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November 6, 2019

VIA EMAIL

Mr. Robert Tucker

Mr. David Yamamoto  
Director  
County of Hawaii  
Department of Public Works

Re: Records of Pre-Approved Building Plans (U APPEAL 20-15)

Dear Mr. Tucker and Mr. Yamamoto:

The Office of Information Practices (OIP) opened an appeal regarding Mr. Robert Tucker's (Requester) request for an investigation into whether the County of Hawaii Department of Public Works (DPW-H) properly denied access to records of pre-approved building plans from 2018 and 2019. This appeal file was randomly assigned to OIP's experimental alternative appeal resolution track pursuant to H.R. 104, Regular Session of 2019, in which the Hawaii House of Representatives requested that OIP conduct an alternative appeal resolution pilot program and prepare "short, informal, unenforceable guidance" for files assigned to the alternative appeal resolution track within two weeks of receiving the agency's final response. A copy of H.R. 104 is attached to this letter.

DPW-H's original Notice to Requester, dated August 1, 2019, stated that it would grant access to all requested records. However, in his email to OIP dated September 5, 2019, Requester noted that DPW-H had not provided all requested records:

While the request is substantially fulfilled, a primary information is lacking. I require the original date(s) of submission for each of the pre approved [sic] plans. It is not provided by [DPW-H].

In response to this appeal, DPW-H sent Requester an email and a revised Notice to Requester dated September 23, 2019, on which OIP was copied, indicating it would grant access to all records it maintained but that, among other things,

[DPW-H] does not maintain records of dates of submissions. There is no standard tracking of such dates, whether by date on the submission, received stamp, or otherwise.

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In an email dated September 27, 2019, Requester questioned DPW-H's assertion that it did not maintain dates of submission for building permit applications:

[S]ome critical information has not been provided which is the date of application of the pre approved [sic] plans. It seems to be an anomaly that [DPW-H] lacks this information. . . . I ask you to consider this lack of delivery and would, in addition, request copies of the original pre approved [sic] building permit applications. They are about two dozen in number.<sup>1</sup>

DPW-H did not provide a statement of position to OIP in response to this appeal. OIP sent a letter to DPW-H dated October 9, 2019, offering DPW-H a second opportunity to provide a position statement, setting out the standard for establishing whether a reasonable search has been done, and noting that the Notice to Requester and accompanying email likely did not provide sufficient information for OIP to determine that DPW-H's search for responsive records was reasonable. That letter set a deadline of October 23 for DPW-H to provide further information. DPW-H has not submitted any additional information to OIP. Since DPW-H has had the opportunity to provide its position and has declined to do so, OIP is now providing informal, unenforceable guidance through this letter.

Requester indicated both in his original appeal and his subsequent correspondence that DPW-H has substantially provided the requested records, but not the dates of submission for pre-approved building plans. DPW-H, in turn, asserts that it does not maintain dates of submission. Thus, the question presented to OIP is whether DPW-H has met its burden to establish that it does not maintain records of the dates of submission. See HRS 92F-15(c) (agency has burden of proof to justify nondisclosure).

When a requester appeals an agency's statement that it has no records responsive to a record request, OIP normally looks at whether the agency's search for a responsive record was reasonable. OIP Op. Ltr. No. F16-03 at 3, citing OIP Op. Ltr. No. 97-8. However, when an agency's staff has actual knowledge that it does not maintain the type of records being requested, the agency is not required to search for such records. OIP Op. Ltr. No. F16-03.

Here, DPW-H has stated regarding the dates of submissions that it "does not maintain records of dates of submissions. There is no standard tracking of such dates, whether by date on the submission, received stamp, or otherwise." Thus, DPW-H is not asserting that creating a list of submission dates from the underlying records would require preparation of a compilation or summary of information that is not readily retrievable, but rather that its records do not include the requested information at all. See HRS § 92F-11(c) (agency is not required to prepare a compilation or summary of its records unless the information is readily retrievable in the form requested).

Based on what DPW-H has submitted, OIP is inclined to find that it has not met its burden to establish that it does not maintain the requested record. DPW-H has not provided any information to support its bald assertion that it maintains no record of dates of submission. And while it claims that it does not have a standard procedure, DPW-H has not explained whether it has done a search to find

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<sup>1</sup> Because Requester did not seek the original applications in the request giving rise to this appeal, the question of his entitlement to those applications is not at issue in this appeal and will not be addressed in this guidance.

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any records that may have had a date stamp, hand notation, or date of entry into another database, or an accompanying record that contained a date of application or transmission. DPW-H has not explained the mechanics of how it receives building plan submissions such that it can be certain that no dates are recorded at the time of submission on any of its records. Thus, DPW-H has not offered any explanation of what it did to search for records of submission dates, and it has not provided enough information for OIP to conclude that it was not required to search for records of submission dates because its staff had actual knowledge that no such record had been created. .

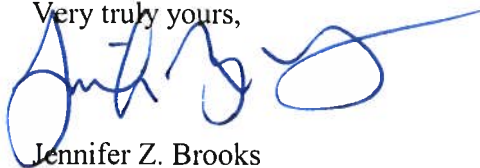
OIP's inclinations as stated herein are informal guidance and are not binding on the parties to this appeal. By this letter OIP notifies DPW-H that if it will disclose records in accordance with this informal guidance, it should provide a revised Notice to Requester within 10 days of the date of this letter, and also copy OIP. OIP further notifies Requester that if DPW-H does not choose to disclose or Requester is otherwise not satisfied with DPW-H's response, Requester is requested to so notify OIP in writing within 30 business days of the date of this letter and OIP will issue a binding determination in accordance with its usual procedures at a future time. If OIP does not hear from Requester within that time, OIP will close this file.

If either party chooses to request that OIP proceed under OIP's usual procedures, OIP will resolve this appeal according to our general "first-in-first-out" policy and cases older than this will be completed first. Depending upon the facts of each appeal, many, but not all, appeals are closed with the issuance of an OIP opinion letter, which could take a year or longer to complete because of OIP's backlog of cases.

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

If you have any questions concerning this matter, please contact OIP.

Very truly yours,



Jennifer Z. Brooks  
Staff Attorney

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Attachment