies: Standards for Protecting Federal Tax Returns and Return Information." In relevant part, this publication states that for return information statistical reports, "[s]tatistical tabulations prepared at the state level may not be released for cells containing data for fewer than 10 returns." As such, TAX asserts that the row that includes the subtotal figure in the spreadsheet as well as the row titled, "Behavior Adjusted Taxable" may not be disclosed because they contain (1) actual tax return data from specific taxpayers, and (2) aggregated data based on less than 10 records.

OIP believes that TAX has met the burden of proof of showing that section 235-116, HRS, requires confidentiality of the specific portion of the spreadsheet titled "HB 0475-a.sc." OIP recognizes that the applicability of this confidentiality statute was not that obvious in this case as it required awareness of the number of taxpayers that the aggregated data was based on. Further, it would be contrary to common sense for OIP to order an agency to violate a confidentiality statute, even when the agency was dilatory in drawing the confidentiality statute to OIP's attention. Thus, OIP granted

partial reconsideration of U MEMO 20-1 in a letter to Requester and TAX dated September 17, 2019.³ OIP therefore affirms the decision rendered in U MEMO 20-1 and incorporates it herein, except as it applies to the spreadsheet titled “HB 0475-a.sc[.]” Specifically, the five rows of that spreadsheet under the section titled, “Income of REITS with no tax deductions <5%” may be withheld from disclosure under section 92F-13(4), HRS, which allows agencies to withhold information protected by a confidentiality statute, because that information is protected by section 235-116, HRS.

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.

³ TAX also submitted redacted versions of the *in camera* documents reviewed by OIP for the issuance of U MEMO 20-1. TAX asserted this redacted version may be disclosed in the event that TAX does not prevail in its court appeal.

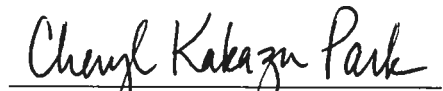
This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES



Carlotta Amerino
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director



DAVID Y. IGE
GOVERNOR

STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

CHERYL KAKAZU PARK
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oiip@hawaii.gov
www.oiip.hawaii.gov

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).

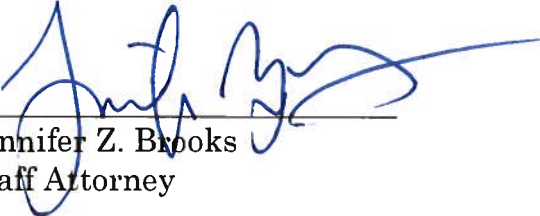
For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

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



Jennifer Z. Brooks
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director