

FIRST CIRCUIT COURT
STATE OF HAWAII
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Attorneys for
THE OFFICE OF INFORMATION PRACTICES

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In re

OFFICE OF INFORMATION PRACTICES
OPINION LETTER NO. F19-05

S.P. No. 19-1-0191 DEO

TRANSMITTAL OF CERTIFIED
ADMINISTRATIVE RECORD ON APPEAL;
INDEX TO CERTIFIED ADMINISTRATIVE
RECORD ON APPEAL; CERTIFICATION OF
RECORD; CERTIFICATE OF SERVICE

TRANSMITTAL OF CERTIFIED ADMINISTRATIVE RECORD ON APPEAL

THE OFFICE OF INFORMATION PRACTICES ("OIP"), by and through its attorneys,
Clare E. Connors, Attorney General, and Patricia Ohara and Stella M.L. Kam, Deputy Attorneys
General, hereby transmit the entire record of the administrative proceeding in the above-entitled

case. The portions of the administrative record that were provided to the OIP for its *in camera* review are transmitted under seal pursuant to Hawaii Court Records Rules 2.16 and 10.5.

DATED: Honolulu, Hawaii, July 12, 2019.



PATRICIA OHARA
STELLA M.L. KAM
Deputy Attorneys General

Attorneys for THE OFFICE OF
INFORMATION PRACTICES

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In re

OFFICE OF INFORMATION PRACTICES
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INDEX TO CERTIFIED ADMINISTRATIVE
RECORD ON APPEAL

INDEX TO CERTIFIED ADMINISTRATIVE RECORD ON APPEAL

U Appeal 16-43 – Public File

Bates Stamp No.	Description of Record
1-14	Request from Ray Kamikawa, Esq. (Requester) dated May 26, 2016, with attachments
15	Email from Office of Information Practices (OIP) to Department of Taxation (TAX) dated June 9, 2016
16-17	Letter from OIP to TAX dated June 9, 2016
18-19	Appeal Procedures and Responsibilities of the Parties
20	Email from OIP to Requester dated June 9, 2016
21-22	Email from TAX to OIP dated June 17, 2016
23-25	Email from OIP to TAX dated June 17, 2016
26	Email from TAX to OIP dated June 24, 2016
27	Email from OIP to TAX dated June 24, 2016
28-29	Email from TAX to OIP dated June 27, 2016
30-34	Letter from TAX to OIP dated June 27, 2016
35	Email from Requester to OIP dated July 21, 2016
36-37	Email from OIP to Requester dated July 25, 2016
38	Email from OIP to TAX dated January 2, 2019
39-40	Letter from OIP to TAX and Requester dated January 2, 2019
41	Email from OIP to Requester dated January 2, 2019
42-43	Email from Requester to OIP dated January 4, 2019
44-45	Letter from TAX to OIP dated January 31, 2019 (received February 8, 2019)
46	Email from TAX to OIP dated February 1, 2019
47-48	Email from Requester to OIP dated February 4, 2019
49-51	Email from OIP to Requester dated February 5, 2019
52-54	Email from Requester to OIP dated February 22, 2019

55-57	Email from Requester to OIP dated February 22, 2019
58-60	Email from OIP to Requester dated February 22, 2019
61-75	OIP Opinion Number F19-05 dated May 20, 2019
76	Email from OIP to TAX dated May 20, 2019
77	Email from OIP to Requester dated May 20, 2019

Confidential Records Submitted for OIP's *In Camera* Review in U Appeal 16-43

Bates Stamp No.	Description of Record	Authority for Confidentiality
78	Hawaii Housing Finance and Development Corporation Awards List as of December 31, 2010	Submitted to OIP for <i>in camera</i> review pursuant to HAR § 2-73-15(d); confidentiality maintained on appeal pursuant to HAR § 2-73-20
79	Hawaii Housing Finance and Development Corporation Awards List as of December 31, 2011	Same as above
80	Hawaii Housing Finance and Development Corporation Awards List as of December 31, 2012	Same as above
81	Hawaii Housing Finance and Development Corporation Awards List as of December 31, 2013	Same as above
82	Hawaii Housing Finance and Development Corporation Awards List as of December 31, 2014	Same as above
83-84	Internal memorandum dated February 8, 2016	Same as above
85-88	Internal memorandum dated April 27, 2016	Same as above
89-92	Internal memorandum dated March 14, 2016	Same as above
93-94	Internal memorandum dated March 28, 2016	Same as above
95-96	Internal memorandum dated February 1, 2016	Same as above
97-98	Internal memorandum dated March 28, 2016	Same as above
99-100	Internal memorandum dated April 21, 2016	Same as above
101-102	Internal memorandum dated February 26, 2016	Same as above
103-105	Internal memorandum dated March 14, 2016	Same as above



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745 Fort Street, 9th Floor
Honolulu, Hawaii 96813-3815
(o) 808-528-8200 (f) 808-536-5869

Writer's Direct Contact:
(808) 528-8211
rkamikawa@chunkerr.com

May 26, 2016

Via Hand Delivery

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 South Hotel Street, Suite 107
Honolulu, HI 96813

16 MAY 26 11:57

RECEIVED BY
OFF OF INFO PRACTICES

Re: Appeal of Determination dated May 13, 2016
Department of Taxation, State of Hawaii ("DOTAX")

Dear Sir or Madam:

This will appeal the determination by DOTAX denying in full the request for disclosure by the undersigned for certain records. In connection with this appeal, please find attached: (1) Notice to Requester dated May 13, 2016; and (2) Request to Access a Government Record dated April 15, 2016 (with enclosures).

Records requested

Assumptions, bases, computations, source data and documents, and analysis relied upon in connection with the Department of Taxation's revenue estimates contained in its testimonies (copies attached) for House Bill 2744, HD1, SD1 (Relating to Housing) and Senate Bill 2833, SD2, HD1 (Relating to the Low-Income Housing Tax Credit), both bills currently pending in the Hawaii State Legislature. Twenty-Eighth Legislative (2016).

Disposition of request

The Department denied the request in its entirety, with no documents disclosed. The basis for the denial are as follows:

Requester asks for "assumptions, bases, computations, source data and documents and analysis relied upon in connection with the Department of Taxation's revenue estimates". The records requested fall under the government records disclosure exception

Office of Information Practices
State of Hawaii
May 26, 2016
Page 2

set forth in section 92F-13(3), HRS. The tax data analyzed to produce revenue estimates is confidential, predecisional, deliberative work product of the Department; further, some of the tax data is protected from disclosure under the confidentiality provisions of Title 14, HRS.

Basis for Appeal

DOTAX provides revenue estimates on measures being considered by the Legislature. In the instant case, DOTAX provided revenue estimates for the measures at issue in written testimonies, which testimonies are of public record and posted on the Legislature's web site.

DOTAX's denial of the request for disclosure has no merit. The records requested form the basis of DOTAX's revenue estimates. As no taxpayer name or return information was requested or involved, there can be no confidentiality concerns. Since the purpose of the revenue estimates relate to proposed legislation and not a taxpayer audit or litigation, there can be no grounds for asserting work product or similar privileges to oppose disclosure. The narrow nature of the revenue estimates also mitigate any claims that the request is burdensome. There should be a file electronic or otherwise providing the records requested for each revenue estimate provided to the Legislature, including the bills at issue.

Remedy.

We respectfully request that the records requested be disclosed without further delay. We request the courtesy of a meeting should you disagree with the requested remedy.

Very truly yours,

CHUN KERR LLP
a Limited Liability Law Partnership



Ray Kamikawa

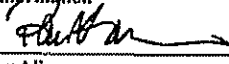
RKK:pnh / 177411.1
Enclosures
cc: client (w/o enclosures)

REQUEST TO ACCESS A GOVERNMENT RECORD

This is a model form that may be used by a Requester to provide sufficient information for an agency to process a record request. Although the Requester is not required to use this form or to provide any personal information, the agency needs enough information to contact the Requester with questions about this request or to provide its response. This request may not be processed if the agency has insufficient information or is unable to contact the Requester.

DATE: April 15, 2016

TO: Department of Taxation, State of Hawaii, 830 Punchbowl Street, Rm. 219
Agency that Maintains the Government Record
Mark Yee, Rules Specialist and Ted Shirashi, Rules Officer via Hand Delivery
Agency's Contact Information

FROM: Ray Kamikawa 
Requester's Name or Alias
Chun Kerr LLP, 745 Fort Street, 9th Floor, Honolulu, Hawaii 96813
Requester's Contact Information
Telephone: (808) 528-8211; Email: rkamikawa@chunkerr.com

AS THE REQUESTER, I WOULD LIKE THE FOLLOWING GOVERNMENT RECORD:

Describe the government record as specifically as possible so that it can be located. Try to provide a record name, subject matter, date, location, purpose, or names of persons to whom the record refers, or other information that could help the agency identify the record. A complete and accurate description of the requested government record will prevent delays in locating the record. Attach additional pages if needed.


(SEE ATTACHED)

I WOULD LIKE: (Please check one or more of the options below, as applicable)

- To inspect the government record
- A copy of the government record: (Please check only one of the options below.) See the next page for information about fees and costs that you may be required to pay for agency services to process your record request. Note: Copying and transmission charges may also apply to certain options.
- Pick up at agency (date and time): _____
- Mail (address): _____
- E-mail (address): rkamikawa@chunkerr.com
- Fax (toll free and only if available; provide fax number): _____
- Other, if available (please specify): _____
- If the agency maintains the records in a form other than paper, please advise in which format you would prefer to have the record.
- Electronic Audio Other (please specify): _____
- Check this box if you are attaching a request for waiver of fees in the public interest (See waiver information on next page).

GIP 1 (rev. 12/1/2015)

Acknowledgment and receipt:


Print Name: Donald Rouslang
Date: April 15, 2016

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FEEs FOR PROCESSING PUBLIC RECORD REQUESTS

You may be charged fees for the services that the agency must perform when processing your request for public records, including fees for making photocopies and other lawful fees. The first \$30 of fees charged for searching for a record, reviewing, and segregating will not be charged to you. Any amount over \$30 will be charged to you. Fees are as follows:

Search for a Record	\$2.50 for 15 minutes
Review and Segregation of a Record	\$5.00 for 15 minutes

Generally, no search, review, and segregation fees may be charged if you are making a request for personal records that are about you.

WAIVER OF FEES IN THE PUBLIC INTEREST

As an alternative to the \$30 fee waiver (not in addition to), the agency may waive the first \$60 of fees for searching for, reviewing and segregating records when the waiver would serve the public interest. If you wish to apply for a waiver of fees in the public interest, you must attach to this request a statement of facts, including your identity as the requester, to show how the waiver of fees would serve the public interest. The criteria for this waiver, found at section 2-71-32, Hawaii Administrative Rules, are

- (1) The requested record pertains to the operations or activities of an agency;
- (2) The record is not readily available in the public domain; and
- (3) The requester has the primary intention and the actual ability to widely disseminate information from the government record to the public at large.

COSTS

The Agency may charge you any other lawful fees and the costs to copy and deliver your personal or public record request.

AGENCY RESPONSE TO YOUR REQUEST FOR ACCESS

The agency to which you addressed your request must respond within a set time period. The agency will normally respond to you within 10 business days from the date it receives your request; however, in *extenuating circumstances*, the agency must respond within 20 business days from the date of your request. If you have questions about the response time or the records being sought, you should first contact the agency and request to consult with the agency's UIPA contact person.

Please note that the Office of Information Practices (OIP) does not maintain the records of other agencies and a requester must seek records directly from the agency. If the agency denies or fails to respond to your written request for records or if you have other questions regarding compliance with the UIPA, then you may contact OIP at 808-586-1400, oiip@hawaii.gov, or 250 South Hotel Street, Suite 107, Honolulu, Hawaii 96813.

REQUESTER'S RESPONSIBILITIES

You have certain responsibilities under section 2-71-16, Hawaii Administrative Rules, which include making arrangements to inspect and copy records, providing further clarification or description of the requested record as instructed by the agency's notice, and making a prepayment of fees and costs, if assessed. The rules and additional training materials are available online at oiip.hawaii.gov or from OIP.

Attachment to Request to Access a Government Record
Form OIP 1
Department of Taxation, State of Hawaii

AS THE REQUESTER, I WOULD LIKE THE FOLLOWING GOVERNMENT RECORDS:

Assumptions, bases, computations, source data and documents, and analysis relied upon in connection with the Department of Taxation's revenue estimates contained in its testimonies (copies attached) for House Bill 2744, HD1, SD1 (Relating to Housing) and Senate Bill 2833, SD2, HD1 (Relating to the Low-Income Housing Tax Credit), both bills currently pending in the Hawaii State Legislature, Twenty-Eighth Legislative (2016).

DAVID Y. IGE
GOVERNOR
SHAN TSUTSUI
LT. GOVERNOR



MARIA E. ZIELINSKI
DIRECTOR OF TAXATION
JOSEPH K. KIM
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809
PHONE NO: (808) 587-1540
FAX NO: (808) 587-1560

To: The Honorable Jill N. Tokuda, Chair
and Members of the Senate Committee on Ways and Means

Date: Wednesday, March 30, 2016
Time: 9:00 A.M.
Place: Conference Room 211, State Capitol

From: Maria E. Zielinski, Director
Department of Taxation

Re: H.B. 2744, H.D. 1 S.D. 1, Relating to Housing.

The Department of Taxation (Department) appreciates the intent of the measure but has concerns regarding the nonconformity to the Internal Revenue Code (IRC) provisions relating to the at-risk and passive activity loss (PAL) limitation rules. The Department defers to the Hawaii Housing Finance and Development Corporation (HHFDC) on the merits of this bill and provides the following comments for your consideration.

H.B. 2744, H.D. 1, S.D. 1, distinguishes the amount of the State low-income housing tax credit (LIHTC) based on whether or not a building is financed by tax-exempt bonds, doubles the amount of the credit with respect to buildings financed by tax-exempt bonds, reduces the term over which the credit is taken from ten to five years to increase the attractiveness of the credit, and provides that the IRC at-risk and PAL rules do not apply. The measure has a defective effective date of July 1, 2050.

