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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 section 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:** Christopher Salem  
**Agency:** Department of the Corporation Counsel, County of Maui  
**Date:** May 8, 2020  
**Subject:** Government Records that Do Not Exist (U APPEAL 17-45, U APPEAL 18-07)

Requester seeks a decision as to whether the Department of the Corporation Counsel (CORP CNSL-M), County of Maui (County), properly denied his request for certain records under Part II of the UIPA. Specifically, CORP CNSL-M responded to his record requests by informing Requester that it does not maintain the government records he requested. Because the same issues were raised by the same Requester involving the same agency, the appeals in U Appeal 17-45 and U Appeal 18-07 were consolidated and resolved in this decision. HAR § 2-73-15 (2012) (providing that “OIP may consolidate appeals that have similar issues or facts, or similarly situated parties”).

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester’s email correspondence dated February 23 and March 2, 2017 (U APPEAL 17-45) and September 6 and 21, 2017 and February 18, 2020 (U APPEAL 18-07), including attached record requests and CORP CNSL-M’s responses; email correspondence dated March 20, 2017 from Brian Bilberry, Deputy Corporation Counsel, CORP CNSL-M; and email correspondence dated October 6, 2017 and February 11 and 12, 2020 from Moana Lutey, Corporation Counsel, CORP CNSL-M.

## Decision

CORP CNSL-M properly denied access to the requested government records in both appeals because CORP CNSL-M does not maintain them and is not required by the UIPA to create government records.

### Statement of Reasons for Decision

#### **I. U APPEAL 17-45: Procurement Report & Conflicts of Interests**

In U Appeal 17-45, Requester submitted a request to CORP CNSL-M for access to a Procurement Report described by him as follows:

Special Counsel law firm Kobayashi, Sugita and Goda, LLPs [sic] procurement disclosures issued by the Department of [the] Corporation Counsel to the members of the Maui County Council including, but not limited to, a list of potential attorney/client conflicts of interest and current and prior legal proceedings involving the Plaintiff and Defendants named in Christopher Salem v. Alan Arakawa, et al (Civil No. 15-00384 LEK KSC) [(Procurement Report)].

According to Requester's U APPEAL 17-45, CORP CNSL-M responded that "[t]here are no documents of which the Department of Corporation Counsel is aware responsive to" his request for the Procurement Report (emphasis in original).

Regarding the Procurement Report, Requester asserts that "procurement of outside legal counsel by the County of Maui is a public process" and that "[d]isclosure of potential conflicts of interest or concurrent representation(s) . . . is an absolute professional and ethical outside counsel procurement obligation by [CORP CNSL-M]." As an example of CORP CNSL-M's preparation and disclosure of a procurement report under different circumstances, Requester provided to OIP a copy of CORP CNSL-M's procurement report that was submitted to the Council about a different law firm in separate litigation.

In CORP CNSL-M's response to U APPEAL 17-45,<sup>1</sup> Mr. Bilberry states that "[Requester's] assertions that the public procurement code requires a written conflict report is [sic] baseless." According to Mr. Bilberry, "[i]t is [CORP CNSL-M's]

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<sup>1</sup> Requester also submitted a request to the Maui County Council (Council) for the Procurement Report. On behalf of the Council, Office of Council Services (OCS) responded in a letter noting that his request made clear that he was seeking a record "maintained by [CORP CNSL-M] (not our office)" and informing Requester that "[w]e have reviewed the records of [OCS] and could not locate any documents corresponding to your request." Mr. Bilberry's response to U APPEAL 17-45 addresses Requester's requests to CORP CNSL-M and OCS for the same record.

professional and ethical prerogative to confer with any client verbally and confidentially about any potential for conflicts of interests involving retention of Special Counsel, in this case to represent several County of Maui officials who [Requester] baselessly sued ‘individually’ in his frivolous lawsuit, which since its filing has been dismissed with prejudice.”

