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IN THE TAX APPEAL COURT OF THE  
STATE OF HAWAII

In the Matter of the Tax Appeal	)	Case No. 1CTX-21-0001613
	)	
of	)	TAXPAYER-APPELLANT
	)	BOOKING.COM B.V.’S MOTION TO
Booking.com B.V.	)	SEAL; MEMORANDUM IN SUPPORT
	)	OF MOTION; DECLARATION OF
Taxpayer-Appellant	)	NATHANIEL A. HIGA;
	)	DECLARATION OF KARINE HALIMI-
	)	GUEZ; EXHIBITS “A” – “B”; NOTICE
	)	OF HEARING AND CERTIFICATE OF
	)	SERVICE
	)	
	)	<b><u>Hearing:</u></b>
	)	<b>Date: January 6, 2025</b>
	)	<b>Time: 1:30 p.m.</b>
	)	<b>Judge: The Honorable Kevin T. Morikone</b>

**TAXPAYER-APPELLANT BOOKING.COM B.V.’s**  
**MOTION TO SEAL**

Taxpayer-Appellant, BOOKING.COM B.V. (“**Taxpayer**”), by and through its attorneys Chun Kerr LLP, a Limited Liability Law Partnership, and Buchalter, hereby moves this Court, pursuant to Rule 10.4 of the Hawaii Court Records Rules (“**HCCR**”) to: (1) maintain the sealing of Dkt. 70<sup>1</sup>, 110, 111, 167, 189, 190, 191, 207, 208, 210, 211, 212, 213, 214, 215, 224<sup>2</sup> and 225<sup>3</sup> (the “**Sealed Records**”); (2) maintain the sealing of portions of information contained in Dkt. 44, 45, 49, 50, 54, 70, 108<sup>4</sup>, 109, 155, 156, 166, 168, 183, 187, 188, 202, 203<sup>5</sup>, 204<sup>6</sup>, 205<sup>7</sup>, 224<sup>8</sup>, 225<sup>9</sup> and 228 (the “**Redacted Records**”); and (3) unseal the previously inadvertently sealed Dkt. 108<sup>10</sup>, 166, 186, 203<sup>11</sup>, 204<sup>12</sup>, 205<sup>13</sup>, 206, 223, 225<sup>14</sup> and 229 (the “**Unsealed Records**”). In the alternative and pursuant to HCCR Rule 10.5, Taxpayer respectfully requests to submit full copies of the Sealed Records and the Redacted Records to this Court for *in camera* review and determination of Taxpayer’s sealed and/or redaction requests.

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<sup>1</sup> Only Exhibit I is requested to be sealed.

<sup>2</sup> Only Exhibits 9-13 are requested to be sealed.

<sup>3</sup> Only Exhibits 14-15 are requested to be sealed.

<sup>4</sup> Only the Director’s Second Supplemental Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, Filed on July 7, 2022, is requested to be redacted.

<sup>5</sup> Only those documents bates labeled A0006-0019 are requested to be redacted.

<sup>6</sup> Only those documents bates labeled A0004-17 are requested to be redacted.

<sup>7</sup> Only those documents bates labeled A0002-9 are requested to be redacted.

<sup>8</sup> Only portions of Taxpayer’s Supplemental Memorandum in Response to the Director’s Supplemental Memorandum, Filed April 5, 2024 and the declarations of Nathaniel A. Higa and Brad Andress are requested to be redacted.

<sup>9</sup> Only Exhibit 17 is being requested to be redacted.

<sup>10</sup> Only the declaration of Joshua Michaels in support of the Director’s Second Supplemental Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, Filed on July 7, 2022, is requested to be unsealed.

<sup>11</sup> Only those documents bates labeled A0001-5 are requested to be unsealed.

<sup>12</sup> Only those documents bates labeled A0001-3 are requested to be unsealed.

<sup>13</sup> Only that document bates labeled A0002 is requested to be unsealed.

<sup>14</sup> Only Exhibit 16 is being requested to be unsealed.

This Motion is brought pursuant to Rule 10.4 of the Hawaii Court Records Rule, Rule 7 of the Hawaii Rules of Civil Procedure and Rule 7 of the Rules of the Circuit Courts of the State of Hawaii. This Motion is supported by the attached memorandum, declarations, and exhibits, and the file and pleadings herein.

DATED: Honolulu, Hawaii, November 22, 2024.

/s/ Nathaniel A. Higa  
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MICHELLE K. CORREIA

of CHUN KERR LLP  
a Limited Liability Law Partnership

and

DANIEL M. RYGORSKY  
of BUCHALTER

Attorneys for Taxpayer-Appellant  
Booking.com B.V.

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IN THE TAX APPEAL COURT OF THE  
STATE OF HAWAII

In the Matter of the Tax Appeal	)	Case No. 1CTX-21-0001613
	)	
of	)	MEMORANDUM IN SUPPORT OF
	)	MOTION
Booking.com B.V.	)	
	)	
Taxpayer-Appellant	)	
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**TAXPAYER-APPELLANT BOOKING.COM B.V.’S  
MEMORANDUM IN SUPPORT OF MOTION TO SEAL**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

On December 28, 2022, Taxpayer and the DIRECTOR OF TAXATION, STATE OF HAWAII (the “**Director**”) filed their proposed stipulated protective order (“**SPO**”). [Dkt. 86] A week later and after due consideration by the Honorable Gary W.B. Chang (Ret.), this Court entered the SPO. [Dkt. 88] Pursuant to and in reliance on the SPO, certain of Taxpayer’s filings in this tax appeal have been made under seal.

On September 18, 2024, Public First Law Center (“**Public First**”) filed its Motion to Unseal Court Records (the “**Motion to Unseal**”), arguing that the SPO is insufficient to support the sealing of filings in this tax appeal and asking that this Court unseal various records which range in dates from March 2023 to April 2024 as follows:

1. The Director’s Second Supplemental Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment [Dkt. 108], including Exhibits A [Dkt. 109] and B [Dkt. 110, 111] thereto, filed on March 28, 2023;
2. Taxpayer’s Memorandum in Opposition to the Director’s Cross Motion for Partial Summary Judgment [Dkt. 166], including Exhibit 2 [Dkt. 167], filed March 8, 2024;

3. The Director's Reply in Support of Its Cross Motion for Partial Summary Judgment [Dkt. 183], including the declaration of Deputy Attorney General Mary Bahng Yokota [Dkt. 186] and Exhibits 12 [Dkt. 187] and 13 [Dkt. 188], filed on March 13, 2024;
4. The Director's Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment and (2) Memorandum in Opposition to Taxpayer's Motion for Summary Judgment [Dkt. 202], including Exhibits 18 to 29 [Dkt. 203-208, 210-215], filed on April 5, 2024;
5. Taxpayer's Supplemental Memorandum in Response to the Director's Supplemental Memorandum [Dkt. 224-225], filed on April 17, 2024; and
6. The Director's Supplemental Reply Memorandum in Response to Taxpayer's Supplemental Memorandum [Dkt. 228], filed on April 26, 2024.<sup>15</sup>

The vast majority of the documents contain Confidential Material, either in whole or in part, as defined on page 3 and in paragraph 2 of the SPO. Declaration of Nathaniel A. Higa, dated November 21, 2024 ("**Higa Decl.**"), at ¶¶ 4-8; Declaration of Karine Halimi-Guez, dated November 19, 2024 ("**Halimi-Guez Decl.**"), at ¶ 5. Specifically, the Sealed Records are comprised of Taxpayer's general terms and conditions, contracts with its accommodation providers, accommodation provider contact lists, documents provided to the Director as part of Taxpayer's audit and summary judgment hearing transcripts. Halimi-Guez Decl. at ¶ 6. Additionally, the Redacted Records include briefing and Taxpayer's discovery responses in this matter that summarizes, describes or quotes directly from the Sealed Records. *Id.* at ¶ 7. Both

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<sup>15</sup> Taxpayer has filed an Opposition to the Motion to Unseal [Dkt. 261], which is currently scheduled to be heard by this Court on November 25, 2024. As outlined in Taxpayer's opposition to the motion to unseal, the terms of the SPO, and its submission to and entry by this Court, satisfy the requirements for sealing the Sealed Records, particularly in the context of a tax appeal. However, in the event that the Court determines that the SPO was not sufficient and that a motion to seal is necessary, Taxpayer submits this motion to maintain the sealing of its confidential business and tax records. The filing of this Motion clearly satisfies the procedural requirements of sealing documents. Accordingly, this Motion focuses on the substantive requirements required to overcome the public's right of access, including that sought by Public First in its Motion to Unseal.



the Sealed Records and the Redacted Records contain Taxpayer’s trade secrets, confidential business information and/or tax return information that must be kept confidential to protect Taxpayer and its proprietary business model and practices. Id. at ¶ 8. In an abundance of caution and notwithstanding its position that Taxpayer was justified in its actions pursuant to the SPO, Taxpayer seeks to maintain the sealing of the Sealed Records and to partially seal the Redacted Records or, in the alternative, to provide this Court with the Sealed Records and the Redacted Records for *in camera* inspection and the Court’s determination of their sealed and/or redacted status.<sup>16</sup>

## **II. STANDARD OF REVIEW**

The Hawaii Supreme Court states that the public has a right to access judicial proceedings and records, including records filed in civil cases. Grube v. Trader, 142 Haw. 412, 422, 420 P.3d 343, 353 (2018); In re Estate of Campbell, 106 Haw. 453, 462, 106 P.3d 1096, 1105 (2005) (observing that “the reasons underlying openness in the criminal context...are equally compelling in the civil context.”). But that right “is not absolute”, and in certain circumstances, “court proceedings may be closed to protect an interest that outweighs the value of openness.” Roy v. Gov’t Emples. Ins. Co. (Roy), 152 Haw. 225, 233, 524 P.3d 1249, 1257 (2023). The standard for determining whether the sealing of records involves both procedural and substantive requirements. Grube, 142 Haw. at 423, 420 P.3d at 354.<sup>17</sup>

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<sup>16</sup> Taxpayer also seeks to unseal the Unsealed Documents that were sealed in error and should be made public.

<sup>17</sup> See e.g., Civil Beat Law Ctr. for Pub. Interest v. Chang, No. SCPW-21-0000511, 2022 Haw. LEXIS 73, 2022 WL 1490412, \*2 (Haw. May 11, 2022) (denying modified writ petition seeking to prohibit the trial judge from enforcing a sealing order: “At this time, . . . the more appropriate course of action is for petitioner to seek relief, as modified, in the underlying case, and for the respondent judge, after all parties are heard on the matter, to thereafter enter formal written findings consistent with constitutional standards and case law, specifically Ahn and Grube.”).

The procedural requirements to seal documents or information contained in documents involve: (1) a reasonable opportunity to state objections; and (2) reasons supporting closure articulated by findings. OAHU Pubs., Inc. v. Ahn (Ahn), 133 Haw. 482, 498, 331 P.3d 460, 476 (2014). The substantive requirements are whether “(1) the closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.” Id. at 497-98, 331 P.3d at 475-76, quoting Oregonian Pub. Co. v. U.S. Dist. Court for the Dist. of Or., 920 F.2d 1462, 1466 (9th Cir. 1990). In the context of business records, courts have made clear when and how these substantive requirements can be met:

Confidential business information in the form of “license agreements, financial terms, details of confidential licensing negotiations, and business strategies” can be “compelling reasons” to prevent competitors from leveraging this information to harm the designating parties in future negotiations. If publicly disclosing that information would harm a designating party’s competitive standing and divulge terms of confidential contracts or contract negotiations, compelling reasons may exist to seal that information.

Demartini v. Microsoft Corp., 2023 U.S. Dist. LEXIS 109855, \*5-6 (N.D. Cal. June 26, 2023)

(internal quotations and citations omitted).

### **III. ARGUMENT**

As noted above, the filing of this Motion fulfills the procedural requirements of sealing filings by providing a reasonable opportunity to state objections and reasons supporting the closure of the records. Taxpayer requests that the Court grant the Motion with the requisite findings.

A. **Dkt. 70<sup>18</sup>, 110, 111, 167, 189, 190, 191, 207, 208, 210, 211, 212, 213, 214, 215, 224<sup>19</sup> and 225<sup>20</sup> Must Remain Sealed In Their Entirety**

1. **There Is A Compelling Interest Requiring Sealing**

First, there are compelling interests to support sealing the Sealed Records in their entirety and protecting them from public disclosure based on Taxpayer's commercially sensitive business information contained therein. Under the "first substantive requirement to close court proceedings or seal court records, the asserted government interest...must be compelling." Grube, 142 Haw. at 425, 420 P.3d at 356. Simply, the "asserted interest must be of such consequence as to outweigh both the right of access of individual members of the public and the general benefits to public administration afforded by open trials." Id.

a. **Documents Containing Taxpayer's Trade Secrets and/or Confidential Business Information Justify Sealing**

The protection of trade secrets is a compelling reason to seal documents. Kamakana v. City & Cnty. of Honolulu (Kamakana), 447 F.3d 1172, 1179 (9th Cir. 2006). A "trade secret" is defined as:

information, including a formula, pattern, compilation, program device, method, technique, or process that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Hawaii Revised Statutes ("HRS") § 482B-2.

Information falls within the definition of a trade secret where disclosure of such information would give competitors an advantage over the moving party. Apple Inc. v. Samsung

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<sup>18</sup> Only Exhibit I is requested to be sealed.

