



DAVID Y. IGE
GOVERNOR

**STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES**

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

CHERYL KAKAZU PARK
DIRECTOR

The Office of Information Practices (OIP) is authorized to issue decisions and advisory opinions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to HRS §§ 92F-27.5 and 92F-42, and chapter 2-73, Hawaii Administrative Rules (HAR). This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions but is binding upon the parties involved.

MEMORANDUM OPINION

Requester: John Herring
Agency: County of Kauai, Department of Finance
Date: January 19, 2018
Subject: Assessed Real Property Values (U RFO-P 15-1)

Requester seeks an opinion on whether the County of Kauai (County) Department of Finance (FIN-K), Real Property Assessment Division (Real Property Division) is required under Part II of the UIPA to provide members of the public with separate assessed values for the land and improvements for a taxpayer parcel (Allocated Assessments).

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in Requester's request for an opinion to OIP with attachment dated February 18, 2015; and a letter to OIP from the County of Kauai Office of the County Attorney (CORP CNSL-K) dated March 6, 2015.

As a preliminary matter, OIP considers CORP CNSL-K's request in its letter dated March 6, 2015, that OIP dismiss this matter and refrain from issuing an advisory opinion because OIP is without jurisdiction to do so. OIP believes it does have jurisdiction to issue an advisory opinion on Requester's question pursuant to section 92F-42, HRS, which states, in relevant part, that OIP's director:

- (3) Upon request by any person, may provide advisory opinions or other information regarding that person's rights and the functions and responsibilities of agencies under this chapter;

- (4) May conduct inquiries regarding compliance by an agency and investigate possible violations by any agency;
- ...
- (9) Shall review the official acts, records, policies, and procedures of each agency; [and]
- (10) Shall assist agencies in complying with the provisions of this chapter[.]

HRS § 92F-42 (2012). In the alternative, CORP CNSL-K requested that OIP work with the County by assisting it in formulating a workable solution to this issue due to the requirements of the Kauai County Code (County Code) and its duties in tax appeal cases. It is OIP's intent that this opinion be instructive to both Requester and FIN-K.

Opinion

FIN-K may continue to provide single assessments of a parcel's whole value in accordance with its Acknowledgement of Receipt memorandum dated January 23, 2014 (Memorandum) in response to inquiries from the public. However, because real property tax assessments are "real property tax information" that is public under section 92F-12(a)(5), HRS, when FIN-K receives UIPA requests for Allocated Assessments, it should provide them if it maintains them. If it does not maintain Allocated Assessments, it should provide them only if they are readily retrievable in the form requested.

Statement of Reasons for Opinion

I. Facts

Requester, a FIN-K employee at the time this request for an opinion was filed, received a copy of the Memorandum, which Real Property Division employees were asked to sign and date. This Memorandum stated:

Under Ordinance #920 SECTION 1 ".....This bill requires a parcel to be valued as a whole instead of with separate land and building values." Section 3 5A-2.2"...The assessment list shall identify the property tax assessed by its tax key, whether it is improved, vacant land or partially complete and shall set forth the general class of the property established for tax rate purposes in accordance with Sec.5A-6.4 the valuation of the real property, the property's highest and best use, the amount of exemption allowed on the real property and the net taxable value of the real property[.]"

Prior to 2013 and the implementation of Ordinance 920, RPA staff were often asked to provide separate assessed valuations for land and

improvements. Under Ordinance #920, however, RPA staff shall no longer disclose this information separately for properties that are valued using "market modeling" techniques as it may expose the County to detrimental reliance on any one component of value. The exception to this policy is that RPA staff may be allowed to provide separate values for those properties that were valued using the "COST" methodology (indicated on CA11 by "Review Code 1") such as most commercial and industrial properties or residential properties with multiple dwellings. The Cost method itself requires the separation of value between land and depreciated improvements, which would be revealed at a tax appeal hearing. Therefore, and only upon request of the taxpayer, it is permissible to divulge the independent assessments of these components of value when valued by the Cost method.

Should you reveal these value components separately, as outlined in the aforementioned paragraph, you must include the disclosure that these values are from internal work products only and are not to be deemed reliable or defensible for anything [sic] other than assisting in the determination of the Total Assessed Value. Also, please remind taxpayers that appeals can only be filed on TOTAL VALUES and not individual "components of value."

I hereby acknowledge that I can only release the "total assessed value" or the "total net taxable" or "total exemption amount" as public information, unless the final assessed value was determined by the Cost method.

Requester explained that, in Kauai County, a taxpayer receives a single property value, and that part of that value is attributable to the land and part is attributable to improvements. The Memorandum's directive applies to properties valued using the "market modeling" technique, but CORP CNSL-K did not elaborate on what this term means and OIP relies on its description in the Memorandum. In addition, the Memorandum states that the Real Property Division should only provide separate assessments for land and improvements for properties using the "Cost" methodology, and these are generally commercial and industrial properties or residential properties with multiple dwellings. OIP thus presumes all other properties are receiving a single "Total Assessed Value" that does not separate land improvement values into Allocated Assessments.

