

FIRST CIRCUIT COURT
STATE OF HAWAII

6-25-19
FILED

1:56 o'clock pm

[Signature]
Clerk, Sixth Division

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

ANDREW WALDEN,

Applicant,

v.

HI'ILEI ALOHA LLC; HO'OKELE PONO
LLC; and HI'IPAKA LLC,

Respondents.

S.P. 18-1-0301 (JPC)
(Special Proceeding)

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND ORDER REGARDING BOTH:

1) GRANTING APPLICATION FOR AN
ORDER ALLOWING INSPECTION OF
PUBLIC RECORDS OF HI'ILEI ALOHA
LLC, HO'OKELE PONO LLC, and
HI'IPAKA LLC; and

2) ISSUES OF A) JURISDICTION;
B) APPLICABILITY OF HRCP; AND
C) PROCESS, AS RAISED BY
RESPONDENTS' OBJECTIONS FILED
4/9/19, AND THIS COURT'S 4/25/19
MINUTE ORDER.

HEARING: October 10, 2018

TIME: 9:00 a.m.

JUDGE: Jeffrey P. Crabtree

Trial Week: None

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER REGARDING BOTH:

1) GRANTING APPLICATION FOR AN ORDER ALLOWING INSPECTION OF PUBLIC
RECORDS OF HI'ILEI ALOHA LLC, HO'OKELE PONO LLC, and HI'IPAKA LLC; and

2) ISSUES OF A) JURISDICTION; B) APPLICABILITY OF HRCP; AND C) PROCESS, AS
RAISED BY RESPONDENTS' OBJECTIONS FILED 4/9/19 AND PER THIS COURT'S
4/25/19 MINUTE ORDER.

I. INTRODUCTION.

This is a special proceeding on the Application for An Order Allowing Inspection of Public Records of Hi`ilei Aloha LLC, Ho`okele Pono LLC, and Hi`ipaka LLC filed on August 28, 2018 (the “Application”) by applicant Andrew Walden (“Walden”). The Application sought an order, pursuant to HRS, Section 92F-15, directing Hi`ilei Aloha LLC (“Hi`ilei”), Ho`okele Pono LLC (“Ho`okele”), and Hi`ipaka LLC (“Hi`ipaka”) (collectively “Respondents”) to produce all their check registers and income and expense statements to present.

The Application came on for hearing before the Honorable Jeffrey P. Crabtree on October 10, 2018. Michael A. Lilly, Esq. represented Applicant and Anna Elento-Sneed, Esq. and Samantha Sneed, Esq. represented the Respondents. Having considered the arguments of counsel, the evidence submitted, the records and files in this case, and per his Court’s Minute Order filed March 29, 2019, and this Court’s Minute Order issued 4/25/19, the Court makes the following Findings of Fact and Conclusions of Law. To the extent that any of the Court’s findings of fact are incorrectly designated as conclusions of law, or its conclusions of law are incorrectly designated as findings, such mis-designations shall be disregarded such that the Court’s findings and conclusions be given their full effect.

II. JURISDICTION.

This Court has jurisdiction over the Application pursuant to HRS 92F-15.

III. FINDINGS OF FACT.

1. Applicant is a member of the public who, on November 22, 2016, requested that the Respondents produce the following records:

Complete check registers and income and expense statements of the Agencies from inception to present day.

See requests dated November 22, 2016 (Applicant’s Exhibits “A” - “C” to the Application).

2. The Respondents, through counsel, rejected the requests by letter dated January 9, 2017. Applicant's Exhibit "D".

3. It is apparently not disputed that the Office of Hawaiian Affairs ("OHA") is an instrumentality of the State of Hawai'i. (See the Respondents' Operating Agreements, "OA", 1st paragraph; Hawai'i Constitution, Article XII, Sections 5 and 6; HRS Section 10-3, et seq.)

HI'ILEI ALOHA, LLC.

4. The mission of Hi'ilei 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 Applicant's Exhibit F, page 6, Hi'ilei is also the parent company handling core functions for all six OHA subsidiaries.

5. OHA is the sole Member of Hi'ilei (OA, 1st paragraph). As sole Member, OHA must expeditiously and vigorously enforce all of its rights in Hi'ilei. (OA, paragraph 5.06.) Hi'ilei was formed and shall be "operated exclusively" to further OHA's purposes. (OA, paragraph 2.02.)

6. Hi'ilei 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 Hi'ilei and make "all decisions." (OA, paragraph 4.01.) Per HRS Section 428-404(b)(1), these two OHA-appointed managers have the "exclusive" authority to manage and conduct Hi'ilei's business. "Any Manager must be a current employee of [OHA]." (OA, paragraph 4.01.) 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.) The Hi'ilei managers have no exclusive duty to Hi'ilei, and

may have other business interests and engage in activities including activities which may compete with Hi`ilei. (OA, amended paragraph 4.05.)

