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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 sections 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR). This is a memorandum decision and will not be relied upon as precedent by OIP in the issuance of its opinions or decisions but is binding upon the parties involved.

MEMORANDUM DECISION

Requester: Mr. Bill Carpenter, Jr.
Agency: Department of Health
Date: May 6, 2020
Subject: Cesspool Records (U APPEAL 18-28)

Requester seeks a decision as to whether the Department of Health (DOH) properly denied his request for records under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's emails to OIP dated June 12, 2018, and attached materials; an email from DOH to OIP dated June 16, 2018, and attached email chain; an email from Requester to DOH dated June 18, 2018, and attached email chain; and an email from DOH to Requester dated June 18, 2018, and attached email chain.

Decision

DOH met its burden under the UIPA to demonstrate that it does not maintain the requested records, and it directed Requester to where he could obtain a record maintained by another agency that might contain the information he sought. See HRS § 92F-11 (2012) (setting out agency's affirmative response obligations under the UIPA); HAR § 2-71-14(c) (1998) (allowing an agency that does not maintain a requested record to respond that it cannot produce the requested record, and if applicable direct the requester to another agency that may). Thus, DOH's response to Requester was consistent with the UIPA's requirements.

Statement of Reasons for Decision

On April 20, 2018, Requester asked DOH for “a) physical addresses and b) mailing addresses associated with all known active cesspools on all islands of the State of Hawaii.” DOH responded on April 23, 2018, “[W]e apologize, we can not provide such a listing.”

In response to DOH’s reply, Requester amended his request and asked DOH on May 4, 2018, for “a) TMK numbers and/or physical addresses associated with all known active cesspools on all islands of the State of Hawaii.”¹ DOH responded on May 18, 2018, as follows:

For your request of: Copies of TMK numbers and/or physical addresses associated with all known active cesspools on all island of the State of Hawaii.

- We cannot generate such a report – when the cesspool cards were scanned into our database system, it was one card at a time, with either TMK and/or Address, sometimes both.

For your request of: TMK numbers and/or physical addresses associated with all cesspools that have been cited for deficiencies on all islands of the State of Hawaii.

- We cannot generate nor have such a report available. Legacy cesspools are logged “in” our database system and “new” cesspools are logged in once received. If there is a cesspool “deficiency”, it is only due to the requirement of an upgrade to a treatment IWS (a building permit application would start that up). We can research a TMK or listing of TMKs requested (or by address), but again, no “one” report has been designed. [All sic.]

Requester replied the same day to ask whether DOH had only images of the cards in its database, rather than text. DOH responded to that question on May 21, 2018, as follows:

For our cesspool cards - “Scanned” images but with a TMK and/or Address listing. We can’t produce a report as requested.

Our database does have TMKs and/or Addresses in text form, but again, not in a report form – just by individual TMK and/or Address

¹ Although DOH’s response refers to two requests, Requester only provided OIP with his request relating to “all known active cesspools” and thus this appeal was opened only with respect to that request.

request. (they were our “first” scanned items and we weren’t sure how we wanted them “research-able”. [All sic.]

Requester again responded with a further question, this time asking whether DOH was able to provide a “list of the physical locations of all the known-to-the-state cesspools in the State.” DOH responded on May 23, 2018:

Sorry, I checked with our engineering section, and no, we do not have reports available with the criteria you request. We can only do search by TMK or address of any existing cesspool, as mentioned, that was our first scanning job and for access, one at a time.

Requester appealed DOH’s denial of access to OIP on June 12, 2018.

After receiving the Notice of Appeal, DOH advised Requester via email on June 18, 2018, that it “does not have a listing of all cesspool owners with their physical and mailing address as you requested. The GIS² data mapping was based on Tax Map Key information.” (Footnote added.) In support of this explanation, DOH provided Requester with links to the two risk ranking reports that were the source of its GIS cesspool maps, as well as the GIS data itself. The risk ranking reports included maps that appeared to pinpoint cesspool locations throughout the State.

OIP reviewed the GIS data available on the website of the Office of Planning (Planning),³ which DOH told Requester it had used to create its GIS cesspool maps. Based on that review OIP finds that the GIS data does in fact include a list of TMK numbers that have associated cesspools, but does not include addresses. Thus, the record does appear to match Requester’s amended request for “a) TMK numbers and/or physical addresses associated with all known active cesspools[.]”

Since the apparently responsive record is maintained by Planning and not by DOH itself, it was not incorrect for DOH to assert that it did not maintain such a record. OIP’s rules encourage, but do not strictly require, an agency that does not maintain a requested record to direct the requester to another agency that may, if the agency

² “A geographic information system (GIS) is a computer system for capturing, storing, checking, and displaying data related to positions on Earth’s surface.” National Geographic, Encyclopedia Entry for “GIS (Geographic Information System)”, <https://www.nationalgeographic.org/encyclopedia/geographic-information-system-gis/> (accessed April 20, 2020).

³ Planning is not part of DOH, but instead is administratively attached to the Department of Business, Economic Development and Tourism. The GIS data is available from Planning’s download page for GIS data by following DOH’s instruction to Requester to “scroll down to . . . utility networks, then in the dropdown menu Onsite Sewage Disposal Systems.” See Planning, Download GIS Data, <http://planning.hawaii.gov/gis/download-gis-data/> (accessed April 20, 2020).

is aware of one. HAR § 2-71-14(c)(1). In this case, DOH's initial response did not advise Requester of the record maintained by Planning, but DOH did ultimately point Requester to where Planning maintained a record apparently matching Requester's revised request, and specifically instructed him as to how he could obtain that record from Planning's website. See id.