CORP CNSL-K confirmed that Kauai County Ordinance No. 920, which was passed in 2011 and is set forth in section 5A-2.2 of the County Code,¹ requires that a parcel of real property be valued as a whole instead of with separate land and building values. The Memorandum was therefore issued to all Real Property Division staff to explain the recent changes in the County's tax law pertaining to valuation of real property and how these changes affected past practices of County real property tax employees.

CORP CNSL-K's understanding is that, because of the programmatic changes effectuated under Ordinance No. 920, the past practices of the Real Property Division were no longer appropriate because the County no longer values real property by evaluating separate land and building values. Therefore, staff was instructed to no longer disclose separate assessed valuations for land and improvements because it was inappropriate under the County Code.

FIN-K believes disclosure of Allocated Assessments could potentially expose the County to liability in a real property tax appeal based upon the theory of detrimental reliance on any one component of value which would operate as a defense for the real property tax payer in the tax appeal process. CORP CNSL-K explained that, in Kauai County, real property tax appeals are initially quasi-judicial actions before the County Real Property Tax Board of Review, and the County is a party to such actions. CORP CNSL-K therefore argued that separate property valuations could be withheld from public disclosure under section 92F-13(2), HRS, which states that the UIPA shall not require disclosure of "government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable."

The Memorandum states that the policy of not providing an Allocated Assessment applies only to properties that are valued using the "market modeling" technique of valuation, and that staff may be allowed to provide separate values for properties that were valued using the "Cost" methodology, such as most commercial and industrial properties or residential properties with multiple dwellings, because the Cost method itself requires the separation of value between land and depreciated improvements, which would be revealed at a tax appeal hearing. OIP understands that FIN-K's position, therefore, is that only upon request of the taxpayer, it is permissible to disclose an Allocated Assessment of these components of value for properties valued by the Cost method. CORP CNSL-K asserted that the Memorandum states that its purpose was not to prohibit the public from receiving

¹ FIN-K does not claim here that the County Code makes Allocated Assessments confidential, and OIP has previously found that, "generally speaking, a record that is public under the UIPA but made confidential by ordinance would remain public." See OIP Op. Ltr. No. 01-02 at 3, citing OIP Op. Ltr. No. 95-14 (finding that records made public under the UIPA cannot be made confidential by charter).

any information, but to address a necessary change to internal policy and procedure of the Real Property Division pursuant to the enactment of Ordinance No. 920.

Requester asserted that the Memorandum prohibits FIN-K employees from providing taxpayers with Allocated Assessments for a parcel upon request, and asked whether this Memorandum is legal.

II. Real Property Tax Information is Public Under the UIPA, Any Provision to the Contrary Notwithstanding

Section 92F-12, HRS, sets forth "a list of records or categories of records that must be disclosed, any other provision of the UIPA notwithstanding." One such category of records, in section 92F-12(a)(5), HRS, provides that "[l]and ownership, transfer, and lien records, including real property tax information" are public. The UIPA's legislative history states that for records set forth in section 92F-12, HRS, "the exceptions such as for personal privacy and frustration of legitimate government purpose are inapplicable." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988).

The UIPA is in large part based on recommendations of the Governor's Committee on Public Records and Privacy (Governor's Committee). OIP therefore consults the Report of the Governor's Committee on Public Records and Privacy (1987) (Governor's Committee Report) as needed for guidance. Many of the records listed in section 92F-12, HRS, were included by the Legislature in response to the recommendations of the Governor's Committee. With respect to real property tax information, the Governor's Committee Report states:

In contrast to the [income and general excise tax] systems the real property tax and exemption information is accessible to the public. This difference of treatment is not surprising because a property tax does not measure otherwise private information such as income and expenses, but instead measures publicly observable accessible items like land and structures.

Furthermore, the property tax system relies on an assessment process that includes notice and an opportunity to appeal. Access to these records is critical if there is to be a successful appeal since a comparison with comparable lots is often the best way to prove the case.

As one of the Committee members noted, land in Hawaii is a precious resource and knowledge about its ownership is, therefore, especially critical. The openness also serves to ensure equal application of the real property tax law to all citizens. That Committee

member also noted that there was some talk about closing exemption information. Such a development would of course substantially undermine the current ability to ensure equal application of the law and the absence of special favors.

All who commented favored leaving the current system, with its openness, in place.

Vol. I Governor's Committee Report 150 (1987) (emphasis added).

