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November 27, 2019

VIA EMAIL

Mr. Valoaga Moananu

The Honorable Bruce S. Anderson, Ph.D.
Director
Department of Health

Re: AG Report (U APPEAL 20-28)

Dear Mr. Moananu and Director Anderson:

The Office of Information Practices (OIP) has not received any response from the Department of Health (DOH) to the Notice of Appeal, dated October 11, 2019, which advised DOH that Mr. Valoaga “Junior” Moananu (Requester) asked for OIP’s assistance to appeal DOH’s denial of his request for access to “Hawaii Attorney General’s Report # AG-18-5791,” which “pertains to the recent termination of Paramedical Assistant/Psychiatric Technician Mr. Cody HIGA from the Hawaii State Hospital on 08/30/2019 due to allegations of patient abuse and employee misconduct” (AG Report). In that Notice, OIP asked DOH to provide to OIP, for its *in camera* review, a detailed explanation for its denial and the AG Report, by October 25, 2019. DOH did not respond to this request or to OIP’s second letter dated November 5, 2019, offering DOH a second opportunity to provide its position with a deadline to do so of November 13, 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. Since DOH has had the opportunity to provide its position and has declined to do so, OIP is now providing informal, unenforceable guidance through this letter.

The UIPA places the burden of proof on a government agency to justify its nondisclosure of records when it claims that access to a record is restricted under the UIPA. See HRS § 92F-15(c) (2012). The agency is required to justify its nondisclosure when it responds to OIP’s Notice of Appeal, and the agency’s response must include its “explanation of its position, including the agency’s justification for the denial of access or actions complained of, with citations to the specific statutory sections and other law that support the agency’s position[.]” HAR § 2-73-14(3). If further explanation is needed, “OIP may, orally or in writing, seek any additional information from a party

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or any other person, and may consider input or relevant materials from any person on pending appeals.” HAR § 2-73-15(e). Additionally, 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 at issue in an appeal. See HAR 2-73-15(c); see also HRS § 92F-42(5), -42(9) (2012). OIP may examine the documents *in camera* as necessary to preserve any claimed exception, exemption, or privilege against disclosure. Id.

Because DOH has failed to respond to several opportunities to provide the AG Report for OIP’s *in camera* review or additional facts or arguments to justify its nondisclosure of the AG Report, OIP is initially inclined to find that DOH has not met its burden to justify nondisclosure under the UIPA. Accordingly, OIP’s initial inclination is to find that DOH is required to disclose the AG Report to Requester.

OIP’s initial inclination as stated herein is informal guidance and is not binding on the parties to this appeal. By this letter OIP notifies DOH that if DOH discloses 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 a copy to OIP. OIP further notifies Requester that if DOH does not choose to disclose or Requester is otherwise not satisfied with DOH’s response, Requester is requested to so notify OIP in writing within 30 business days of the date of this letter. 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,



Lorna Aratani
Staff Attorney

Attachment