Two types of Low Income Housing Credits (LIHTCs) are available depending on the nature of the rental housing construction. The so-called 9% credit is generally reserved for new construction and is intended to subsidize 70% of a building's cost (not including land), while the so-called 4% credit is typically claimed for rehabilitated housing and new construction that is financed with tax-exempt bonds, and is intended to subsidize 30% of a building's cost (not including land). Each LIHTC project will fall into either the 9% category or the 4% category depending upon how the project is financed. The 9% and 4% categories are further divided by the construction method of the project- new construction or rehabilitating an existing structure, with rehabilitation completion within 24 months in order to be eligible for tax credits.

Currently, both the 9% credit and the 4% credit is claimed annually over a 10-year credit period. The actual credit rate fluctuates and is set by the United States Treasury to deliver a subsidy equal to 70% and 30% respectively of a project's qualified basis in present value terms. For State tax purposes, the amount of the credit is set at 50% of the federal tax credit. Other than projects financed with tax exempt bonds, both the 9% and the 4% credit is subject to the federal

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allocation limit for the State, which for 2016 is \$3,264,990. Although credits allocated for projects financed with tax-exempt bonds is not included in this cap, the total amount of the credit that can be allocated is limited by the amount of federal tax free Private Activity Bonds that may be issued by the State.

With regards to credits that are subject to the allocation cap (i.e. non tax exempt bond financed), the LIHTC is fully subscribed and the State will be unable to generate additional investment with respect to the 9% credit. Only projects that are financed with tax-exempt bonds are under subscribed, such that additional inducements may attract additional investors. The Department notes that implementing multiple incentives at the same time may prevent an examination of how effective any particular incentive was, and whether in fact it was required.

The Senate Committee on Housing amended this measure by providing that the at-risk rules found at IRC section 41(k) and the PAL rules of IRC section 469 do not apply. The Department notes that it always prefers conformity to the IRC where possible, as this provides clear guidance to both the Department and to taxpayers, since there is substantial guidance issued in the form of rules and regulations issued by the Internal Revenue Service (IRS), as well as court decisions regarding the various sections of the IRC. Conformity greatly minimizes the burden on the Department and taxpayers, thereby assisting compliance with Hawaii's tax law.

Both the at risk and PAL rules apply to:

- Individuals (including partners and S corporation shareholders);
- Estates;
- Trusts (other than grantor trusts);
- Personal service corporations; and
- Closely held corporations.

It should first be noted that the measure is unclear whether the relaxation of the at-risk and PAL limitation rules apply only for buildings allocated tax credits after December 31, 2016, or is applicable to all taxpayers. Currently, losses from activities that exceed the amount the taxpayer has at-risk are disallowed for the current year, but are carried forward until the taxpayer increases the amount that the taxpayer has at-risk, at which time the losses up to that amount may be utilized. Similarly, losses from passive activities that exceed the income from passive activities are disallowed for the current year, but are carried forward until they may be used against passive income or the interest in the activity has been disposed of. If the relaxation of the at-risk and PAL rules applies to all holders of the LIHTC, taxpayers would be able to immediately use the carried over amounts to the full extent of their ordinary income. If the Legislature is inclined to relax these rules, the Department strongly urges that it be limited only to buildings allocated credits after December 31, 2016 to avoid fiscal implications.

Congress originally enacted the at-risk provisions as part of the Tax Reform Act of 1976 in order to deter deductions from losses generated by tax shelters. Prior to the enactment, a taxpayer could increase his or her basis in the partnership by utilizing nonrecourse loans for which the individual had no true economic risk. This increase in basis allowed the taxpayer to

use investment losses to offset ordinary income. Although the IRS attempted to limit this practice, its attempts were only marginally effective until the enactment of IRC section 465.

Currently, nonrecourse financing is treated as at-risk only if the property is acquired by the taxpayer from a non-related person, and the financing is received from a lender in the business of lending (other than the seller of the property) or a government agency. If the at-risk rules are relaxed for the LIHTC, the investor could acquire the property from a related person at a greatly inflated price using nonrecourse liability (such that no individual partner has a liability in the event of default), and yet take virtually unlimited losses in connection with the property. In addition, the at-risk rules prevent a taxpayer from artificially increasing basis through the use of subscription promissory notes (whereby an investor promises to pay an amount in the future) which in fact are never paid. See e.g. Zeluck v. Commissioner, 103 TCM (2012), where the taxpayer contributed \$310,000 to a partnership in 2001 in the form of \$110,000 in cash and a \$200,000 note that matured on December 31, 2009. The taxpayer also guaranteed a note that was issued by the partnership up to an amount equal to the note he contributed, giving him an initial at risk tax basis of \$310,000 (\$110,000 of cash plus \$200,000 of guaranteed debt). In 2001 and 2002, the taxpayer was allocated losses from the partnership that practically eliminated his at-risk tax basis, and in 2003 the partnership terminated. After the partnership terminated, no attempt was made to enforce payment of the taxpayer's note or the partnership's note on which the taxpayer never made any principal payments and failed to make all interest payments.

The PAL rules were enacted as part of the Tax Reform Act of 1986 to address widespread avoidance of tax through the generation of artificial losses from tax shelters and other trades or business for which the taxpayer did not bear sufficient economic risk. The PAL rules focus on the source and character of losses rather than on the taxpayer's wherewithal to recognize such losses. Broadly speaking, the rules operate to prevent taxpayers from offsetting ordinary income from non-passive activities (i.e., wages or businesses they operate) with losses from passive activities in which the taxpayer does not materially participate, thereby insuring that all taxpayers pay a fair share of taxes on ordinary income. It should also be noted that if the PAL limitation rules are relaxed, a taxpayer will be able to shield their ordinary income and yet obtain capital gain treatment when the interest in the activity is sold.

Under section 201H-36, Hawaii Revised Statutes, HHFDC certifies that a housing project is entitled to the GET exemption, and upon such certification, a taxpayer is entitled to claim the GET exemption. The regulatory agreements and the determination of whether a taxpayer is eligible for the exemption remain with HHFDC, and as such, the Department will be able to implement any changes without any undue burden.

With the original effective date, the Department estimates losses of \$9 million in FY 2019, \$18 million in FY 2020 and \$27 million in FY 2021. The elimination of at-risk rules will increase the cost of the tax credit, but we are unable to determine the amount at this time.

Thank you for the opportunity to provide comments.

DAVID Y. IGE
GOVERNOR
SHAN TSUTSUI
LT. GOVERNOR



MARIA E. ZIELINSKI
DIRECTOR OF TAXATION
JOSEPH K. KIM
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809
PHONE NO: (808) 587-1540
FAX NO: (808) 587-1560

To: The Honorable Sylvia Luke, Chair
and Members of the House Committee on Finance

Date: Wednesday, March 30, 2016
Time: 3:00 P.M.
Place: Conference Room 308, State Capitol

From: Maria E. Zielinski, Director
Department of Taxation

Re: S.B. 2833, S.D. 2, H.D. 1, Relating to the Low-Income Housing Tax Credit.

The Department of Taxation (Department) appreciates the intent of the measure but has concerns regarding the nonconformity to the Internal Revenue Code (IRC) provisions relating to the at-risk and passive activity loss (PAL) limitation rules. The Department defers to the Hawaii Housing Finance and Development Corporation (HHFDC) on the merits of this bill and provides the following comments for your consideration.

S.B. 2833, S.D. 2, H.D. 1 distinguishes the amount of the State low-income housing tax credit (LIHTC) based on whether or not a building is financed by tax-exempt bonds, doubles the amount of the credit with respect to buildings financed by tax exempt bonds, reduces the term over which the credit is taken from ten to five years to increase the attractiveness of the credit, and provides that the IRC at risk and PAL rules do not apply. The measure is effective January 1, 2017 and applies to buildings allocated credits after December 31, 2016.

Two types of Low Income Housing Credits (LIHTCs) are available depending on the nature of the rental housing construction. The so-called 9% credit is generally reserved for new construction and is intended to subsidize 70% of a building's cost (not including land), while the so-called 4% credit is typically claimed for rehabilitated housing and new construction that is financed with tax-exempt bonds, and is intended to subsidize 30% of a building's cost (not including land). Each LIHTC project will fall into either the 9% category or the 4% category depending upon how the project is financed. The 9% and 4% categories are further divided by the construction method of the project- new construction or rehabilitating an existing structure, with rehabilitation completion within 24 months in order to be eligible for tax credits.

Currently, both the 9% credit and the 4% credit is claimed annually over a 10- year credit period. The actual credit rate fluctuates and is set by the United States Treasury to deliver a subsidy equal to 70% and 30% respectively of a project's qualified basis in present value terms.

For State tax purposes, the amount of the credit is set at 50% of the federal tax credit. Other than projects financed with tax exempt bonds, both the 9% and the 4% credit is subject to the federal allocation limit for the State, which for 2016 is \$3,264,990. Although credits allocated for projects financed with tax exempt bonds is not included in this cap, the total amount of the credit that can be allocated is limited by the amount of federal tax-free Private Activity Bonds that may be issued by the State.

With regards to credits that subject to the allocation cap (i.e. non tax exempt bond financed), the LIHTC is fully subscribed and the State will be unable to generate additional investment with respect to the 9% credit. Only projects that are financed with tax-exempt bonds are under subscribed, such that additional inducements may attract additional investors. The Department notes that implementing multiple incentives at the same time may prevent an examination of how effective any particular incentive was, and whether in fact it was required.

The House Committee on Housing amended this measure by providing that the at-risk rules found at IRC section 41(k) and the PAL rules of IRC section 469 do not apply. The Department notes that it always prefers conformity to the IRC where possible, as this provides clear guidance to both the Department and to taxpayers, since there is substantial guidance issued in the form of rules and regulations issued by the Internal Revenue Service (IRS), as well as court decisions regarding the various sections of the IRC. Conformity greatly minimizes the burden on the Department and taxpayers, thereby assisting compliance with Hawaii's tax law.

Both the at-risk and PAL rules apply to:

- Individuals (including partners and S corporation shareholders);
- Estates;
- Trusts (other than grantor trusts);
- Personal service corporations; and
- Closely held corporations.

Currently, losses from activities that exceed the amount the taxpayer has at-risk are disallowed for the current year, but are carried forward until the taxpayer increases the amount that he has at-risk at which time the losses up to that amount may be utilized. Similarly, losses from passive activities that exceed the income from passive activities are disallowed for the current year, but are carried forward until they may be used against passive income or the interest in the activity has been disposed of. If the relaxation of the at-risk and PAL rules applies, taxpayers would be able to immediately use any losses to offset income up to the full extent of ordinary income.

Congress originally enacted the at-risk provisions as part of the Tax Reform Act of 1976 in order to deter deductions from losses generated by tax shelters. Prior to the enactment, a taxpayer could increase his or her basis in the partnership by utilizing non-recourse loans for which the individual had no true economic risk. This increase in basis allowed the taxpayer to use investment losses to offset ordinary income. Although the IRS attempted to limit this

practice, its attempts were only marginally effective until the enactment of IRC Section 465.

Currently, nonrecourse financing is treated as at-risk only if the property is acquired by the taxpayer from a non-related person, and the financing is received from a lender in the business of lending (other than the seller of the property) or a government agency. If the at-risk rules are relaxed for the LIHTC, the investor could acquire the property from a related person at a greatly inflated price using nonrecourse liability (such that no individual partner has a liability in the event of default), and yet take virtually unlimited losses in connection with the property. In addition, the at-risk rules prevent a taxpayer from artificially increasing basis through the use of subscription promissory notes (whereby an investor promises to pay an amount in the future) which in fact are never paid. See e.g. Zeluck v. Commissioner, 103 TCM (2012), where the taxpayer contributed \$310,000 to a partnership in 2001 in the form of \$110,000 in cash and a \$200,000 note that matured on December 31, 2009. The taxpayer also guaranteed a note that was issued by the partnership up to an amount equal to the note he contributed, giving him an initial at-risk tax basis of \$310,000 (\$110,000 of cash plus \$200,000 of guaranteed debt). In 2001 and 2002, the taxpayer was allocated losses from the partnership that practically eliminated his at-risk tax basis, and in 2003 the partnership terminated. After the partnership terminated, no attempt was made to enforce payment of the taxpayer's note or the partnership's note on which the taxpayer never made any principal payments and failed to make all interest payments.

The PAL rules were enacted as part of the Tax Reform Act of 1986 to address widespread avoidance of tax through the generation of artificial losses from tax shelters and other trades or business for which the taxpayer did not bear sufficient economic risk. The passive activity loss rules focus on the source and character of losses rather than on the taxpayer's wherewithal to recognize such losses. Broadly speaking, the rules operate to prevent taxpayers from offsetting ordinary income from non-passive activities (i.e., wages or businesses they operate) with losses from passive activities in which the taxpayer does not materially participate, thereby insuring that all taxpayers pay a fair share of taxes on ordinary income. It should also be noted that if the PAL limitation rules are relaxed, a taxpayer will be able to shield their ordinary income and yet obtain capital gain treatment when the interest in the activity is sold.

Under section 201H-36, Hawaii Revised Statutes, HHFDC certifies that a housing project is entitled to the GET exemption, and upon such certification, a taxpayer is entitled to claim the GET exemption. The regulatory agreements and the determination of whether a taxpayer is eligible for the exemption remain with HHFDC, and as such, the Department will be able to implement any changes without any undue burden.

With the original effective date, the Department estimates losses of \$9 million in FY 2019, \$18 million in FY 2020 and \$27 million in FY 2021. The elimination of at-risk rules will increase the cost of the tax credit, but we are unable to determine the amount at this time.

Thank you for the opportunity to provide comments.

NOTICE TO REQUESTER

TO: Ray Kamikawa, Esq.
Chun Kerr Dodd LLC

FROM: Mallory Fujitani, Department of Taxation Ph: 587-1540 Email: tax.directors.office@hawaii.gov

DATE THAT THE RECORD REQUEST WAS RECEIVED BY AGENCY: April 20, 2016

DATE OF THIS NOTICE: May 13, 2016

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):
"Assumptions, bases, computations, source data and documents and analysis relied upon in connection with the Department of Taxation's revenue estimates contained in its testimonies" for H.B.2711 and S.B.2833.