OIP has previously interpreted the above-quoted passages from the Governor's Committee Report as evidence of the Governor's Committee's recommendation to the Legislature that any new public records law preserve the existing public accessibility of real property tax and exemption information maintained by the county departments of finance. OIP Op. Ltr. No. 02-04 at 7. OIP also found that in adopting section 92F-12(a)(5), HRS, the Legislature intended to implement the Governor's Committee's recommendations. *Id.* In fact, the legislative history of House Bill 2002 of the 1988 Regular Legislative Session (H.B. 2002) notes that public testimony received by the Governor's Committee was incorporated into the records of public hearings on H.B. 2002. *Id.*, *citing* H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess. (Feb. 19, 1988). Further, the Senate noted that the Governor's Report was "translat[ed]. . . into legislation." *Id.*, *citing* S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess. (Mar. 31, 1988).

OIP was not provided with any sample assessments for this opinion. However, based on section 92F-12(a)(5), HRS, and relevant portions of the Governor's Committee Report, OIP is of the opinion that real property tax assessments are public without exception under section 92F-12(a)(5), HRS. Allocated Assessments are "real property tax information" that must be disclosed to the public as required by section 92F-12(a)(5), HRS, notwithstanding any provision to the contrary. Therefore, the exceptions to disclosure in section 92F-13, HRS, are not applicable and FIN-K's argument that section 92F-13(2), HRS, allows it to withhold Allocated Assessments must fail even if the Allocated Assessments are records pertaining to the prosecution or defense in a quasi-judicial action.

Nevertheless, the Memorandum does not violate the UIPA on its face. In the passages quoted *supra*, the Memorandum states that "only upon request of the taxpayer, it is permissible to divulge [Allocated Assessments] when valued by the Cost method." If Allocated Assessments are disclosed as separate value components, then employees are instructed to include a disclaimer. The last paragraph requires the employee to "acknowledge that I can only release the 'total assessed value' or the 'total net taxable' or 'total exemption amount' as public information, unless the final assessed value was determined by the Cost method." (Emphasis added.) Despite its apparent admonition to not release certain real property tax information, the Memorandum actually allows Allocated Assessments

to be disclosed to requesters when the Cost method is used. This practice is in compliance with the UIPA. However, the Real Property Division cannot use the Memorandum's directive to withhold Allocated Assessments for properties valued under "market modeling" techniques because section 92F-12(a)(5), HRS, requires that real property tax information is always public.

As discussed above, OIP emphasizes that section 92F-12(a)(5), HRS, requires the disclosure, upon request, of Allocated Assessments that are maintained by the County.² But if FIN-K does not maintain Allocated Assessments, section 92F-11(c), HRS, states that it "shall" prepare a compilation or summary of its records only if the requested information is "readily retrievable." Thus, if FIN-K's records do not include separate valuations for land and improvements, the UIPA would not require it to create such valuations in response to a UIPA request.

In conclusion, FIN-K may continue to follow the procedures in the Memorandum when it routinely provides assessments, such as when it mails assessments to owners. If, however, Allocated Assessments are specifically requested and maintained by the County, then FIN-K must provide these separate valuations for land and improvements.

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 personal record requests, an action against the agency denying access must be brought within two years of the denial of access (or where applicable, receipt of a final OIP ruling). HRS § 92F-27(f).

² Agencies have affirmative disclosure responsibilities under the UIPA, which include making government records available for inspection and copying under section 92F-11(b), HRS. So long as an agency maintains the information in the form requested by a UIPA requester, the agency must generally provide a copy of that record in the format requested unless doing so might significantly risk damage, loss, or destruction of the original records. OIP Op. Ltr. No. 97-8 at 4, citing OIP Op. Ltr. No. 90-35 at 13.

The Hawaii Supreme Court has stated, however, that the UIPA does not impose an affirmative obligation on government agencies to maintain records. State of Hawaii Organization of Police Officers v. Society of Professional Journalists—University of Hawaii Chapter, 83 Haw. 397, 927 P.2d 386, 401 (Haw. 1996); see also Molfino v. Yuen, 134 Haw. 181, 186, 339 P.3d 679, 684 (Nov. 13, 2014) (finding that there is no express record keeping requirement in the UIPA). OIP notes that while the UIPA does not require the creation or retention of records by government agencies, there may be other laws that have such requirements. OIP Op. Ltr. No. 97-8 at 4.

For personal record requests, Requester is entitled to seek assistance directly from the courts after Requester has exhausted the administrative remedies set forth in section 92F-23, HRS. HRS §§ 92F-27(a), 92F-42(1) (2012). If the court finds that the agency knowingly or intentionally violated a provision under Part III of the UIPA, the agency will be liable for: (1) actual damages (but in no case less than \$1,000); and (2) costs in bringing the action and reasonable attorney's fees. HRS § 92F-27(d). The court may also assess attorney's fees and costs against the agency when a requester substantially prevails, or it may assess fees and costs against the requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e).

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 opinion 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-3(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

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

OFFICE OF INFORMATION PRACTICES



Carlotta Amerino
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director