



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 19, 2019

VIA EMAIL AND POSTAL MAIL

Mr. Glen Murray
P.O. Box 310
Kailua, Hawaii 96734

The Honorable Pankaj Bhanot, Director
Department of Human Services

Re: Contractor Records (U APPEAL 20-30)

Dear Mr. Murray and Director Bhanot:

The Office of Information Practices (OIP) opened an appeal regarding the Department of Human Services's (DHS) denial of Mr. Glen Murray's (Requester) request for "documents, records, BTG-VI-GDADTV 2 and any other materials maintained by your contractor / vendor Institute for Human Services." 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.

DHS provided a statement of position dated November 4, 2019, and OIP is now providing informal, unenforceable guidance through this letter.

The primary question raised in this appeal is whether the requested records maintained by the Institute for Human Services (IHS), which DHS acknowledges it contracts with for homeless outreach services, are administratively maintained by DHS. OIP explained the concept of administrative control in OIP Opinion Letter Number 92-25, at pages 3-5:

Section 92F-11(b), Hawaii Revised Statutes, states, "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying." Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1991) (emphasis added).

While the Legislature did not define the meaning of the term "maintain" when it adopted the UIPA, in OIP Opinion Letter No. 91-5 (April 15, 1992), the OIP concluded that the definition of this term set forth in the uniform law upon which the UIPA was patterned provides useful guidance in construing the meaning of this term.

Specifically, the Legislature modeled the UIPA upon the Uniform Information Practice Code ("Model Code") adopted by the National Conference of Commissioners on Uniform State Laws. The term "maintain" is defined in section 1-104(6) of the Model Code to mean, "hold, possess, preserve, retain, store, or administratively control." The commentary to this Model Code provision reflects that: (1) the term "maintain" was defined broadly, and (2) an agency that lacks physical custody of a record may nevertheless "maintain" that record. [Footnote, quotation and citation omitted.]

In OIP Opinion Letter No. 91-5, we noted that the term "control" has different meanings depending upon the context in which it is used, and that most authorities agree that in its usual context, it refers to "the power or authority to manage, direct, or oversee," or to "to exercise restraining or directing influence over," and also relates to "authority over what is not in one's physical possession." [Citation omitted.]

Following this analysis, OIP has most frequently looked to the contract between an agency and its contractor when determining whether the agency has administrative control over records held by the contractor and not in the physical possession of the agency, as it is common for such contracts to include a clause addressing the agency's right to review records relevant to or generated through the contract. E.g. OIP Op. Ltr. Nos. F18-03, 95-08, and 92-25.

Here, DHS asserted that it does not "exercise administrative control of the records of IHS, a private non-profit." Although DHS provided OIP with general information regarding the organization of homeless services in Hawaii and specific services that have been provided to Requester, it did not provide any information specifically relevant to its appeal, *i.e.* information about its relationship with IHS and its contractual or other authority to access IHS records relating to its contract with IHS. DHS could, for instance, have provided a copy of its contract with IHS showing a clause stating that DHS has no right to review IHS's contract-related records, or showing that access to records is not addressed in the contract. However, DHS did not provide a copy of the contract or other information about its contract with IHS. DHS's unsupported assertion that it has no administrative control over IHS records, especially those generated pursuant to its contract, is simply not adequate to meet an agency's burden to establish that it does not maintain records. See HRS § 92F-15(c) (2012) (agency has burden to justify denying access to records). Thus, based on the submittals that have been made in this appeal to date, OIP is inclined to find that DHS has not met its burden to establish that it has no administrative control of, and thus does not maintain, IHS records related to IHS's contract with DHS. Indeed, it appears that DHS may not have understood the nature of a UIPA appeal or the concept of administrative control when preparing its response to this appeal, given DHS's focus on non-UIPA services it has provided to Requester in the past and its apparent belief that "administrative control" equates to physical control over records or general control over an organization.

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As a secondary matter, OIP also notes that DHS may have found Requester's request unclear. While it seems likely that Requester is seeking only those records related to his specific dealings with IHS, that is not clearly indicated in the request, which is broadly phrased. As OIP advised DHS in the Notice of Appeal dated October 28, 2019, if DHS cannot respond to a request because it "requires a further description or clarification of the requested record in order to identify and search for the record," the correct procedure is to so inform the requester and ask for clarification as permitted by section 2-71-14(c)(2). DHS did not request clarification of the request here. However, if DHS plans to issue a revised Notice to Requester for those records within its administrative control in accordance with this guidance, DHS may wish to consider seeking clarification as to whether the request was intended to apply only to records specifically about Requester himself.

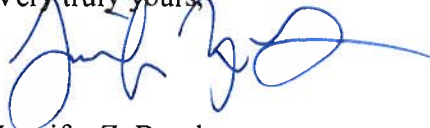
OIP's inclinations as stated herein are informal guidance and are not binding on the parties to this appeal. By this letter OIP notifies DHS that if it will disclose records in accordance with this informal guidance, it should provide a revised Notice to Requester within 10 days of the date of this letter, and also copy OIP. OIP further notifies Requester that if DHS does not choose to disclose or Requester is otherwise not satisfied with DHS'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 Requester does not so notify OIP 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