THIS NOTICE IS TO INFORM YOU THAT YOUR RECORD REQUEST:

Will be granted in its entirety.

Cannot be granted. Agency is unable to disclose the requested records for the following reason:

Agency does not maintain the records. (HRS § 92F-3)

Other agency that is believed to maintain records: _____

Agency needs further clarification or description of the records requested. Please contact the agency and provide the following information: _____

Request requires agency to create a summary or compilation from records, but requested information is not readily retrievable. (HRS § 92F-11(c))

Will be granted in part and denied in part, OR Is denied in its entirety

Although the agency maintains the requested records, it is not disclosing all or part of them based on the exemptions provided in HRS § 92F-13 and/or § 92F-22 or other laws cited below.

(Describe the portions of records that the agency will not disclose.)

RECORDS OR
INFORMATION WITHHELD

APPLICABLE
STATUTES

AGENCY
JUSTIFICATION

Requester asks for "assumptions, bases, computations, source data and documents and analysis relied upon in connection with the Department of Taxation's revenue estimates". The records requested fall under the government records disclosure exception set forth in section 92F-13(3), HRS. The tax data analyzed to produce revenue estimates is confidential, predecisional, deliberative work product of the Department; further, some of the tax data is protected from disclosure under the confidentiality provisions of Title 14, HRS.

The Department provides revenue estimates at the request of certain Legislative committees for their deliberation of specific draft legislation. These certain Legislative committees request the Department of Taxation to produce revenue estimates for certain measures because the committees do not have access to tax data and other relevant information needed to determine the fiscal impact of draft tax legislation.

REQUESTER'S RESPONSIBILITIES:

You are required to (1) pay any lawful fees and costs assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed below; and (3) provide the agency any additional information requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to process your request, you

OIP (rev. 12/1/2015)

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may be liable for any fees and costs incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.

METHOD & TIMING OF DISCLOSURE:

Records available for public access in their entireties must be disclosed within a reasonable time, not to exceed 10 business days from the date the request was received, or after receipt of any prepayment required. Records not available in their entireties must be disclosed within 5 business days after this notice or after receipt of any prepayment required. HAR § 2-71-13(c). If incremental disclosure is authorized by HAR § 2-71-15, the first increment must be disclosed within 5 business days of this notice or after receipt of any prepayment required.

Method of Disclosure:

- Inspection at the following location: _____
- As requested, a copy of the record(s) will be provided in the following manner:
 - Available for pick-up at the following location: _____
 - Will be mailed to you.
 - Will be transmitted to you by other means requested: _____

Timing of Disclosure: All records, or the first increment if applicable, will be made available or provided to you:

- On _____, 20____.
- After prepayment of 50% of fees and 100% of costs, as estimated below.

For incremental disclosures, each subsequent increment will be disclosed within 20 business days after:

- The prior increment (if one prepayment of fees is required and received), or
- Receipt of each incremental prepayment, if prepayment for each increment is required.

Records will be disclosed in increments because the records are voluminous and the following extenuating circumstances exist:

- Agency must consult with another person to determine whether the record is exempt from disclosure under HRS chapter 92F.
- Request requires extensive agency efforts to search, review, or segregate the records or otherwise prepare the records for inspection or copying.
- Agency requires additional time to respond to the request in order to avoid an unreasonable interference with its other statutory duties and functions.
- A natural disaster or other situation beyond agency's control prevents agency from responding to the request within 10 business days.

ESTIMATED FEES & COSTS AND PAYMENT:

FEES: For personal record requests under Part III of chapter 92F, HRS, the agency may charge you for its costs only, and fee waivers do not apply.

For public record requests under Part II of chapter 92F, HRS, the agency is authorized to charge you fees to search for, review, and segregate your request (even if a record is subsequently found to not exist or will not be disclosed in its entirety). The agency must waive the first \$30 in fees assessed for general requesters, OR in the alternative, the first \$60 in fees when the agency finds that the request is made in the public interest. Only one waiver is provided for each request. See HAR §§ 2-71-19, -31 and -32.

COSTS: For either personal or public record requests, the agency may charge you for the costs of copying and delivering records in response to your request, and other lawful fees and costs.

PREPAYMENT: The agency may require prepayment of 50% of the total estimated fees and 100% of the total estimated costs prior to processing your request. If a prepayment is required, the agency may wait to start any search for or

review of the records until the prepayment is received by the agency. Additionally, if you have outstanding fees or costs from previous requests, including abandoned requests, the agency may require prepayment of 100% of the unpaid balance from prior requests before it begins any search or review for the records you are now seeking.

The following is an itemization of what you must pay, based on the estimated fees and costs that the agency will charge you and the applicable waiver amount that will be deducted:

For public record requests only:

Fees: Search	Estimate of time to be spent: _____ hours (\$2.50 for each 15-minute period)	\$
Review & segregation	Estimate of time to be spent: _____ hours (\$5.00 for each 15-minute period)	\$
Fees waived	<input checked="" type="checkbox"/> general (\$30), <u>OR</u> <input type="checkbox"/> public interest (\$60) (Only one waiver per request)	<\$ _____>
Other	_____	\$
	(Pursuant to HAR §§ 2-71-19 & 2-71-31)	
Total Estimated Fees:		\$

For public or personal record requests:

Costs: Copying	Estimate of # of pages to be copied: _____ (@ \$ _____ per page, pursuant to HRS § 92-21)	\$
Delivery	Postage	\$
Other	_____	\$
Total Estimated Costs:		\$

TOTAL ESTIMATED FEES AND COSTS from above: \$

- The estimated fees and costs above are for the first incremental disclosure only. Additional fees and costs, and no further fee waivers, will apply to future incremental disclosures.
- PREPAYMENT IS REQUIRED** (50% of fees + 100% of costs, as estimated above) \$
- UNPAID BALANCE FROM PRIOR REQUESTS** (100% must be paid before work begins) \$

TOTAL AMOUNT DUE AT THIS TIME \$

Payment may be made by: cash
 personal check payable to _____
 other _____

For questions about this notice or the records being sought, please contact the agency person named at the beginning of this form. Please note that the Office of Information Practices (OIP) does not maintain the records of other agencies, and a requester must seek records directly from the agency it believes maintains the records. If the agency denies or fails to respond to your written request for records or if you have other questions regarding compliance with the UIPA, then you may contact OIP at (808) 586-1400, oiip@hawaii.gov, or 250 South Hotel Street, Suite 107, Honolulu, Hawaii 96813.

OIP (rev. 12/1/2015)

From: [OIP](#)
To: [Zielinski, Maria E](#)
Bcc: [Brooks, Jennifer Z](#)
Subject: Notice of Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Thursday, June 09, 2016 1:31:00 PM
Attachments: [0609 Ltr to DOTAX.pdf](#)
[0415 Rqst to DOTAX fr Kamikawa.pdf](#)
[0513 NTR to Kamikawa fr DOTAX.pdf](#)
[0526 Ltr fr Kamikawa.pdf](#)
[0609 Appeal Procedures & Responsibilities of Parties.pdf](#)

Director Zielinski:

Attached is a letter dated June 9, 2016 from the Office of Information Practices regarding a request we received from Mr. Ray Kamikawa. Also attached is:

- The Appeal Procedures and Responsibilities of the Parties;
- Mr. Kamikawa's request to DOTAX;
- DOTAX's NTR to Mr. Kamikawa;
- Mr. Kamikawa's request to OIP.

Please contact our office if you have difficulty opening the attachments.

Thank you,

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oiip@hawaii.gov
Website: <http://oiip.hawaii.gov>



DAVID Y. IGE
GOVERNOR
SHAN TSUTSUI
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
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) 588-1412
E-MAIL: oiip@hawaii.gov
www.oiip.hawaii.gov

June 9, 2016

The Honorable Maria E. Zielinski
Director
Department of Taxation
860 Punchbowl Street
Honolulu, HI 96813

Re: Notice of Appeal from Denial of Access to General Records
(U APPEAL 16-43)

Dear Director Zielinski:

The Office of Information Practices (OIP) has received an appeal from Mr. Ray Kamikawa with respect to Department of Taxation's (DOTAX) denial of his request for records made under Part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA). Specifically, Mr. Kamikawa indicated that he made a written request to DOTAX dated April 15, 2016, for access to assumptions, bases, computations, source data, and documents and analysis relied upon in connection with the Department of Taxation's revenue estimates contained in its testimonies for H.B. 2711 and S.B. 2833.

Mr. Kamikawa provided OIP with a copy of DOTAX's letter to him dated May 13, 2016, in which DOTAX advised Mr. Kamikawa that DOTAX was withholding the requested records in accordance with section 92F-13(3), HRS.

DOTAX's response to this appeal is DOTAX's opportunity to provide additional justification for its denial, or any additional information that DOTAX would like OIP to consider regarding this appeal. Within ten business days of receipt of this notice, please provide OIP with a written statement that includes the information listed in the enclosed summary of appeal procedures. Please remember that the UIPA places the burden on the agency to establish justification for the nondisclosure of government records. HRS § 92F-15(c) (2012).

Please provide OIP with unaltered copies of the records at issue for use in reviewing DOTAX's denial of Mr. Kamikawa's request. See HRS § 92F-42(5) (2012). OIP would appreciate receiving the copies of the records no later than ten business days from receipt of this notice. For your information, OIP will destroy the records and any copies of the records in its possession upon

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The Honorable Maria E. Zielinski
June 9, 2016
Page 2

completion of this matter. If you would prefer that the records and any copies of the records be returned to you at the conclusion of this matter, please let OIP know. Even where OIP believes a record cannot be withheld under the UIPA, OIP will not disclose the record to the requester. If the record is to be disclosed, disclosure will be by the agency maintaining the record and not by OIP.

Please be advised that, for purposes of complying with the UIPA, DOTAX should not destroy a requested record that may be required to be made available for public inspection by OIP or the court. See OIP Op. Ltr. No. 92-13 at 6 n.1.

Please also be advised that a record requester need not wait for OIP's decision on this appeal, and may file a lawsuit for access within two years after an agency denial. HRS § 92F-15 (2012).

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.

Thank you in advance for your cooperation and assistance in this matter. Please do not hesitate to contact me if you have any questions or require assistance in responding to this letter.

Very truly yours,



Jennifer Z. Brooks
Staff Attorney

JZB:za
Enclosures

cc: Mr. Ray Kamikawa (without enclosures)



DAVID Y. IGE
GOVERNOR
SHAN TSUTSUI
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
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

Appeal Procedures and Responsibilities of the Parties

This statement of appeal procedures provides an informational summary of the applicable procedures and the parties' responsibilities in an appeal before OIP pursuant to chapter 2-73, Hawaii Administrative Rules (HAR). The procedures described here are more fully set out in chapter 2-73 itself, which controls in the event of any inconsistency between its language and the language of this informational summary.

A party may contact OIP to request an extension of a deadline.

1. Agency response (HAR §§ 2-73-14 and -15)

The agency's written response is due ten business days after it receives the notice of appeal from OIP. Its written response must include:

- (1) a concise statement of the factual background;
- (2) An explanation of the agency's position, including its justification for denying access to records, with citations to the specific statutory sections and other law supporting the agency's position;
- (3) Any evidence necessary to support the agency's argument; and
- (4) Contact information for the agency officer or employee who is authorized to respond and make representations on behalf of the agency concerning the appeal.

If checked, the agency's response must include, for OIP's *in camera* review, an unredacted copy of

the records to which access was denied

the minutes of the relevant meeting

other records:

Where the agency claims that a record is protected by the attorney-client privilege, the agency may request to submit to OIP the record in redacted form in order to preserve this privilege. OIP will generally allow such a request where the application of the claimed privilege can be determined by review of the redacted record.

2. Other submissions to OIP (HAR § 2-73-15)

In addition to the information and materials submitted as part of the appeal, OIP may ask the person who filed the appeal, or any other parties participating in the appeal, to submit a written statement or statements. If OIP does so, OIP will also let all the parties know when the statement is due, whether there are any requirements as to the form it takes or what it includes, and when any response by the agency or other parties is due.

OIP can consider information or materials submitted by any person, not just parties to the appeal. However, if someone other than the person who filed the appeal and the responding agency wants to participate in the appeal as a party or in some other way, that person must submit a written request and must explain the reason for the request, and OIP will then determine whether to allow such participation.

Because an appeal before OIP is an informal proceeding, a party's or third person's communication with OIP can be *ex parte*, *i.e.*, outside the presence of the other party or parties. However, OIP does have the option to require the parties to copy each other on submissions.

3. OIP's Decision (HAR §§ 2-73-15, -17, -18, and -19)

OIP's written decision on the appeal will be sent to all parties when it is issued. There is no specific deadline set for OIP's decision on an appeal.

A party can request that OIP reconsider its decision. The deadline to request reconsideration is ten business days after the date the decision was issued. If a party misses the deadline for reconsideration or if OIP declines to reconsider the opinion, the party still has the option of appealing the decision to court. Section 92F-43, Hawaii Revised Statutes (HRS), sets out the standard for an agency's appeal of an OIP decision. For a record requester or Sunshine Law complainant, appeal to court is provided by section 92F-15, HRS (denial of general record request), section 92F-27, HRS (denial of a personal record request), or sections 92-11 and -12, HRS (Sunshine Law complaint).

In some instances, OIP may issue a notice dismissing all or part of an appeal, instead of issuing a written decision. The circumstances in which OIP can dismiss an appeal are listed in section 2-73-18. OIP may also ask (but will not require) the parties to mediate the appeal, or an issue within the appeal, as an alternative means to resolve the appeal.

From: OIP
To: "rkamikawa@chunkerr.com"
Bcc: [Brooks, Jennifer Z](#)
Subject: Notice of Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Thursday, June 09, 2016 1:31:00 PM
Attachments: [0609 Ltr to DOTAX.PDF](#)
[0609 Appeal Procedures & Responsibilities of Parties.pdf](#)

Mr. Kamikawa:

Attached is a letter dated June 9, 2016 from the Office of Information Practices regarding your request to OIP. Also attached is the Appeal Procedures and Responsibilities of the Parties.

