

FILED

3-29-19

11:36 o'clock am

[Signature]

Clerk, Sixth Division

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ANDREW WALDEN,)	CIVIL NO. 1SP 18-1-0301 (JPC)
)	
Applicant,)	
)	MINUTE ORDER RE: APPLICATION FOR
vs.)	AN ORDER ALLOWING INSPECTION OF
)	PUBLIC RECORDS (Application filed
HI'ILEI ALOHA LLC; HO'OKELE PONO)	8/28/18)
LLC; and HI'IPAKA LLC,)	
)	Judge: Hon. Jeffrey P. Crabtree
Respondents.)	Hearing Date: 10/10/18
)	Trial Week: None
)	

MINUTE ORDER RE: APPLICATION FOR AN ORDER
ALLOWING INSPECTION OF PUBLIC RECORDS (Application filed 8/28/18)

1. The court has reviewed all submittals following the court's 3/5/19 Minute Order.
2. The court denies Respondents' 3/15/19 non-hearing motion to strike the amicus memorandum filed 1/31/19 by Civil Beat Law Center ("CBLC"). Reason: allowing amicus briefs is within the court's discretion, and the court sees no prejudice from CBLC's 1/31/19 brief. The central issue(s) posed by this Petition are thoroughly addressed in other filings.
3. Applicant Walden's Application is granted. The court finds as a matter of law that each Respondent is an "agency" for UIPA purposes. The primary bases for the court's ruling are a) the broad language of HRS Section 92F-3, b) the principles of Olelo v. OIP, 116

Haw 337 (2007), and c) the corporate structure and governance of Respondents, in conjunction with the requirements of HRS Section 428.

4. The court has no doubt that the mission and purpose of each Respondent is worthy and important. But that is not a relevant factor in defining an agency for purposes of a UIPA records request under HRS Section 92F-3.

5. The court unfortunately has been unable to find the time to promptly decide this petition. Rather than compound the problem by taking even more time for a complete and detailed analysis and findings, this Minute Order is intended as a summary. Further details can be included in the final and binding order following the usual Rule 23 process.

6. It is apparently not disputed that OHA is an instrumentality of the State of Hawai‘i. (See Respondents’ Operating Agreements, 1st paragraph.) See also, Hawai‘i Constitution, Article XII, Sections 5 and 6; HRS 10-3, et seq.

7. The parties appear to agree that per HRS 92F-3, the critical question is whether Respondents are corporations owned, or operated, or managed by or on behalf of the State of Hawai‘i. As part of that question, the court holds that per HRS 92F-3, and Olelo, the question is disjunctive. In other words, Applicant must show that a Respondent is either owned, or operated, or managed by or on behalf of OHA, as it is an instrumentality of the State of Hawai‘i.

8. Whether any Respondent is an “agency” as defined by HRS 92F-3 is a question of law. Olelo v OIP, 116 Haw 337, 344-346 (2007).

9. The court does not find that the purposes and activities of Respondent are “on behalf of” the State. Reason: based on the present record, the court cannot now say as a matter of law that Respondent’s activities substitute for the State in the performance of a required governmental function. However, per Olelo, “by or on behalf of the State” is in the disjunctive.

In other words, the failure (to date) to show Respondents' activities are on behalf of the State is not fatal to Applicant's request, because Applicant can show Respondents are corporations owned, operated or managed "by" the State. See Olelo v. OIP, 116 Haw. at 350-351 (2007).

10. HI'ILEI ALOHA, LLC.

A. The mission of Respondent Hi'ilei Aloha, LLC includes but is not limited to: study the history and culture of the Hawaiian people; educate regarding the history and culture of the Hawaiian people; preserve, protect, and enhance Hawaiian values, customs, practices, resources and sites; and receive contributions and pay them to tax exempt organizations to further these purposes (OA, paragraph 2.02.) Per Exhibit F, page 6 of Applicant's 8/28/18 Application, Hi'ilei Aloha, LLC is also the parent company handling core functions for all six OHA subsidiaries.

