



DAVID Y. IGE
GOVERNOR

STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

CHERYL KAKAZU PARK
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING
250 SOUTH HOTEL STREET, SUITE 107
HONOLULU, HAWAII 96813
Telephone: (808) 586-1400 FAX: (808) 586-1412
E-MAIL: oip@hawaii.gov
www.oip.hawaii.gov

November 13, 2019

VIA EMAIL

Mr. Robert Tucker

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

Re: Directly Approved Building Plans (U APPEAL 20-24)

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 building plans that had been "directly approved by the Director(s) of Public Works and/or the Building Division Chief(s)" in 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 did not respond to the Notice of Appeal dated October 3, 2019. OIP sent a second letter dated October 22, 2019, offering DPW-H a second opportunity to provide its position with a deadline to do so of October 29, 2019. 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.

In this appeal, Requester asked whether DPW-H violated the UIPA through its response to his request for:

[A] list of all approved building permits for the calendar years 2018 and 2019 which have been directly approved by the Director(s) of Public Works and/or the Building Division Chief(s). The list should include the 1) permit number, 2) name of applicant, 3) date of application and 4) date of approval.

Mr. Robert Tucker
Mr. David Yamamoto
November 13, 2019
Page 2

In response, DPW-H provided a Notice to Requester indicating that it did not maintain the requested records, and a cover letter explaining:

We are unable to provide you such list as building permits are not “directly” approved by the Director(s), nor the Building Division Chief(s).

As noted above, DPW-H did not respond to this appeal and thus provide any further explanation or argument to support its assertion that it does not maintain the requested records.

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 that it has no building permits “directly” approved by the relevant officials because building permits are not “directly” approved by those officials, without offering any further explanation of the process by which building permits are approved or the respective roles of those officials. DPW-H is not asserting that creating a list of permits from the underlying records would require preparation of a compilation or summary of information that is not readily retrievable, but rather that no such permits exist. 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 records. DPW-H has not provided any information to support its bald assertion that no building permits are directly approved by the relevant officials. For instance, DPW-H has not explained what the process is by which building permits are approved and whether there are sometimes deviations from that process, what the role of the relevant officials is such that DPW-H staff can be certain they have not approve any building permits, or whether the number of approved building permits is so small that its staff has certain knowledge that there were no deviations from the usual process over the past two years. DPW-H likewise has provided no indication that it searched its records of building permits to determine whether any were directly approved by the relevant officials during 2018 and 2019. Thus, DPW-H has not offered any explanation of what it did to search for records of building permits directly approved by the relevant officials, and it has not provided enough information for OIP to conclude that it was not required to search for such records 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.

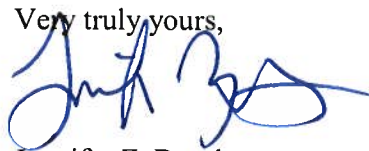
Mr. Robert Tucker
Mr. David Yamamoto
November 13, 2019
Page 3

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

JZB:za

Attachment