Please contact our office if you have difficulty opening the attachments.

Thank you,

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oiip@hawaii.gov
Website: <http://oiip.hawaii.gov>

From: [Fujitani, Mallory C](#)
To: [OIP](#)
Cc: [Remigio, Dana A](#); [Zielinski, Maria E](#)
Subject: RE: Notice of Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Friday, June 17, 2016 10:53:45 AM

ATTN: Jennifer Brooks, Esq.

Hi Jennifer,

We are in the process of responding in writing to your request for additional information. However, we noticed that your response also asks for "...unaltered copies of the records at issue for use in reviewing DOTAX's denial of Mr. Kamikawa's request."

Some of the documentation reviewed by our Tax Research and Planning Office in generating revenue estimates includes taxpayer returns which are protected by the confidentiality provisions under Title 14. The actual tax returns cannot be provided, but we will explain reason/purpose for the use of actual tax return data. The other documentation will be provided with the Department's response.

Mallory C. Fujitani
State of Hawaii
Department of Taxation
P.O. Box 259
Honolulu, Hawaii 96813
Phone: (808)587-1481
Email: mallory.c.fujitani@hawaii.gov

From: Zielinski, Maria E
Sent: Thursday, June 09, 2016 1:50 PM
To: Fujitani, Mallory C <Mallory.C.Fujitani@hawaii.gov>
Cc: Remigio, Dana A <dana.a.remigio@hawaii.gov>
Subject: Fwd: Notice of Appeal from Denial of Access to General Records (U APPEAL 16-43)

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From: "OIP" <oip@hawaii.gov>
Date: Thu, Jun 9, 2016 at 1:31 PM -1000
Subject: Notice of Appeal from Denial of Access to General Records (U APPEAL 16-43)
To: "Zielinski, Maria E" <maria.e.zielinski@hawaii.gov>

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Director Zielinski:

Attached is a letter dated June 9, 2016 from the Office of Information Practices regarding a request we received from Mr. Ray Kamikawa. Also attached is:

- The Appeal Procedures and Responsibilities of the Parties;
- Mr. Kamikawa's request to DOTAX;
- DOTAX's NTR to Mr. Kamikawa;
- Mr. Kamikawa's request to OIP.

Please contact our office if you have difficulty opening the attachments.

Thank you,

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oiip@hawaii.gov
Website: <http://oiip.hawaii.gov>

From: OIP
To: [Fujitani, Mallory C](#)
Bcc: [Brooks, Jennifer Z](#)
Subject: RE: Notice of Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Friday, June 17, 2016 2:31:00 PM

Mallory,

It will be adequate to just state in your written response to the appeal that the requested records included taxpayer returns and cite the confidentiality statute that applies to them. We won't need to review the individual returns when there's a confidentiality statute that applies to them generally. If you want to explain why they're used, that would also be helpful for giving context.

Aloha,
Jennifer

Jennifer Z. Brooks
Staff Attorney
Office of Information Practices

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oiip@hawaii.gov
Website: <http://oiip.hawaii.gov>

From: Fujitani, Mallory C
Sent: Friday, June 17, 2016 10:54 AM
To: OIP <oiip@hawaii.gov>
Cc: Remigio, Dana A <dana.a.remigio@hawaii.gov>; Zielinski, Maria E <maria.e.zielinski@hawaii.gov>
Subject: RE: Notice of Appeal from Denial of Access to General Records (U APPEAL 16-43)

ATTN: Jennifer Brooks, Esq.

Hi Jennifer,

We are in the process of responding in writing to your request for additional information. However, we noticed that your response also asks for "...unaltered copies of the records at issue for use in reviewing DOTAX's denial of Mr. Kamikawa's request."

000023

Some of the documentation reviewed by our Tax Research and Planning Office in generating revenue estimates includes taxpayer returns which are protected by the confidentiality provisions under Title 14. The actual tax returns cannot be provided, but we will explain reason/purpose for the use of actual tax return data. The other documentation will be provided with the Department's response.

Mallory C. Fujitani
State of Hawaii
Department of Taxation
P.O. Box 259
Honolulu, Hawaii 96813
Phone: (808)587-1481
Email: mallory.c.fujitani@hawaii.gov

From: Zielinski, Maria E
Sent: Thursday, June 09, 2016 1:50 PM
To: Fujitani, Mallory C <Mallory.C.Fujitani@hawaii.gov>
Cc: Remigio, Dana A <dana.a.remigio@hawaii.gov>
Subject: Fwd: Notice of Appeal from Denial of Access to General Records (U APPEAL 16-43)

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From: "OIP" <oip@hawaii.gov>
Date: Thu, Jun 9, 2016 at 1:31 PM -1000
Subject: Notice of Appeal from Denial of Access to General Records (U APPEAL 16-43)
To: "Zielinski, Maria E" <maria.e.zielinski@hawaii.gov>

Director Zielinski:

Attached is a letter dated June 9, 2016 from the Office of Information Practices regarding a request we received from Mr. Ray Kamikawa. Also attached is:

- The Appeal Procedures and Responsibilities of the Parties;
- Mr. Kamikawa's request to DOTAX;
- DOTAX's NTR to Mr. Kamikawa;
- Mr. Kamikawa's request to OIP.

Please contact our office if you have difficulty opening the attachments.

Thank you,

000024

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oiip@hawaii.gov
Website: <http://oiip.hawaii.gov>

From: [Fujitani, Mallory C](#)
To: [OIP](#)
Subject: ATTN: Jennifer Brooks
Date: Friday, June 24, 2016 2:14:44 PM

Hi Jennifer,

Our response to Ray Kamikawa's appeal of our denial for documents related to revenue estimates related to HB2711 and SB2833 is due today. Would it be possible to have an extension until Monday?

Thanks,

Mallory C. Fujitani
State of Hawaii
Department of Taxation
P.O. Box 259
Honolulu, Hawaii 96813
Phone: (808)587-1481
Email: mallory.c.fujitani@hawaii.gov

From: OIP
To: [Fujitani, Mallory C](#)
Bcc: [Brooks, Jennifer Z](#)
Subject: RE: ATTN: Jennifer Brooks
Date: Friday, June 24, 2016 3:00:00 PM

An extension to Monday, June 27, is fine.

Aloha,
Jennifer

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oiip@hawaii.gov
Website: <http://oiip.hawaii.gov>

From: Fujitani, Mallory C
Sent: Friday, June 24, 2016 2:15 PM
To: OIP <oiip@hawaii.gov>
Subject: ATTN: Jennifer Brooks

Hi Jennifer,

Our response to Ray Kamikawa's appeal of our denial for documents related to revenue estimates related to HB2711 and SB2833 is due today. Would it be possible to have an extension until Monday?

Thanks,

Mallory C. Fujitani
State of Hawaii
Department of Taxation
P.O. Box 259
Honolulu, Hawaii 96813
Phone: (808)587-1481
Email: mallory.c.fujitani@hawaii.gov

From: [Fujitani, Mallory C](#)
To: [OIP](#)
Subject: RE: ATTN: Jennifer Brooks
Date: Monday, June 27, 2016 4:29:41 PM
Attachments: [DOC086.pdf](#)

Hi Jennifer,

Please find attached the Department of Taxation's response to Ray Kamikawa's appeal.

The original letter and attachments will be sent via inter-agency mail.

Let me know if you have any questions.

Mallory C. Fujitani
State of Hawaii
Department of Taxation
P.O. Box 259
Honolulu, Hawaii 96813
Phone: (808)587-1481
Email: mallory.c.fujitani@hawaii.gov

From: OIP
Sent: Friday, June 24, 2016 3:00 PM
To: Fujitani, Mallory C <Mallory.C.Fujitani@hawaii.gov>
Subject: RE: ATTN: Jennifer Brooks

An extension to Monday, June 27, is fine.

Aloha,
Jennifer

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oiip@hawaii.gov
Website: <http://oiip.hawaii.gov>

From: Fujitani, Mallory C
Sent: Friday, June 24, 2016 2:15 PM
To: OIP <oiip@hawaii.gov>
Subject: ATTN: Jennifer Brooks

000028

Hi Jennifer,

Our response to Ray Kamikawa's appeal of our denial for documents related to revenue estimates related to HB2711 and SB2833 is due today. Would it be possible to have an extension until Monday?

Thanks,

Mallory C. Fujitani
State of Hawaii
Department of Taxation
P.O. Box 259
Honolulu, Hawaii 96813
Phone: (808)587-1481
Email: mallory.c.fujitani@hawaii.gov

DAVID Y. IGE
GOVERNOR

SHAN TSUTSUI
LT. GOVERNOR



MARIA E. ZIELINSKI
DIRECTOR OF TAXATION

JOSEPH K. KIM
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF TAXATION

P.O. BOX 259
HONOLULU, HAWAII 96809
PHONE NO: (808) 587-1540
FAX NO: (808) 587-1560

June 27, 2016

Via Email and State Messenger

Jennifer Brooks, Esq.
Office of Information Practices
250 South Hotel Street, Suite 107
Honolulu, Hawaii 96813

Re: Letter Dated June 9, 2016 Regarding Appeal from Ray Kamikawa

Dear Ms. Brooks:

Thank you for your letter dated June 9, 2016, regarding an appeal from Mr. Ray Kamikawa, with respect to the Department of Taxation's (Department) denial of Mr. Kamikawa's request for "...access to assumptions, bases, computations, source data, and documents and analysis relied upon in connection with the Department of Taxation's revenue estimates contained in its testimonies for H.B.2711 and S.B.2833." The information requested relates to revenue estimates generated by the Department of Taxation with respect to amendments to the low-income housing tax credit set forth in section 235-110.8 of the Hawaii Revised Statutes (HRS).

We are providing additional justification for the Department's denial of his request, as well as unaltered copies of the documents which Mr. Kamikawa has requested for your review. Documents that have not been enclosed for your review include tax returns that had been reviewed in whole or part, by Department staff in their effort to produce the revenue estimate; the tax returns are protected from disclosure under the confidentiality provisions of Title 14, Hawaii Revised Statutes.

In general, revenue estimates are constructed by the Department's Tax Research and Planning (TRP) Office staff. Sometimes, the estimates require us to extract tax data from tax returns, but more often the estimates are constructed using tax data that the Department tabulates for its regular reports or data from other sources. To estimate the revenue cost of SB 2833, SD2, HD1 and HB 2744, HD1, SD1, TRP used data on new awards of the low-income housing tax credit (LIHTC) provided by the Hawaii Housing Finance and Development Corporation (HHFDC). The data are available to the public. The Department also reviewed certain filed tax returns to check the validity of some assumptions used to produce the revenue estimates.

000030

Detailed description of the methodology and analysis used by the Department to estimate the revenue effects of SB 2833, SD2, HD1 and of HB 2744, HD1, SD1

The HHFDC awards tax credits in two categories, a "Volume Cap" category and "Non-Volume Cap" category. Tax credits awarded in the Volume Cap category are capped at about \$1.5 million per year and consistently meet the annual cap. Tax credits that may be awarded in the Non-Volume Cap category are not capped, but the low-income housing construction must be financed with tax-exempt bonds. New awards in the Non-Volume Cap category varied between zero and \$4.5 million from 2010 through 2014 (the latest year of data when the revenue estimate was produced). The new awards in these years totaled \$12.1 million, for an annual average of about \$2.4 million. To be conservative (i.e., to avoid understating the revenue cost of the new legislation) it was assumed that the new awards going forward in the Non-Volume Cap category would be \$2.5 million per year. Thus, going forward, the new awards of the low-income housing tax credit in the Volume Cap and Non-Volume Cap categories combined were assumed to be \$4 million annually.

The new low-income housing tax credits awarded to a low-income housing project in the first year represents 10% of the total tax credits that may be taken on the project. The total tax credits are spaced out evenly over ten years. For example, an initial award of \$4 million for new projects means that the total amount of tax credits for the projects is \$40 million, to be taken at the rate of \$4 million each year over ten years. The tax credit may be claimed against the individual and corporate net income taxes in chapter 235 of the Hawaii Revised Statutes (HRS), against the tax on banks and other financial corporations in chapter 241, HRS, and against the tax on insurance premiums in chapter 431, HRS. The tax credit is not refundable, but any excess of tax credits over the tax liability may be carried over and applied to future tax liabilities until exhausted.

For the Volume Cap category, both SB 2833, SD2, HD1 and HB 2744, HD1, SD1 would have doubled the amount of the tax credits available to new low-income housing projects in the first five years, but neither bill would have changed the total amount of tax credits that could be taken on the projects. For the Non-volume Cap category, both bills would have quadrupled the amount of the tax credits available to new low-income housing projects in the first five years and they would have doubled the total amount of tax credits that could be claimed for the projects. In both bills, the increase in tax credits would be available only for projects that received allocations after December 31, 2016. It was assumed that tax credits awarded in a calendar year show up on tax returns after a lag of more than one year. More specifically, it was assumed that under current law the tax credits awarded in 2017 will be claimed in fiscal years 2019 through 2028, at \$4 million per year, tax credits awarded in 2018 will be claimed in fiscal years 2020 through 2029 at \$4 million per year, and so forth for tax credits awarded in subsequent years. Thus, total tax credits from awards made in the Volume Cap and Non-Volume cap categories after December 31, 2016 will be \$4 million in fiscal year 2019 (from awards made in 2017), \$8 million in fiscal year 2020 (from awards made in 2017 and in 2018), and \$12 million in fiscal year 2021 (from awards made in 2017, 2018 and 2019).

Under the proposed legislation, the assumptions imply that tax credits from new awards made after December 31, 2016 in the Volume Cap category would rise from \$1.5 million to \$3.0 million in each of the first five fiscal years, 2019 through 2023. Thus, total tax credits from the new awards in the Volume Cap category would be \$3.0 million in fiscal year 2019, \$6.0 million in fiscal year 2020 and \$9 million in fiscal year 2021. For the Non-volume Cap category, the assumptions imply that tax credits from the new awards would rise from \$2.5 million to \$10 million, so total tax credits from new awards in the category would be \$10 million in fiscal year 2019, \$20 million in fiscal year 2020 and \$30 million in fiscal year 2021.