B. OHA is the sole Member of Respondent Hi'ilei Aloha, LLC (OA, 1st paragraph). As the Member, OHA must expeditiously and vigorously enforce all of its rights in the LLC (OA, paragraph 5.06). The LLC was formed and shall be "operated exclusively" to further OHA's purposes (OA, paragraph 2.02). The LLC is managed by two managers, and except where OHA's approval is required, these managers have "full and complete" authority and power to manage and control the LLC and make "all decisions." (OA, paragraph 4.01). Per HRS 428-404(b)(1), these two OHA-appointed managers have the "exclusive" authority to manage and conduct the LLC's business. The two managers shall be the Administrator of OHA, and a named Deputy Administrator for OHA and they shall serve until new managers are designated by OHA (OA, paragraph 4.02). OHA bars many major decisions by the LLC's Managers, including adding a new Member; the sale or mortgage of real estate; authorizing leases more than ten years; paying any manager except reimbursement of costs; adding, hiring

and firing the managers; selling all assets; dissolving the LLC; or changing the OA (Article 4.11). The managers may delegate certain functions to LLC employees, agents or independent contractors, such as writing checks, hiring and firing, signing contracts not exclusively reserved to OHA approval (OA, paragraph 4.10).

C. Based on factors including the above, the court finds as a matter of law that OHA owns, and has authority and control over the operation and management of the LLC's operations. Two high-level OHA administrators are appointed per the OAs as the specific managers of the LLC. Per HRS 428-404(b)(1), these two managers have the "exclusive" authority to manage and conduct the LLC's business. (Interestingly, per HRS 428-404(b)(2), if there is more than one manager, decisions are by a "majority" of the managers, which would seem to mean the two managers would have to agree on all decisions within their authority.) By HRS 428-404 and by the OAs, the managers can be replaced by OHA at any time. Respondents seem to rely heavily on the argument that the two OHA-appointed managers delegate various operating decisions to an LLC employee, thereby arguably creating some level of separation or independence from OHA. But this delegation is expressly limited as described above, and OHA-appointed manager(s) can replace and appoint a new "delegated manager" whenever they choose to. So while the LLC's delegated manager may have some say in decision-making in some activities of the LLC, the court concludes that it elevates form over substance to say the delegated manager actually operates and manages the LLC. Any delegation of or limit on OHA's authority to control the LLC is by OHA's consent. The two OHA-appointed administrators have the statutory and "exclusive" authority to manage and conduct the LLC's business, limited only by the major decision-making which is exclusively reserved to OHA under both HRS 428 and the OAs. Bottom line: the "delegated manager's" circumscribed operation

and management of the LCC, and the continued operation of the LLC itself, is at the sole discretion of OHA. Therefore, the court finds as a matter of law that Hi‘ilei Aloha, LLC is an “agency” for purposes of HRS 92F-3, in that it is a corporation owned, and operated, and managed by OHA, a state entity.

11. HO‘OKELE PONO, LLC.

A. The purposes of Respondent Ho‘okele Pono, LLC include but are not limited to: study the history and culture of the Hawaiian people; education regarding the history and culture of the Hawaiian people; scientifically investigate and study, and educate all people as to the natural resources endemic or early introduced to Hawaii, and to encourage the propagation and protection of such endemic life; preserve, protect, and enhance Hawaiian historical values, customs, practices, resources and sites; educate and train to prepare Hawaiians for leadership in government, business and community affairs; and receive contributions and pay them to tax exempt organizations to further these purposes (OA, paragraph 2.02).

B. For purposes of the issues in this case, the relationship between Ho‘okele Pono, LLC and OHA is essentially the same as between Hi‘ilei Aloha, LLC and OHA. The only substantive difference the court sees is that the two OHA-appointed managers shall be the CEO of OHA, and the CFO for OHA. Otherwise, the structure and governance of Ho‘okele Pono, LLC is virtually the same as Hi‘ilei Aloha, LLC per the OA and the operation of HRS 428.

C. Based on the same factors discussed in paragraphs 10(B) and 10 (C), above, the court makes the same analysis for Ho‘okele Pono, LLC as in 10(C) above, and finds that Ho‘okele Pono, LLC is an “agency” for purposes of HRS 92F-3, in that it is a corporation owned, and operated, and managed by OHA, a state entity.

12. HI'IPAKA, LLC.

A. The mission of Respondent Hi'ipaka, LLC is to preserve and perpetuate the human, cultural, and natural resources of Waimea, Oahu, for generations -- through education and stewardship (OA paragraph 2.02).

