

CLARE E. CONNORS 7936  
Attorney General of Hawaii

GARY S. SUGANUMA 6960  
KRISTEN M.R. SAKAMOTO 9279  
Deputy Attorneys General  
Department of the Attorney General,  
State of Hawaii  
425 Queen Street  
Honolulu, Hawaii 96813  
Telephone: (808) 586-1470

Attorneys for DEPARTMENT OF TAXATION,  
STATE OF HAWAII

FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED

2019 SEP 30 AM 9:38

N. ANAYA  
CLERK

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

DEPARTMENT OF TAXATION, STATE  
OF HAWAII'S OPENING BRIEF;  
CERTIFICATE OF SERVICE

DEPARTMENT OF TAXATION, STATE OF HAWAII'S OPENING BRIEF

**INTRODUCTION**

Pursuant to section 92F-13(3), Hawaii Revised Statutes (HRS), a government agency may withhold government records in response to a records request if disclosure would frustrate a legitimate government function. In this case, the Department of Taxation (DOTAX) properly withheld the assumptions, data, and analysis it used to create revenue estimates for legislative bills because disclosure would frustrate a legitimate government function by politicizing the estimates, thereby compromising their objectivity and independence, and providing an unfair advantage to the requester.

The Hawaii Supreme Court recently held in *Peer News LLC v. City and County of Honolulu*, 143 Hawaii 472 (2018) that the Office of Information Practices (OIP) must make an "individualized determination" of whether disclosure would frustrate a legitimate government function by evaluating the legitimacy of the specific government function defined by the government agency and the connection between disclosure and frustration of the government function. In this case, OIP failed to make an individualized determination, opting instead to use a formulaic or "blanket" rule to resolve the issue.

Specifically, OIP opined that section 92F-13(3), HRS, does not apply whenever the government function identified by an agency can be described as "decisionmaking by another name." OIP rejected the specific government function defined by DOTAX—the creation of revenue estimates—and broadly redefined the government function as "decisionmaking" to fit its blanket rule. OIP also failed to evaluate whether politicizing the revenue estimates, which will compromise the objectivity and independence of the estimates and confer an unfair advantage on the requester, constitutes frustration of a legitimate government function, and instead, merely analyzed whether DOTAX's "ability to produce sound decisions" qualifies for the exemption. In sum, OIP's adoption of a blanket rule and determination that disclosure of the assumptions, data, and analysis used to create the revenue estimates would not frustrate a legitimate government function are palpably erroneous.

In the alternative, the assumptions, data, and analysis used by DOTAX to create the revenue estimates are exempt from disclosure under section 92F-13(5), HRS, because the records constitute draft documents or work product of a legislative committee, as DOTAX created the estimates at the direction of a legislative committee. OIP therefore palpably erred in concluding that section 92F-13(5), HRS, does not apply.

Accordingly, the Court should reverse OIP Opinion Letter No. F19-05 because OIP palpably erred in: (1) adopting a blanket rule to analyze the exemption for frustration of a legitimate government function under section 92F-13(3), HRS, which fails to take into account the actual and specific government function identified by the agency and the connection between disclosure and frustration; (2) failing to evaluate and conclude that DOTAX's creation of revenue estimates is a legitimate government function; (3) failing to conclude that disclosure of the assumptions, data, and analysis for revenue estimates would politicize the revenue estimates, compromising their objectivity and independence, and confer an unfair advantage on the requester, thereby frustrating a legitimate government function; and (4) concluding that the assumptions, data, and analysis for revenue estimates do not qualify as draft documents or work product of a legislative committee under section 92F-13(5), HRS.

#### **STATEMENT OF QUESTIONS PRESENTED**

1. Did OIP palpably err in adopting a blanket rule that makes section 92F-13(3), HRS, inapplicable whenever the government function identified by an agency can be described as "decisionmaking by another name"?
2. Did OIP palpably err in failing to conclude that the creation of revenue estimates is a legitimate government function?
3. Did OIP palpably err in failing to conclude that disclosure of the assumptions, data, and analysis used by DOTAX to create revenue estimates would frustrate a legitimate government function by politicizing the estimates, thereby compromising their objectivity and independence, and conferring an unfair advantage on the requester?

4. Did OIP palpably err in concluding that the assumptions, data, and analysis used by DOTAX to create revenue estimates, which are completed at the request of legislative committees, do not qualify as draft papers or work product of legislative committees?

### STATEMENT OF FACTS

On or about April 15, 2016, Ray Kamikawa, Esq. made a written request to DOTAX for 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).