To calculate the cost of the proposed legislation, the tax credits estimated under current law were subtracted from those estimated under the proposed law. The results were revenue losses of \$9 million for fiscal year 2019, \$18 million for fiscal year 2020 and \$27 million for fiscal year 2021. To confirm and validate the revenue estimate, a rough check on the assumptions used to produce the revenue estimates was done by Department staff. Specifically, they reviewed actual tax returns filed by banks and other financial corporations, where the low-income housing tax credit had been claimed in tax years 2011 through 2013 (the latest year for which data were available when the estimates were produced).

It should be noted that in most cases where a revenue estimate can be determined based on the draft language in the bill, as was the case with H.B.2711 and S.B. 2833, the revenue estimate is provided in the Department's written testimony to the Senate Committee on Ways and Means and the House Committee on Finance.

Reasons for limiting disclosure of the methodology and analysis used by the Department to produce revenue estimates

The Department denied Mr. Kamikawa's request for "assumptions, bases, computations, source data and documents and analysis relied upon in connection with the Department of Taxation's revenue estimates..." because the Department believes the information is exempted from disclosure under section 92F-13(3), HRS. In part, section 92F-13(3), HRS, states that the UIPA does not require disclosure of "...government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." The OIP further expanded this exception and noted in OIP Op. Ltr. 04-15, that "the deliberative process privilege shields from disclosure 'recommendations, draft documents, proposals, suggestions, and other subjective documents' that comprise part of the process by which the government formulates decisions and policies." OIP Op. Ltr. 04-15 at 4.

The documentation requested by Mr. Kamikawa that reflects the "...assumptions, bases, computations, source data, and documents and analysis relied upon..." by Department staff while performing its revenue estimation function clearly falls within the exception provided in section 92F-13(3), HRS. The requested material reflects staff work product used to develop revenue estimates, which are necessary for the Legislature's consideration and deliberation so they can be assured that adoption of proposed legislation will not undermine the state's budget.

The Department also notes that the Legislature specifically exempted “inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product...” in section 92F-13(5), HRS. While the Department recognizes that we are not part of the Legislative branch, only the Department’s Tax Research and Planning staff is able to undertake this specialized function of developing revenue estimates due to the specialized job skills and experience of its staff. As Department employees, they also have access to historical tax data, a key resource necessary for developing revenue estimates.

To our knowledge, no other staff or agency in the Executive and Legislative Branches is able to perform this revenue estimation function. For these reasons, when the Department generates revenue estimates for the Legislature, the Department acts from a neutral policy perspective, as if the staff were attached to the Legislature. Therefore, while the Department’s Tax Research and Planning Office is housed within the Executive, not Legislative branch, the Department believes the revenue estimation work product meets the intent of protecting intra-agency and inter-agency documentation under the exception set forth in section 92F-13(3), HRS, and is similar to work product that the Legislature intended to protect from disclosure under section 92F-13(5), HRS.

Subjecting the assumptions and methods for a particular revenue estimate to public scrutiny by interested parties would result in skewed analyses, as the interested parties would challenge only the assumptions they found less favorable to their position. In many cases the revenue estimates guide the specific amendments contemplated; as with H.B. 2711 and S.B.2833, the adoption of certain language will either increase or decrease the potential revenue impact of the legislation.

It is important that the Department staff be able to develop revenue estimates free from outside influence and without concern that its analysis will be second-guessed and criticized by interested parties, either proponents or opponents, during or after the Legislative session. Revenue estimates often require assumptions about facts for which data are limited or subject to a great deal of uncertainty, such as when behavioral responses of taxpayers must be taken into account. “The privilege protects the quality of agency decision-making, specifically, by encouraging subordinates to provide uninhibited opinions and recommendations to decision-makers without fear of public ridicule or criticism; by protecting against premature disclosure of proposed policies or decisions before they are finally formulated or adopted; and by protecting against any confusion of the issues and misleading of the public that might be caused by dissemination of documents suggesting reasons and rationales that are not in fact the ultimate reasons for an agency’s action.” OIP Op. Ltr. No. 04-15 at 4. Such would be the case if proponents and opponents of any particular measure were able to undermine the revenue estimate analyses by Department staff.

Finally, the Office of Tax Analysis in the U.S. Treasury Department has offered the following reasons for limiting disclosure of revenue-estimating assumptions and methods to the public (see <http://www.heritage.org/research/reports/2004/12/transparency-in-revenue-estimating>):

Jennifer Brooks, Esq.
June 27, 2016
Page 5 of 5

"Estimates are often made on short notice and a great deal of experience and judgment is required."

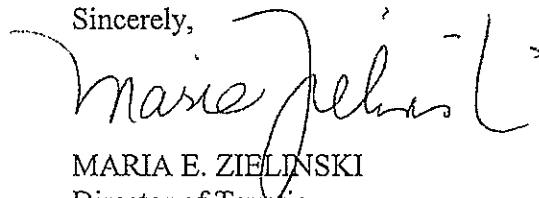
"Estimates frequently involve novel ideas where there is little or no data, no previous experience to draw upon, no studies to refer to, indeed nothing available but the estimator's past experience. Making this public will not result in better estimates and will hamper efforts to take advantage internally of the estimator's input."

"Public release of detail allows interested parties to criticize those elements of the estimate [un]favorable to them and conveniently overlook issues on the other side. Only biased criticism results and the estimate is not improved."

For the foregoing reasons, the Department believes that it correctly denied access to the government records requested by Mr. Kamikawa. Release of such records would frustrate a legitimate government purpose, including the ability of the Department to provide unbiased revenue estimates to the Legislature.

If you have any questions, or would like to discuss this matter further, please feel free to contact me at 587-1540.

Sincerely,

A handwritten signature in black ink, appearing to read "Maria Zielinski", with a stylized flourish at the end.

MARIA E. ZIELINSKI
Director of Taxation

Attachments

000034

From: [Ray Kamikawa](#)
To: [OIP](#)
Cc: [Karen Piltz](#)
Subject: OIP request/status of my appeal
Date: Thursday, July 21, 2016 8:49:53 AM

Hello Zoey, this message is for Ms. Jennifer Brooks, the attorney who is assigned to my appeal.

Dear Ms. Brooks,

I have not received any communication since I filed the appeal on May 26 this year. Considering the disclosure in the DLNR/Amano case that I read about in the Star Advertiser today, there is no legitimate basis upon which DOTAX can withhold my requested disclosure. I am hopeful that OIP and DOTAX will not put me to the cost and expense of filing suit to enforce disclosure.

Thank you,
Ray.

Note our new address below:

Ray K. Kamikawa
Partner
Direct: 808-528-8211
Direct Fax: 808-664-8596
rkamikawa@chunkerr.com



CHUN KERR LLP
a Limited Liability Law Partnership
First Hawaiian Center
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Main: 808-528-8200
Main Fax: 808-536-5869
www.chunkerr.com

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From: OIP
To: "Ray Kamikawa"
Bcc: [Brooks, Jennifer Z](#)
Subject: RE: OIP request/status of my appeal
Date: Monday, July 25, 2016 2:07:00 PM
Attachments: [0627 Email fr DOTAX \(attachment\).pdf](#)

Mr. Kamikawa,

I'm sorry I missed your e-mail last week. I was out of the office.

Attached is the Department of Taxation's response dated June 27, 2016, with the exception of the records provided for OIP's in camera review. The records provided for in camera review are withheld under the UIPA's exception for records whose disclosure would frustrate a legitimate government function, section 92F-13(3), HRS.

You mentioned in your email that you are considering filing suit. You are not required to wait for OIP's decision on this appeal before filing a lawsuit for access, and you may do so within two years after an agency denial. HRS § 92F-15. If you do file suit, you are required to notify OIP at the time of the filing. HRS § 92F-15.3. Please be aware that OIP has a backlog of cases and generally follows a first in – first out policy, i.e. working on the oldest cases first, so it could take a year or more before your case will be resolved. If time is of the essence, an action in court for access to records is heard on an expedited basis. HRS § 92F 15(f).

Aloha,
Jennifer Brooks

Jennifer Z. Brooks
Staff Attorney

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oiip@hawaii.gov
Website: <http://oiip.hawaii.gov>

From: Ray Kamikawa [mailto:RKamikawa@chunkerr.com]
Sent: Thursday, July 21, 2016 8:50 AM
To: OIP <oiip@hawaii.gov>
Cc: Karen Piltz <KPiltz@chunkerr.com>
Subject: OIP request/status of my appeal

000036

Hello Zoey, this message is for Ms. Jennifer Brooks, the attorney who is assigned to my appeal.

Dear Ms. Brooks,

I have not received any communication since I filed the appeal on May 26 this year. Considering the disclosure in the DLNR/Amano case that I read about in the Star Advertiser today, there is no legitimate basis upon which DOTAX can withhold my requested disclosure. I am hopeful that OIP and DOTAX will not put me to the cost and expense of filing suit to enforce disclosure.

Thank you,
Ray.

Note our new address below:

Ray K. Kamikawa
Partner
Direct: 808-528-8211
Direct Fax: 808-664-8596
rkamikawa@chunkerr.com



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From: [OIP](#)
To: [Takayama, Linda C](#)
Bcc: [Brooks, Jennifer Z](#)
Subject: Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Wednesday, January 02, 2019 1:38:00 PM
Attachments: [0102 Ltr to DOTAX.pdf](#)
[1043620989.pdf](#)

Director Takayama:

Attached is a letter dated January 2, 2019 from the Office of Information Practices regarding the above referenced file. Also attached is the Supreme Court's decision on deliberative process privilege (DPP).

Please contact our office if you have difficulty opening the attachments.

Thank you,

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: qip@hawaii.gov
Website: <http://qip.hawaii.gov>



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OFFICE OF INFORMATION PRACTICES**

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E-MAIL: oiip@hawaii.gov
www.oiip.hawaii.gov

DAVID Y. IGE
GOVERNOR

CHERYL KAKAZU PARK
DIRECTOR

January 2, 2019

VIA EMAIL

The Honorable Linda Chu Takayama
Director
Department of Taxation
860 Punchbowl Street
City and County of Honolulu
Honolulu, HI 96813

Ray Kamikawa, Esq.
Chun Kerr Dodd LLC

Re: Appeal from Denial of Access to General Records (U APPEAL 16-43)

Dear Director Takayama and Mr. Kamikawa:

As you are aware, the Office of Information Practices (OIP) has a pending appeal filed by Mr. Ray Kamikawa with respect to the denial by the Department of Taxation (DOTAX) of his request for records made under Part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA). Specifically, Mr. Kamikawa indicated that he made a written request to DOTAX dated April 15, 2016, for access to assumptions, bases, computations, source data, and documents and analysis relied upon in connection with DOTAX's revenue estimates contained in legislative testimony.

In response to his record request and to this appeal, DOTAX asserted that section 92F-13(3), HRS, allowed DOTAX to withhold all or part of the requested records in order to avoid the frustration of a legitimate government function. Specifically, DOTAX argued that the deliberative process privilege (DPP) allowed it to withhold the requested records under the UIPA's frustration exception.

OIP has issued a long line of opinions applying the DPP since 1989, based on the federal Freedom of Information Act and related case law, protecting certain predecisional and deliberative government records from disclosure, including when appropriate, intra- and inter-agency communications comprising part of a process by which governmental decisions and policies are formulated. However, the Hawaii Supreme Court, in a 3-2 decision, recently overruled all OIP

000039

The Honorable Linda Chu Takayama
Ray Kamikawa, Esq.
January 2, 2018
Page 2

opinions which had recognized the DPP as a valid exception to disclosure allowing government agencies to withhold access to government records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function. In light the decision in Peer News LLC v. City and County of Honolulu, SCAP-16-0000114, a copy of which is enclosed, OIP will no longer recognize the DPP under the UIPA's frustration exception to disclosure. Agencies, including DOTAX, that have relied on the DPP to withhold records in cases currently pending before OIP, are being allowed to submit supplemental arguments.

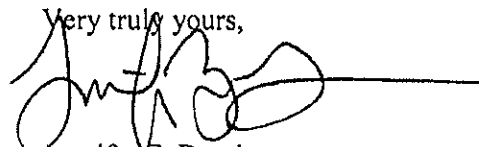
At this time, OIP asks DOTAX to review the enclosed decision, consult with your legal counsel if you deem it appropriate, and determine whether you would like to provide a new argument as to why the records subject to this appeal may be withheld from the requester under one or more subsections of section 92F-13, HRS. In the alternative, please provide the requester with an amended notice to requester informing him that you will be disclosing the records you previously sought to protect under the DPP. **If you choose to provide an amended notice to requester, please provide OIP with a copy** for purposes of resolving this appeal. **Please provide either your revised argument against disclosure or your amended notice to requester by February 1, 2019.** This additional time is being provided in consideration of the recent holidays and the fact that the legislative session is about to begin.

Please remember that the UIPA places the burden on the agency to establish justification for the nondisclosure of government records. HRS § 92F-15(c) (2012). Please also be advised that a record requester need not wait for OIP's decision on this appeal and may file a lawsuit for access within two years after an agency denial. HRS § 92F-15 (2012). Even if the time for filing a lawsuit in this particular case may have passed, the requester can make a new request for the same records and file a lawsuit if the agency again denies the request.

OIP asks Mr. Kamikawa to confirm to OIP by February 1, 2019, whether he is still interested in receiving an opinion in this file. **If OIP does not hear back from you by February 1, we will assume you no longer interested in receiving an opinion and will close this file.**

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.

Thank you in advance for your cooperation and assistance in this matter. Please do not hesitate to contact me if you have any questions or require assistance in responding to this letter.

Very truly yours,

Jennifer Z. Brooks
Staff Attorney

JZB:za
Enclosure

From: [OIP](#)
To: "rkamikawa@chunkerr.com"
Bcc: [Brooks, Jennifer Z](#)
Subject: Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Wednesday, January 02, 2019 1:38:00 PM
Attachments: [0102 Ltr to DQTAX.PDF](#)
[1043620989.pdf](#)

Mr. Kamikawa:

Attached is a letter dated January 2, 2019 from the Office of Information Practices regarding the above referenced file. Also attached is the Supreme Court's decision on deliberative process privilege (DPP).