<sup>19</sup> Only Exhibits 9-13 are requested to be sealed.

<sup>20</sup> Only Exhibits 14-15 are being requested to be sealed.

Elec. Co., 727 F.3d 1214, 1221-22 (Fed. Cir. 2013) (applying Ninth Circuit law regarding “sealing documents when the release of the documents will cause competitive harm to a business,” and defining “trade secret” for purposes of a motion to seal as “information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”). Confidentiality provisions within a contract serve as a means of supporting a showing that the information is secretive in nature and falls within the definition of a trade secret. Stafford v. Rite Aid Corp., 2019 U.S. Dist. LEXIS 137609, \*4 (S.D. Cal. Aug 14, 2019); see also, Delashaw v. Seattle Times Co., 2020 U.S. Dist. LEXIS 93506, \*10 (W.D. Wash. May 28, 2020) (the court granted the motion to seal certain contracts on the basis that “each contract specifically agreed that the contract is confidential and shall be maintained in strict confidence.”).

Another compelling reason to keep documents under seal is that they contain “sources of business information that might harm a litigant’s competitive standing.” Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1097 (9th Cir. 2016).<sup>21</sup> The information in the documents sought to be sealed must be confidential, not publicly available and would reasonably result in injury if disclosed. Primus Grp., Inc. v. Inst. for Env’tl. Health, Inc., 395 F.Supp. 3d 1243, 1269 (N.D. Cal. 2019) (“revealing the identity of customers and the specific services provided to them would harm its competitive standing because competitors would more effectively be able to target

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<sup>21</sup> The Ninth Circuit has recognized that confidential business information contained in a party’s commercial contracts is sufficient to meet the compelling reasons standard. See, e.g., In re Elec. Arts, Inc., 298 F. App’x 568, 569 (9th Cir. 2008) (disclosure of “pricing terms, royalty rates and guaranteed minimum payment terms” in a licensing agreement satisfied the “compelling reasons” standard necessary to seal records); see also, Aya Healthcare Servs. v. Amn Healthcare, Inc., 2020 U.S. Dist. LEXIS 68855, \*17 (S.D. Cal. Apr. 20, 2020) (the court granted the defendant’s request to seal a report and depositions that contained “references to information detailing Defendants’ sensitive financial terms, proprietary business strategies, and confidential negotiations and agreements with third parties.”), and Stout v. Hartford Life & Accident Ins. Co., 2012 U.S. Dist. LEXIS 172088, \*7 (N.D. Cal. Dec. 4, 2012) (“litigants may file under seal their contracts with third parties that contain proprietary and confidential information”).

their marketing efforts ... disclosure would provide its competitors and its customers' competitors with valuable insights ... in particular product categories without conducting similar tests themselves.”).

**b. The Sealed Records Contain Both Taxpayer's Trade Secrets and/or Confidential Business Information That Must Remain Sealed**

Here, the Sealed Records found in Dkt. 110, 111, 167, 189, 190, 191, 207, 208, 210, 211, 212, 213, 215, 224<sup>22</sup> and 225<sup>23</sup> contain information that constitutes both trade secrets and confidential business information of Taxpayer. Halimi-Guez Decl. at ¶ 9. Specifically, these documents contain Taxpayer's general terms and conditions applicable to its contracts with its accommodation providers, various contracts with Taxpayer's accommodation providers, accommodation provider contact lists, and summary judgment hearing transcripts discussing and quoting directly from Taxpayer's contracts. *Id.* As outlined below and in **Exhibit "A"** hereto, each document is supported by a factual basis for sealing in that they involve Taxpayer's: (1) agency and business model information; (2) commission and payment information; (3) gross income and commission income information; (4) platform operations and information; (5) marketing information; (6) parties' business relationship information and terms; (7) licensing terms; and/or (8) accommodation provider contact information. *Id.* at ¶ 10; Higa Decl. at ¶ 9. All of these documents fall under protected trade secrets and/or confidential business information that serve the compelling interest for sealing them from public disclosure.

First, the agency and business model information contained in certain Sealed Records<sup>24</sup>

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<sup>22</sup> Only Exhibits 9-13 are requested to be sealed.

<sup>23</sup> Only Exhibits 14-15 are requested to be sealed.

<sup>24</sup> Dkt. 110 (documents bates labeled BOOKING000001-15, BOOKING000212, BOOKING000273, BOOKING000286, BOOKING000345-346), 167 (documents bates labeled BOOKING000212, BOOKING000235-236, BOOKING000245, BOOKING000248), 189 (documents bates labeled 00003947-3953, 00003954-3959), 191, 208, 210, 212, 213, 215, 224

involve Taxpayer’s trade secrets and confidential business information related to its specific method and process for organizing and structuring its business. See, HRS § 482B-2; Halimi-Guez Decl. at ¶ 11. This information must remain confidential in order for Taxpayer to distinguish its business model from that of its competitors and to remain competitive with those competitors. Id.; see also, Apple Inc., 727 F.3d at 1221-22 (for purposes of a motion to seal, a trade secret is “information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.”). Additionally, the Sealed Records include Taxpayer’s general terms and conditions applicable to its contracts with its accommodation providers as well as Taxpayer’s specific contracts with its accommodation providers, all of which require confidentiality and nondisclosure to the public. Halimi-Guez Decl. at ¶ 11; see, Aya Healthcare, 2020 U.S. Dist. Lexis 68855, \*17; see also, Delashaw, 2020 U.S. Dist. LEXIS 93506, \*10, Stout, 2012 U.S. Dist. LEXIS 172088, \*7.

Second, the commission and payment information contained in certain Sealed Records<sup>25</sup> – including Taxpayer’s general terms and conditions as well as its contracts with accommodation providers – involve formulas and algorithms describing how Taxpayer calculates its commissions and payments. See, HRS § 482B-2; Halimi-Guez Decl. at ¶ 12. This qualifies as both a trade secret and confidential business information specific to Taxpayer as these Sealed Records contain Taxpayer’s pricing terms, rates and fees used in calculating earned commission for its services. Halimi-Guez Decl. at ¶ 12; see also, In re Elec. Arts, Inc., 298 F. App’x at 569; see also, Aya

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(documents bates labeled 00000405-433, BOOKING000001-25, 00000246-248) and 225 (documents bates labeled 00000547-462). See also, **Exhibit “A”** at pp. 1-7.

<sup>25</sup> Dkt. 110 (documents bates BOOKING000001-15, BOOKING000124-125, BOOKING000202\_REV), 167 (documents bates labeled BOOKING000206\_REV, BOOKING000245, BOOKING000248), 191, 207, 210, 211, 212, 213, 215, 224 (documents bates labeled 00000405-433, BOOKING000001-25) and 225 (documents bates labeled 00000457-462). See also, **Exhibit “A”** at pp. 1-7.

Healthcare, 2020 U.S. Dist. Lexis 68855, \*17. Similarly, Taxpayer’s gross and commission income information found in some of the same Sealed Records<sup>26</sup> outlines Taxpayer’s earnings and rates calculated from the contracts entered into with companies that agree to use its services. Halimi-Guez Decl. at ¶ 13. Such contracts contain pricing terms, rates and fees used to calculate Taxpayer’s income and which were to remain confidential pursuant to the confidentiality clauses contained therein. Id.; see, Delashaw, 2020 U.S. Dist. LEXIS 93506, \*10 (“...the parties to each contract specifically agreed that the contract is confidential and shall be maintained in strict confidence.”); see also, In re Elec. Arts, Inc., 298 F. App’x at 569, Aya Healthcare, 2020 U.S. Dist. Lexis 68855, \*17.

Fourth, information describing Taxpayer’s platform operations contained in certain of the Sealed Records<sup>27</sup>, including its general terms and conditions and specific contracts, involve the website(s), apps, tools, platforms and/or other devices Taxpayer and its affiliated companies and business partners use or facilitate to conduct its proprietary business operations. Halimi-Guez Decl. at ¶ 14. Platform operations and information falls squarely within the parameters of protected trade secrets and confidential business information because this information provides details into how Taxpayer maintains, administers and operates not only the online platform itself, but the services it provides through the online platform. See, HRS § 482B-2; Halimi-Guez Decl. at ¶ 14; see also, Aya Healthcare, 2020 U.S. Dist. Lexis 68855, \*17.

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<sup>26</sup> See, FN 22 and Dkt. 215 and 225 (documents bates labeled 00000457-462). See also, **Exhibit “A”** at pp. 5-7.

<sup>27</sup> Dkt. 110 (documents bates labeled BOOKING000001-15, BOOKIN000124-125, BOOKING000202\_REV), 167 (documents bates labeled BOOKING000206\_REV, BOOKING000245, BOOKING000248), 207, 208, 210, 211, 212, 213 and 224 (documents bates labeled 00000405-433, BOOKING000001-25). See also, **Exhibit “A”** at pp. 1-6.

Fifth, Taxpayer’s marketing information outlined in certain Sealed Records<sup>28</sup> involves its confidential business strategies and practices in advising its clients on how it will market, advertise or promote its business. Halimi-Guez Decl. at ¶ 15. This information is both trade secrets and confidential business information because it is used in promoting Taxpayer’s business throughout the world and provides Taxpayer with “an opportunity to obtain an advantage over competitors who do not know or use it”. Id.; see also, Apple Inc., 727 F.3d at 1221-22.

Sixth, business relationship information and terms between Taxpayer and its accommodation providers outlined in certain Sealed Records<sup>29</sup>, which consist of Taxpayer’s general terms and conditions and its contracts with accommodation providers, includes customer data, transaction volume, and obligations and duties of both Taxpayer and its clients that were written based on the agreed upon business relationship. See, HRS § 482B-2; Halimi-Guez Decl. at ¶ 16. The information and terms of these business relationships highlight Taxpayer’s process and business strategies when entering into these confidential negotiations and agreements with third parties. Halimi-Guez Decl. at ¶ 16; see also, Aya Healthcare, 2020 U.S. Dist. Lexis 68855, \*17., Delashaw, 2020 U.S. Dist. LEXIS 93506, \*10, Stout, 2012 U.S. Dist. LEXIS 172088, \*7.

Seventh, licensing term information in some of the Sealed Records<sup>30</sup> qualifies as trade secrets and confidential business information because that information outlines Taxpayer’s and its clients’ contractual obligations and duties, and specific terms and rights related to the

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<sup>28</sup> Dkt. 110 (documents bates labeled BOOKING000001-15), 191 and 224 (documents bates labeled 00000405-433, BOOKING000001-25). See also, **Exhibit “A”** at pp. 1-3, 6.

<sup>29</sup> Dkt. 110 (documents bates labeled BOOKING000001-15), 167 (documents bates labeled BOOKING000212, BOOKING000235-236, BOOKING000245, BOOKING000248), 191, 207, 208, 210, 211, 212, 213 and 224 (documents bates labeled 00000405-433, BOOKING000001-25, 00000246-248). See also, **Exhibit “A”** at pp. 1-6.

<sup>30</sup> Dkt. 110 (documents bates labeled BOOKING000001-15), 207, 208, 210, 211, 212, 213 and 224 (documents bates labeled 00000405-433, BOOKING000001-25). See also, **Exhibit “A”** at pp. 1-6.



collaboration with affiliated companies and/or third parties. Halimi-Guez Decl. at ¶ 17; see also, In re Elec. Arts, Inc., 298 F. App'x at 569.

Finally, the accommodation provider contact information contained in certain of the Sealed Records<sup>31</sup> provides the name, address, state, contract date and specific contact person for each individual Taxpayer's contracts in the State of Hawaii. Halimi-Guez Decl. at ¶ 18. This is confidential business information that, if released, would allow Taxpayer's competitors to potentially misuse or usurp. Id.; see also, Primus Grp., 395 F. Supp. At 1269 ("revealing the identity of customers and the specific services provided to them would harm its competitive standing because competitors would more effectively be able to target their marketing efforts ... disclosure would provide its competitors and its customers' competitors with valuable insights").

Accordingly, there are sufficient and justifiable compelling reasons – e.g., inclusion of Taxpayer's trade secrets and confidential business information – that warrant sealing those documents found in Dkt. 110, 111, 167, 189, 190, 191, 207, 208, 210, 211, 212, 213, 215, 224<sup>32</sup>, 225<sup>33</sup> and as detailed supra and in **Exhibit "A"**.

**c. Documents Containing Taxpayer's Tax Return Information Obtained During Audit Justify Sealing**

Yet another compelling reason that justifies Taxpayer's request to maintain the sealing of the Sealed Records<sup>34</sup> is that such documents contain tax return information obtained by the Director during Taxpayer's audit underlying the present action. Halimi-Guez Decl. at ¶ 19. The

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<sup>31</sup> Dkt. 110 (documents bates labeled BOOKING000202\_REV, BOOKING000212, BOOKING000273, BOOKING000286, BOOKING000345-346, BOOKING000420-455), 111, 167 (documents bates labeled BOOKING000206\_REV, BOOKING000235-236), 207, 208, 210, 211, 212 and 213. See also, **Exhibit "A"** at pp. 1-5.

<sup>32</sup> Only Exhibits 9-13 are requested to be sealed.

<sup>33</sup> Only Exhibits 14-15 are requested to be sealed.

