

November 3, 1989

Mr. Larry Mednick
The IRS Dehassler
700 Bishop Street, Suite 1014
Honolulu, Hawaii 96813

Dear Mr. Mednick:

Re: Public Access to Offers-in-Compromise Accepted by
Department of Taxation

This is in response to your request for an advisory opinion from the Office of Information Practices concerning whether taxpayer offers-in-compromise accepted by the Department of Taxation, State of Hawaii ("Department") and the statements described by Haw. Rev. Stat. § 231-3(10) (1985) must be available for public inspection and/or copying pursuant to Haw. Rev. Stat. Chapter 92F, the Uniform Information Practices Act (Modified) ("UIPA").

ISSUE PRESENTED

Whether offers by state taxpayers to compromise tax liabilities which are accepted by the Department ("offers-in-compromise") and the statement required to be filed with the Department pursuant to Haw. Rev. Stat. § 231-3(10) (1985) must be made available to any person for inspection and copying upon request, under the UIPA.

BRIEF ANSWER

No. Under the UIPA, agencies are not required to make available for public inspection government records which pursuant to State statute are protected from disclosure. See, Haw. Rev. Stat. § 92F-14(4) (Supp. 1988). Haw. Rev. Stat. §§ 235-116 and 237-34(b) (1985) make all "returns" and "return information" confidential.

Unlike Internal Revenue Code § 6103(k) ("I.R.C."), accepted offers-in-compromise and the statements described by the Haw. Rev. Stat. § 231-3(10) (1985) are not exempt from the general confidentiality of "returns" and "return information." Although return information is not defined by State statutes, in applying the federal definition set forth at I.R.C. § 6103 (b), we conclude that the information is protected from disclosure.

FACTS

By letter dated July 10, 1989, your office requested access to records maintained by the Department under the UIPA.¹ Specifically, you requested access to "statements" required to be filed with the Department by Haw. Rev. Stat. § 231-3(10) (1985). This statute provides that with respect to any compromise under any tax law the administration of which is within the scope of the Department's duties, there shall be placed on file in the Department's office a statement of:

- a) The amount of tax assessed, or proposed to be assessed;
- b) The amount of penalties and interest imposed or which could have been imposed by law with respect to the preceding item, as computed by the department;
- c) The total amount of liability as determined by the terms of the compromise, and the actual payments made thereon with the dates thereof; and
- d) The reasons for the compromise.

Haw. Rev. Stat. § 231-3(10) (1985).

By letter dated August 10, 1989, the Department refused to allow you access to the above requested information. In refusing access, the Department asserted that the UIPA does not require disclosure of government records which pursuant to state or

¹ This letter was originally addressed to the Office of Information Practices, and was forwarded to the Department of Taxation as the agency maintaining the government records sought to be inspected.

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federal law are protected from disclosure, citing Haw. Rev. Stat. § 92F-13(4) (Supp. 1988). It is the position of the Department that:

The records comprise a category of government records which are confidential by statute. Tax compromises are part of the concerned taxpayers' tax records and, therefore, are exempt from disclosure. Furthermore, while section 231-3 (10), Hawaii Revised Statutes requires the Department to maintain certain information in its files with respect to each tax compromise, the statute does not direct that those files be open to the public.

By letter dated August 25, 1989, you requested our office to render an advisory opinion concerning your rights, if any, to inspect and copy the information, access to which was denied by the Department.

DISCUSSION

The UIPA, the State's new open records law effective July 1, 1989, sets forth the policy of this State that:

[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of government agencies—shall be conducted as openly as possible.

Haw. Rev. Stat. § 92F-2 (Supp. 1988).

On the other hand, the legislature recognized that this policy of openness, ". . . must be tempered by a recognition of the right of the people to privacy, as embodied in section 6 and section 7 of Article I of the Constitution of the State of Hawaii." Id. Therefore, the UIPA is a comprehensive legislative attempt to balance the public interest in disclosure (and

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governmental accountability through such disclosure) against the individual's right to privacy.

Haw. Rev. Stat. § 92F-11(a) (Supp. 1988), provides, "[a]ll government records are open to inspection unless access is restricted or closed by law." Further, Haw. Rev. Stat. § 92F-11(b) (Supp. 1988) states:

Except 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.
[Emphasis added.]

The Department has asserted that the statement required to be filed with their office by Haw. Rev. Stat. § 231-3(10) (1985) is a government record which pursuant to State statute, is protected from disclosure under Haw. Rev. Stat. § 92F-13(4) (Supp. 1988).

In denying your request for access to the relevant government records, the Department did not indicate which federal or state statute protected from disclosure the government records you sought to inspect and copy. Rather, the Department stated that Haw. Rev. Stat. § 231-3(10) (1985) did not explicitly require public disclosure of the statement required thereunder. However, as stated above, under the UIPA, the general promise is that all government records are available for public inspection unless access is restricted or closed by law.