7. OHA bars many major decisions by Hi`ilei'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 Hi`ilei; or changing the OA. (Article 4.11.) The managers may delegate certain functions to Hi`ilei's employees, agents or independent contractors, such as writing checks, hiring and firing, signing contracts not exclusively reserved to OHA approval. (OA, paragraph 4.10.)

8. OHA may dissolve Hi`ilei by resolution. (OA, paragraph 10.01.) Upon dissolution, the net assets of Hi`ilei are distributed to OHA, so long as it continues to be a governmental unit or wholly-owned instrumentality of the State of Hawai'i. (OA, paragraph 10.02 and per the definition in OA paragraph 5.02.)

HO`OKELE PONO, LLC.

9. The purposes of Ho`okele 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 Hawai'i, 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.)

10. For purposes of the issues in this case, the relationship between Ho`okele and OHA is essentially the same as between Hi`ilei 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 is virtually the same as Hi'ilei per the OA and the operation of HRS Chapter 428.

HI`IPAKA, LLC.

11. The mission of Hi`ipaka is to preserve and perpetuate the human, cultural, and natural resources of Waimea, Oahu, for generations -- through education and stewardship.

(OA paragraph 2.02.)

12. Hi`ipaka's corporate structure is different from the other Respondents.

13. Hi'ilei (not OHA) is the sole Member of Hi`ipaka (OA, 1st paragraph).

Otherwise, per the OAs and the operation of HRS Section 428-404, as the sole Member, Hi'ilei enjoys virtually unlimited decision-making control and authority over Hi`ipaka. (OA, paragraph 5.06.) Hi`ipaka was formed and shall be "operated exclusively" to further Hi'ilei's purposes.

(OA, paragraph 2.03.)

14. Hi`ipaka has two managers and, except where OHA's approval is required, these managers have the power and authority to manage and control Hi`ipaka and make "all decisions". (OA, paragraph 4.01.) Per HRS Section 428-404(b)(1), these two managers have the "exclusive" authority to manage and conduct Hi`ipaka's business. "Any Manager must be a current employee of [OHA]." (OA, paragraph 4.01.) 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. (OA, paragraph 4.02.) The Hi`ipaka managers do not violate any duty of loyalty to Hi`ipaka by, among other things, taking actions in support of OHA. (OA, paragraph 4.05.)

15. Hi'ilei bars many major decisions by Hi`ipaka'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 Hi`ipaka; or changing the OA. (Article 4.11.) The Managers may delegate certain functions to Hi`ipaka employees, agents or independent contractors, such as writing checks, hiring and firing, signing certain contracts. (OA, paragraph 4.10.)

16. Hi`ilei may dissolve Hi`ipaka by resolution. (OA, paragraph 10.01.) Upon dissolution, the net assets of Hi`ipaka are distributed to Hi`ilei, so long as it continues to be a 501(c)(3) organization, governmental unit, or wholly-owned instrumentality of the State of Hawai`i. (OA, paragraph 10.02, per the definition in paragraph 5.02.)

IV. AMICUS.

17. By Orders filed January 29 and 31, 2019, the motions of the Tax Foundation of Hawai`i (“TFH”) and Civil Beat Law Center for the Public Interest (“CBLC”) to file amicus briefs were granted.

18. The Court denied (or hereby denies) Respondents’ March 15, 2019 Motion to Strike the amicus memorandum of CBLC. Allowing amicus briefs is within the court’s discretion and the court sees no prejudice to Respondents from CBLC’s memorandum.

19. The TFH filed its Amicus Curiae Memorandum on Behalf of Applicant on January 30, 2019 and the CBLC filed its Amicus Memorandum on January 31, 2019.

20. The court finds the IRS classifications described by amicus HTF and CBLC at minimum support the instant FOFCOL and rulings 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.

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V. CONCLUSIONS OF LAW.

1. The 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: The Corp. for Comm'ty Tel. v. Office of Information Practices*, 116 Haw. 337, 173 P.3d 484 (Haw. 2007) ("Olelo"); and c) the corporate structure and governance of Respondents, in conjunction with HRS Chapter 428.

2. 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.

3. The UIPA provides that, "[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." Section 92F-11(b). Per HRS 92F-3, the term "agency" includes any subsidiary organization "owned, operated, or managed by or on behalf of this State."

4. The parties appear to agree that per HRS Section 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. Whether any Respondent is an "agency" as defined by HRS 92F-3 is a question of law. *Olelo*, 116 Haw. at 344-346.

