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LESLIE H. KONDO
DIRECTOR

August 30, 2004

Mr. Sean Hao
Honolulu Advertiser
P.O. Box 3110
Honolulu, Hawaii 96802

Re: Public Access to Forecasted Tax Credit Information Prepared for the Council on Revenues
(RFO-P 04-026)

Dear Mr. Hao:

This letter responds to your request for an opinion, received by the Office of Information Practices (the "OIP") on June 14, 2004, regarding disclosure of the above-referenced information under the Uniform Information Practices Act (Modified) (the "UIPA"), chapter 92F of the Hawaii Revised Statutes ("HRS"). Specifically, we have construed your request to raise the following issue:

ISSUE PRESENTED

Whether forecast sections of tax credit data tables (the "Staff Forecasts"), prepared by staff of the Tax Research and Planning Office for use by the Council on Revenues (the "Council") in deliberating and preparing the forecast of state general fund tax revenues issued on March 10, 2004 (the "March 2004 Council Forecast"), must be open to public inspection under the UIPA.

BRIEF ANSWER

We find that the Staff Forecasts consist of the predecisional and deliberative work product of staff to the Council and that the Staff Forecasts were not adopted or incorporated into the March 2004 Council Forecast. Accordingly, we conclude

that the Staff Forecasts are protected by the "deliberative process privilege" and may, therefore, be withheld from disclosure under the "frustration" exception to the UIPA. Haw. Rev. Stat. § 92F-13(3) (1993).

FACTUAL BACKGROUND

Based upon the correspondence and materials received by the OIP from you, the Department of Taxation ("DOTAX"), and the Council, we understand the relevant facts underlying the issue presented above to be as follows:

Article VII, Section 7 of the Constitution of the State of Hawaii established a council on revenues to "prepare revenue estimates of the state government" to be reported to, and considered by, the governor "in preparing the budget, recommending appropriations and revenues and controlling expenditures" and the legislature in "appropriating funds and enacting revenue measures." Section 7 further mandates that "[a]ll revenue estimates submitted by the council to the governor and the legislature shall be made public." See also Haw. Rev. State. § 37-112 (1993). To assist the council, the legislature charged the departments of budget and finance and taxation with providing the council "with such staff assistance and technical support as it may require[,]" and ordered that "all departments and agencies of the executive branch shall furnish the council with such information as deemed necessary by the council to prepare revenue estimates." Haw. Rev. Stat. § 37-111(d)(1993).

In advance of the March 10, 2004 meeting of the Council, staff of the Tax Research and Planning Office ("DOTAX staff") prepared a March 2004 handout report for the Council (the "Staff Report"). The Staff Report included three separate tables entitled: (1) "Tax Credits Claimed by Individuals"; (2) "Tax Credits Claimed by Corporations"; and (3) "Tax Credit Claimed by Insurance Companies, Individuals, & Corporations" (collectively, the "Tax Credit Tables"). The Tax Credit Tables set forth both the tax credits actually claimed by taxpayers for fiscal years 1999 through 2003 and the tax credits projected to be claimed for fiscal years 2004 through 2010.

You requested a copy of the Tax Credit Tables from DOTAX and the Council, which request was denied by both. By letter dated March 19, 2004 to DOTAX and to the Council, this office relayed your request for documents that contained the estimated revenue impact of tax credits on state tax collections and noted that, if the agencies believed that a statutory exception to disclosure applied to a requested document, a written basis for the nondisclosure should be provided.

By letter dated April 6, 2004, DOTAX responded to your request by providing a copy of the Tax Credit Tables with the Staff Forecasts redacted. DOTAX stated that the Staff Forecasts, being the preliminary, opinion work product of DOTAX employees for the Council, were protected from disclosure under the "frustration" exception set forth at section 92F-13(3), HRS. DOTAX further stated that the Staff Forecasts "were not discussed at the March 10, 2004 meeting, nor were they made part of the Council's written opinion that was transmitted to the Governor and released publicly."

By letter dated April 6, 2004, the Council responded to your request by also providing the Tax Credit Tables with the Staff Forecasts redacted, relying upon the discussion provided by DOTAX in its April 6, 2004 response to support the Council's position that the Staff Forecasts were "privileged." In addition, the Council explained that DOTAX staff provides technical support to the Council by statute, that the Council is not bound to accept these values, and that the Council, in fact, did not discuss the precise figures included in the Staff Forecasts or adopt them in the March 2004 Council Forecast. By letter dated July 20, 2004 in response to an OIP letter, the Council reiterated that it did not adopt the Staff Forecasts or incorporate them into its decision by reference.

By letter dated March 31, 2004, you requested various information from DOTAX on a number of topics, including, again, the estimated cost of state tax credits. By letter dated June 8, 2004, DOTAX provided you with six documents in response to that specific topic, including, again, the Tax Credit Tables with the Staff Forecasts redacted based upon the "frustration" exception under the UIPA.[1] On June 14, 2004, you requested an OIP opinion on whether the Staff Forecasts must be made available to the public.

DISCUSSION

The UIPA mandates that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (1993). The UIPA itself restricts access to five categories of government records enumerated in section 92F-13, HRS. This section states that the UIPA does not require disclosure of, among others, "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function[.]" Haw. Rev. Stat. § 92F-13(3).

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[1] In addition, DOTAX disclosed that it had various working drafts of all of the documents provided, which drafts had not been formally adopted by the Director of DOTAX or disclosed to anyone outside of DOTAX. Although not specifically asked to address this issue, we note that drafts of documents are generally protected from disclosure under section 92F-13(3), HRS. See OIP Op. Ltr. No. 90-8.