(R. 3-11.)

House Bill 2744, HD 1, SD 1 and Senate Bill 2833, SD 2, HD 1, which are substantially similar, would have amended the State low-income housing tax credit by increasing the amount of credit that may be claimed for buildings financed by tax-exempt bonds, reducing the term over which the credit is taken from ten years to five years, and making the at-risk rules and passive activity loss rules provided by the Internal Revenue Code inapplicable. (R. 6-7, 9-10.) In written testimony submitted to the Senate Committee on Ways and Means and the House Committee on Finance, DOTAX estimated that each bill would have resulted in losses of \$9 million in fiscal year 2019, \$18 million in fiscal year 2020, and \$27 million in fiscal year 2021.

(R. 8, 11.)

Revenue estimates are prepared by DOTAX's Tax Research and Planning Office pursuant to a request from certain legislative committees. (R. 12.) As far as DOTAX is aware, it is the only agency that is able to perform the revenue estimating function because of the specialized

job skills and experience of its staff and access to historical tax data. (R. 33.) The revenue estimates are prepared from a neutral policy perspective and are presented to the Senate Committee on Ways and Means and the House Committee on Finance. (*Id.*)

On May 13, 2016, DOTAX denied Mr. Kamikawa's request for records and Mr. Kamikawa subsequently appealed to OIP. (R. 1-2, 12.) On May 20, 2019, OIP issued Opinion Letter No. F19-05, in which it concluded that the exemptions for frustration of a legitimate government function under section 92F-13(3), HRS, and work product of a legislative committee under section 92F-13(5), HRS, do not apply. (R. 61-75.)

### **STANDARD OF REVIEW**

A decision by OIP shall be reversed if it is palpably erroneous. HRS § 92F-43(b).

### **ARGUMENT**

I. **OIP PALPABLY ERRED IN CONCLUDING THAT DISCLOSURE OF THE ASSUMPTIONS, DATA, AND ANALYSIS USED BY DOTAX TO CREATE REVENUE ESTIMATES WOULD NOT FRUSTRATE A LEGITIMATE GOVERNMENT FUNCTION.**

The Uniform Information Practices Act provides, "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." HRS § 92F-11(b). 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." The exemption under section 92F-13(3), HRS, applies to records that are of "such a nature that disclosure would impair the government's ability to fulfil its proper duties." *Peer News LLC v. City and County of Honolulu*, 143 Hawaii 472, 479 (2018).

**A. OIP Palpably Erred in Adopting a Blanket Rule in Lieu of Making an Individualized Determination as to Whether Disclosure Would Frustrate a Legitimate Government Function.**

1. The Hawaii Supreme Court, in rejecting the deliberative process privilege, held that an "individualized determination" must be made.

In *Peer News LLC v. City and County of Honolulu*, the Hawaii Supreme Court overturned a line of opinions issued by OIP that recognized the deliberative process privilege as an exception to disclosure under section 92F-13(3), HRS. 143 Hawaii at 479, 489. The deliberative process privilege, as formulated by OIP, applied anytime a record was pre-decisional and deliberative and did not require any showing that disclosure would negatively impact a legitimate government function. *Id.* at 479. After finding the disclosure of pre-decisional, deliberative records did not "inherently" frustrate a legitimate government function, the Hawaii Supreme Court concluded that there was no "blanket" privilege that would "uniformly" shield records from disclosure "without a determination that disclosure would frustrate a legitimate government function." *Id.* at 480-81.

The Hawaii Supreme Court did not, however, hold that pre-decisional, deliberative records could never be exempt from disclosure under section 92F-13(3), HRS. *Id.* at 480 n.15. In fact, the Hawaii Supreme Court clarified that certain pre-decisional, deliberative records may be exempt from disclosure, but an "individualized determination" must be made:

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."

*Id.* at 480 n.15, 487.

Accordingly, "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." *Id.* at 487. OIP must then evaluate "the legitimacy of the government function and the likelihood that the function will be frustrated in an identifiable way if the record is disclosed." *Id.*

2. OIP's blanket rule contravenes the requirement that an individualized determination be made.

Contrary to the express instructions provided in *Peer News*, OIP failed to evaluate the legitimacy of DOTAX's function in preparing revenue estimates and the likelihood that the function will be frustrated by disclosure. Instead, OIP adopted a blanket rule whereby any government function that can be described as "decisionmaking" will not qualify for the exemption under section 92F-13(3), HRS. (R. 72.) As OIP erroneously explained, "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." (*Id.*)

