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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 sections 92F-27.5 and 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:** Edward K. Fuller  
**Agency:** Department of Taxation, State of Hawaii  
**Date:** May 16, 2018  
**Subject:** Taxpayer's Audit File (APPEAL 15-18)

Requester seeks a decision as whether the Department of Taxation (DOTAX) properly denied access to records from Requester's audit file under Part III of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in letters from Requester's attorney, Ronald L. Heller, Esq., to OIP dated November 20, 2014, January 12, 2015, and July 1, 2015, and attached materials; OIP's Notice of Appeal to DOTAX dated December 8, 2014; and a letter from DOTAX to OIP dated December 22, 2014.

**Decision**

DOTAX properly withheld the records in Requester's audit file under the exemption to personal record disclosure for records that are part of an open investigative file. See HRS § 92F-22(4) (2012); OIP Op. Ltr. No. 90-03. However, DOTAX's description of the withheld records as simply "[o]ther documents in the audit file" was inadequate; while it was not required to list and describe each individual record being withheld, it 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) (1998).

## Statement of Reasons for Opinion

Requester, through his attorney, sought access to DOTAX's complete audit file relating to him. DOTAX granted the request in part and denied it in part, as provided in its Notice to Requester:

Attached are copies of the worksheets that had been previously provided to the taxpayer, Mr. Edward Fuller, related to the proposed general excise tax assessment for tax years 2006-2012.

Other documents in the audit file are not required to be released pursuant to section 92F-13(3), Hawaii Revised Statutes, as the release would frustrate a legitimate government function as they are predecisional and deliberative.

Requester's attorney then submitted this appeal to OIP on his behalf with regard to the records DOTAX withheld.

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

DOTAX declined to provide the withheld records for OIP's *in camera* review, as OIP had asked for in its Notice of Appeal to DOTAX. DOTAX argued that if it provided the withheld records to OIP, it would be in violation of section 237-34(b), HRS, a confidentiality statute making 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. See HRS §§ 92F-17(a) (2012) and 237-34(b) (Supp. 2017).

Section 237-34(b), HRS, provides in relevant part:

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 willfully 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 only, the taxpayer, the taxpayer's authorized agent, or persons with a material interest in the return, return information, or report may examine them. Unless otherwise provided by law, persons with a

material interest in the return, return information, or report shall include:

\* \* \*

- (9) Persons duly authorized by the State in connection with their official duties;

\* \* \*

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

HRS § 237-34(b). Arguably, section 237-34(b), HRS, may bar a disclosure even to another state government agency in the course of its official duties unless the disclosure is for tax purposes. OIP further notes that although Mr. Heller provided DOTAX with a power of attorney authorizing disclosure of Requester's file to him, Requester evidently did not provide DOTAX with a power of attorney authorizing disclosure to OIP.

However, 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 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) (2012); 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 DOTAX 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 DOTAX to provide records to OIP rests with the requester bringing the appeal, who has no incentive to help DOTAX to prove its case.

In this instance, however, the issue is moot given the broad nature of the exception DOTAX ultimately claimed, because as discussed below, OIP has sufficient information from the factual background DOTAX provided to determine the applicability of the exception without review of the specific records withheld. Nevertheless, OIP does not accept DOTAX'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 DOTAX 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, DOTAX asserted that the requested records could be withheld from disclosure under the deliberative process privilege form of the UIPA's exception for records whose disclosure would frustrate a legitimate government function. See HRS § 92F-13(3) (2012).

Requester's attorney argued, based on both federal and Hawaii law relating to claims of privilege in the context of civil discovery, that Hawaii does not recognize the deliberative process privilege. However, this argument is inapposite, because this appeal concerns a denial of access under the UIPA, not a discovery request. As OIP has previously recognized, the UIPA and the rules of pretrial discovery are two separate and distinct mechanisms for the discovery or disclosure of records. OIP Op. Ltr. 95-16. The bases for finding that information is protected from disclosure are not the same under the UIPA and the rules of pretrial discovery. Id.

OIP has long recognized the concept of deliberative process privilege as a valid form of the UIPA's frustration exception when the conditions for its application are met. E.g. OIP Op. Ltr. No. 90-3 at 11-12.<sup>1</sup> In this case, however, the frustration exception as a whole is inapplicable because it applies only to general government record requests made under Part II of the UIPA, whereas the request at issue here is a personal record request made under Part III of the UIPA. OIP thus turns to DOTAX's argument made in response to this appeal that the records may be withheld under Part III of the UIPA.

## III. Open Investigation Exemption Under Part III

In its response to this appeal, DOTAX argued that the records from Mr. Heller's audit file that it did not disclose 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, DOTAX 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 [DOTAX] is preparing a final assessment."

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<sup>1</sup> The deliberative process privilege is a standard for resolving the dilemma of balancing the need for government accountability with the need for government to act efficiently and effectively. It is recognized under the UIPA's "frustration exception." HRS § 92F-13(3). The policy purposes behind the deliberative process privilege are: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies or decisions before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. OIP Op. Ltr. No. 90-3 at 11.

Thus, based on the factual background provided by DOTAX, the requested records were part of an open investigative file that could lead to a civil proceeding against Requester. The open investigation exemption to personal record disclosure is a broadly applicable one and does generally apply to the entire file, with the exception of material provided by the requester or previously provided to the requester and public records such as court records. OIP Op. Ltr. No. 09-03 at 3-4. Here, consistent with that opinion, DOTAX did provide Requester with records that had been prepared by the auditor but reflected only information from Requester's own tax returns. Because of the broad applicability of the open investigation exemption to personal record disclosure, and because DOTAX did disclose those records that contained only information already known to Requester, OIP finds it unnecessary to review the withheld records *in camera* in this limited instance, and concludes based on the factual background that DOTAX properly withheld them under the open investigative file exemption. See HRS § 92F-22(4); OIP Op. Ltr. No. 90-03.

However, OIP agrees with Requester that DOTAX 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"). DOTAX's description of the withheld records as simply "[o]ther documents in the audit file" was inadequate. While it was not required to list and describe each individual record being withheld, DOTAX 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 DOTAX withheld, Requester or his attorney should so advise DOTAX within ten business days of the date of this letter, and DOTAX 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 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). 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).

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).

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). If Requester decides to file a lawsuit, 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.

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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