5. 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.

6. The Court holds that per HRS Section 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.

7. The court does not find -- one way or the other -- 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).

8. Hi`ilei and Ho`okele are owned by OHA because it is the sole member of those entities and because it is entitled to their net assets on dissolution. Accordingly, Hi`ilei and Ho`okele are agencies within the meaning of HRS section 92F-3. For Hi`ipaka, making Hi`ilei the sole member (as opposed to OHA) does not change the end result of the analysis, since the court finds that Hi`ilei, like OHA, is a state instrumentality. Thus, Hi`ipaka also is an agency within the meaning of HRS section 92F-3 because it is owned by Hi`ilei.

9. The court also finds as a matter of law that OHA owns and has authority and control over the operation and management of each Respondent. Two high-level OHA administrators are appointed per the OAs as the specific managers of each Respondent. Per HRS Section 428-404(b)(1), these two managers have the "exclusive" authority to manage and conduct each Respondent’s business. (Interestingly, per HRS Section 428-404(b)(2), if there is more than one manager, decisions are by a "majority" of the managers. This would seem to mean the two managers have to agree on all decisions within their authority.) By HRS Section 428-404 and by the OAs, the managers can be replaced by OHA at any time.

10. Respondents seem to rely heavily on the argument that the two OHA employees appointed as managers delegate various operating decisions to an employee of

the specific Respondent, thereby arguably creating some level of separation or independence from OHA. But this delegation is expressly limited as described above, and the OHA employees appointed as manager(s) can replace and appoint a new "delegated manager" whenever they choose. While each Respondent's delegated manager may have some say in decision-making in some activities of the specific Respondent, the Court concludes that it elevates form over substance to say the delegated manager actually *operates and manages* the Respondent. Any delegation of or limit on the member's authority to control the Respondent is by the member's consent. The two OHA employees appointed as managers have the statutory and "exclusive" authority to manage and conduct each Respondent's business, limited only by the major decision-making which is exclusively reserved to the member under both HRS Chapter 428 and the OAs. The "delegated manager's" circumscribed operation and management of each Respondent, and the continued operation of the Respondent itself, is at the sole discretion of the member.

11. Therefore, the court further finds as a matter of law that each Respondent is an "agency" for purposes of HRS Section 92F-3, in that it is a corporation owned, operated and managed by OHA, a state entity, or in the case of Hi`ipaka, by or on behalf of OHA or Hi`ilei, both of which are state entities.

12. The court does not see any indication in Chapter 92F that the Legislature sought to create privacy protections for the information sought in this case. The Legislature's strong public policy statement underlying HRS Section 92F supports the court's ruling. The court concludes as a matter of law that the requested documents are not exempt from disclosure under Chapter 92F.

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VI. ISSUES OF A) JURISDICTION; B) APPLICABILITY OF HRCP; AND C) PROCESS, AS RAISED BY RESPONDENTS' OBJECTIONS FILED 4/9/19, AND THIS COURT'S 4/25/19 MINUTE ORDER.

1. Per this Court's Minute Order entered April 25, 2019, the Court issues the following findings and conclusions on the issues of: A) jurisdiction; B) the applicability of the Hawai'i Rules of Civil Procedure ("HRCP"); and C) the process by which this action should be decided.

2. This Court has jurisdiction over the Application pursuant to Hawai'i Revised Statutes, Section 92F-15.

3. Respondents "specially appeared" to challenge jurisdiction of the court for an alleged failure to personally serve Respondents with a Complaint and Summons. Respondents did not waive their objections regarding service of process by filing their memoranda and participating at the hearing on October 10, 2018, or by being given leave and then filing supplemental memorandum, declarations, and exhibits on November 30, 2018. However, under the circumstances of this case, neither should Respondents be granted remedies absent concrete adverse consequences caused by any initial lack of summons or service of process. The Court finds that all three Respondents were served with the Application and Summons by December 27, 2018. (Dkt ##29-31.) This was less than 6 months after the initial pleading. *See* RCCH 28. Whatever deficiencies in service may have occurred were cured, and the Court finds that it has jurisdiction over the Respondents. *See* 5A C. Wright & A. Miller, Federal Practice and Procedure § 1353 (2d ed. 2002) (stating that a dismissal for insufficient process should be granted only when the defect is prejudicial to the defendant, otherwise the court should generally allow an amendment of the process to correct the defect). If there is anything Respondents wanted to offer or argue that was precluded by the lack of earlier service of process, the Court is not aware of it.