In adopting this blanket rule, OIP rejected the specific government function defined by DOTAX—the creation of revenue estimates—and broadly redefined the government function as "decisionmaking." (R. 73.) OIP's rejection of DOTAX's definition renders the requirement that an agency define the government function with specificity meaningless. *See Peer News*, 143 Hawaii at 487 ("agency must define the government function that would be frustrated by a record's disclosure with a degree of specificity"). Further, OIP's reclassification of the government function as "decisionmaking," which the Hawaii Supreme Court has ruled is too broad, allows OIP to automatically reject DOTAX's claim and circumvent the requirement to make an individualized determination. *See id.* at 487 ("HRS § 92F-13(3) calls for an

individualized determination that disclosure of the particular record or portion thereof would frustrate a legitimate government function").

Moreover, OIP's approach effectively nullifies the exemption, as "nearly all government actions . . . almost inevitably involve decisions of some sort." *See id.* at 486-87. In fact, many of the examples of legitimate government functions that qualify for the exemption that are listed in the legislative history involve decisionmaking. *See* S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1095 (listing "examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function"). For example, the government's law enforcement function ultimately results in a decision on whether a person has violated a law and what penalties will be imposed, and can therefore be described as decisionmaking. *See id.* (identifying "[r]ecords or information compiled for law enforcement purposes" as type of record that may qualify for exemption). Similarly, the government's procurement and contract administration function ultimately results in a decision of which party will be awarded a contract, how much will be spent, and which terms will be included in the contract—actions that can be described as decisionmaking. *See id.* (identifying "[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 agreement with an agency" as type of record that may qualify for exemption).

Accordingly, OIP's conclusion that records that constitute decisionmaking are subject to disclosure "even if the nature of the frustration is explained in detail and even if the function is described by a term other than decisionmaking" should be reversed as palpably erroneous. *See Peer News*, 143 Hawaii at 485 (OIP opinion palpably erroneous where "interpretation rendered portions of the UIPA a 'nullity'"). Section 92F-13(3), HRS, requires "an individualized



determination" that disclosure would frustrate a legitimate government function, which OIP's blanket rule contravenes. *Id.* at 487.

**B. OIP Palpably Erred in Failing to Conclude That DOTAX's Creation of Revenue Estimates is a Legitimate Government Function.**

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.* The government function, which must be more specific than "decisionmaking," must be legitimate, or within the government's legal authority. *Id.* at 486-87 (rejecting decisionmaking as a legitimate government function because it may encompass "illegitimate actions beyond the government's legal authority"); *see also* Black's Law Dictionary (11th ed. 2019) (defining legitimate as lawful, genuine, or valid); *see also* *Adams v. CDM Media USA, Inc.*, 135 Hawaii 1, 15 (2015) (defining legitimate as lawful or genuine).

The specific and legitimate government function implicated in this case is the creation of revenue estimates for legislative bills.<sup>1</sup> OIP has not asserted that DOTAX's creation of revenue estimates is unlawful or beyond its legal authority. (R. 61-75.) In fact, OIP did not provide any analysis as to whether the creation of revenue estimates is a legitimate government function. (*Id.*) OIP merely acknowledged the "importance of TAX's role in creating neutral revenue estimates for legislative measures." (R. 73.)

---

<sup>1</sup> The Tax Foundation of Hawaii proffers that the government function at issue in this case is not the creation of revenue estimates, but rather "making good and wise laws." (Tax Foundation of Hawaii's Amicus Curiae Mem. ("AC") at 2.) Like "decisionmaking," however, "lawmaking" is too broad a category for purposes of analyzing the exemption for frustration of a legitimate government function. *See Peer News*, 143 Hawaii at 486-87 ("'decision-making' is such a broad and ill-defined category"). Moreover, lawmaking is a function of the legislature, not DOTAX. *See Sherman v. Sawyer*, 63 Haw. 55, 57 (1980) (legislature vested with "power to enact laws and to declare what the law shall be").

DOTAX's revenue-estimating function is consistent with its statutory duty to "construe the tax and revenue laws, the administration of which is within the scope of the department's duties, whenever requested by any officer acting under those laws, or by an interested person" and to "recommend to the governor any amendments, changes, or modifications of the laws as may seem proper or necessary to remedy injustice or irregularity in taxation or to facilitate the assessment of taxes." HRS § 231-3(3), (7). As far as DOTAX is aware, "no other staff or agency in the Executive and Legislative Branches is able to perform this revenue estimation function." (R. 33.) Certain legislative committees have therefore requested that DOTAX provide them with revenue estimates, which are used in the committees' deliberations on whether to advance the bill and relied on for purposes of balancing the State's budget. (R. 12, 44.)