Please contact our office if you have difficulty opening the attachments.

Thank you,

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oop@hawaii.gov
Website: <http://oop.hawaii.gov>

From: [Ray Kamikawa](#)
To: [OIP](#)
Subject: RE: Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Friday, January 04, 2019 2:26:18 PM
Attachments: [0102 Ltr to DOTAX.PDF](#)

Hello Jennifer, Happy New Year.

Per our telecon today, I am confirming my interest in receiving an opinion in this file.

I have calendared February 1, 2019, which is the deadline that you provided for DOTAX to submit its revised argument against disclosure or amended notice to requester. I will call you if I don't see anything from DOTAX by then.

Please note the change in our firm name and form of organization. You have on file an old "Chun Kerr Dodd LLC" reference that appears on the first page of your January 2 letter.

Thank you,
Ray.

CHUN KERR LLP
a Limited Liability Law Partnership
Direct: 808-528-8211
Direct Fax: 808-664-8596
rkamikawa@chunkerr.com

From: OIP [<mailto:oop@hawaii.gov>]
Sent: Wednesday, January 02, 2019 1:38 PM
To: Ray Kamikawa
Subject: Appeal from Denial of Access to General Records (U APPEAL 16-43)

Mr. Kamikawa:

Attached is a letter dated January 2, 2019 from the Office of Information Practices regarding the above referenced file. Also attached is the Supreme Court's decision on deliberative process privilege (DPP).

Please contact our office if you have difficulty opening the attachments.

Thank you,

Office of Information Practices
State of Hawaii
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Ph (808) 586-1400
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DAVID Y. IGE
GOVERNOR

JOSH GREEN M.D.
LEUTENANT GOVERNOR



LINDA CHU TAKAYAMA
DIRECTOR

DAMIEN A. ELEFANTE
DEPUTY DIRECTOR

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<http://tax.hawaii.gov/>
Phone: (808) 587-1540 / Fax: (808) 587-1560
Email: Tax.Directors.Office@hawaii.gov

January 31, 2019

VIA EMAIL

Jennifer Z. Brooks
Office of Information Practices
250 South Hotel Street, Suite 107
Honolulu, Hawaii 96813

Re: Appeal from Denial of Access to General Records (U APPEAL 16-43)

Dear Ms. Brooks:

The Department of Taxation (Department) is writing in response to your letter dated January 2, 2019, in which you ask the Department to review the Office of Information Practice's decision and to consult with the Department's legal counsel in determining whether to provide a new argument supporting the Department's withholding of the records that were requested. The Department has consulted with the Department of the Attorney General and determined that it is appropriate for the Department to present a supplemental argument in support of withholding the records requested. The supplemental argument is as follows.

SUPPLEMENTAL ARGUMENT IN SUPPORT OF NON-DISCLOSURE

Section 92F-13(3), HRS, exempts from disclosure "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function." Although the Hawaii Supreme Court, in *Peer News LLC v. City and County of Honolulu*, 143 Hawaii 472, 431 P.3d 1245 (2018) overruled the Office of Information Practices' long line of opinions recognizing the deliberative process privilege, the Court recognized that certain deliberative records may still qualify for the exemption under section 92F-13(3), HRS. The Court explained that, for the exemption to apply, an agency must "define the government function that would be frustrated by a record's disclosure with a degree of specificity" and "demonstrate a connection between disclosure of the specific record and the likely frustration of a legitimate government function." *Id.* at 1260.

In this matter, the government function that would be frustrated by disclosure is the Department of Taxation's (Department) ability to produce objective and independent revenue estimates. Because the legislature relies on the Department's revenue estimates in balancing the State's budget, the availability of estimates made by a neutral party, free from political interference, is essential.

000044

The requestor in this case, Ray Kamikawa, is believed to represent proponents of the legislative bills at issue here. Although the information requested in this matter relates to revenue estimates made during the 2016 Legislative Session, similar bills have been introduced during the current session. Mr. Kamikawa made his intentions clear in his written testimony to the Senate Committee on Government Operations on February 8, 2018 in support of Senate Bill 2257, which would have required DOTAX to disclose its methodology and assumptions for all revenue estimates: "[The bill] will provide transparency to the process, giving everyone an opportunity to question the analysis." Relating to Taxation: Hearing on S.B. 2257 Before the S. Comm. on Gov't Operations, 29th Leg. (2018) (written testimony of Ray Kamikawa).

If proponents (or opponents) of legislative bills are given the assumptions and methodology for DOTAX's revenue estimates, DOTAX's revenue estimates will be subject to politically-motivated attacks, DOTAX's staff will be forced to defend every assumption, data point, and calculation made, and DOTAX will be the subject of public and legislative pressure to create new revenue estimates or amend its previous revenue estimates. As a result, the objectivity of revenue estimates, which were originally created free from political motivation and intrusion, will be compromised.

Accordingly, the assumptions and methodology for DOTAX's revenue estimates must be maintained as confidential, as disclosure would frustrate a legitimate government function.

Sincerely,



LINDA CHU TAKAYAMA
Director of Taxation

From: [Brooks, Jennifer Z](#)
To: [Abrams, Zoe E](#)
Subject: FW: U APPEAL 16-43
Date: Friday, February 01, 2019 4:32:15 PM

For the file

From: Kwan, Deborah
Sent: Friday, February 01, 2019 4:31 PM
To: Brooks, Jennifer Z <Jennifer.Z.Brooks@hawaii.gov>
Cc: Shiraishi, Ted S <ted.s.shiraishi@hawaii.gov>
Subject: U APPEAL 16-43

Hi Jennifer,

It was good speaking with you today. Thank you for granting our request to extend the time to respond to your letter dated January 2, 2019 regarding U APPEAL 16-43 to Friday, February 8, 2019.

Deborah

--

Deborah Kwan | State of Hawaii – Department of Taxation
830 Punchbowl Street, Rm 221, Honolulu, Hawaii 96813
(808) 587-1481 | deborah.kwan@hawaii.gov | <http://tax.hawaii.gov>

000046

From: [Ray Kamikawa](#)
To: [OIP](#)
Subject: RE: Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Monday, February 04, 2019 9:16:21 PM

Hello Jennifer, the tax department's response was due last Friday February 1. Please LMK if the department complied.

Thank you,
Ray. (note change of address below)
Ray Kamikawa
Partner
Direct: 808-528-8211
Direct Fax: 808-664-8596
rkamikawa@chunkerr.com



CHUN KERR LLP
a Limited Liability Law Partnership
First Hawaiian Center
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Honolulu, Hawaii 96813-4443
Main: 808-528-8200
Main Fax: 808-536-5869
www.chunkerr.com

From: Ray Kamikawa
Sent: Friday, January 04, 2019 2:26 PM
To: 'OIP'
Subject: RE: Appeal from Denial of Access to General Records (U APPEAL 16-43)

Hello Jennifer, Happy New Year.

Per our telecon today, I am confirming my interest in receiving an opinion in this file.

I have calendared February 1, 2019, which is the deadline that you provided for DOTAX to submit its revised argument against disclosure or amended notice to requester. I will call you if I don't see anything from DOTAX by then.

Please note the change in our firm name and form of organization. You have on file an old "Chun Kerr Dodd LLC" reference that appears on the first page of your January 2 letter.

Thank you,
Ray.

CHUN KERR LLP
a Limited Liability Law Partnership
Direct: 808-528-8211
Direct Fax: 808-664-8596
rkamikawa@chunkerr.com

From: OIP [<mailto:oop@hawaii.gov>]
Sent: Wednesday, January 02, 2019 1:38 PM
To: Ray Kamikawa
Subject: Appeal from Denial of Access to General Records (U APPEAL 16-43)

Mr. Kamikawa:

000047

Attached is a letter dated January 2, 2019 from the Office of Information Practices regarding the above referenced file. Also attached is the Supreme Court's decision on deliberative process privilege (DPP).

Please contact our office if you have difficulty opening the attachments.

Thank you,

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
250 S. Hotel Street, #107
Honolulu, HI 96813
Ph (808) 586-1400
Facsimile: (808) 586-1412
Email: oiip@hawaii.gov
Website: <http://oiip.hawaii.gov>

From: OIP
To: "Ray Kamikawa"
Bcc: Brooks, Jennifer Z
Subject: RE: Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Tuesday, February 05, 2019 10:25:00 AM

Mr. Kamikawa:

We granted a one week extension of time for the tax department to respond, so their response is now due February 8.

Aloha,
Jennifer

Jennifer Z. Brooks
Staff Attorney

Office of Information Practices
State of Hawaii
No. 1 Capitol District Building
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Facsimile: (808) 586-1412
Email: qip@hawaii.gov
Website: <http://qip.hawaii.gov>

From: Ray Kamikawa <RKamikawa@chunkerr.com>
Sent: Monday, February 04, 2019 9:16 PM
To: OIP <qip@hawaii.gov>
Subject: RE: Appeal from Denial of Access to General Records (U APPEAL 16-43)

Hello Jennifer, the tax department's response was due last Friday February 1. Please LMK if the department complied.

Thank you,
Ray. (note change of address below)

Ray Kamikawa
Partner
Direct: 808-528-8211
Direct Fax: 808-664-8596
rkamikawa@chunkerr.com



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a Limited Liability Law Partnership
First Hawaiian Center
999 Bishop Street, Suite 2100
Honolulu, Hawaii 96813-4443

000049

Main: 808-528-8200
Main Fax: 808-536-5869
www.chunkerr.com

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Sent: Friday, January 04, 2019 2:26 PM
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Subject: RE: Appeal from Denial of Access to General Records (U APPEAL 16-43)

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Direct: 808-528-8211
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rkamikawa@chunkerr.com

From: OIP [<mailto:oip@hawaii.gov>]
Sent: Wednesday, January 02, 2019 1:38 PM
To: Ray Kamikawa
Subject: Appeal from Denial of Access to General Records (U APPEAL 16-43)

Mr. Kamikawa:

Attached is a letter dated January 2, 2019 from the Office of Information Practices regarding the above referenced file. Also attached is the Supreme Court's decision on deliberative process privilege (DPP).

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Website: <http://oip.hawaii.gov>

000050

From: [Ray Kamikawa](#)
To: [OIP](#)
Subject: RE: Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Friday, February 22, 2019 8:36:33 AM

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Sent: Tuesday, February 05, 2019 10:26 AM
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Jennifer Z. Brooks
Staff Attorney

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Honolulu, HI 96813

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Website: <http://qip.hawaii.gov>

From: [Ray Kamikawa](#)
To: [OIP](#)
Subject: RE: Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Friday, February 22, 2019 4:08:39 PM

Thank you Jennifer. I will not be working on a response and leave it to you to work on the opinion.

Thank you,
Ray.

From: OIP [<mailto:ois@hawaii.gov>]
Sent: Friday, February 22, 2019 10:56 AM
To: Ray Kamikawa
Subject: RE: Appeal from Denial of Access to General Records (U APPEAL 16-43)

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Jennifer Z. Brooks
Staff Attorney

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Ph (808) 586-1400
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From: OIP
To: "Ray Kamikawa"
Bcc: Brooks, Jennifer Z
Subject: RE: Appeal from Denial of Access to General Records (U APPEAL 16-43)
Date: Friday, February 22, 2019 10:55:00 AM
Attachments: 0131 Ltr fr DOTAX.pdf

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**STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES**

DAVID Y. IGE
GOVERNOR

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CHERYL KAKAZU PARK
DIRECTOR

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).

OPINION

Requester: Ray Kamikawa, Esq.
Agency: Department of Taxation
Date: May 20, 2019
Subject: Deliberative Material for Revenue Estimates (APPEAL 16-43)

REQUEST FOR OPINION

Requester seeks a decision as to whether the Hawaii Department of Taxation (TAX) properly denied Requester's request under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA), for "assumptions, bases, computations, source data, and documents and analysis relied upon" for TAX's revenue estimates in legislative testimony. Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's letter to OIP dated May 26, 2016, and attached materials; TAX's letter to OIP dated June 27, 2016, and attached materials; Requester's emails to OIP dated January 4 and February 22, 2019; and TAX's letter to OIP dated January 31, 2019, and received February 8, 2019.

QUESTION PRESENTED

Whether TAX may withhold from public disclosure under the UIPA the underlying assumptions, source data and documents, and computations it uses to create revenue estimates presented in legislative testimony, either based on a confidentiality statute, as working papers of a legislative committee, or to prevent frustration of its ability to produce objective and independent revenue estimates. See HRS § 92F-13(3), (4), and (5) (2012).

BRIEF ANSWER

No. TAX has not established that a confidentiality statute applies to information in the records at issue, although OIP recognizes that a confidentiality statute could apply to source data and documents used by TAX in creating other revenue estimates. See HRS § 92F-13(4). The records at issue here were created by TAX, not by a legislative committee, and therefore are not working papers of “legislative committees” that may be withheld under section 92F-13(5), HRS. See HRS § 92F-13(5).

TAX asserts that disclosure of the records at issue would frustrate one of its legitimate government functions, namely its “ability to produce objective and independent revenue estimates.” See HRS § 92F-13(3). Under the UIPA, as interpreted by the Hawaii Supreme Court, deliberative and predecisional materials cannot be withheld on the basis that they would frustrate an agency’s decisionmaking function, although such materials may still be withheld under the UIPA’s frustration exception where some other specifically identified government function would be frustrated by disclosure. Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (2018) (Peer News). The government function TAX seeks to protect is its decisionmaking function by another name, so TAX may not withhold the records at issue under the UIPA’s frustration exception to protect its ability to produce objective and independent revenue estimates.

FACTS

In a request made on April 15, 2016, Requester asked TAX for a copy of:

Assumptions, bases, computations, source data and documents, and analysis relied upon in connection with [TAX’s] revenue estimates contained in its testimonies . . . for House Bill 2744, HD1, SD1 (Relating to Housing) and Senate Bill 2833, SD2, HD1 (Relating to the Low-Income Housing Tax Credit), both bills currently pending in the Hawaii State Legislature, Twenty-Eighth Legislative (2016).