4. Respondents also argued that this case cannot be commenced as a special proceeding, and therefore the Application must be refiled as a “Complaint.” The Court respectfully disagrees. Whether this is a special proceeding or civil action is not determinative. The Court is not aware of any legal authority requiring exactly how a UIPA-based action must commence. The Court finds there is nothing of value to be gained by starting over. If the Court had imposed the relief requested by Respondents, it is virtually certain we would be back in the same place within months -- the only difference being more attorneys’ fees incurred by all, and more time spent by all with no demonstrable benefit. Per HRCP Rule 1, the rules are to be construed and administered to secure the just, speedy, and inexpensive determination of every action. Bottom line: the Court finds this issue is purely one of form over substance. *In re Eric G.*: 65 Haw. 219, 224-225 (1982) (challenge to a “special proceeding” was rejected as a “matter of form, not substance”). The Application put Respondents on notice of the relief sought, Respondents fully participated, service was ultimately effected within the time period called for, and there is no showing of any bad faith by Petitioner or concrete prejudice suffered by Respondents.

5. Further, per Circuit Court Rule 31, *if* a civil proceeding is not governed by the HRCP, the court may designate and order that any one or more of the Hawai‘i Rules of Civil Procedure be applicable. So, there is no strict requirement that certain types of cases are in individual procedural silos and certain procedures must always be observed.

6. Per HRCP, Rule 81(b)(12), the HRCP are inappropriate for this case only if inconsistent with the public records law. (Rule 81(b)(12) references an earlier public records statute, HRS section 92-6 (1959). That provision was renumbered in 1975 and ultimately replaced by section 92F-15 when the Legislature adopted the UIPA in 1988. *See* HRS section 92-52 (1975). Thus, 92F-15 governs to the extent it is inconsistent with HRCP.

7. Respondents argue that they are prejudiced because they claim a right to conduct discovery which they argue was denied them. The Court disagrees on several levels. First, Respondents submitted voluminous materials in this case. Second, given the nature of this case, Respondents essentially control the evidence that is relevant to the key legal issues. Third, Respondents have not persuasively specified any evidence they seek to gain through discovery that would bear on the relevant findings and issues. Fourth, as held by the Hawai'i Supreme Court in *Olelo v. Office of Information Practices*, 116 Hawai'i 337, 346 (Haw. 2007), the issue whether each Respondent is an 'agency,' as defined by the UIPA, is a question of law to be reviewed *de novo* by this Court. Fifth, if UIPA cases were routinely allowed the full scope of discovery under the HRCF, HRS Section 92-F's emphasis on timely disclosure of government records would be largely unachievable. Based on the above, the Court finds and concludes there is no showing of a genuine factual dispute that is material to the outcome. The real questions here are legal issues (see Section V (1), above). Are Respondents agencies within the meaning of UIPA? What does the *Olelo* opinion require given the uncontroverted evidence of Respondents' corporate structure, management and operational requirements as set forth in their own Operating Agreements per the above Findings of Fact?

**ORDER GRANTING APPLICATION FOR AN ORDER ALLOWING
INSPECTION OF PUBLIC RECORDS OF HI'ILEI ALOHA LLC,
HO'OKELE PONO LLC, and HI'IPAKA LLC**

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Court
HEREBY GRANTS the Application as follows:

1. Within thirty days following the entry of this Order, Respondents are directed to produce to Walden their check registers and income and expense statements from inception to the present day.

2. The Court will award Applicant reasonable attorney fees and costs pursuant to HRS, Section 92F-15(d), upon a non-hearing motion for same.

3. This FOFCOL and Order is the Court's version, finalized after the Rule 23 process of receiving proposals from the parties and amicus. The Court's version a) primarily tracks Petitioner's proposed orders, and b) on some issues borrows from amicus' proposals, and c) in places differs in significant respects from the proposals that were submitted. The process of reviewing the parties' submittals for the FOFCOL was extensive. A reviewing court may want to review the proposals in order to understand how this final version of the FOFCOL and Order was arrived at. Therefore, the Court hereby directs counsel for all parties and amicus to file in this case all their submissions regarding the form of the FOFCOL and Order, so that a reviewing court is aware of the positions taken by parties and amicus, and how the Court resolved them. To assist any reviewing court, each party and amicus shall include an index, and attach and tab as separate exhibits all their submittals (for the court's consideration in finalizing this FOFCOL and Order) following the Court's 3/29/19 and 4/25/19 Minute Orders.

DATED: Honolulu, Hawai'i,

6-25-19

JUDGE OF THE ABOVE-ENTITLED COURT

Walden v. Hi'ilei Aloha LLC, et al.; S.P. No. 18-1-0301 (JPC); FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER REGARDING BOTH:

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