DOTAX's creation of revenue estimates, which is performed at the behest of the legislature and in line with DOTAX's statutory duties, is therefore a legitimate government function and OIP palpably erred in failing to reach said conclusion.

**C. OIP Palpably Erred in Failing to Conclude That Disclosure of the Assumptions, Data, and Analysis for Revenue Estimates Would Frustrate a Legitimate Government Function.**

Once a legitimate government function is identified, section 92F-13(3), HRS, requires the agency "demonstrate a connection between disclosure of the specific record and the likely frustration of a legitimate government function." *Peer News*, 143 Hawaii at 487 (emphasis in original). Although "generalized concerns alone" that disclosure may inhibit agency personnel from expressing candid opinions are insufficient to qualify for the exemption, a legitimate government function may be impaired in other ways. *Id.* at 479, 480 n.15. Particularly, the legislature, in enacting section 92F-13(3), provided examples of records which, if disclosed, may frustrate a legitimate government function and explanations of how a frustration may occur:

- (1) Records or information compiled for law enforcement purposes;
- (2) Materials used to administer an examination which, if disclosed, would compromise the validity, fairness or objectivity of the examination;
- (3) Information 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 agreement with an agency, including information pertaining to collective bargaining;
- (4) Information identifying or pertaining to real property under consideration for future public acquisition, unless otherwise available under State law;
- (5) Administrative or technical information, including software, operating protocols and employee manuals, which, if disclosed, would jeopardize the security of a record-keeping system;
- (6) Proprietary information, such as research methods, records and data, computer programs and software and other types of information manufactured or marketed by persons under exclusive legal right, owned by an agency or entrusted to it;
- (7) Trade secrets or confidential commercial and financial information;
- (8) Library, archival, or museum material contributed by private persons to the extent of any lawful limitation imposed by the contributor; and
- (9) Information that is expressly made nondisclosable or confidential under Federal or State law or protected by judicial rule.

S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1095. Although this list is instructive, "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." *Peer News*, 143 Hawaii at 486.

In this case, OIP narrowly analyzed whether a hindrance of DOTAX's "ability to produce sound decisions" constitutes frustration of a legitimate government function. (R. 73.) The issue presented, however, is not limited to whether the creation of revenue estimates will be frustrated by the inhibition of ideas. OIP failed to analyze whether, in addition to inhibiting the free exchange of ideas, a legitimate government function will be frustrated by the loss of the revenue estimates' objectivity and independence and the unfair benefit that will be conferred on the requester. (R. 61-75.)

Just as disclosure of information used to administer an examination (second example in Senate Standing Committee Report No. 2580) may "compromise the validity, fairness or

objectivity of the examination," disclosure of the assumptions, data, and analysis used to create the revenue estimates will compromise the objectivity and independence of the estimates. *See* S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1095. If DOTAX's assumptions, data, and analysis are disclosed, revenue estimates will be subject to politically-motivated attacks and DOTAX will be the subject of public and legislative pressure to change its methodology and create new revenue estimates or amend its previous estimates. Thus, revenue estimates, which were originally free from political motivation and intrusion, will lose their objectivity and independence. As explained by the Office of Tax Analysis of the United States Treasury Department, which provides revenue estimates for federal tax proposals, disclosure of its methodology will result in "biased criticism," as the "[p]ublic 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." (R. 34 (quoting Thomas Field, *Transparency in Revenue Estimating* (The Heritage Foundation 2004), available at <https://www.heritage.org/taxes/report/transparency-revenue-estimating>)).

The Tax Foundation of Hawaii asserts that the revenue estimates are not independent or objective because DOTAX prepares its own legislative proposals, supports Administration proposals, and takes positions on other bills. (AC 4.) The bills at issue in this case (House Bill 2744, HD 1, SD 1 and Senate Bill 2833, SD 2, HD 1) were not Administration measures (*i.e.*, the bills were not introduced at the request of the Governor) and DOTAX neither supported nor opposed the bills. (R. 6-11.) Even if, however, DOTAX supported or opposed the bills, the revenue estimating process is independent from any policy positions taken by DOTAX, as the estimates are derived from a neutral policy perspective, a fact that has been accepted by OIP. (R. 65.)