After DOH had directed Requester to the GIS data maintained by Planning, which apparently satisfied his revised request for "TMK numbers and/or physical addresses" but not his original request for mailing addresses and physical addresses associated with active cesspools, Requester asked DOH to clarify that if it "needed to contact Hawaii citizens who own cesspools . . . there is no way [it] is able to contact these citizens through a mass mail list or other efficient method?" In response, DOH confirmed that was the case and offered a further explanation of why it did not maintain actual addresses:

Due to our limited resources, the cesspool data is based on TMKs and not the physical or mailing addresses. For the eligibility of the income tax credit, it is based on TMK and not physical address. The mandate to upgrade all cesspools is scheduled for 2050, that is another 32 years from now. I believe that [DOH] will have a list of cesspool owners with their physical and mailing addresses by that date.

Thus, in addition to directing Requester to the location online of a record of TMKs associated with active cesspools maintained by another agency, DOH has repeatedly stated that DOH itself does not maintain a list of TMKs or addresses associated with active cesspools, and has explained why it does not have and cannot readily produce such a list.

OIP has previously stated that

in most cases when an agency claims a record does not exist, it must first conduct a reasonable search. . . . [I]n rare cases . . . an agency's staff may have actual knowledge that the type of record requested was never created. Only in these rare cases is an agency absolved from having to conduct a search reasonably likely to produce the requested records.

OIP Op. Ltr. No. F16-03 at 3-4. Here, OIP finds that DOH's assertion that no responsive record had been created was based on the actual knowledge of the employees in its engineering section, who would know if a current version of such a list had been or could readily be created. The engineering section employees advised that it could not create such a list by simply running a database report, but would instead have to do a manual search of underlying records. OIP notes that the existence of statewide maps of cesspool locations included in reports produced by DOH reasonably raised a question as to how DOH could have produced such maps

without being able to produce a list of cesspools by TMK or address. However, OIP finds that DOH's explanation that it relied on cesspool data maintained by Planning,⁴ which does allow producing such a list by TMK number and to which it directed Requester, sufficiently answers that question. Thus, OIP concludes that DOH met its burden to demonstrate that it does not currently maintain a list of TMKs or physical or mailing addresses associated with active cesspools, and that it properly directed Requester to where he could obtain a record maintained by another agency that might contain the information he sought, *i.e.* the list of TMKs associated with active cesspools currently maintained by Planning.

Finally, OIP notes that the information that would be included in a list responsive to Requester's requests is all information that can be found in DOH's records, and DOH has not asserted that any exception to disclosure would apply to that information. However, since DOH does not currently maintain such a list, to provide one as requested would require DOH to create a compilation or summary of its existing records. Section 92F-11, HRS, requires creation of a compilation or summary of government records only when such a compilation or summary is "readily retrievable." HRS § 92F-11(c) (2012). Whether information is "readily retrievable" from an agency's database is a question of fact to be determined on a case-by-case basis; routine retrieval of information by agency for its own use using existing programming capabilities indicates such information is "readily retrievable." OIP Op. Ltr. No. 90-35 at 10. In this case, DOH has not routinely retrieved such information for its own use and OIP has no reason to reject DOH's assertion that it is unable to use its existing programming capability to retrieve it. OIP therefore finds that since DOH is unable to run a database report that would produce the requested compilation, and would instead need to manually consult each address or TMK record to determine if that record included a cesspool, such a compilation or summary would not be "readily retrievable." Based on that finding, OIP concludes that DOH did not have a duty to create such a compilation from its records.

⁴ The published metadata for the relevant database indicates the data was "[d]eveloped in 2008 as part of the [DOH] source water protection program to assess the health and environmental risks posed by On-Site Sewage Disposal Systems. Sources: City and County of Honolulu dwelling, sewer system, and TMK data; [DOH] Individual Wastewater System and cesspool data; private wastewater system data, EPA LCC database, Hawaii legislative districts GIS layers." Planning, On-Site Sewage Disposal Systems (osds) for the island of Oahu (2008), http://files.hawaii.gov/dbedt/op/gis/data/osds_oah.pdf (accessed April 29, 2020). This suggests that in or before 2008, DOH did manually review the TMK listings it maintains to see which ones included a cesspool or other onsite sewage disposal system, together with consulting various other government and private sources of information, but OIP does not find that the fact that DOH created such a compilation approximately a decade before Requester's request implies that the effort required to do so afresh would have been less than DOH claims.

However, if Requester is still interested in obtaining a current listing of property addresses associated with both cesspools in general and cesspools that have been cited as deficient, and is willing to pay any associated fees, he could make a request for the underlying records, which in this case would be DOH's cesspool database.

Right to Bring Suit

Requester is entitled to seek assistance from the courts when Requester has been improperly denied access to a government record. HRS § 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 decision 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-43(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. Id.

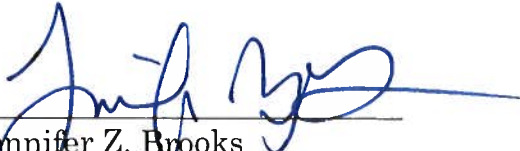
A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

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 Memorandum 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 now provides 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 the OIP, relating to requests for government records and/or complaints to OIP." SP7, Exhibit H.

The UIPA's part IV sets forth OIP's powers and duties in section 92F-42(18), HRS, which give OIP authority to resolve this appeal and have been restored by SP7, except for the deadline restriction. Thus, for OIP's UIPA opinions issued while SP7 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 no later than ten business days after suspension of the UIPA's deadlines are lifted upon expiration of SP7 after May 31, 2020, unless SP7 is terminated or extended by a separate proclamation of the Governor. Agencies wishing to appeal a UIPA 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 lifted upon expiration of SP7 after May 31, 2020, unless terminated or extended by a separate proclamation of the Governor.

OFFICE OF INFORMATION PRACTICES



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