<sup>34</sup> Dkt. 70 (Exhibit I), 189, 190, 214, 215, 224 (documents bates labeled 00000405-433, 00000397-398, 00000482-483, 00000246-248) and 225 (documents bates labeled 00000203-208, 0000457-462). See, **Exhibit "A"** at pp. 1-7.

description of a taxpayer’s “records”, “other documents” and “other evidence” in HRS § 237-39(a) as it relates to an audit is encompassed within the definition of tax return information in 26 U.S. Internal Revenue Code § 6103(b)(2), which states in pertinent part:

return information” means (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, overassessments, 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 impositions or offense[. <sup>35</sup>]

HRS § 237-39(a) states that for purposes of an audit or for “making an assessment where no return has been made”, the Director may “examine all account books, bank books, bank statements, records, vouchers, taxpayer’s copies of federal tax returns, and any and all other documents and evidence having any relevancy to the determination of the gross income or gross proceeds of sales of any taxpayer as required to be returned under this chapter ... and may require the production of any books, statements, or other evidence open to examination[.]”

Based on this statutory description, certain of the Sealed Records sought by Taxpayer to be sealed fall within the definition of tax “return information” in 26 U.S. Code § 6103(b)(2)<sup>36</sup> as

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<sup>35</sup> While HRS Chapter 237 does not have a conformity provision as does HRS Chapter 235 (see, HRS § 235-3), the Director has previously argued for application of the definition of “return information” in 23 U.S. Code § 6103(b)(2) to HRS § 237-34. See, OIP Op. Ltr. No. F21-01 (dated August 26, 2020), attached hereto as **Exhibit “B”**. Such an application to Taxpayer’s request to seal documents obtained by the Director during its audit conforms with the position taken by the Director in other circumstances in which it argued for the confidentiality and nondisclosure of certain tax return documents.

<sup>36</sup> Although Taxpayer did not file Hawaii GET returns, the definition of “return information” for purposes of HRS § 237-39(a) and HRS § 237-34(b)’s confidentiality provision is applicable to Taxpayer and its present request. See, *Tweedy v. U.S.*, 1994 U.S. App. LEXIS 14836 (9th Cir. 1994) (discussion that certain documents of a person who did not file federal income tax returns are “return information” for purposes of 26 U.S. Code § 6103(b)(2)).

they include: (1) Taxpayer's identity; (2) the nature, source, or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, [or] net worth; (3) tax liability; (4) tax withheld; (5) deficiencies, overassessments, or tax payments; (6) whether Taxpayer's return was, is being, or will be examined or subject to other investigation or processing; and/or (7) any other data received by, recorded by, prepared by, furnished to, or collected by the Director with respect to Taxpayer's returns or with respect to the Director's determination of the existence, or possible existence, of liability (or the amount thereof) for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

Moreover, tax return information is protected from disclosure by certain confidentiality statutes in HRS, Title 14.<sup>37</sup> For purposes of the present matter and under HRS § 237-34(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, including the auditor or the auditor's agent with regard to tax return information obtained pursuant to section 23-5(a), to intentionally make known information imparted by any tax return or return information filed pursuant to this chapter, or any report of any investigation of the return or of the subject matter of the return, or to willfully permit any return, return information, or report so made, or any copy thereof, to be seen or examined by any person[.]

Accordingly, those documents in Dkt. 70<sup>38</sup>, 189, 190, 214, 215, 224<sup>39</sup> and 225<sup>40</sup> – as being ones provided to the Director during the course of Taxpayer's audit – qualify as tax “return information” under the federal definition. Therefore, as tax “return information”, these Sealed

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<sup>37</sup> See e.g., HRS §§ 235-116 (re: income tax return information) and 237D-13 (re: transient accommodation tax return information).

<sup>38</sup> Exhibit I.

<sup>39</sup> Documents bates labeled 00000405-433, 00000397-398, 00000482-483, 00000246-248.

<sup>40</sup> Documents bates labeled 00000203-208, 0000457-462.

Records Taxpayer seeks to seal in their entirety fall under HRS § 237-34 as it is unlawful to disclose tax return information.

**2. The Compelling Interest Would Be Harmed Absent Sealing**

Any disclosure of the Sealed Records would substantially and irreparably harm the compelling interest in protecting Taxpayer's trade secrets, confidential business information and/or tax return information. Halimi-Guez Decl. at ¶ 20. In order to satisfy the second requirement to seal documents, the movant must demonstrate with specificity that these compelling reasons exist and pose significant danger or harm if not properly sealed. See, Grube, 142 Haw. at 426, 420 P.3d at 357.

Here, allowing the Sealed Records to be placed into the eyes of the public will provide Taxpayer's competitors with an inside look into Taxpayer's trade secrets, confidential business information and/or tax return information that its competitors would not otherwise have or be able to obtain. Halimi-Guez Decl. at ¶ 21; see, Apple Inc., 727 F.3d at 1221-22. For example, any disclosure of Taxpayer's agency and business model information contained in Dkt. 110<sup>41</sup>, 167<sup>42</sup>, 189<sup>43</sup>, 191, 208, 210, 212, 213, 215, 224<sup>44</sup> and 225<sup>45</sup> would benefit Taxpayer's competitors and its customers' competitors with valuable insights on how Taxpayer models its business and operations without engaging in their own research or investigative practices. Halimi-Guez Decl. at ¶ 22; see also, Aya Healthcare, 2020 U.S. Dist. LEXIS 68855, \*17. Additionally, placing

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<sup>41</sup> Documents bates labeled BOOKING000001-15, BOOKING000212, BOOKING000273, BOOKING000286, BOOKING000345-346.

<sup>42</sup> Documents bates labeled BOOKING000212, BOOKING000235-236, BOOKING000245, BOOKING000248.

<sup>43</sup> Documents bates labeled 00003947-3953, 00003954-3959.

<sup>44</sup> Documents bates labeled 00000405-433, BOOKING000001-25, 00000246-248.

<sup>45</sup> Documents bates labeled 00000547-462.

Taxpayer's platform operations and information as found in Dkt. 110<sup>46</sup>, 167<sup>47</sup>, 207, 208, 210, 211, 212, 213 and 224<sup>48</sup> into the public realm would give its competitors an advantage over Taxpayer in understanding the inner workings of Taxpayer's platform without expending time and resources in developing its own platform. Halimi-Guez Decl. at ¶ 23; see also, Aya Healthcare, 2020 U.S. Dist. LEXIS 68855, \*17. Yet another example is that disclosure of Taxpayer's accommodation provider contact information in Dkt. 110<sup>49</sup>, 167<sup>50</sup>, 207, 208, 210, 211, 212, 213 and 224<sup>51</sup> would expose Taxpayer's business to its competitors and subsequently allows its competitors to target Taxpayer's clients more effectively with opposing marketing. Halimi-Guez Decl. at ¶ 24; see also, Primus Grp., Inc., 395 F. Supp. 3d at 1269. Moreover, many of the Sealed Records<sup>52</sup> are Taxpayer's general terms and conditions applicable to its contacts with accommodation providers as well as those specific contracts themselves that contain confidentiality clauses and require nondisclosure to the public. Halimi-Guez Decl. at ¶ 25; see, Delashaw, 2020 U.S. Dist. LEXIS 93506, \*10 (upholding sealing of records where "the parties to each contract specifically agreed that the contract is confidential and shall be maintained in strict confidence.").

Generally speaking, the disclosure of any of the Sealed Records constitute a significant danger and harm to Taxpayer's current and future business. Halimi-Guez Decl. at ¶ 26; see, Grube, 142 Haw. at 426, 420 P.3d at 357. Additionally, if one of Taxpayer's competitors accesses

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<sup>46</sup>Documents bates labeled BOOKING000001-15, BOOKING000124-125, BOOKING000202\_REV.

<sup>47</sup> Documents bates labeled BOOKING000206\_REV, BOOKING000245, BOOKING000248.

<sup>48</sup> Documents bates labeled 00000405-433, BOOKING000001-25.

<sup>49</sup> Documents bates labeled BOOKING000001-15.

<sup>50</sup> Documents bates labeled BOOKING000212, BOOKING000235-236, BOOKING000245, BOOKING000248.

<sup>51</sup> Documents bates labeled 00000405-433, BOOKING000001-25, 00000246-248.

<sup>52</sup> Dkt. 110 (documents bates labeled BOOKING000001-14), 207, 208, 210, 211, 212 and 224 (documents bates labeled BOOKING000001-25).

and misappropriates the information contained in the Sealed Records, Taxpayer will likely suffer significant loss of its business without a clear legal remedy. Halimi-Guez Decl. at ¶ 27; see also, H.Q. Milton, Inc. v. Webster, 2017 U.S. Dist. LEXIS 193646, \*12 (N.D. Cal. Nov. 22, 2017) (the court found a likelihood of significant harm would occur if defendants were not enjoined from using the plaintiff's trade secrets, including customer and pricing information based on the arguments that this information undermined the plaintiff's competitive advantage and allowed for specific targeting of the plaintiff's clients and customers). Accordingly, Taxpayer can establish with specific evidence that a connection exists between unsealing of the Sealed Records and the resulting infliction of irreparable harm. See, Grube, 142 Haw. at 425-25, 420 P.3d at 355-56. Indeed, as evidenced by Taxpayer's insistence on the entry of the SPO prior to the production of the Confidential Material, as well as steps taken by Taxpayer in the ordinary course of business to protect such material – including a confidentiality provision in each contract – it is of paramount importance that Taxpayer's Confidential Material remain confidential.

**3. There Is No Alternative To Sealing To Protect The Compelling Interest**

Taxpayer satisfies the third substantive requirement of the test to seal documents because there are no reasonable alternatives other than the complete sealing of the Sealed Records. As part of this requirement, a court will consider potential alternatives that would adequately protect the compelling interest before it grants a motion to seal the entire document. See, Ahn at 497-98, 331 P.3d at 475-76. Redaction is a common alternative when courts find full sealing of a document unnecessary. In re Civ. Beat Law Ctr. for the Pub. Int., 2023 U.S. Dist. LEXIS 86167, \*14 (D. Haw. May 17, 2023).

However, redaction is inadequate where the “secret and non-secret information cannot be separate” or “the record is sufficiently voluminous, the consequences of disclosure sufficiently

grave, or the risks of accidental disclosure sufficiently great.” U.S. v. Index Newspapers LLC, 766 F.3d 1072, 1095 (9th Cir. 2014). Another “alternative is limited release, with a court making records available to only certain persons along with an agreement about how and when those persons can disclose the information.” In re Civ. Beat, 2023 U.S. Dist. LEXIS 86167, \*14.

Here, redaction of the Sealed Records is not a reasonable alternative. The Sealed Records include trade secrets, confidential business and/or tax return information that are heavily intertwined with non-trade secret, non-confidential business and non-tax return information throughout each sentence and/or paragraph of the document and cannot be feasibly separated. Halimi-Guez Decl. at ¶ 28; see also, Index Newspapers, 766 F.3d at 1095. To redact the information contained in the Sealed Records would make such records unintelligible and exhaust an unnecessary amount of administrative time, burden and cost. Halimi-Guez Decl. at ¶ 29. Additionally, the potential for inadvertent disclosure of the information contained in the Sealed Records would negatively affect Taxpayer’s ability to negotiate the terms of future agreements and harms its competitive standing and advantage in the online travel booking marketplace. Halimi-Guez Decl. at ¶ 30; see also, Aya Healthcare Servs., 2020 U.S. Dist. LEXIS 68855, \*9. Limited release of this information by way of redacting is not an alternative for the stated reasons supra given the significant gravity and risk associated with disclosing any trade secrets, confidential business information and/or tax return information contained in the Sealed Records. See, In re Civ. Beat, 2023 U.S. Dist. LEXIS 86167, \*14.

Accordingly, this Court should grant Taxpayer’s Motion and maintain the sealing of the Sealed Records because (1) there exists an overriding interest that overcomes the right of public access, (2) there is a substantial probability that this overriding interest will be irreparably harmed if the Sealed Records are disclosed and (3) no less restrictive means exist to achieve the overriding

interest than to seal the Sealed Records in their entirety.

**B. Certain Portions of Dkt. 44, 45, 49, 50, 54, 70, 108<sup>53</sup>, 109, 155, 156, 166, 168, 183, 187, 188, 202, 203<sup>54</sup>, 204<sup>55</sup>, 205<sup>56</sup>, 224<sup>57</sup>, 225<sup>58</sup> and 228 Can Be Redacted**

Unlike with the Sealed Records, redaction is an appropriate and adequate alternative to full sealing of the Redacted Records because redaction of certain information therein serves a compelling interest and the proposed redactions are narrowly tailored. See, Grube 142 Haw. at 427, 420 P.3d at 358; see also, In re Civ. Beat, 2023 U.S. Dist. LEXIS 86167, \*21. The Redacted Records primarily consist of briefing, declarations and discovery responses – of both Taxpayer and the Director – in this matter and which include exact wording or summaries of portions of the Sealed Records. See, Exhibit “A” at pp. 7-16; Higa Decl. at ¶ 11. Moreover, the Redacted Records contain information constituting trade secrets, confidential business information and/or tax return information that must remain confidential and sealed from public access for the exact same reasons as discussed in Section III.A.1 supra. See, id. (setting forth the reasoning for redactions in each of the Redacted Records); Halimi-Guez at ¶ 31.<sup>59</sup> Disclosure of the information contained in the Redacted Records would cause the same irreparable harm to the compelling interest in protecting Taxpayer’s trade secrets, confidential business information and/or tax return information as discussed in Section III.A.2 supra.<sup>60</sup> Halimi-Guez Decl. at ¶ 32.