In a previous opinion, OIP Opinion Letter No. 97-8 (Opinion 97-8), OIP addressed the issue of whether CORP CNSL-M was required to disclose a memorandum authorizing a settlement when CORP CNSL-M asserted that no such record exists. In Opinion 97-8, CORP CNSL-M informed OIP that conversations were held with County officials on the matter of settlement but that the conversations were never reduced to writing, nor were any memoranda produced on the matter. As Opinion 97-8 discussed, the Hawaii Supreme Court stated that the UIPA does not impose an affirmative obligation on government agencies to maintain records. OIP Op. Ltr. No. 97-8 at 3 (citing State of Hawaii Organization of Police Officers v. Society of Professional Journalists—University of Hawaii Chapter, 83 Haw. 397 (Haw. 1996)). Other laws may exist which require the creation or retention of records by government agencies, but the UIPA contains no such requirements. *Id.* In subsequent opinions, OIP similarly concluded that the UIPA’s mandate to agencies to allow inspection and provide copies applies only to records that an agency already maintains and does not require that a new record be created. OIP Op. Ltr. No. F15-03 (citing Nuuanu Valley Assoc. v. City and County of Honolulu, 119 Haw. 90, 97 (2008); see also Molfino v. Yuen, 134 Haw. 181 (2014) (citing cases construing the UIPA to provide access to records that are “actually maintained” and concluding that there was no statutory basis for imposing tort liability upon an agency for failing to maintain records).

In the present case, OIP finds credible CORP CNSL-M’s assertion that it did not create and does not maintain a Procurement Report responsive to Requester’s specific record request. Consistent with its previous opinions, OIP determines that the UIPA does not require CORP CNSL-M to create or maintain the requested Procurement Report. Further, in OIP’s opinion, the UIPA does not require CORP CNSL-M to search for the Procurement Report when CORP CNSL-M credibly asserted that it never created this Procurement Report. *See* OIP Op. Ltr. No. F16-05 (concluding that an agency is not required to search for a record that it knows was never created). Therefore, OIP concludes that, under the UIPA, CORP CNSL-M properly responded to Requester’s request for the Procurement Report by informing him that it did not maintain the Procurement Report, regardless of Requester’s belief that CORP CNSL-M should have created it.

## **II. U APPEAL 18-07: Record Referenced in Court Memorandum**

In U Appeal 18-07, Requester sought from CORP CNSL-M a record described as follows: “the date and record of the **first time** the public documents referenced in the

Declaration of Matson Kelley were ‘**eventually produced**’ by the County of Maui” (First Production Date) (emphasis in original). As Requester informed OIP, he requested CORP CNSL-M to disclose the First Production Date of when CORP CNSL-M supposedly produced and disclosed the “Developer Lot 48A, LLC’s complete County of Maui SMA Permit file” (Permit File). CORP CNSL-M’s Notice to Requester stated that “[t]his notice is to inform you that your record request cannot be granted . . . [because] the Agency does not maintain the records.”

As OIP finds, the Permit File is the same government record for which Requester filed a Complaint for Production of Requested Public Records in the Hawaii Circuit Court for the Second Circuit, which alleged that the County “failed and refused to produce” the Permit File to him under the UIPA (State Lawsuit). In its memorandum (Memorandum) in support of a motion to dismiss or alternatively for summary judgment of the State Lawsuit (Motion), CORP CNSL-M asserted that the Permit File which the Requester sought “does not exist.” Nevertheless, Requester alleged in U APPEAL 18-07 that CORP CNSL-M’s Memorandum indicated that the Permit File had been previously produced. CORP CNSL-M, however, informed OIP that its Memorandum actually referred to the production of different records in a separate lawsuit filed by Requester against the County in federal district court (Federal Lawsuit) and did not refer to the Permit File at issue in Requester’s State Lawsuit and U Appeal 18-07.

The Circuit Court obviously agreed with CORP CNSL-M’s assertion in its Memorandum that the Permit File did not exist as the court granted the Motion and dismissed with prejudice Requester’s State Lawsuit. Salem v. The County of Maui, Civil No. 17-1-0208(1) (Haw. 2<sup>nd</sup> Cir. Ct., 8/8/17) (Order granting Defendants County of Maui, William Spence and Brian Bilberry’s Motion to Dismiss or, in the Alternative, for Summary Judgment with Prejudice). Like the Circuit Court, OIP finds credible CORP CNSL-M’s assertion that the Permit File, which is the same file considered in both the State Lawsuit and in the present appeal before OIP, cannot be produced because it does not exist. Consequently, OIP concludes that CORP CNSL-M properly responded to the request for the First Production Date by informing Requester that it does not maintain this record.

### **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. 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.

**OFFICE OF INFORMATION PRACTICES**

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APPROVED:

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