TAX responded by denying the request in its entirety, citing section 92F-13(3), HRS, the UIPA’s exception for records whose disclosure would frustrate a legitimate government function. According to TAX’s Notice to Requester,

The tax data analyzed to produce revenue estimates is confidential, predecisional, deliberative work product of [TAX]; further, some of the tax data is protected from disclosure under the confidentiality provisions of Title 14, HRS.

[TAX] provides revenue estimates at the request of certain Legislative committees for their deliberation of specific draft legislation. These

certain Legislative committees request [TAX] to produce revenue estimates for certain measures because the committees do not have access to tax data and other relevant information needed to determine the fiscal impact of draft tax legislation.

Requester appealed the denial to OIP, arguing among other things that since “no taxpayer name or return information was requested or involved, there can be no confidentiality concerns.”

According to TAX, creating revenue estimates sometimes requires extracting tax data from tax returns, but more typically is based on “tax data that [TAX] tabulates for its regular reports or data from other sources.” For the revenue estimates at issue here, TAX used data provided by the Hawaii Housing Finance and Development Corporation (HHFDC), which TAX noted is available to the public. Indeed, OIP found that HHFDC Awards Lists included in the requested records are available online, although the versions in the requested records had handwritten notations added in some cases. See Awards, HHFDC (last visited May 15, 2019), http://dbedt.hawaii.gov/hhfdc/developers/copy_of_copy_of_rhtf_html/. TAX “also reviewed certain filed tax returns to check the validity of some assumptions used to produce the revenue estimates.” However, no tax returns were included in the records provided for OIP’s *in camera* review, and the only information identifiable to a single taxpayer was in the HHFDC Awards Lists that, as TAX acknowledged, are already available to the public.

TAX’s employees have “specialized job skills and experience” in addition to “access to historical tax data” that TAX asserts make them the only agency within the executive or legislative branch capable of revenue estimation. In creating revenue estimates, TAX “acts from a neutral policy perspective, as if the staff were attached to the Legislature.” TAX presents its revenue estimates of the effect of legislative bills to the Legislature by way of its testimony on those bills.

In its response to this appeal, TAX originally argued that (1) the UIPA exempts “inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product” and TAX staff acts on behalf of the Legislature in creating revenue estimates, and (2) the records sought were predecisional and deliberative and thus fell within the “deliberative process privilege” (DPP)¹ form of the UIPA’s exception for records whose disclosure would frustrate a legitimate government function. See HRS § 92F-13(3) and (5).

The DPP has been adopted in other jurisdictions and allows government agencies to withhold predecisional and deliberative internal records. Since 1989,

¹ For OIP’s detailed analysis of the history of the DPP, including legislative source materials, see <https://oip.hawaii.gov/wp-content/uploads/2019/03/OIP-analysis-of-DPP-case-3.1.2019-final.pdf>.

OIP had recognized the DPP as a valid reason to withhold records under section 92F-13(3), HRS, the UIPA's frustration exception. Subsequent to the filing of this appeal, the Hawaii Supreme Court's Peer News decision invalidated the use of the DPP under the UIPA to withhold certain internal records on the basis that decisionmaking was not a government function that fell within the frustration exception.

OIP informed TAX of the Peer News decision and allowed time for TAX to supplement its position based on the Court's decision. In its supplemental response, TAX argued that the government function that would be frustrated by disclosure of the records at issue is TAX's "ability to produce objective and independent revenue estimates," which the Legislature relies on to balance the State's budget.

DISCUSSION

Under the UIPA, all government records are open to the public unless an exception to disclosure in section 92F-13, HRS, applies. HRS § 92F-11 (2012). As discussed above, TAX raised several possible exceptions to disclosure, which OIP will address in turn.

I. TAX Has Not Established That a Confidentiality Statute Applies

In its Notice to Requester, TAX stated generally that "some of the tax data is protected from disclosure under the confidentiality provisions of Title 14, HRS." TAX did not mention this argument in its responses to this appeal, and did not at any point provide a citation to a specific statute or identify specific information covered by a confidentiality statute. Thus, TAX may not have intended to seriously pursue this argument; nonetheless, since it was raised in TAX's Notice to Requester OIP will address it before moving on to TAX's other grounds for withholding the requested records.

An agency bears the burden to establish that an exception to disclosure applies under the UIPA. E.g. OIP Op. Ltr. No. F17-02 at 8, citing HRS § 92F-15(c) (2012) and § 2-73-15(c) (2012), HAR. To meet this burden, an agency arguing that section 92F-13(4), HRS, allows it to withhold records based on a confidentiality statute must typically cite the specific confidentiality statute relied upon and explain its applicability to specific records or information withheld. A general citation to Title 14 is inadequate to meet this burden. OIP further notes that in this case the records that include names of specific projects qualifying for a tax credit, the HHFDC Awards Lists, are public information according to TAX and are

available online. OIP therefore concludes that the records at issue² do not fall under a confidentiality statute and thus may not be withheld under section 92F-13(4), HRS.

II. TAX Work Product Does Not Fall Under Section 92F-13(5), HRS

The UIPA does not require disclosure of “[i]nchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product[.]” HRS § 92F-13(5). TAX argues that although it is not part of the legislative branch, “only [TAX’s] Tax Research and Planning staff is able to undertake the specialized function of developing revenue estimates. . .,” and TAX “acts from a neutral policy perspective, as if the staff were attached to the Legislature.” It appears that TAX made this argument primarily to support its original argument that the records at issue fall under the now-defunct DPP form of the UIPA’s frustration exception (see discussion of Peer News, supra); however, OIP will examine whether TAX has established that the records may be withheld under section 92F-13(5), HRS.

OIP is required to interpret the UIPA’s provisions to promote its underlying purposes. HRS § 92F-2 (2102). The purposes most relevant here are “the public interest in disclosure” and “governmental accountability through a general policy of access to government records.” See id. To promote those underlying purposes, OIP must interpret the UIPA’s exceptions to disclosure narrowly. OIP Op. Ltr. No. 90-3 at 7.

The plain language of section 92F-13(5), HRS, clearly makes it applicable to working papers of “legislative committees,” not executive branch agencies such as TAX. OIP further notes that even assuming for the sake of argument that this exception could apply to the work of executive branch employees who are effectively acting as temporary legislative committee staff, TAX has not established here that its Tax Research and Planning staff is effectively acting as legislative staff in all but name during the legislative session. OIP accepts that TAX has specialized knowledge and skills that it uses to provide neutral revenue analysis in its testimony to the Legislature, but does not find that this is unique to TAX. Other executive branch agencies also testify based on their specialized knowledge and skills in particular areas, and in many cases also seek to provide a neutral analysis of the effects of legislative proposals. TAX has not asserted that its staff is

² TAX asserted that in some cases the source data and documents it relies upon to produce revenue estimates include data extracted from tax returns. While the source data and documents at issue here did not include information subject to a confidentiality statute, OIP does not conclude in this opinion that such source data and documents must be disclosed in all cases. When responding to future requests, to the extent the responsive records include information actually protected by a confidentiality statute, TAX may withhold that information.

temporarily housed in legislative offices during the legislative session, or that it produces these revenue analyses under the direction of legislative committees such that the employees involved are acting effectively as legislative staffers. To the contrary, TAX stated that it presents the revenue estimates to the relevant committees in its testimony on measures up for hearing. Based on the plain language of the statute as well as the circumstances in which the revenue estimates are created and presented to the Legislature, OIP concludes that the records at issue here are not working papers of “legislative committees” that may be withheld under section 92F-13(5), HRS.

III. Disclosure of Assumptions and Methodology Would Not Frustrate a Legitimate Government Function

A. TAX’s Argument

TAX argued in its original response to the appeal that public disclosure of how TAX reaches revenue estimates would frustrate “the ability of [TAX] to provide unbiased revenue estimates to the Legislature.” In TAX’s view, making its assumptions and methods for a revenue estimate public “would result in skewed analyses, as the interested parties would challenge only the assumptions they found less favorable to their position.” TAX further asserted that its revenue estimates “often require assumptions about facts for which data are limited or subject to a great deal of uncertainty, such as when behavioral responses of taxpayers must be taken into account,” and that disclosure would allow “proponents and opponents of [a] measure . . . to undermine the revenue estimate analyses” by TAX staff.³

In its supplemental response after the Peer News decision was issued, TAX argued that the government function that would be frustrated by disclosure was its “ability to produce objective and independent revenue estimates.”

TAX has set out a rationale for how disclosure of the assumptions and methodology used in reaching revenue estimates for legislative measures could ultimately impair the effectiveness of its revenue forecasts in allowing the Legislature to make decisions based on neutral analysis, by allowing proponents or opponents of a bill to contest the assumptions and methodology by which the estimates were reached instead of arguing as to why a legislative measure was or

³ TAX also argued that for these same reasons, revenue-estimating assumptions and methods are not publicly disclosed by the Office of Tax Analysis in the Treasury Department of the United States of America. However, the fact that the DPP is recognized as a basis for withholding records under the federal Freedom of Information Act, whereas the Peer News court held that it is not recognized under the UIPA, makes federal agency practices regarding deliberative materials an unreliable guide for State and county agencies. See 5 U.S.C.S. § 552 (LexisNexis, Lexis Advance through PL 116-17, approved 5/10/19).

was not worthwhile in view of its anticipated effect on revenue or proposing changes to a measure to address a prospective loss of revenue. However, the impairment TAX has described is essentially a frustration of both TAX's and arguably the Legislature's ability to reach sound decisions. TAX's argument is that under the Peer News standard "certain deliberative records may still qualify" for the UIPA's frustration exception, so long as the agency "define[s] the government function that would be frustrated by a record's disclosure with a degree of specificity" and "demonstrate[s] a connection between disclosure of the specific record and the likely frustration of a legitimate government function." See Peer News at 143 Haw. 472, 487.

B. The Peer News Decision

1. **Recognition that Deliberative Material May Sometimes Be Withheld**

In the Peer News majority opinion,⁴ the Court recognized in a lengthy footnote that certain types of deliberative material may be withheld from disclosure under certain conditions:

This is not to say that certain types of deliberative communications will not qualify for withholding when the government can identify a concrete connection between disclosure and frustration of a particular legitimate government function. For instance, if disclosed prior to a final agency decision, many pre-decisional draft documents may impair specific agency or administrative processes in addition to inhibiting agency personnel from expressing candid opinions. However, an agency must clearly describe what will be frustrated by disclosure and provide more specificity about the impeded process than simply "decision making." See infra Section III.D.

Additionally, writings that are truly preliminary in nature, such as personal notes and rough drafts of memorandum that have not been finalized for circulation within or among agencies, may not qualify as government records for purposes of an agency's disclosure obligations. See OIP Op. Ltr. No. 04-17 (Oct. 27, 2004) ("[W]e find, in line with the number of other state and federal courts that have similarly construed other open records laws, that the determination of whether or not a record is a 'government record' under the UIPA or a personal record of an official depends on the totality of circumstances surrounding its

⁴ As will be discussed infra, a dissenting opinion by two members of the Hawaii Supreme Court accompanied the three-member majority opinion.

creation, maintenance and use. . . . [C]ourts have distinguished personal papers. . . from public records where they ‘are generally created solely for the individual’s convenience or to refresh the writer’s memory, are maintained in a way indicating a private purpose, are not circulated or intended for distribution within agency channels, are not under agency control, and may be discarded at the writer’s sole discretion.’” (internal citations omitted) (quoting Yacobellis v. Bellingham, 780 P.2d 272, 275 (Wash. App. 1989)); Shevin v. Byron, Harless, Schaffer, Reid & Assoc., Inc., 379 So.2d 633, 640 (Fla. 1980) (“To be contrasted with ‘public records’ are materials prepared as drafts or notes, which constitute mere precursors of governmental ‘records’ and are not, in themselves, intended as final evidence of the knowledge to be recorded [unless] they supply the final evidence of knowledge obtained in connection with the transaction of official business.”); cf. Conn. Gen. Stat. § 1-210(e)(1) (2018) (“[D]isclosure shall be required of: . . . [i]nteragency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency.”).

It is also noted that, when there is a true concern that disclosure of deliberative communications may expose specific individuals to negative consequences, the individuals’ identities may potentially qualify for withholding pursuant to HRS § 92F-13(1) if their privacy interests outweigh the public’s interest in disclosure.

Peer News at 480, n. 15.⁵

⁵ In OIP Opinion Letter Number 04-17, which was referenced above by the majority, OIP concluded that individual employees’ personal calendars and telephone message slips were personal records and not “government records” maintained by an agency. As the Court suggested, a set of handwritten notes or perhaps a draft document stored only a computer’s local drive, similar to personal paper calendars or a calendar on a computer’s local drive accessed only by that computer’s user, might not be considered a government record because it is not “maintained” by a government agency.

Since the time OIP Opinion Letter Number 04-17 was issued, however, agencies have increasingly turned to file servers, including cloud servers, to store their work product including both finished documents and unfinished or draft documents. OIP notes that this technological shift makes it more likely that most draft documents created by agency staff would indeed be considered “government records” for the purpose of the UIPA, because

If read in isolation, this footnote would support TAX's argument that under the Peer News standard an agency may still withhold deliberative documents to protect the integrity of its decisionmaking process as long as it explains in specific detail and without using the term DPP how the disclosure of deliberative and predecisional material would deter its staff from expressing candid opinions or otherwise impair its ability to reach sound decisions. However, it is important to read the footnote in the context of the full opinion, and particularly in the context of the majority opinion's rejection of the approach proposed by the dissenting opinion, to fully understand the Peer News decision's approach to deliberative and predecisional material.