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<sup>53</sup> Only the Director’s Second Supplemental Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, Filed July 7, 2022, is requested to be redacted.

<sup>54</sup> Only those documents bates labeled A0006-19 are requested to be redacted.

<sup>55</sup> Only those documents bates labeled A0004-17 are requested to be redacted.

<sup>56</sup> Only those documents bates labeled A0002-9 are requested to be redacted.

<sup>57</sup> Only portions of Taxpayer’s Supplemental Memorandum in Response to the Director’s Supplemental Memorandum, Filed April 5, 2024 and the declarations of Nathaniel A. Higa and Brad Andress are requested to be redacted.

<sup>58</sup> Only Exhibit 17 is requested to be redacted.

<sup>59</sup> In the interests of brevity and judicial economy, Taxpayer refers this Court to its analysis in Sections III.A.1 and III.A.2 as to the Sealed Records as the same information is contained in the Redacted Records and the justification for sealing are the same as that for the Sealed Records.

<sup>60</sup> See FN 59.



Accordingly, this Court should grant Taxpayer’s Motion and permit Taxpayer to submit the Redacted Records with the proposed redactions to this court for *in camera* review to determine redaction status. The proposed redactions are narrowly tailored to prevent disclosure of Taxpayer’s trade secrets, confidential business information and/or tax return information. See, Roy, 152 Haw. at 234, 524 P.3d at 1258; “**Exhibit A**” at pp.7-16.

**C. Dkt. 108<sup>61</sup>, 166, 186, 203<sup>62</sup>, 204<sup>63</sup>, 205<sup>64</sup>, 206, 223, 225<sup>65</sup> and 229 Should Be Unsealed**

The Unsealed Records were either inadvertently sealed and do not warrant sealing under Hawai’i law. Therefore, Taxpayer requests that Dkt. 108<sup>66</sup>, 166, 186, 203<sup>67</sup>, 204<sup>68</sup>, 205<sup>69</sup>, 206, 223, 225<sup>70</sup> and 229 be unsealed.

**IV. CONCLUSION**

For the foregoing reasons, Taxpayer respectfully requests that this Court grant its Motion and (1) seal Dkt. 70<sup>71</sup>, 110, 111, 167, 189, 190, 191, 207, 208, 210, 211, 212, 213, 214, 215, 224<sup>72</sup> and 225<sup>73</sup>; (2) seal portions of information contained in Dkt. 44, 45, 49, 50, 54, 70, 108<sup>74</sup>, 109,

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<sup>61</sup> Only the declaration of Joshua Michaels in support of the Director’s Second Supplemental Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, filed on July 7, 2022, is requested to be unsealed.

<sup>62</sup> Only those documents bates labeled A0001-5 are requested to be unsealed.

<sup>63</sup> Only those documents bates labeled A0001-3 are requested to be unsealed.

<sup>64</sup> Only that document bates labeled A0001 is requested to be unsealed.

<sup>65</sup> Only Exhibit 16 is requested to be unsealed.

<sup>66</sup> Only the declaration of Joshua Michaels in support of the Director’s Second Supplemental Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, filed on July 7, 2022, is requested to be unsealed.

<sup>67</sup> Only those documents bates labeled A0001-5 are requested to be unsealed.

<sup>68</sup> Only those documents bates labeled A0001-3 are requested to be unsealed.

<sup>69</sup> Only that document bates labeled A0001 is requested to be unsealed.

<sup>70</sup> Only Exhibit 16 is requested to be unsealed.

<sup>71</sup> Only Exhibit I is requested to be sealed.

<sup>72</sup> Only Exhibits 9-13 are requested to be sealed.

<sup>73</sup> Only Exhibits 14-15 are requested to be sealed.

<sup>74</sup> Only the Director’s Second Supplemental Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, filed on July 7, 2022, is requested to be unsealed.

155, 156, 166, 168, 183, 187, 188, 202, 203<sup>75</sup>, 204<sup>76</sup>, 205<sup>77</sup>, 224<sup>78</sup>, 225<sup>79</sup> and 228; and (3) unseal the previously inadvertently sealed Dkt. 108<sup>80</sup>, 166, 186, 203<sup>81</sup>, 204<sup>82</sup>, 206, 223, 225<sup>83</sup> and 229.

DATED: Honolulu, Hawaii, November 22, 2024.

/s/ Nathaniel A. Higa  
NATHANIEL A. HIGA  
MICHELLE K. CORREIA

of CHUN KERR LLP  
a Limited Liability Law Partnership

and

DANIEL M. RYGORSKY  
of BUCHALTER

Attorneys for Taxpayer-Appellant  
Booking.com B.V.

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<sup>75</sup> Only those documents bates labeled A0006-0019 are requested to be redacted.

<sup>76</sup> Only those documents bates labeled A0004-17 are requested to be redacted.

<sup>77</sup> Only those documents bates labeled A0002-9 are requested to be redacted.

<sup>78</sup> Only portions of Taxpayer's Supplemental Memorandum in Response to the Director's Supplemental Memorandum, Filed April 5, 2024 and the declarations of Nathaniel A. Higa and Brad Andress are requested to be redacted.

<sup>79</sup> Only Exhibit 17 is requested to be redacted.

<sup>80</sup> Only the declaration of Joshua Michaels in support of the Director's Second Supplemental Memorandum in Opposition to Taxpayer's Motion for Partial Summary Judgment, filed on July 7, 2022, is requested to be unsealed.

<sup>81</sup> Only those documents bates labeled A0001-5 are requested to be unsealed.

<sup>82</sup> Only those documents bates labeled A0001-3 are requested to be unsealed.

<sup>83</sup> Only Exhibit 16 is requested to be unsealed.

IN THE TAX APPEAL COURT OF THE  
STATE OF HAWAII

In the Matter of the Tax Appeal	)	Case No. 1CTX-21-0001613
	)	
of	)	DECLARATION OF
	)	NATHANIEL A. HIGA
Booking.com B.V.	)	
	)	
Taxpayer-Appellant	)	
_____	)	

DECLARATION OF NATHANIEL A. HIGA

1. I am NATHANIEL A. HIGA, a partner in the law firm of Chun Kerr LLP, a Limited Liability Law Partnership, one of the counsel for Taxpayer-Appellant, Booking.com B.V. (“**Taxpayer**”) in the above-captioned action. I am duly licensed to practice law before this Court, and I make this declaration based on personal knowledge.

2. I am fully familiar with the facts of this matter. In connection with my representation, I have reviewed the pertinent documents, including all of the exhibits attached hereto.

3. Unless indicated otherwise, all terms herein have the same meaning as set forth in the instant motion and memorandum in support.

4. On December 28, 2022 and with approval from counsel for the Director, I caused my office to file the proposed SPO [Dkt.86] via the Hawaii Judiciary Electronic Filing and Service System (“**JEFS**”).

5. On January 4, 2023, the SPO was entered by the Honorable Gary W.B. Chang (Ret.) [Dkt. 88], without any revisions to the terms outlined by the parties. I received notice of said entry via JEFS.

6. During the course of my representation of Taxpayer, I prepared or assisted in the preparation of various memoranda, including (i) the Taxpayer's Memorandum in Opposition to the Director's Cross Motion for Partial Summary Judgment, including Exhibit 2, filed March 8, 2024 [Dkt. 166, 167]; and (ii) Taxpayer's Supplemental Memorandum in Response to the Director's Supplemental Memorandum, filed on April 17, 2024 [Dkt. 224-225].

7. In preparing these memoranda and in reliance on the SPO, it was determined that a vast majority of the documents contained Confidential Material either in whole or in part, as defined on page 3, paragraph 2 of the SPO.

8. During the course of my representation of Taxpayer, I reviewed the Director's various filings including:

(i) the Director's Second Supplemental Memorandum in Opposition to Taxpayer's Motion for Partial Summary Judgment, including Exhibits A and B, filed March 28, 2023 [Dkt. 108-111];

(ii) Director's Reply In Support of Its Cross Motion for Partial Summary Judgment, including the declaration of Deputy Attorney General Mary Bahng Yokota and Exhibits 12 and 13, filed March 13, 2024 [Dkt. 183, 186-188];

(iii) Director's Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment and (2) Memorandum in Opposition to Taxpayer's Motion for Summary Judgment, including Exhibits 18 to 29, filed on April 5, 2024 [Dkt. 202, 203-208, 210-215]; and

(iv) Director's Supplemental Reply Memorandum in Response to Taxpayer's Supplemental Memorandum, filed April 26, 2024 [Dkt. 228].

After review of these filings, it is apparent a vast majority of the documents contain Confidential Material as set forth in the SPO.

9. Attached as **Exhibit “A”** is an index detailing the factual basis for sealing records that involve Taxpayer’s Confidential Material, including (1) agency and business model information; (2) commission and payment information; (3) gross income and commission income information; (4) platform operations and information; (5) marketing information; (6) parties’ business relationship information and terms; (7) licensing terms; and/or (8) accommodation provider contact information. **Exhibit “A”** was prepared by my office at my direction and under my supervision.

10. Attached as **Exhibit “B”** is a true copy of OIP Op. Ltr. No. F21-01 (dated August 26, 2020), which was obtained by my office via online research at <https://oip.hawaii.gov/wp-content/uploads/2020/09/OIP-Op.-Ltr.-No.-F21-01-Braswell-re-DOTAX.pdf>.

11. Under my direction and supervision, my office has prepared redacted versions of filings, as set forth in detail in Exhibit A at pp.7-16 (“**Redacted Records**”). These proposed redactions are narrowly tailed to prevent disclosure of Taxpayer’s trade secrets, confidential business information and/or tax return information. As some of these records were previously filed under seal, we request that the Redacted Records be submitted *in camera* for inspection for the Court’s determination of their sealed and/or redacted status.

I, Nathaniel A. Higa, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, November 21, 2024.

/s/ Nathaniel A. Higa  
NATHANIEL A. HIGA

IN THE TAX APPEAL COURT OF THE  
STATE OF HAWAII

In the Matter of the Tax Appeal ) Case No 1CTX-21-0001613  
 )  
 of ) DECLARATION OF KARINE HALIMI-  
 ) GUEZ  
 Booking.com B V )  
 )  
 Taxpayer-Appellant )  
 )  
 \_\_\_\_\_ )

DECLARATION OF KARINE HALIMI-GUEZ

I, Karine Halimi-Guez, hereby declare:

1. I am the Vice President of Tax of Booking.com International B.V. located at Oosterdokskade 163, 1011 DL, Amsterdam, The Netherlands. I am responsible for overseeing and managing all tax aspects of Booking.com B.V.'s ("**Booking.com**") services, including those that are the subject of this tax appeal for tax years 2010 to 2020.

2. I make this Declaration on personal knowledge and belief and am competent to testify as to the matters set forth herein.

3. As part of my responsibilities for Booking.com, I am familiar with the records created and maintained by Booking.com related to its operations, including communications, requests, agreements, general delivery terms, contracts with accommodation providers, among other records ("business records"). It is also part of my responsibility to respond to various tax inquiries from government agencies/entities.

4. I have personal knowledge of Booking.com's policies and procedures related to creating and maintaining business records. Such business records are (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal

knowledge, (b) kept in the ordinary course of Booking.com's regularly conducted business activities, and (c) created by Booking.com as a regular practice

5. The vast majority of the documents included in Dkt. 44, 45, 49, 50, 54, 70, 108, 109, 110, 111, 155, 156, 166, 167, 168, 183, 187, 189, 190, 191, 202, 203, 204, 205, 207, 208, 210, 211, 212, 213, 215, 224, 225 and 228 contain Confidential Material, either in whole or in part, as defined on page 3 and in paragraph 2 of the Stipulated Protective Order entered between Booking.com and the Director of Taxation, State of Hawai'i (the "**Director**") [Dkt. 88].

6. Specifically, the records found in Dkt. 70, 110, 111, 167, 189, 190, 191, 207, 208, 210, 211, 212, 213, 214, 215, 224 and 225 (the "**Sealed Documents**") are comprised of Taxpayer's general terms and conditions, contracts with its accommodation providers, accommodation provider contact lists, documents provided to the Director as part of Taxpayer's audit, and summary judgment hearing transcripts

7. Additionally, the documents contained in Dkt. 44, 45, 49, 50, 54, 70, 108, 109, 155, 156, 166, 168, 183, 187, 188, 202, 203, 204, 205, 224, 225 and 228 (the "**Redacted Records**") include briefing and Taxpayer's discovery responses in this matter that summarizes, describes or quotes directly from the Sealed Records

8. Specifically, these documents contain Taxpayer's trade secrets, confidential business information and/or tax return information that must be kept confidential to protect Booking.com and its proprietary business model and practices.

9. Certain documents found in Dkt. 110, 111, 167, 189, 190, 191, 207, 208, 210, 211, 212, 213, 215, 224 (documents bates labeled 00000405-433, BOOKING000001-25) and 225 (documents bates labeled 00000457-462, BOOKING000001-15, BOOKING000124-125, BOOKING000202\_REV, BOOKING000212, BOOKING000273, BOOKING000286, and

BOOKING000346-366) contain information that constitutes both trade secrets and confidential business information of Booking.com. Specifically, these documents contain Booking.com's general terms and conditions applicable to its contracts with its accommodation providers, various contracts with Booking.com's accommodation providers, accommodation provider contact lists, and summary judgment hearing transcripts discussing and quoting directly from Booking.com's contracts.