B. With Hi'ipaka, LLC, the corporate structure is different. Hi'ilei Aloha, LLC (not OHA) is the sole Member of Respondent Hi'ipaka, LLC (OA, 1st paragraph). Otherwise, again per the OAs and the operation of HRS 428-404, as the Member, Hi'ilei Aloha, LLC enjoys virtually unlimited decision-making control and authority over Hi'ipaka, LLC (OA, paragraph 5.06). The LLC was formed and shall be "operated exclusively" to further Hi'ilei Aloha, LLC's purposes (OA, paragraph 2.03). The LLC has two managers, and except where OHA's approval is required, these managers have the power and authority to manage and control Hi'ipaka, LLC and make "all decisions" (OA, paragraph 4.01). Again, per HRS 428-404(b)(1), these two managers have the "exclusive" authority to manage and conduct the LLC's business. The two managers shall be the Administrator of OHA, and the Director of Land Management for OHA, and they shall serve until new Managers are designated by Hi'ilei Aloha, LLC (OA, paragraph 4.02). The Managers may delegate certain functions to Hi'ipaka, LLC employees, agents or independent contractors, such as writing checks, hiring and firing, signing certain contracts (OA, paragraph 4.10).

C. Based on the same factors discussed above, the court makes the same finding for Hi'ipaka, LLC as for the other Respondents. Making Hi'ilei Aloha, LLC the Member (as opposed to OHA) does not change the end result of the analysis, since the court finds that Hi'ilei Aloha, LLC, like OHA, is a state instrumentality. Therefore, the court finds as a matter of law that Hi'ipaka, LLC is an "agency" for purposes of HRS 92F-3, in that it is a corporation owned,

and operated, and managed by or on behalf of OHA or Hi‘ilei Aloha, LLC, both of which are state entities.

13. The court finds the IRS classifications described by amicus HTF and CBLC at minimum support this ruling if factored into the court’s decision. That said, the court did not significantly rely on this factor. The court focused primarily on HRS Section 92F, HRS 428, the Olelo opinion, and Respondents’ OAs.

14. Respondents argue that the result in Olelo should be echoed here. The court agrees with Respondents that the factors discussed in Olelo apply. But the underlying facts of Olelo showed nowhere near the ownership and control of management and operations as exists between OHA and Respondents. Therefore, a different result is warranted.

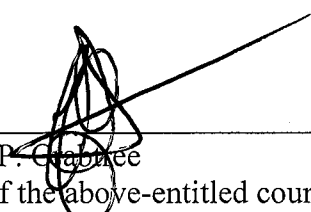
15. The court finds that the Legislature’s strong public policy statement underlying HRS Section 92F supports the court’s ruling. The court does not see any indication in HRS 92F that the Legislature sought to create privacy protections for the information sought in this case.

16. Counsel for Applicant shall promptly prepare and send to all counsel and the court a proposed order per the usual Rule 23 process.

17. Division staff is directed to promptly serve this document on all counsel in this case, including amicus counsel, and verify it was received.

DATED: Honolulu, Hawai‘i:

3-29-19



Jeffrey P. Grabbee
Judge of the above-entitled court

Walden v. Hi‘ilei Aloha LLC, et al.; Civil No. 1SP 18-1-0301 (JPC); First Circuit Court;
MINUTE ORDER RE: APPLICATION FOR AN ORDER ALLOWING INSPECTION OF
PUBLIC RECORDS (Application filed 8/28/18); NOTICE OF ENTRY

NOTICE OF ENTRY

The above MINUTE ORDER RE: APPLICATION FOR AN ORDER ALLOWING INSPECTION OF PUBLIC RECORDS (Application filed 8/28/18) has been entered and copies served on the parties by:

1. NA United States mail;
2. Delivery to the court jackets of attorneys;

Michael Lilly, Esq. (firm: Ning Lilly & Jones)
Attorney for Plaintiff ANDREW WALDEN

Anna Elento-Sneed, Esq. and Samantha Sneed, Esq (firm: ES&A, Inc)
Attorneys for Defendant HI'ILEI ALOHA LLC; HO'OKELE PONO LLC, and
HI'IPAKA LLC

Robert Brian Black, Esq (firm: Civil Beat Law Center for the Public Interest)
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3. Via e-mail to:

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Dated: Honolulu, Hawaii, 3-29, 2019



Clerk/Sixth Division

ANDREW WALDEN V HI'ILEI ALOHA LLC; HO'OKELE PONO LLC; AND HI'IPAKA LLC; SP. No. 18-1-0301 (JPC), Circuit Court of the First Circuit; MINUTE ORDER RE: APPLICATION FOR AN ORDER ALLOWING INSPECTION OF PUBLIC RECORDS (Application filed 8/28/18); NOTICE OF ENTRY.