Further, just as the disclosure of information relating to government procurements (third example in Senate Standing Committee Report No. 2580) may confer an "unfair advantage" to a person proposing to enter into a contract with the State, disclosure of the assumptions, data, and analysis used to create the revenue estimates will confer an unfair advantage to the requester. *See* S. Stand. Comm. Rep. No. 2580, in 1988 Senate Journal, at 1095. Interested persons, such as Mr. Kamikawa, will have an unfair advantage, as they will have the opportunity to challenge unfavorable parts of a bill, based on information not widely disseminated to the general public. In fact, Mr. Kamikawa has already made his intent in obtaining the assumptions, data, and analysis clear when he submitted testimony to the legislature in support of Senate Bill 2257, a bill introduced during the 2018 legislative session that would have required DOTAX to disclose its methodology and assumptions for all revenue estimates<sup>2</sup>: "[The bill] will provide transparency to the process, giving everyone an opportunity to question the analysis." (R. 45 (quoting Relating to Taxation: Hearing on S.B. 2257 Before the S. Comm. on Gov't Operations, 29th Leg. (2018) (written testimony of Ray Kamikawa).)

In sum, this case is distinguishable from *Peer News*, in which the sole frustration contemplated was the inhibition of agency personnel from expressing candid opinions. Here, DOTAX has established that a legitimate government function will be frustrated because the objectivity and independence of the revenue estimates will be compromised and an unfair advantage will be conferred upon the requester. Accordingly, OIP Opinion Letter No. F19-05 should be reversed, as OIP palpably erred in concluding that disclosure of the assumptions, data, and analysis for revenue estimates would not frustrate a legitimate government function.

---

<sup>2</sup> Senate Bill 2257, 29th Leg. (2018) did not pass out of the legislature.

**II. OIP PALPABLY ERRED IN CONCLUDING THE ASSUMPTIONS, DATA, AND ANALYSIS FOR REVENUE ESTIMATES DO NOT QUALIFY AS DRAFT WORKING PAPERS OR WORK PRODUCT OF LEGISLATIVE COMMITTEES.**

Section 92F-13(5), HRS, exempts from disclosure “[i]nchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports” and “work product.” Legislative work product includes work performed by consultants or experts. *See ACORN v. City of Nassau*, 2009 WL 2923435, at \*6 (E.D.N.Y. Sept. 10, 2009) (“Legislators must be permitted to have discussions and obtain recommendations from experts retained by them to assist in their legislative functions, without vitiating or waiving legislative privilege”); *see also* Black’s Law Dictionary (11th ed. 2019) (defining work product as “[t]angible material or its intangible equivalent, in unwritten or oral form, that was either prepared by or for a lawyer”).

Although DOTAX itself is not part of a legislative committee, DOTAX acts as an expert or consultant when it prepares the revenue estimates at the committees’ request. (R. 12.) OIP noted that other executive branch agencies also testify based on their specialized knowledge and skills and seek to provide a neutral analysis of the effects of legislative proposals. (R. 65.) Revenue estimates, however, are distinguishable from general testimony given by executive branch agencies because the legislative committees have specifically requested that DOTAX perform the revenue estimates. (R. 12.) Accordingly, OIP Opinion Letter No. F19-05 should be reversed, as OIP palpably erred in concluding that the assumptions, data, and analysis for revenue estimates do not qualify as work product of legislative committees.


## CONCLUSION

The Court should reverse OIP Opinion Letter No. F19-05 and find that the assumptions, data, and analysis DOTAX used to create revenue estimates for House Bill 2744, HD 1, SD 1 and Senate Bill 2833, SD 2, HD 2 during the 28th Legislative Session are not subject to disclosure because OIP palpably erred in concluding that disclosure would not frustrate a legitimate government function. OIP Opinion Letter No. F19-05 should also be reversed because it establishes bad precedent insofar as it runs contrary to the Hawaii Supreme Court's ruling in *Peer News* by allowing OIP to use a blanket rule in lieu of making an individualized determination regarding the applicability of section 92F-13(3), HRS. Moreover, OIP's blanket rule effectively nullifies the exemption by disqualifying any government function that can be described as "decisionmaking."

In the alternative, OIP Opinion Letter No. F19-05 should be reversed because OIP palpably erred in concluding that the assumptions, data, and analysis for revenue estimates do not constitute draft papers or work product of legislative committees.

DATED: Honolulu, Hawaii, September 30, 2019.

CLARE E. CONNORS  
Attorney General

By:   
\_\_\_\_\_  
KRISTEN M.R. SAKAMOTO  
Deputy Attorney General

Attorneys for DEPARTMENT OF  
TAXATION, STATE OF HAWAII

DATED: Honolulu, Hawaii, September 30, 2019.



---

KRISTEN M.R. SAKAMOTO  
Deputy Attorney General