10. Each of the certain Sealed Documents outlined in paragraph 9 of this declaration is supported by a factual basis for sealing in that they involve Booking.com's (1) agency and business model information, (2) commission and payment information; (3) gross income and commission income information, (4) platform operations and information; (5) marketing information, (6) parties' business relationship information and terms, (7) licensing terms; and/or (8) accommodation provider contact information.

11. The agency and business model information contained in Dkt 110 (documents bates labeled BOOKING000001-15, BOOKING000212, BOOKING000273, BOOKING000286, BOOKING000345-346), 167 (documents bates labeled BOOKING000212, BOOKING000235-236, BOOKING000245, BOOKING000248), 189 (documents bates labeled 00003947-3953, 00003954-3959), 191, 208, 210, 212, 213, 215, 224 (documents bates labeled 00000405-433, BOOKING000001-25, 00000246-248) and 225 (documents bates labeled 00000457-462) involve Booking.com's information related to its specific method and process for organizing and structuring its business. This information must remain confidential in order for Booking.com to distinguish its business model from that of its competitors and to remain competitive with those competitors. Additionally, these certain Sealed Records include Taxpayer's general terms and conditions applicable to its contracts with its accommodation



providers as well as Taxpayer's specific contracts with its accommodation providers, all of which require confidentiality and nondisclosure to the public.

12 The commission and payment information contained in Dkt 110 (documents bates BOOKING000001-15, BOOKING000124-125, BOOKING000202\_REV), 167 (documents bates labeled BOOKING000206\_REV, BOOKING000245, BOOKING000248), 191, 207, 210, 211, 212, 213, 215, 224 (documents bates labeled 00000405-433, BOOKING000001-25) and 225 (documents bates labeled 00000457-462) – including Booking.com's general terms and conditions as well as its contracts with accommodation providers – involve formulas and algorithms describing how Booking.com calculates its commissions and payments. The information in these certain Sealed Records contain Booking.com's pricing terms, rates and fees used in calculating earned commission for its services.

13. Booking.com's gross and commission income information found in Dkt 215 and 225 (documents bates labeled 00000457-462) outlines Booking.com's earnings and rates calculated from the contracts entered into with companies that agree to use its services. Such contracts contain pricing terms, rates and fees used to calculate Booking.com's income and which were to remain confidential pursuant to the confidentiality clauses contained therein.

14. Information describing Booking.com's platform operations contained in Dkt 110 (documents bates labeled BOOKING000001-15, BOOKING000124-125, BOOKING000202\_REV), 167 (documents bates labeled BOOKING000206\_REV, BOOKING000245, BOOKING000248), 207, 208, 210, 211, 212, 213 and 224 (documents bates labeled 00000405-433, BOOKING000001-25), including its general terms and conditions and specific contracts, involve the website(s), apps, tools, platforms and/or other devices

Booking.com and its affiliated companies and business partners use or facilitate to conduct its proprietary business operations. Platform operations and information provide details into how Booking.com maintains, administers and operates not only the online platform itself, but the services it provides through the online platform.

15. Booking.com's marketing information outlined in Dkt. 110 (documents bates labeled BOOKING000001-15), 191 and 224 (documents bates labeled 00000405-433, BOOKING000001-25) involves its confidential business strategies and practices in advising its clients on how it will market, advertise or promote its business. This information is used in promoting Booking.com's business throughout the world.

16. Business relationship information and terms between Booking.com and its accommodation providers outlined in Dkt. 110 (documents bates labeled BOOKING000001-15), 167 (documents bates labeled BOOKING000212, BOOKING000235-236, BOOKING000245, BOOKING000248), 191, 207, 208, 210, 211, 212, 213 and 224 (documents bates labeled 00000405-433, BOOKING000001-25, 00000246-248), which consist of Booking.com's general terms and conditions and its contracts with accommodation providers, includes customer data, transaction volume, and obligations and duties of both Booking.com and its clients that were written based on the agreed upon business relationship. The information and terms of these business relationships highlight Booking.com's process and business strategies when entering into these confidential negotiations and agreements with third parties.

17. Licensing term information in Dkt. 110 (documents bates labeled BOOKING000001-15), 207, 208, 210, 211, 212, 213 and 224 (documents bates labeled 00000405-433, BOOKING000001-25) outlines Booking.com's and its clients' contractual

obligations and duties, and specific terms and rights related to the collaboration with affiliated companies and/or third parties

18 The accommodation provider contact information contained in Dkt. 110 (documents bates labeled BOOKING000202\_REV, BOOKING000212, BOOKING000273, BOOKING000286, BOOKING000345-346, BOOKING000420-455), 111, 167 (documents bates labeled BOOKING000206\_REV, BOOKING000235-236), 207, 208, 210, 211, 212 and 213 provides the name, address, state, contract date and specific contact person for each individual Booking.com's contracts in the State of Hawaii. Release of this information would allow Booking.com's competitors to potentially misuse or usurp the released information.

19. The Sealed Records contained in Dkt. 70 (Exhibit I), 189, 190, 214, 215, 224 (documents bates labeled 00000405-433, 00000397-398, 00000482-483, 00000246-248) and 225 (documents bates labeled 00000203-208, 0000457-462) include tax return information obtained by the Director during Booking.com's audit underlying the present action.

20. Any disclosure of the Sealed Records would substantially and irreparably harm the compelling interest in protecting Booking.com's trade secrets, confidential business information and/or tax return information.

21 Allowing the Sealed Records to be placed into the eyes of the public will provide Booking.com's competitors with an inside look into Booking.com's trade secrets, confidential business information and/or tax return information that its competitors would not otherwise have or be able to obtain.

22 Any disclosure of Booking.com's agency and business model information contained in Dkt. 110 (documents bates labeled BOOKING000001-15, BOOKING000212, BOOKING000273, BOOKING000286, BOOKING000345-346), 167 (documents bates labeled

BOOKING000212, BOOKING000235-236, BOOKING000245, BOOKING000248), 189 (documents bates labeled 00003947-3953, 00003954-3959), 191, 208, 210, 212, 213, 215, 224 (documents bates labeled 00000405-433, BOOKING000001-25, 00000246-248) and 225 (Documents bates labeled 00000547-462) would benefit Booking.com's competitors and its customers' competitors with valuable insights on how Booking.com models its business and operations without engaging in their own research or investigative practices

23 Placing Booking.com's platform operations and information as found in Dkt. 110 (Documents bates labeled BOOKING000001-15, BOOKING000124-125, BOOKING000202\_REV), 167 (documents bates labeled BOOKING000206\_REV, BOOKING000245, BOOKING000248), 207, 208, 210, 211, 212, 213 and 224 (documents bates labeled 00000405-433, BOOKING000001-25) into the public realm would give its competitors an advantage over Booking.com in understanding the inner workings of Booking.com's platform without expending time and resources in developing its own platform

24 Disclosure of Booking.com's accommodation provider contact information in Dkt 110 (documents bates labeled BOOKING000001-15), 167 (documents bates labeled BOOKING000212, BOOKING000235-236, BOOKING000245, BOOKING000248), 207, 208, 210, 211, 212, 213 and 224 (documents bates labeled 00000405-433, BOOKING000001-25, 00000246-248) would expose Booking.com's business to its competitors and subsequently allows its competitors to target Booking.com's clients more effectively with opposing marketing

25 Dkt 110 (documents bates labeled BOOKING000001-14), 207, 208, 210, 211, 212 and 224 (documents bates labeled BOOKING000001-25) include Booking.com's general terms and conditions applicable to its contacts with accommodation providers as well as

those specific contracts themselves that contain confidentiality clauses and require nondisclosure to the public

26. The disclosure of any of the Sealed Records constitute a significant danger and harm to Booking.com's current and future business.

27. If one of Booking.com's competitors accesses and misappropriates the information contained in the Sealed Records, Booking.com will likely suffer significant loss of its business without a clear legal remedy

28. The Sealed Records include trade secrets, confidential business and/or tax return information that are heavily intertwined with non-trade secret, non-confidential business and non-tax return information throughout each sentence and/or paragraph of the document and cannot be feasibly separated

29. To redact the information contained in the Sealed Records would make such records unintelligible and exhaust an unnecessary amount of administrative time, burden and cost.

30. The potential for inadvertent disclosure of the information contained in the Sealed Records would negatively affect Booking.com's ability to negotiate the terms of future agreements and harms its competitive standing and advantage in the online travel booking marketplace

31. Certain information found in the Redacted Records contain information constituting trade secrets, confidential business information and/or tax return information that must remain confidential and sealed from public access for the exact same reasons as discussed in Section III.A.1 of Booking.com's Motion to Seal (the "Motion")

32. Disclosure of the information contained in the Redacted Records would cause the same exact irreparable harm to the compelling interest in protecting Booking.com's trade secrets, confidential business information and/or tax return information as discussed in Section III.A.2 of the Motion.

I, Karine Halimi-Guez, do declare under penalty of law that the foregoing is true and correct.

DATED: November 19, 2024

KARINE HALIMI-GUEZ



**EXHIBIT A**

<b>DKT No.</b>	<b>Document Name</b>	<b>Type of Document</b>	<b>Factual Basis for Sealing</b>
70	Taxpayer’s Supplemental Reply Memorandum in Support of Motion for Partial Summary Judgment, Filed July 7, 2022	Audit documents	<b>Exhibit I:</b> Includes tax return information obtained by the Department during audit of Taxpayer.
110	Sealed [Exhibit “B” (Part 1 of 2) to Director’s Second Supplemental Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, Filed on July 7, 2022]	Contract documents	<b>Document bates labeled BOOKING000001-15:</b> Contains trade secrets and confidential business information involving: (1) <sup>1</sup> agency and business model information, (2) commission and payment information, (4) platform operations and information, (5) marketing information, (6) parties’ business relationship information and terms, and (7) licensing terms.
		Contract documents	<b>Document bates labeled BOOKING000124-125:</b> contains trade secrets and confidential business information involving: (2) commission and payment information, and (4) platform operations and information.
		Contract documents	<b>Document bates labeled BOOKING000202_REV:</b> contains trade secrets and confidential business information involving: (2) commission and payment information, (4) platform operations and information, and (8) accommodation provider contact information.
		Contract documents	<b>Document bates labeled BOOKING000212:</b> contains trade secrets and confidential business information involving: (1) agency and business model information, and (8) accommodation provider contact information.

<sup>1</sup> Number references align with the order of compelling interests discussed in Section III.A.1.d.

		Contract documents	<b>Document bates labeled BOOKING000273:</b> contains trade secrets and confidential business information involving: (1) agency and business model information, and (8) accommodation provider contact information.
		Contract documents	<b>Document bates labeled BOOKING000286:</b> contains trade secrets and confidential business information involving: (1) agency and business model information, and (8) accommodation provider contact information.
		Contract documents	<b>Documents bates labeled BOOKING000345-346:</b> contains trade secrets and confidential business information involving: (1) agency and business model information, and (8) accommodation provider contact information.
		Client contact list	<b>Documents bates labeled BOOKING000420-455:</b> contains confidential business information involving: (8) accommodation provider contact information.
111	Sealed [Exhibit “B” (Part 2 of 2) to Director’s Second Supplemental Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, Filed July 7, 2022]	Client contact list	<b>Documents bates labeled BOOKING000456-511:</b> contains confidential business information involving: (8) accommodation provider contact information.
		Client contact list	<b>Documents bates labeled BOOKING000512-663:</b> contains confidential business information involving: (8) accommodation provider contact information.
167	Sealed [Exhibit 2 to Taxpayer’s Memorandum in Opposition to the Director’s Cross Motion for Partial Summary Judgment]	Contract documents	<b>Documents bates labeled BOOKING000202_REV, BOOKING000206_REV:</b> contains trade secrets and confidential business information involving: (2) commission and payment information, (4) platform operations and information, and (8) accommodation provider contact information.
		Contract documents	<b>Documents bates labeled BOOKING000212, BOOKING000235-236:</b> contains trade secrets and confidential business information involving: (1) agency and business model information, (6) parties’ business relationship information and terms, and (8) accommodation provider contact information.



		Contract documents	<b>Documents bates labeled BOOKING000245, BOOKING000248:</b> contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, and (8) accommodation provider contact information.
189	EXHIBIT “14” [to the Director’s Reply in Support of His Cross Motion for Partial Summary Judgment, Filed on February 29, 2024]	Contract documents	Contains trade secrets and confidential business information involving: (1) agency and business model information, and (2) commission and payment information. Also includes tax return information obtained by the Department during audit of Taxpayer.
190	EXHIBIT “15” [to the Director’s Reply in Support of His Cross Motion for Partial Summary Judgment, Filed February 29, 2024]	Contract documents	Contains trade secrets and confidential business information involving: (1) agency and business model information, and (2) commission and payment information. Also includes tax return information obtained by the Department during audit of Taxpayer.
191	EXHIBIT “16” [to the Director’s Reply in Support of His Cross Motion for Partial Summary Judgment, Filed February 29, 2024]	Summary judgment hearing transcript	Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (5) marketing information, and (6) parties’ business relationship information and terms.
207	Sealed [Exhibit “22” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024 and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed on December 1, 2023]	Contract documents	Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, (6) parties’ business relationship information and terms, (7) licensing terms, and (8) accommodation provider contact information.