Therefore, it is necessary to determine if any federal or state statute protects from disclosure the statements described by Haw. Rev. Stat. § 231-3(10) (1985), such that the Department may restrict access to such statements under the UIPA.

There are several provisions of the Hawaii Revised Statutes, Title 14, which refer to the accessibility of records maintained by the Department. First, Haw. Rev. Stat. § 231-19 (1985), provides:

Records open to public. All maps and records compiled, made, obtained, or received by the director of taxation or any of the director's subordinates, shall be public records, and in case of the death, removal,

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or resignation of any such officers, shall immediately pass to the care and custody of their respective successors. The information and all maps and records connected with the assessment and collection of taxes shall, during business hours, be open to the inspection of the public. [Emphasis added.]

Haw. Rev. Stat. Chapter 231 (1985), does not define the meaning of the word "records." However, under the UIPA, "government record" means "... information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1988). Thus, it would initially appear that the statement provided by Haw. Rev. Stat. § 231-3(10) (1985) would qualify as a "government record" subject to public inspection under the UIPA. On the other hand, Haw. Rev. Stat. § 235-116 (1985) provides in relevant part:

Disclosure of return unlawful; penalty. All tax returns and return information required to be filed under this chapter shall be confidential, including any copy of any portion of a federal return which may be attached to a state tax return, or any information reflected in the copy of such federal return. It shall be unlawful for any person, or any officer or employee of the State to make known intentionally information imparted by any income tax return or estimate made under sections 235-92, 235-94, 235-95, and 235-97 or willfully to permit any income tax return or estimate so made or copy thereof to be seen or examined by any person other than the taxpayer or the taxpayer's authorized agent, persons duly authorized by the State in connection with their official duties, the Multistate Tax Commission or the authorized representative thereof, except as provided by law, and any offense against the foregoing provisions shall be punished by a fine not exceeding \$500 or by imprisonment not exceeding one year, or both. [Emphasis added.]

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Similarly, Haw. Rev. Stat. § 237-34(b) (1985) makes all general excise tax returns and return information confidential and provides in pertinent part:

(b) All tax returns and return information required to be filed under this chapter, and the report of any investigation of the return or of the subject matter of the return, shall be confidential. It shall be unlawful for any person or any officer or employee of the State to intentionally make known information imparted by any tax return or return information filed pursuant to this chapter [Emphasis added.]

Given the inconsistency created when reading Haw. Rev. Stat. §§ 231-19, 231-116 and 237-34(b) (1985), it is appropriate to consult the legislative history to Haw. Rev. Stat. § 231-19 (1985) to ascertain the legislative intent behind this statute. In consulting such history, it is apparent that the legislature intended the broad right of public inspection set forth under this section to apply only to real property tax "maps and records." The public inspection rights set forth at Haw. Rev. Stat. § 231-19 (1985) were originally enacted by the legislature in 1932. In particular, such public inspection rights were contained within "An Act to Create a Real Property Taxation System in the Territory of Hawaii." See Act approved May 11, 1932, ch. 40, 1932 Haw. Sess. Laws 93. Thereafter, the provisions of Haw. Rev. Stat. § 231-19 were contained within a chapter entitled "Administration and Real Property Tax" until the adoption of the 1968 Hawaii Revised Statutes, when Haw. Rev. Stat. § 231-19 appeared simply under the heading "Administration."

After the transfer of all functions and duties relating to real property taxation from the Department to the counties in 1981, the several counties adopted ordinances identical to Haw. Rev. Stat. § 231-19 (1983). Therefore, we conclude from the history of Haw. Rev. Stat. § 231-19 (1985) that the legislature intended that its application be limited to real property tax "maps and records."

It must still be determined whether the statement referred to by Haw. Rev. Stat. § 231-3(10) (1985) consists

of data which is either a "return" or "return information" such that Haw. Rev. Stat. §§ 231-116 and 237-34(b) (1985) make such data confidential. Nowhere do State statutes define "return" or "return information." As set forth by Haw. Rev. Stat. § 235-3(a) (1985), the legislature intended Haw. Rev. Stat. Chapter 235 "... to conform to income tax law of the state as closely as may be with the Internal Revenue Code. . . ." Therefore, resort to the Internal Revenue Code may properly provide guidance for the definitions of "return" and "return information." I.R.C. § 6103(b) (1) defines "return" as follows:

(1) Return. The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or parts of, the return so filed.

The statement described at Haw. Rev. Stat. § 231-3(10) (1985) does not appear to fall within the definition of "return" under I.R.C. § 6301(b) (1). However, I.R.C. § 6301(b) (2) defines "return information" as:

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns or examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws. [Emphasis added.]

