In his Answering Brief, Respondent Ray Kamikawa makes various policy arguments as to why more transparency in revenue estimating is needed. The issue, however, is not whether the law should be changed to require the Department of Taxation, State of Hawaii (DOTAX) to disclose the assumptions, data, and analysis for revenue estimates. Instead, the issue in this case is whether the exemption under section 92F-13(3), Hawaii Revised Statutes (HRS), applies. Because DOTAX has established that disclosure of the assumptions, data, and analysis for revenue estimates will frustrate a legitimate government function, Office of Information Practices (OIP) Opinion Letter No. F19-05 should be reversed and DOTAX's decision to
withhold the records should be upheld. 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.

ARGUMENT

1. DISCLOSURE OF THE ASSUMPTIONS, DATA, AND ANALYSIS USED BY DOTAX TO CREATE REVENUE ESTIMATES WOULD FRUSTRATE A LEGITIMATE GOVERNMENT FUNCTION.

Respondent Ray Kamikawa does not dispute that the blanket rule formulated by OIP, which would disqualify any government function that can be described as decisionmaking from the exemption under section 92F-13(3), Hawaii Revised Statutes (HRS), is palpably erroneous, nor does Respondent dispute that the creation of revenue estimates is a legitimate government function. Respondent also does not dispute that an unfair advantage will be conferred upon the requester if disclosure of the assumptions, data, and analysis for the revenue estimates is made, which would result in frustration of a legitimate government function.

Instead, Respondent incorrectly asserts that the assumptions, data, and analysis for the revenue estimates should be provided to him because, otherwise, DOTAX will be given an undue advantage. (Respondent Ray Kamikawa's Answering Brief ("AB"), at 6-7.) DOTAX, however, created the revenue estimates for House Bill 2744, HD 1, SD 1 and Senate Bill 2833, SD 2, HD 1 from a neutral policy perspective and did not support or oppose the bills.¹ (R. 6-11, 65.) Stated differently, the legislature's adoption of DOTAX's revenue estimates conferred no advantage on DOTAX.

¹ As previously explained in the Opening Brief, OIP does not dispute DOTAX's neutrality in creating the revenue estimates: "OIP accepts that TAX has specialized knowledge and skills that it uses to provide neutral revenue analysis in its testimony to the Legislature." (R. 65 (emphasis added).)
Respondent Kamikawa also sets forth arguments as to why he believes sound public policy favors the disclosure of the assumptions, data, and analysis for the revenue estimates. (AB 6-9.) The issue here, however, is not whether public policy supports disclosing the assumptions, data, and analysis for revenue estimates, but rather, whether the records are protected from disclosure under the statutory exemption for frustration of a legitimate government function. Notably, Respondent Kamikawa presented the same policy arguments being advanced here to the legislature in support of a bill that would have required DOTAX to disclose its methodology and assumptions, but the legislature opted not to pass the bill. S.B. 2257, 29th Leg. (2018).

Finally, Respondent references a federal case, American Society of Pension Actuaries v. IRS, 746 F. Supp. 188 (D.D.C. 1990), (hereinafter "ASPA"), in which the IRS was ordered to release its revenue estimates in response to a Freedom of Information Act request. The issue in ASPA, however, was whether the IRS' revenue estimates were protected from disclosure under the deliberative process privilege, which does not exist under Hawaii law, and not whether disclosure would frustrate a legitimate government function.\(^2\) Id. at 190. Thus, the ASPA case is easily distinguishable from the instant matter.

In sum, Respondent Kamikawa has failed to negate DOTAX's showing that disclosure of the assumptions, data, and analysis used to create revenue estimates would frustrate a legitimate government function. Accordingly, OIP Opinion Letter No. F19-05 should be reversed and DOTAX's decision to withhold the records should be affirmed.

\(^2\) The Freedom of Information Act, 5 U.S.C. § 552(b), does not contain an exemption for frustration of a legitimate government function, similar to that in section 92F-13(3), HRS.
II. THE ASSUMPTIONS, DATA, AND ANALYSIS USED BY DOTAX TO CREATE REVENUE ESTIMATES QUALIFY AS DRAFT WORKING PAPERS OR WORK PRODUCT OF LEGISLATIVE COMMITTEES.

Respondent Kamikawa contends that the revenue estimates do not qualify as legislative work product because they were not formally adopted or incorporated by the Legislature. Notwithstanding the fact that Respondent's contention lacks authoritative support, the Senate Committee on Ways and Means expressly incorporated the revenue estimates into its committee report, noting that the measure, as estimated by DOTAX, "will result in revenue losses of $9,000,000 in fiscal year 2019, $18,000,000 in fiscal year 2020, and $27,000,000 in fiscal year 2021." S. Stand. Com. Rep. No. 3354, in 2016 Senate Journal, at 1445.

Further, Respondent's contention that, if the revenue estimates qualify as legislative work product, any testimony considered by a legislative committee would ipso facto become legislative work product ignores the fact that the revenue estimates were prepared at the request of the legislative committees to assist in their deliberations. (R. 12.) The revenue estimates are therefore distinguishable from testimony submitted from members of the public or other agencies on their own accord.

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

Based on the foregoing, the Court should reverse OIP Opinion Letter No. F19-05 as palpably erroneous and affirm DOTAX's decision to withhold the records under sections 92F-13(3) and 92F-13(5), HRS.

DATED: Honolulu, Hawaii, OCT 14 2019

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