208	Sealed [Exhibit “23” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024 and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed on December 1, 2023]	Contract documents	Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, (6) parties’ business relationship information and terms, (7) licensing terms, and (8) accommodation provider contact information.
210	Sealed [Exhibit “24” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024 and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed on December 1, 2023]	Contract documents	Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, (6) parties’ business relationship information and terms, (7) licensing terms, and (8) accommodation provider contact information.
211	Sealed [Exhibit “25” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024 and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed on December 1, 2023]	Contract documents	Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, (6) parties’ business relationship information and terms, (7) licensing terms, and (8) accommodation provider contact information.

212	Sealed [Exhibit “26” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024 and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed on December 1, 2023]	Contract documents	Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, (6) parties’ business relationship information and terms, (7) licensing terms, and (8) accommodation provider contact information.
213	Sealed [Exhibit “27” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024 and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed on December 1, 2023]	Contract documents	Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, (6) parties’ business relationship information and terms, (7) licensing terms, and (8) accommodation provider contact information.
214	Sealed [Exhibit “28” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024 and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed on December 1, 2023]	Audit documents	Contains tax return information obtained by the Department during audit of Taxpayer.

215	Sealed [Exhibit “29” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024 and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed on December 1, 2023]	Audit documents	Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, and (3) gross income and commission income information. Also includes tax return information obtained by the Department during audit of Taxpayer.
224	Sealed [Exhibits 9-13 (Part 1 of 2) to Taxpayer’s Supplemental Memorandum in Response to the Director’s Supplemental Memorandum, Filed April 5, 2024]	<p>Audit documents</p> <p>Contract documents</p> <p>Audit documents</p> <p>Audit documents</p> <p>Audit documents</p>	<p><b>Exhibits 9 (documents bates labeled 00000405-433):</b> contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, (5) marketing information, (6) parties’ business relationship information and terms, and (7) licensing terms. Also includes tax return information obtained by the Department during audit of Taxpayer.</p> <p><b>Exhibit 10 (documents bates labeled BOOKING000001-25):</b> contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, (5) marketing information, (6) parties’ business relationship information and terms, and (7) licensing terms.</p> <p><b>Exhibit 11 (documents bates labeled 00000397-398):</b> Includes tax return information obtained by the Department during audit of Taxpayer.</p> <p><b>Exhibit 12 (documents bates labeled 00000483-483):</b> Includes tax return information obtained by the Department during audit of Taxpayer.</p> <p><b>Exhibit 13 (documents bates labeled 00000246-248):</b> contains trade secrets and confidential business information involving: (1) agency and business model information, and (6) parties’ business relationship information and terms. Also</p>

			includes tax return information obtained by the Department during audit of Taxpayer.
225	Sealed [Exhibits 14-17 (Part 2 of 2) to Taxpayer's Supplemental Memorandum in Response to the Director's Supplemental Memorandum, Filed April 5, 2024]	Audit documents  Audit documents  Contract documents	<b>Exhibit 14 (documents bates labeled 00000203-208):</b> Includes tax return information obtained by the Department during audit of Taxpayer.  <b>Exhibit 15 (documents bates labeled 00000457-462):</b> contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, and (3) gross income and commission income information. Also includes tax return information obtained by the Department during audit of Taxpayer.  <b>Exhibit 17:</b> contains portions of Exhibit B from Dkt 110 (documents bates labeled BOOKING000001-15, BOOKING000124-125, BOOKING000202_REV, BOOKING000212, BOOKING000273, BOOKING000286, and BOOKING000346-366) that contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, (5) marketing information, (6) parties' business relationship information and terms, and (7) licensing terms.
<b>DKT No.</b>	<b>Document Name</b>	<b>Document Type</b>	<b>Factual Basis for Redaction</b>
44	Director's Memorandum in Opposition to Taxpayer's Motion for Partial Summary Judgment, Filed on July 7, 2022	Case briefing  Case briefing	The highlighted information (pp. 3, 6) must remain sealed for the stated reasons below:  <b>Pg. 3:</b> contains trade secrets and confidential business information involving: (1) agency and business model information, and (6) parties' business relationship information and terms.  <b>Pg. 6:</b> contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, and (6) parties' business relationship information and terms.

45	Exhibit “1” to Director’s Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, Filed on July 7, 2022	Discovery responses	The highlighted information must remain sealed for the stated reasons below:  Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, and (6) parties’ business relationship information and terms.
49	Exhibit “5” to Director’s Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, Filed on July 7, 2022	Discovery responses	The highlighted information must remain sealed for the stated reasons below:  Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, and (6) parties’ business relationship information and terms.
50	Exhibit “6” to Director’s Memorandum in Opposition to Taxpayer’s Motion for Partial Summary Judgment, Filed on July 7, 2022	Discovery responses	The highlighted information must remain sealed for the stated reasons below:  Contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, and (6) parties’ business relationship information and terms.
54	Taxpayer’s Reply Memorandum in Support of Motion for Partial Summary Judgment, filed July 7, 2022	Case briefing	The highlighted information (pp. 5 – 7) must remain sealed for the stated reasons below:  <b><u>Pg. 5:</u></b> contains trade secrets and confidential information involving: (1) agency and business model information, and (2) commission and payment information.  <b><u>Pg. 6, 7:</u></b> contains trade secrets and confidential information involving: (1) agency and business model information, (2) commission and payment information, and (6) parties’ business relationship and terms.
70	Taxpayer’s Supplemental Reply Memorandum in Support of Motion for Partial Summary Judgment, Filed July 7, 2022	Audit documents	The highlighted information (p. 3) must remain sealed for the stated reasons below:  Contains trade secrets and confidential information involving: (1) agency and business model information, and (2) commission and payment information.

			Also includes tax return information obtained by the Department during audit of Taxpayer.
108	Sealed [Director's Second Supplemental Memorandum in Opposition to Taxpayer's Motion for Partial Summary Judgment, Filed July 7, 2022]	Case briefing	<p>The highlighted information (pp: 4 – 10) must remain sealed for the stated reasons below:</p> <p><b>Pg. 4:</b> summarizes and/or quotes trade secrets and confidential business information involving: (2) commission and payment information, (3) gross income and commission income information, and (6) parties business relationship information and terms.</p> <p><b>Pg. 5:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, and (8) accommodation provider contact information.</p> <p><b>Pg. 6:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, and (7) licensing terms.</p> <p><b>Pg. 7:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, (5) marketing information, (6) parties' business relationship information and terms, and (7) licensing terms.</p> <p><b>Pg. 8:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties' business relationship information and terms.</p> <p><b>Pg. 9:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (3) gross income and commission</p>

			<p>income information, (4) platform operations and information, and (6) parties' business relationship information and terms.</p> <p><b>Pg. 10:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations information, (6) parties' business relationship information and terms, and (7) licensing terms.</p>
109	Sealed [Exhibit "A" to the Director's Second Supplemental Memorandum in Opposition to Taxpayer's Motion for Partial Summary Judgment, Filed July 7, 2022]	Discovery responses	<p>The highlighted information (pp: 7, 10 – 13) must remain sealed for the stated reasons below:</p> <p><b>Pg. 7:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, and (6) parties business relationship information and terms.</p> <p><b>Pg. 10, 11, 12, 13:</b> summarizes and/or quotes trade secrets and confidential business information involving: (2) commission and payment information, and (3) gross income and commission income information.</p>
155	Sealed [Exhibit "1" to the Director's Cross Motion for Partial Summary Judgment]	Discovery responses	<p>The highlighted information (pp. 7 – 13, 17, 19 – 37) must remain sealed for the stated reasons below:</p> <p><b>Pg. 7, 9, 10, 11, 20, 22:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, and (6) parties' business relationship information and terms.</p> <p><b>Pg. 8:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (3) gross income and commission income information, and (6) parties' business relationship information and terms.</p> <p><b>Pg. 12:</b> summarizes and/or quotes trade secrets and confidential business information including: (1) agency and business model information, (4) platform</p>



			<p>operations and information, and (6) parties’ business relationship information and terms.</p> <p><b>Pg. 13, 19, 21:</b> summarizes and/or quotes trade secrets and confidential business information including: (1) agency and business model information, and (6) parties’ business relationship information and terms.</p> <p><b>Pg. 17:</b> summarizes and/or quotes trade secrets and confidential business information including: (1) agency and business model information, and (4) platform operations and information.</p> <p><b>Pg. 23:</b> summarizes and/or quotes trade secrets and confidential business information including: (1) agency and business model information, (2) commission and payment information, and (4) platform operations and information.</p> <p><b>Pg. 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37:</b> summarizes and/or quotes trade secrets and confidential business information including: (6) parties’ business relationship information and terms.</p>
156	Sealed [Exhibit “2” to the Director’s Cross Motion for Partial Summary Judgment]	Discovery responses	<p>The highlighted information (pp. 7 – 8, 10 – 13) must remain sealed for the stated reasons below:</p> <p><b>Pg. 7:</b> summarizes and/or quotes trade secrets and confidential business information including: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, and (6) parties’ business relationship information and terms</p> <p><b>Pg. 8, 10:</b> summarizes and/or quotes trade secrets and confidential business information including: (6) parties’ business relationship information and terms.</p> <p><b>Pg. 11:</b> summarizes and/or quotes trade secrets and confidential business information including: (1) agency and business model information, (4) platform</p>

			<p>operations and information, and (6) parties' business relationship information and terms</p> <p><b>Pg. 12, 13:</b> summarizes and/or quotes trade secrets and confidential business information including: (1) agency and business model information, (4) platform operations and information, and (6) parties' business relationship information and terms.</p>
166	Sealed [Booking's Memorandum in Opposition to the Director's Cross Motion for Partial Summary Judgment]	Case briefing	<p>The highlighted information in (pp: 7 – 10, 16, 19, 21) must remain sealed for the stated reasons below:</p> <p><b>Pg. 7, 9:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, and (6) parties' business relationship information and terms.</p> <p><b>Pg. 8, 16, 21:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties' business relationship information and terms.</p> <p><b>Pg. 10, 19:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, and (6) parties' business relationship information and terms.</p>
168	Sealed [Exhibit 2 to Taxpayer's Memorandum in Opposition to the Director's Cross Motion for Partial Summary Judgment]	Discovery responses	<p>The highlighted information in Exhibit 1: (pp: 5 – 7) must remain sealed for the stated reasons below:</p> <p><b>Pg. 5, 6:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (3) gross income and commission income information, and (4) platform operations and information.</p> <p><b>Pg. 7:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform</p>

			operations and information, and (6) parties' business relationship information and terms.
183	Sealed [The Director's Reply in Support of His Cross Motion for Partial Summary Judgment, Filed February 29, 2024]	Case briefing	<p>The highlighted information in (pp: 3 – 5, 7 – 9) must remain sealed for the stated reasons below:</p> <p><b>Pg. 3:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, and (6) parties' business relationship information and terms.</p> <p><b>Pg. 4, 8:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties' business relationship information and terms.</p> <p><b>Pg. 5, 7:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties' business relationship information and terms. Also includes tax return information obtained by the Department during audit of Taxpayer.</p> <p><b>Pg. 9:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, and (6) parties' business relationship information and terms.</p>
187	Sealed [Exhibit "12" to the Director's Reply in Support of His Cross Motion for Partial Summary Judgment, Filed February 29, 2024]	Discovery responses	<p>The highlighted information in (pp: 7 – 8) must remain sealed for the stated reasons below:</p> <p><b>Pg. 7, 8:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties' business relationship information and terms. Also includes tax return information obtained by the Department during audit of Taxpayer.</p>

188	Sealed [Exhibit “13” to the Director’s Reply in Support of His Cross Motion for Partial Summary Judgment, Filed February 29, 2024]	Discovery responses	<p>The highlighted information in (pp: 7, 9) must remain sealed for the stated reasons below:</p> <p><b>Pg. 7:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations information, and (6) parties’ business relationship information and terms. Also includes tax return information obtained by the Department during audit of Taxpayer.</p>
202	Sealed [the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024, and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed December 1, 2023]	Case briefing	<p>The highlighted information in (pp: 4 – 10, 12 – 14, 17 – 18) must remain sealed for the stated reasons below:</p> <p><b>Pg. 4, 7, 9:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties’ business relationship information and terms.</p> <p><b>Pg. 5, 6, 8, 10, 12, 13, 14:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, and (6) parties’ business relationship information and terms.</p> <p><b>Pg. 17, 18:</b> summarizes and/or quotes trade secrets and confidential business information involving: (6) parties’ business relationship information and terms.</p>
203	Sealed [Exhibit “18” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024, and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed December 1, 2023]	Discovery responses	<p>The highlighted information in (pp: 7, 8, 14) must remain sealed for the stated reasons below:</p> <p><b>Pg. 7, 8, 14:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties’ business relationship information and terms.</p>