In previous advisory opinions, the OIP recognized that the disclosure of certain intra-agency and inter-agency memoranda or correspondence would frustrate the legitimate government function of agency decision-making by injuring the quality of agency decisions. See OIP Op. Ltr. No. 90-8 at 3-4 (citing OIP Op. Ltr. No. 89-9; OIP Op. Ltr. No. 90-3). The OIP thus extended the "frustration" exception under the UIPA, in line with case law interpreting the federal Freedom of Information Act, to allow the withholding of agency records protected by the executive or "deliberative process privilege." 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. No. 90-8 at 4 (quoting Schell v. U.S. Dep't of Health & Human Servs., 843 F.2d 933, 940 (6th Cir. 1988)); OIP Op. Ltr. No. 90-3 at 11 (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)). See OIP Op. Ltr. No. 89-9.

"This privilege, which protects the deliberative and decisionmaking processes of the executive branch, rests most fundamentally on the belief that were agencies forced to 'operate in a fishbowl,' the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." Dudman Communications Corp. v. Dep't of Air Force, 815 F.2d 1565, 1567 (D.C. Cir. 1987)(quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). 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. 90-8 at 5 (citing Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

To invoke the deliberative process privilege, an agency must show that the document sought to be protected meets two requirements: First, the document must be "predecisional," i.e., received by the decision-maker prior to the time the agency decision or policy is made. OIP Op. Ltr. No. 90-8 at 4 (quoting Schell, 843 F.2d at 940). OIP Op. Ltr. No. 90-11 at 5. Second, the document must be "deliberative," i.e., a recommendation or opinion on agency matters that is a direct part of the decision-making process. OIP Op. Ltr. No. 90-11 at 5-6 (quoting Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975)). See also OIP Op. Ltr. No. 90-8 at 4 ("deliberative" document "reflects the give-and-take of the consultative process.")(quoting Schell, 843 F.2d at 940). The privilege thus protects the back-and-forth discussions that lead up

to the agency's decision, not the final policy of the agency. See OIP Op. Ltr. No. 90-8 at 4 (privilege protects "subjective documents which reflect the personal opinions of the writer rather than the policy of the agency")(quoting Schell, 843 F.2d at 940). A protected document may lose its privileged status, however, where an agency later "chooses **expressly** to adopt or incorporate [it] by reference" into the final decision or policy of the agency. OIP Op. Ltr. No. 90-8 at 5 (quoting NLRB v. Sears Roebuck & Co., 421 U.S. at 161) (emphasis in original).

As set forth above, the State Constitution charges the Council with preparation of the final revenue estimates for the State; requires that the estimates be reported to, and used by, the governor and the legislature in fulfilling their respective duties; and requires that the estimates be made public. To assist the Council in its task, the statute requires DOTAX and the Department of Budget and Finance ("B & F") to provide staff and technical assistance to the Council, and all executive departments and agencies to furnish information that the Council deems necessary to prepare the revenue estimates. The Council, thus, is the final decision-making agency with respect to the revenue estimates of the State, and to assist it in that process, the legislature granted it broad access to information and support staff from DOTAX and B & F.

In accordance with this grant, DOTAX staff created the Staff Forecasts for use by the Council in its deliberation and preparation of the revenue estimates issued as the March 2004 Council Forecast. We find that the Staff Forecasts are: (1) predecisional, being received by the Council prior to issuance of the March 2004 Council Forecast; and (2) deliberative, being an expression of the opinions of staff on revenue matters that were directly part of the Council's revenue forecast process. Indeed, the Staff Forecasts, by their very nature, reflect the preliminary, personal opinions of the staff, not the final policy or determination of the Council. Accordingly, it is our opinion that the Staff Forecasts are clearly predecisional, deliberative, intra-agency communications protected under the deliberative process privilege.

We further believe that the privilege should be invoked here in order to avoid frustration of the Council's function of determining the final revenue estimates of the State. The Council must be able to ensure that its staff produces future forecasts uninhibited by fear of public ridicule or criticism and to prevent the confusion of the issues and the misleading of the public that might occur by dissemination of staff prepared forecasts that do not in fact reflect the ultimate basis for the Council's revenue estimates. The constitutional and statutory requirements that the March 2004 Council Forecast be made public ensures that

the public is adequately and accurately informed of the actual revenue estimates used to administer the State.

Lastly, based upon the Council's representation that it did not in fact adopt the Staff Forecasts or incorporate them into the March 2004 Council Forecast, we further find that the Staff Forecasts retained their privileged status after the issuance of the March 2004 Council Forecast.

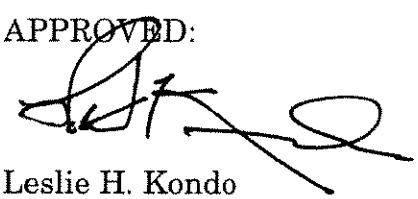
CONCLUSION

Because we find the Staff Forecasts clearly predecisional and deliberative, we conclude that the deliberative process privilege allows the Staff Forecasts to be withheld under the "frustration" exception to the UIPA.

Very truly yours,

Cathy L. Takase
Staff Attorney

APPROVED:



Leslie H. Kondo
Director

CLT:clt

cc: The Honorable Kurt Kawafuchi
Director, Department of Taxation

The Honorable Michael A. Sklarz, Ph.D.
Chair, Council on Revenues