2. Majority Opinion Compared to Dissenting Opinion

The majority opinion strictly construed the UIPA's statutory policy that "the formation . . . of public policy,' including 'discussions' and 'deliberations,' 'shall be conducted as openly as possible,'" and concluded that "[c]ommunications between decision-makers and their subordinates regarding adopting available courses of action prior to the making of a decision is the very definition of deliberations in common usage, case law, and the OIP's own precedents." Peer News at 480, n. 14. Based on that, the majority opinion concluded that the DPP would render much of the UIPA's policy "a dead letter" because it would protect from public scrutiny the very deliberations comprising part of a process by which government decision and policies are formulated. Id. The majority opinion concluded that "because the deliberative process privilege attempts to uniformly shield records from disclosure without a determination that disclosure would frustrate a legitimate government function, it is inconsistent with the plain language of HRS § 92F-13(3)." Id. at 481.

By contrast, the dissenting opinion emphasized the limitations placed in the UIPA's statutory purpose: "as possible" and "unless access is restricted or closed by law." It concluded that "the inclusion of such qualifying language in the

unlike handwritten notes in a desk drawer or a document stored on a computer's local drive, a file on an agency's fileservers is readily accessible to other agency personnel even in the absence of its author and thus is "maintained" by the agency as a whole, rather than by an individual staffer in a way indicating a private purpose. Of course, UIPA exceptions could still apply to such records.

Information stored on an agency's fileservers may be distinguished from information stored on an employee's personal cloud-based calendar or other account and accessed on a government computer to coordinate business scheduling or for personal reasons while on break. The mere access to a person's personal calendar or other information from a government computer does not turn the personal information into a government record maintained by the agency, absent other facts showing that a government agency actually "maintained" those records.

UIPA supports that the Legislature may have intended for certain ‘discussions, deliberations, decisions, and action[s] of government agencies,’ HRS § 92F-2, to remain confidential” and that “the recognition of a privilege that limits the disclosure of certain types of internal memoranda and communications relating to an agency’s deliberative process in the course of decision-making and policy formation is consistent with such legislative intent.” Peer News at 492. While agreeing that “the UIPA favors ensuring the transparency of and public access to our government’s decisionmaking and policy-development processes,” the dissenting opinion found that the “the plain language of several provisions in the UIPA indicates that the Legislature did not intend for such transparency and accessibility to be absolute” and viewed the DPP, as properly applied, to exempt some but not all government deliberations. Id.

Thus, the dissenting opinion would not have completely abandoned the DPP, and instead proposed an approach that “would require the government to more fully describe in the first instance why a specific document qualifies for the privilege, and require the court to balance that interest with a party’s statutory interest in disclosure.” Peer News at 500. After an agency established a preliminary showing of why disclosure would be harmful to its interests, the dissent proposed that the government’s interest in confidentiality for its deliberative process be balanced with the requesters’ interest in disclosure of the materials. Id. Thus, rather than mechanically considering whether a document is predecisional and deliberative to qualify under the DPP, the dissent proposed “weigh[ing] the government’s interest in confidentiality with a party’s interest in disclosure on a case-by-case basis.” Id.

When reading statements in the majority opinion that seem to support the idea that an agency may still withhold deliberative documents to protect the integrity of its decisionmaking process as long as it explains its concerns in detail, it is important to recognize that the majority opinion explicitly **rejected** the dissent’s proposal to weigh an agency’s interest in confidentiality against the public interest in disclosure for predecisional and deliberative documents, stating that “the dissent would thus usurp the role of the legislature by reading a complex exception into the statute that has no basis in its text or legislative history.” Peer News at 488. While recognizing that “[t]he dissent’s approach may well represent sound policy, and we express no opinion as to its advisability as matter of public administration,” the majority nevertheless asserted that “[t]he determination as to whether and to what extent deliberative documents should be shielded from disclosure must be made by the legislature and not by judicial fiat.” Id. at 489.

3. Guidance in Majority Opinion

The majority opinion provided guidance as to the application of the frustration exception and used as a starting point the examples found in the UIPA’s legislative history. See Senate Standing Committee Report No. 2580,

March 31, 1988 (SSCR 2580).⁶ The majority stated, “Although it is not necessary that a record fall within or be analogous to one of the enumerated categories for it to be shielded from disclosure under HRS § 92F-13(3), the list and text of the Senate Standing Committee report provides guidance as to the provision’s operation.” Peer News at 486. The Court noted that “each of the legislature’s provided examples implicates a specific legitimate government function, including the enforcement of laws, the procurement of property, the fair administration of exams, and the maintenance of secure record-keeping systems. Id. (emphasis in opinion). The majority rejected, however, “decision-making” as a legitimate government function because it “is such a broad and ill- defined category that it threatens to encompass nearly all government actions, which almost inevitably involve decisions of some sort,” and even illegitimate actions. Id. at 486-487. Because the agency has the burden of proof to establish justification for nondisclosure, “an agency must define the government function that would be frustrated by a record’s disclosure with a degree of specificity sufficient for a reviewing court to evaluate the legitimacy of the contemplated function.” Id. at 486.

The majority further noted that even the expressly enumerated categories of records in SSCR 2580 are not automatically exempt from disclosure. Thus, in addition to establishing the legitimacy of the contemplated function, the frustration exception requires “an individualized determination that disclosure of the particular record or portion thereof would frustrate a legitimate government function.”⁷ Id. at 487 (noting also in footnote 26 that “redaction and disclosure of the remainder of the record is appropriate when the portion of a document that qualifies for withholding under one of HRS § 92F-13’s exceptions is reasonably separable from the record as a whole”). The opinion continued:

That a record is of a certain type—whether that type is deliberative, pre-decisional, or even a type included in or analogous to the examples set forth in the Senate Standing Committee Report—is not alone sufficient to shield the record from disclosure under the provision. While such a designation may be instructive, an agency must nonetheless demonstrate a connection between disclosure of the specific record and the likely frustration of a legitimate government function, including by clearly describing the particular frustration and providing concrete information indicating that the identified outcome is the likely result of disclosure. See OIP Op. Ltr. No. 03-16 at 8 (Aug. 14, 2003) (stating that withholding disclosure of a coaching contract

⁶ For a link to legislative documents, see n. 1.

⁷ OIP has followed this same approach in past opinions. E.g. OIP Op. Ltr. No. F17-01 at 6-7, citing Peer News LLC v. City and County of Honolulu, 138 Haw. 53, 75, 376 P. 3d 1, 23 (2016) (citing with approval OIP Op. Ltr. No. 98-02 at 10).

under HRS § 92F-13(3) was not justified because the university “has provided us with no specific examples of or any concrete information as to how disclosure of the contract will frustrate the Athletic Department’s ability to function”).

In sum, to justify withholding a record under HRS § 92F-13(3), an agency must articulate a real connection between disclosure of the particular record it is seeking to withhold and the likely frustration of a specific legitimate government function. The explanation must provide sufficient detail such that OIP or a reviewing court is capable of evaluating the legitimacy of the government function and the likelihood that the function will be frustrated in an identifiable way if the record is disclosed. See id. at 8, 16 (stating that “[w]e would be remiss in our statutory duties if we simply accepted UH’s statement that disclosure [of the Head Coach’s compensation package] will frustrate a legitimate government function without any factual basis to support UH’s assertion” that disclosure “could have the impact of frustrating the Athletic Director’s ability to maintain a cohesive coaching team and a successful athletic program”). In the absence of such a showing, withholding disclosure under the provision is not warranted.

Id.

C. Decisionmaking as a Government Function Under the Frustration Exception

Given this guidance from the Court, OIP must conclude that decisionmaking fundamentally is not a government function that may be frustrated under section 92F-13(3), HRS, even if the nature of the frustration is explained in detail and even if the function is described by a term other than decisionmaking. In isolation, the Court’s statement that “if disclosed prior to a final agency decision, many pre-decisional draft documents may impair specific agency or administrative processes in addition to inhibiting agency personnel from expressing candid opinions” could be read to suggest that deliberative material can be withheld so long as agency explains how its disclosure would inhibit agency personnel from expressing candid opinions. See Peer News at 480, n. 15. In the context of the opinion as a whole and in particular the majority’s rejection of the dissenting approach, though, it is clear that the Court was not recognizing inhibition of agency personnel from expressing candid opinions as a legitimate basis for frustration by itself, but instead was noting that disclosure of pre-decisional documents might frustrate a specific government function other than decisionmaking, particularly one enumerated in SSCR 2580, and could potentially be withheld (with a sufficient explanation) to avoid frustration of that other government function.

OIP finds that the government function TAX asserts would be frustrated by disclosure—its “ability to produce objective and independent revenue estimates”—is decisionmaking by another name. It is not OIP’s intent to understate the importance of TAX’s role in creating neutral revenue estimates for legislative measures, and OIP notes that the Court acknowledged that an approach allowing some confidentiality for an agency’s deliberative process “may well represent sound policy.” However, as stated above, the Peer News majority explicitly rejected such an approach as proposed by the Peer News dissent, and in light of the Peer News decision, OIP cannot conclude that records may be withheld on the basis that their disclosure would frustrate an agency’s ability to produce sound decisions. The anticipated public scrutiny and questioning of TAX’s methodology and analysis in creating revenue estimates, which TAX points to in support of its frustration argument, is exactly the sort of public scrutiny of the process by which government decisions and policies are formulated that the Court found to be at the core of the UIPA’s public purpose. See Peer News at 479-480.

OIP concludes that under the UIPA as interpreted in Peer News, deliberative and predecisional materials cannot be withheld on the basis that they would frustrate an agency’s decisionmaking function, but may still be withheld under the UIPA’s frustration exception where the agency establishes that some other specific government function would be frustrated by disclosure.⁸

⁸ OIP notes that other forms of frustration of a legitimate government function previously recognized by OIP, and in some cases other UIPA exceptions, may be applied to deliberative and predecisional documents in appropriate circumstances. For instance, SSCR 2580 lists records compiled for law enforcement purposes as an example of records whose disclosure would frustrate a legitimate government function. Applying this example, OIP has long recognized that in most cases, disclosure of the contents of the investigation file in a prospective criminal or civil law enforcement proceeding could reasonably be expected to interfere with that proceeding, and thus most of the contents of an ongoing investigative file can be withheld while the investigation is still pending to prevent frustration of the agency’s criminal or civil investigative function. See, e.g., OIP Op. Ltr. No. 91-9 at 4-8 (discussing similar protection in federal law, frustration exception’s protection of open civil or criminal investigation, and limitations on that protection). An open investigation file will often include predecisional and deliberative material such as investigator notes, internal correspondence about how to proceed in the investigation, draft reports, or similar deliberative materials, which could still be withheld under the frustration exception to avoid interference with the investigation.

SSCR 2580 also lists as an example of where the frustration exception would apply “[i]nformation which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency[.]” In OIP Opinion Letter Number 94-18, citing this legislative example, OIP concluded that an agency could withhold its internal scoring of design / build

Where the agency argues that some other government function would be frustrated by disclosure, the agency must provide an individualized and sufficiently detailed analysis demonstrating the legitimacy of the government function and the likelihood that the function will be frustrated in an identifiable way if the record is disclosed.

RIGHT TO BRING SUIT

Requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, 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 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.

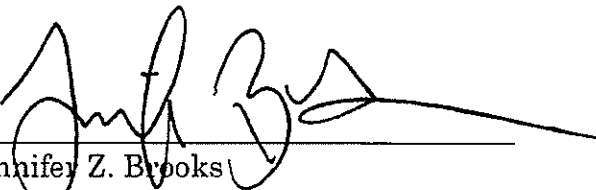
proposals prior to the actual execution of a contract. While a government procurement is ongoing, similar deliberative and predecisional material regarding it could be still be withheld as necessary to avoid frustrating a legitimate government function by raising the cost of government procurements or giving a manifestly unfair advantage to one prospective contractor.

Where government attorneys are involved, OIP has recognized the attorney work product privilege and the attorney client privilege as falling within the UIPA's frustration exception, as well as section 92F-13(2) and, in the case of the attorney client privilege, section 92-13(4), HRS. E.g. OIP Op. Ltrs. No. F14-01 and 01-05. These privileges would in many instances apply to deliberative material involving or created by a government attorney. Additionally, an agency may still withhold information discussed in deliberative materials where the information is itself protected, such as information that would fall within the UIPA's privacy exception, section 92F-13(1), HRS, or that falls within a confidentiality statute and thus may be withheld under section 92F-13(4), HRS.

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

From: [OIP](#)
To: [Takayama, Linda C](#)
Cc: [Kwan, Deborah](#)
Bcc: [Brooks, Jennifer Z](#)
Subject: OIP Op. Ltr. No. F19-05 relating to U APPEAL 16-43
Date: Monday, May 20, 2019 12:50:00 PM
Attachments: [OIP Op. Ltr. No. F19-05 Kamikawa re DOTAX.pdf](#)

Director Takayama and Ms. Kwan:

Attached is Formal Opinion F19-05 regarding U APPEAL 16-43.

Please contact our office if you have difficulty opening the attachment.

Thank you,

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From: [OIP](#)
To: ["Ray Kamikawa"](#)
Bcc: [Brooks, Jennifer Z](#)
Subject: OIP Op. Ltr. No. F19-05 relating to U APPEAL 16-43
Date: Monday, May 20, 2019 12:50:00 PM
Attachments: [OIP Op. Ltr. No. F19-05 Kamikawa re DOTAX.pdf](#)

Ms. Kamikawa:

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Please contact our office if you have difficulty opening the attachment.

Thank you,

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In re

OFFICE OF INFORMATION PRACTICES
OPINION LETTER NO. F19-05


S.P. No. 19-1-0191 DEO
(Agency Appeal)

CERTIFICATION OF RECORD

CERTIFICATION OF RECORD

I, JENNIFER Z. BROOKS, Staff Attorney for the Office of Information Practices, hereby certify that the documents listed in the Index to Certified Administrative Record on Appeal to the Circuit Court of the First Circuit, State of Hawaii, and attached hereto, constitute the true and complete record of the proceedings in U APPEAL 16-43 on file of the Office of Information Practices.

DATED: Honolulu, Hawaii, July 10, 2019.



JENNIFER Z. BROOKS
Staff Attorney
Office of Information Practice

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

In re

OFFICE OF INFORMATION PRACTICES
OPINION LETTER NO. F19-05

S.P. No. 19-1-0191 DEO

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of the foregoing document was duly served upon the individuals listed below by hand delivery or U.S. Mail, postage prepaid, as indicated below:

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