204	Sealed [Exhibit “19” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024, and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed December 1, 2023]	Discovery responses	<p>The highlighted information in (pp: 7, 8, 14) must remain sealed for the stated reasons below:</p> <p><b>Pg. 7, 8, 14:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties’ business relationship information and terms.</p>
205	Sealed [Exhibit “20” to the Director’s Supplemental Memorandum in Support of His (1) Cross Motion for Partial Summary Judgment, Filed February 29, 2024, and (2) Memorandum in Opposition to Taxpayer’s Motion for Summary Judgment, Filed December 1, 2023]	Discovery responses	<p>The highlighted information in (pp: 7, 9) must remain sealed for the stated reasons below:</p> <p><b>Pg. 7:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties’ business relationship information and terms.</p>
224	Sealed [Taxpayer’s Supplemental Memorandum in Response to the Director’s Supplemental Memorandum, Filed April 5, 2024]	Case briefing	<p>The highlighted information in (pp: 2 – 7, 9, 11 – 12) must remain sealed for the stated reasons below:</p> <p><b>Pg. 2, 3, 4, 5, 6, 7, 9, 11, 12:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties’ business relationship information and terms.</p> <p><b>Pg. 13:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (2)</p>

			commission and payment information, and (6) parties' business relationship information and terms.
225	Sealed [Exhibits 14-17 (Part 2 of 2) to Taxpayer's Supplemental Memorandum in Response to the Director's Supplemental Memorandum, Filed April 5, 2024]	Case briefing	<b>Exhibit 17:</b> summarizes and/or quotes portions of Dkt 108 (pp. 6, 9 – 10) that contains trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (3) gross income and commission income information, (4) platform operations and information, (6) parties' business relationship information and terms, and (7) licensing terms.
228	Sealed [the Director's Supplemental Reply Memorandum in Response to Taxpayer's Supplemental Memorandum]	Case briefing	<p>The highlighted information in (pp: 3 – 6) must remain sealed for the stated reasons below:</p> <p><b>Pg. 3, 6:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, and (6) parties' business relationship information and terms.</p> <p><b>Pg. 4:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (4) platform operations and information, and (6) parties' business relationship information and terms.</p> <p><b>Pg. 5:</b> summarizes and/or quotes trade secrets and confidential business information involving: (1) agency and business model information, (2) commission and payment information, (4) platform operations and information, and (6) parties' business relationship information and terms.</p>



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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

**OPINION**

**Requester:** Jason Braswell  
**Agency:** Department of Taxation  
**Date:** August 26, 2020  
**Subject:** Closing Agreements (U APPEAL 17-44)

**REQUEST FOR OPINION**

Requester seeks a decision as to whether the Department of Taxation (TAX) properly denied his request for copies of two closing agreements under the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's appeal with exhibits dated February 24, 2017; OIP's letters to TAX dated April 28 (with enclosure) and July 6, 2017; TAX's letter to OIP dated March 8, 2017 (received on May 1, 2017); a letter from TAX to OIP with enclosure dated October 17, 2017; a letter from OIP to TAX and Requester dated May 22, 2020; and a letter to OIP from TAX dated July 22, 2020.

**QUESTION PRESENTED**

Whether TAX closing agreements are public under the UIPA.

**BRIEF ANSWER**

No. Closing agreements are protected from disclosure by several confidentiality statutes in Title 14, HRS, titled "Taxation" (Title 14), namely, sections 237-34(b), 235-116, 237D-13, and 238-13, HRS. In accordance with section 92F-13(4),

OIP Op. Ltr. No. F21-01

**EXHIBIT B**

HRS, which allows an agency to withhold records protected by a confidentiality statute, TAX may withhold the closing agreements.

### FACTS

On January 23, 2017, Requester made a request for the settlement agreements<sup>1</sup> between TAX and the taxpayers in two litigations: (1) Safeway Inc. v. State of Hawai'i Department of Taxation, No. 1TX071000042; and (2) Costco Wholesale Corporation v. State of Hawai'i Department of Taxation, No. 1TX061000001. Both cases were filed in the Hawaii Tax Appeal Court.

Requester received from TAX a Notice to Requester (NTR) dated February 22, 2017, which denied the request in its entirety. The NTR explained:

In your request, you have requested a copy of the “settlement agreement(s)” related to two separate cases. . . . The Department of Taxation enters into a “closing agreement” rather than a “settlement agreement[”] in settlement of tax appeals cases. In all closing agreements, however, there is a confidentiality provision which binds both the taxpayer and the Department from disclosing information related to the settlement of the case. For this reason, your request for copies of the two agreements is denied.

After TAX denied access, Requester filed this appeal. In response to the appeal, TAX explained that a closing agreement between it and the taxpayer “concerns the taxpayer’s tax liability for a specific tax period.” TAX asserted again that it and the taxpayers involved with the requested closing agreements are bound by a confidentiality statute, and Requester is neither the taxpayer, nor has he provided proof of a waiver of confidentiality from either taxpayer.

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<sup>1</sup> For this appeal, Requester’s request for “settlement agreements” is treated as a request for closing agreements. TAX referred to section 231-3(13), HRS, for the definition of “closing agreement.” This section is not a definition section. Instead, it sets forth TAX’s duties and powers. Regarding closing agreements, it states, in relevant part:

Closing agreements: To enter into an agreement in writing with any taxpayer or other person relating to the liability of the taxpayer or other person, under any law the administration of which is within the scope of the department’s duties, in respect of any taxable period, or in respect of one or more separate items affecting the liability for any taxable period; the agreement, signed by or on behalf of the taxpayer or other person concerned, and by or on behalf of the department, shall be final and conclusive.

HRS § 231-3(13) (2017).



Cases filed with the Tax Appeals Court are a matter of public record, but TAX asserted that closing agreements are not. TAX explained that closing agreements reflect an agreement between TAX and the taxpayer in settlement of disputed tax issues and contain confidential tax information. TAX routinely includes a confidentiality provision in all closing agreements that bind TAX and the taxpayer. TAX further asserted that confidentiality of taxpayer information in all settlements is necessary and consistent with the confidentiality provisions in Title 14, and is consistent with the underlying premise of maintaining the confidentiality of tax information necessary to maintain a voluntary-based tax compliance system. Therefore, TAX stated that its confidentiality provisions in all closing agreements are necessary.<sup>2</sup>

For this appeal, OIP asked TAX twice, in letters dated February 27 and July 6, 2017, for copies of the closing agreements for OIP's *in camera* review.<sup>3</sup> TAX's letter to OIP dated October 17, 2017, declined to provide the requested closing agreements for *in camera* review because TAX is "uncomfortable releasing copies of these documents

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<sup>2</sup> OIP has found that agencies may not validly enter into a confidentiality agreement that would circumvent the disclosure requirements of the UIPA, and OIP cautions agencies not to rely on them as controlling in all circumstances. OIP Op. Ltr. No. 90-39 at 10, citing OIP Op. Ltrs. No. 89-10 and 90-2.

<sup>3</sup> OIP's requests were based on OIP's statutory authority to review confidential records *in camera*. The UIPA vests in OIP these duties and powers:

- (4) May conduct inquiries regarding compliance by an agency and investigate possible violations by any agency;
- (5) May examine the records of any agency for the purpose of paragraphs (4) and (18) and seek to enforce that power in the courts of this State;
- ...
- (9) Shall review the official acts, records, policies, and procedures of each agency[.]

HRS § 92F-42(4), (5), and (9) (2012 & Supp. 2019). In addition, OIP's appeal rules state:

OIP may require any party to submit to OIP the original or a copy of one or more documents necessary for its ruling, including government records or minutes at issue in an appeal. OIP may examine the documents *in camera* as necessary to preserve any claimed exception, exemption, or privilege against disclosure. OIP shall take measures necessary to protect any records submitted for *in camera* review from unauthorized disclosure.

HAR § 2-73-15(c).

to [OIP] without a court order. Also, section 92F-42(5), HRS provides no immunity from criminal prosecution for the disclosure.”<sup>4</sup>

TAX did provide a “sample draft of a typical closing agreement for [OIP’s] review and understanding.” The sample closing agreement contains mostly boilerplate-type provisions such as statements that the closing agreement is made between the parties, *i.e.*, TAX and the taxpayer; and that the parties wish to resolve claims for particular tax years and to avoid further litigation. The sample closing agreement also contains a confidentiality provision stating that, except as required by law or pursuant to a subpoena or written consent of the parties, the parties will not make public announcements regarding the closing agreement’s terms; will not disclose any terms of the agreement; and will not make available or distribute the agreement, or any portion. Further, either party without the consent of the other may disclose the existence of the agreement.

The sample closing agreement also calls for insertion of information that would be made public in a court action by a taxpayer, including the taxpayer’s Tax Identification Number and address, and the party names. The records filed in a tax appeal to the court are public unless the court has sealed them, but the parties would not necessarily file a closing agreement and do not appear to have done so here based on OIP’s review of available court documents.

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<sup>4</sup> In support of its refusal to provide records for OIP’s *in camera* review, TAX invoked section 237-34(b), HRS (see full citation at pages 6-7, *infra*), which governs filing and nondisclosure of general excise tax returns, as a statute requiring confidentiality of settlement agreements. OIP previously noted in a non-precedential opinion that, arguably, section 237-34(b), HRS, may bar disclosure even to another State agency such as OIP in the course of its official duties unless the disclosure is for tax purposes. U MEMO 18-17. Agencies nonetheless have the burden of proof in UIPA appeals, and must provide relevant records for *in camera* review, when so requested, to demonstrate that a claimed exception applies. HAR §§ 2-73-14(4) and -15(c); HRS § 92F-15(c) (2012). OIP recognizes there may be a conflict of laws between section 237-34, HRS, and section 92F-42, HRS, that potentially puts TAX in an untenable position: if it fails to provide records for *in camera* review in an OIP appeal based on a confidentiality statute that arguably applies, it may fail to meet its burden to establish that the claimed exception applies and lose the appeal for that reason; yet if the confidentiality statute applies, the power to authorize TAX to provide records to OIP rests with the taxpayers, who are not involved in the appeal. For this appeal, the sample closing agreement was sufficient, as discussed below, for OIP to determine whether closing agreements must be disclosed as a rule, and thus to meet TAX’s burden under the UIPA. Nevertheless, in a future case OIP may find that an agency refusing to provide *in camera* records has failed to meet its burden to demonstrate the applicability of a claimed exception, or may go to court to enforce its right to examine the records at issue.

## DISCUSSION

### I. Closing Agreements Are Tax Return Information

TAX asserted, and OIP agrees, that the description of closing agreements in section 231-3(13), HRS, (see note 1, supra), is encompassed within the federal definition of tax return information in 26 U.S. Internal Revenue Code section 6103(b)(2), which reads in relevant part:

**26 U.S. Code § 6103. Confidentiality and disclosure of returns and return information**

...

**(b) Definitions** For purposes of this section—

...

- (2) Return information** The term “return information” means—
- (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, overassessments, 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,
  - (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.

26 U.S. Code § 6103(b)(2).

Section 231-3(13), HRS, states that a closing agreement is an agreement in writing between TAX and a taxpayer relating to the taxpayer’s liability under any law within the scope of TAX’s duties, during a taxable period, or in respect of one or more separate items affecting liability for a taxable period, that once signed is final and conclusive. Based on this statutory description, OIP finds that closing agreements do fall within the federal definition of tax “return information” in 26 U.S. Code § 6103(b)(2), which includes a taxpayer’s identity; the nature, source, or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth; tax liability; tax withheld; deficiencies, overassessments, 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 TAX or the federal Internal Revenue Service (IRS) with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

## II. Closing Agreements Are Protected by Several Confidentiality Statutes

Section 92F-13(4), HRS, allows an agency to withhold “[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure.” Tax return information is protected from disclosure by several confidentiality statutes in Title 14 except for very limited situations where it is made public by statute, or a waiver is obtained from the taxpayer.

OIP asked TAX which specific provisions of Title 14 allow it to withhold the closing agreements. TAX invoked several sections, including section 237-34, HRS, which governs filing and nondisclosure of general excise tax (GET)<sup>5</sup> returns, as a statute requiring confidentiality of closing agreements. The applicable language states:

(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, including the auditor or the auditor’s agent with regard to tax return information obtained pursuant to section 23-5(a), to intentionally make known information imparted by any tax return or return information filed pursuant to this chapter, or any report of any investigation of the return or of the subject matter of the return, or to wilfully permit any return, return information, or report so made, or any copy thereof, to be seen or examined by any person; provided that for tax purposes only, the taxpayer, the taxpayer’s authorized agent, or persons with a material interest in the return, return information, or report may examine them.

...

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<sup>5</sup> General excise taxes are “privilege taxes” levied annually against persons “on account of their business and other activities in the State measured by the application of rates against values of products, gross proceeds of sales, or gross income, whichever is specified,” including manufacturers, sellers of tangible personal property, contractors, theaters, amusements, radio broadcasting stations, sales representatives, service businesses, insurance producers, and other businesses. HRS § 237-13 (2017 and Supp. 2019).

Any violation of this subsection shall be a class C felony.

HRS § 237-34(b) (2017).<sup>6</sup>

TAX invoked section 235-116, HRS, which governs income tax, as a statute requiring confidentiality of closing agreements:

**§235-116 Disclosure of returns 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 that may be attached to a state tax return, or any information reflected in the copy of the federal return. It shall be unlawful for any person, or any officer or employee of the State, including the auditor or the auditor's agent with regard to tax return information obtained pursuant to section 23-5(a), 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 wilfully 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 otherwise provided by law. Any offense against the foregoing provisions shall be punishable as a class C felony.

HRS § 235-116 (2017).