The statement under Haw. Rev. Stat. § 231-3(10) (1985) appears to constitute "data received by, recorded by, prepared by, furnished to, or collected by the [Department] . . . with respect to the determination of the existence, or possible existence, of liability (or amount thereof) of any person . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense. . . ." I.R.C. § 6301(b) (2) (B) also provides, however, that "such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."²

The statement described by Haw. Rev. Stat. § 231-3(10) (1985) is required to contain data that would appear difficult, if not impossible to use in identifying a particular taxpayer. However, in Church of Scientology of California v. Internal Revenue Service, 484 U.S. 9, 98 L. Ed. 2d 228, 108 S. Ct. 271 (1987), the United States Supreme Court adopted a very narrow construction of the language of the Haskell amendment, holding that the Haskell amendment did not exempt from confidentiality material in I.R.S. files which could be redacted (sanitized) to delete information identifying a particular taxpayer.

² This statutory text was added by Congress in 1976 as part of the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1520. It is commonly referred to as the "Haskell amendment."

The Court additionally concluded, based upon the legislative history of the Haskell amendment, that the purpose of the Haskell amendment was to simply allow the continuation of the I.R.S.' practice of releasing "statistical studies and compilations" for research purposes, because there would be no need for the laborious definition of return information found in Section 6103 as most of the stated categories would be irrelevant in the face of the Haskell amendment. The decision of the Court of Appeals for the District of Columbia affirmed by the Supreme Court in Scientology suggested that the Haskell amendment requires reformulation of return information. In that decision, the Court reasoned, "[t]hat reformulation will typically consist of statistical tabulation or of some other form or combination with other data so as to produce a unitary product that disguises the origin of its components." Scientology, 792 F.2d 153, 163 (D.C. Cir. 1986). Further, the court opined that this requirement would not be met simply by "copying the same data onto a fresh piece of paper, perhaps in a narrative style." Id. at 163, n.5.

Therefore, based upon the decision in Scientology, it would appear that the statement described in Haw. Rev. Stat. § 231-3(10) (1985) is not exempted from confidentiality by virtue of I.R.C. § 6103(b) (B), because that information would not constitute a "statistical study or compilation" prepared for research purposes and because it does not combine return information with other data so as to produce a unitary product that disguises the origins of its components.

Significantly, however, I.R.C. § 6103(k)(1) exempts from the confidentiality of return information "accepted offers-in-compromise," and provides:

(1) **Disclosure of accepted offers-in-compromise.** Return information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.³ [Emphasis added.]

Under I.R.C. § 7122(b), in the event of any compromise under internal revenue laws, there must be placed on file in the Office

³ Accepted offers-in-compromise by the Internal Revenue Service were originally made subject to public inspection by President Harry S. Truman. See Exec. Order No. 10386.

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of the Secretary, a statement virtually identical to the one described by Haw. Rev. Stat. § 231-3(10) (1985). According to the District Counsel for the Internal Revenue Service, Honolulu Branch, the I.R.S. permits public inspection of the statement referred to under I.R.C. § 7122(b).

The fact remains, however, that while the legislature has adopted a confidentiality statute similar to I.R.S. § 3601(a), it has not followed the Congressional lead to make accepted offers-in-compromise along with the statement referred to under Haw. Rev. Stat. § 231-3(10) (1985) available for public inspection. Presumably, the public policy behind the federal exemption from confidentiality of return information is a Congressional belief that the compromise of tax liabilities is affected with significant public interest, to the extent that all taxpayers are affected by such a compromise.

Further, while it was the legislative intention that Haw. Rev. Stat. Chapter 235 conform the state tax laws "as closely as may be with the Internal Revenue Code," only those provisions specifically adopted by the legislature are "operative" for purposes of Haw. Rev. Stat. Chapter 235 (1985) See Haw. Rev. Stat. §§ 235-2.3, 235-2.4, 235-2.5, 235-3(b) (1985). The administrative provisions of subtitle F (Sections 6001 to 7852) of the Internal Revenue Code do not appear to have been made "operative" by the legislature. Therefore, we cannot credibly assert that the exemption from confidentiality for tax compromises set forth at I.R.C. § 6301(k) is part of the State tax code.⁴

Unfortunately, the legislative history to Haw. Rev. Stat. § 213-3(10) (1985) is silent on any intention to make such information open to public inspection. In the absence of such an indication in its legislative history, and in absence of a statute exempting such information from the confidentiality of "return information," we are constrained to conclude that the statement described by Haw. Rev. Stat. § 231-3(10) (1985) is not subject to public inspection under the UIPA, based upon the definition of "return information" set forth by the I.R.C. § 6301(b) (2), and based upon the confidentiality provisions of Haw. Rev. Stat. §§ 235-116 and 237-34(b) (1985).

⁴ We find it unfortunate that in absence of a definition of "return information" in the state tax code, we must analogize to the definitions contained in I.R.C. § 6301(b), yet cannot, without legislative action, draw upon the exemption from confidentiality provided by I.R.C. § 6301(k).

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Hugh R. Jones
Staff Attorney

cc: The Honorable Richard F. Kahle, Jr.
Director of Taxation

APPROVED:

Kathleen A. Callaghan
Director