TAX invoked section 237D-13, HRS, which governs the transient accommodation tax, as a statute requiring confidentiality of closing agreements. The applicable language states:

**§237D-13 Disclosure of returns unlawful; destruction of returns.** (a) All tax returns and return information required to be filed under this chapter, and the report of any investigation of the

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<sup>6</sup> Section 23-5(a), HRS, is cited in sections 237-34(b), 235-116, and 237D-13(a), HRS, all of which are quoted herein. Section 23-5(a), HRS, states that the legislative auditor may examine and inspect all records of every department, office, agency, and political subdivision; with two provisos. First, upon written request by the auditor, TAX shall provide access to tax returns to the extent necessary and relevant to the scope of the State comprehensive annual financial report audit. HRS § 23-5(a)(1) (Supp. 2019). Second, tax return information provided to the auditor by TAX is considered working papers of the auditor pursuant to section 23-9.5, HRS, which makes the auditor's papers confidential. HRS § 23-5(a)(2).

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, including the auditor or the auditor's agent with regard to tax return information obtained pursuant to section 23-5(a), to intentionally make known information imparted by any tax return or return information filed pursuant to this chapter, or any report of any investigation of the return or of the subject matter of the return, or to wilfully permit any return, return information, or report so made, or any copy thereof, to be seen or examined by any person; provided that for tax purposes only the taxpayer, the taxpayer's authorized agent, or persons with a material interest in the return, return information, or report may examine them. Unless otherwise provided by law, persons with a material interest in the return, return information, or report shall include:

- (1) Trustees;
- (2) Partners;
- (3) Persons named in a board resolution or a one per cent shareholder in the case of a corporate return;
- (4) The person authorized to act for a corporation in dissolution;
- (5) The shareholder of an S corporation;
- (6) The personal representative, trustee, heir, or beneficiary of an estate or trust in the case of the estate's or decedent's return;
- (7) The committee, trustee, or guardian of any person in paragraphs (1) through (6) who is incompetent;
- (8) The trustee in bankruptcy or receiver, and the attorney-in-fact of any person in paragraphs (1) through (7);
- (9) Persons duly authorized by the State in connection with their official duties;
- (10) Any duly accredited tax official of the United States, or of any state or territory, or of any county of this State;
- (11) The Multistate Tax Commission or its authorized representative; and
- (12) Members of a limited liability company.

Any violation of this subsection shall be a class C felony.

HRS § 237D-13(a) (2017).

TAX invoked section 238-13, HRS, which governs the use tax, as a statute requiring confidentiality of closing agreements:

**§238-13 Other provisions of general excise tax law applicable.** In respect of:

- (1) The examination of books and records and of taxpayers and other persons;
- (2) Procedure and powers upon failure or refusal by a taxpayer to make a return or a proper return; and
- (3) The general administration of this chapter,

the director of taxation shall have all the rights and powers conferred upon the director by the general excise tax law with respect to taxes thereby or thereunder imposed; and, without restriction upon these rights and powers, sections 237-8, 237-30, 237-34, and 237-36 to 237-41 are hereby made applicable to and with respect to the taxes and the taxpayers, tax officers, and other persons, and the matters and things affected or covered by this chapter, insofar as not inconsistent with this chapter, in the same manner, as nearly as may be, as in similar cases covered by the general excise tax law.

HRS § 238-13 (2017).<sup>7</sup>

As OIP found in section I, supra, based on section 231-3(13), HRS, and 26 U.S. Code § 6103(b)(2), the closing agreements qualify as “tax return information” under the federal definition. Therefore, as “tax return information,” closing agreements falling under any of the Title 14 statutes cited by TAX, supra (sections 237-34(b), 235-116, 237D-13, and 238-13, HRS), may be withheld under section 92F-13(4), HRS, because Title 14’s confidentiality statutes make it unlawful to disclose tax return information for the various types of taxes covered by those sections. As the tax return information at issue here falls within at least one of those statutes, presumably the GET, OIP finds that section 92F-13(4), HRS, allows TAX to withhold them in this instance.

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<sup>7</sup> TAX also cited to OIP opinions that found “tax returns” and “tax return information” are protected from disclosure. OIP Opinion Letter Number 89-3 found that offers by State taxpayers to compromise tax liabilities that are accepted by TAX and statements required to be filed with TAX are protected from disclosure under the Internal Revenue Code’s definition of “return information.” OIP Opinion Letter Number 90-38 found that tax return information contained in escheated warrant reports was protected from disclosure by law. OIP Opinion Letter Number 92-22 found that for blind individuals who, under section 235-1, HRS, claim a personal tax exemption and file with TAX a report from an ophthalmologist, the information contained in those reports received by TAX certifying the visual impairment constitutes “return information required to be filed under” chapter 235, HRS, and TAX is prohibited from disclosing the report under section 235-116, HRS.

### III. Section 231-19.5, HRS, Shows Legislative Intent that Tax Returns and Tax Return Information Generally Are Confidential

Although it is not germane to the request here for closing agreements, OIP notes that chapter 231, HRS, titled “Administration of Taxes[,]” includes section 231-19.5, HRS, on public inspection of TAX written opinions.<sup>8</sup> A written opinion is a “written statement issued by [TAX] to a taxpayer . . . that interprets and applies any provision in title 14 administered by [TAX] to a specific set of facts.” HRS § 231-19.5(b) (2017). Section 231-19.5(f), HRS, allows a taxpayer or interested person to file an appeal with OIP when TAX designates all or a portion of a written opinion as confidential. Written opinions are not at issue here, but OIP notes the existence of the confidentiality provision in section 231-19.5(a), HRS, which states, in relevant part, “[e]xcept as provided in subsection (f), regarding the disclosure of the text of written opinions, chapter 92F shall not apply to tax returns and tax return information.”

OIP notes the existence of section 231-19.5, HRS, because it also makes clear that tax returns and tax return information remain confidential, subject to the limited exemption described therein allowing public inspection of TAX’s written opinions. As discussed in section II, supra, tax return information is clearly subject to several other confidentiality statutes and is not required to be disclosed under the UIPA, a conclusion that is reinforced by the legislative history and policy of section 231-19.5, HRS, and OIP Op. Ltr. No. 92-10 (Opinion 92-10).

The preamble of House Bill (H.B.) 3190 House Draft (H.D.) 1 Senate Draft (S.D.) 1, which ultimately became section 231-19.5, HRS, stated:

SECTION 1. The purpose of this Act is to open to public inspection written opinions of the department of taxation that interpret the tax laws, while at the same time maintaining the confidentiality of tax return information.

The viability of Hawaii’s tax system depends upon the voluntary disclosure of information to the taxing authorities. The legislature finds that it is necessary to keep information disclosed by taxpayers confidential in order to maintain voluntary compliance with the tax laws. At the same time, the legislature finds that correct reporting can

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<sup>8</sup> Although it was not raised by either party this appeal, OIP provided both TAX and Requester the opportunity to comment on section 231-19.5, HRS, and referred them to OIP’s website where the legislative history of this section has been posted. Requester did not respond. TAX responded that the settlement agreements at issue were not written opinions containing interpretations of Hawaii tax laws or analysis applying tax laws to the specific facts, and thus were not subject to the public inspection requirements of section 231-19.5, HRS.



be enhanced by issuing guidance to taxpayers in areas where the interpretation of the tax laws is unclear. Accordingly, this Act makes available to the public written opinions of the department in areas where the law is unclear.

This Act does not open to public inspection the voluminous routine correspondence with taxpayers concerning established principles of law. **This Act is an exception to the well-established principle of confidentiality of tax information and thus, it is narrowly tailored to achieve its purpose to provide guidance on the interpretation of tax laws in order to enhance correct reporting, while maintaining the confidentiality of tax return information in order to maintain voluntary compliance with the tax laws.** To protect the integrity of the voluntary disclosure system, doubts about whether information should be publicly disclosed shall be resolved in favor of nondisclosure.

H.B. 3190 H.D. 1 S.D. 1, 17th Leg., Reg. Sess. (1994) (emphasis added).

Section 231-19.5, HRS, became law partly in response to OIP Opinion Letter Number 92-10 (Opinion 92-10), which found that TAX was not required under the UIPA to disclose certain “private letter rulings or other written determinations” issued by TAX to taxpayers concerning the applicability of the franchise tax. Using the federal definition of the term “return information” for guidance (see section I, supra, for that federal definition), Opinion 92-10 found that TAX opinion letters constituted return information, the disclosure of which is a criminal offense under State law. OIP Op. Ltr. No. 92-10 at 12-14. OIP noted that Congress, unlike the State Legislature, adopted specific provisions allowing disclosure of written determinations by the IRS. Id. at 3. Because of the significant public interest in the disclosure of TAX opinions, OIP recommended in Opinion 92-10 that TAX and the State Legislature adopt provisions similar to those permitting the IRS to issue written opinions providing guidance to the public on its interpretation and administration of tax laws. Id.

When H.B. 3190 was being considered by the Legislature in 1994, OIP testified in support of H.D. 1, describing H.D. 1’s purpose as “to amend the State’s taxation laws to permit the public inspection and copying of written opinions issued by the Department of Taxation[,]” and OIP described the bill as “a definite improvement over the existing law[,]” which had prevented any TAX opinion letters from being disclosed to the public. Nothing in H.B. 3190’s legislative history shows an intent to exempt records consisting of tax returns and tax return information wholesale from the UIPA, as that would have meant that TAX would not have to respond at all to record requests or respond to OIP when a requester challenged a TAX denial on the basis that requested records did indeed consist of or contain tax returns or tax return information. Instead, it is clear from the preamble and

legislative history of H.B. 3190 H.D. 1 S.D. 1 that its purpose was not to remove TAX records from the category of “government records” subject to the UIPA, but rather to open TAX opinions to public disclosure under limited conditions, while maintaining confidentiality of tax return information in order to keep the tax system viable through voluntary compliance with the tax laws.

The important point to take away from this discussion is that, since the adoption of the UIPA and to this day, tax returns and tax return information are clearly confidential under Hawaii tax laws. While making TAX’s written opinions public, section 231-19.5, HRS, also contains a confidentiality provision for tax return information contained in such opinions. Thus, OIP believes the Legislature has repeatedly set forth its intent that tax returns and tax return information remain confidential with very limited exceptions not raised here.

### **RIGHT TO BRING SUIT**

Requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney’s fees and costs. HRS §§ 92F-15(d), (f) (2012).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. Id. The court’s review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-3(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP’s role herein is as a neutral third party.

**SPECIAL NOTICE:** During the COVID-19 pandemic, Hawaii’s Governor issued his Supplementary Proclamation on March 16, 2020, which suspended the UIPA in its entirety. The suspension was continued until May 31, 2020, by the Governor’s Sixth Supplementary Proclamation dated April 25, 2020. On May 5, 2020, the Governor’s Seventh Supplementary Proclamation (SP7) modified the prior suspension of the UIPA in its entirety and provided that the UIPA and chapters 71 and 72, Title 2, HAR, “are suspended to the extent they contain any deadlines for agencies, including deadlines for OIP, relating to requests for government records and/or complaints to OIP.” SP7, Exhibit H. On May 18, 2020, the Governor’s Eighth Supplementary Proclamation (SP8) at Exhibit H, continued the modified suspension of the UIPA provided in SP7. On June 10, 2020, the Governor’s Ninth Supplementary Proclamation (SP9) at Exhibit H, continued the modified suspension of SP8, Exhibit H. On July 17, 2020, the Governor’s Tenth Supplementary Proclamation (SP10) at Exhibit G, continued the modified suspension in SP9, Exhibit H, through August 31, 2020. On August 20, 2020, the Governor’s Twelfth Supplementary Proclamation (SP12)<sup>9</sup> at Exhibit G, continued the modified suspension in SP10, Exhibit G, through September 30, 2020.

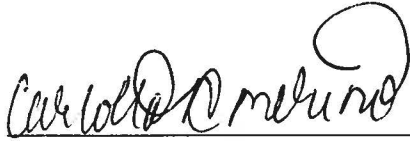
The UIPA’s Part IV sets forth OIP’s powers and duties in section 92F-42, HRS, which give OIP authority to resolve this appeal and have been restored by SP7 through SP12, except for the deadline restriction. Thus, for OIP’s opinions issued while SP12 is still in force, agencies will have a reasonable time to request reconsideration of an opinion to OIP, but a request for reconsideration shall be made by an agency no later than ten business days after suspension of the UIPA’s deadlines are lifted upon expiration of SP12 after September 30, 2020, unless SP12 is terminated or extended by a separate proclamation of the Governor. Agencies wishing to appeal an OIP opinion to the court under section 92F-43, HRS, have a reasonable time to do so, subject to any orders issued by the courts during the pandemic, and no later than thirty days after suspension of the UIPA’s deadlines is

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<sup>9</sup> On August 6, 2020, the Governor’s Eleventh Supplementary Proclamation pertaining only to the interisland travel quarantine was issued.

lifted upon expiration of SP12 after September 30, 2020, unless terminated or extended by a separate proclamation of the Governor.

**OFFICE OF INFORMATION PRACTICES**



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Carlotta Amerino  
Staff Attorney

APPROVED:



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Cheryl Kakazu Park  
Director



**Monday, January 6, 2025 at 1:30 p.m.**, or as soon thereafter as counsel may be heard, or as further instructed by the Court.

DATED: Honolulu, Hawaii, November 22, 2024.

/s/ Nathaniel A. Higa  
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and

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DATED: Honolulu, Hawaii, November 22, 2024.

/s/ Nathaniel A. Higa  
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