



STATE OF HAWAII
OFFICE OF INFORMATION PRACTICES

DAVID Y. IGE
GOVERNOR

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

CHERYL KAKAZU PARK
DIRECTOR

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-27.5 and 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: Kamealoha Smith
Agency: Kanuikapono Public Charter School
Date: June 29, 2020
Subject: Access to Personnel File Records (U APPEAL 20-2)

Requester seeks a decision as to whether Kanuikapono Public Charter School (KPCS) properly responded to his request for personal records under Part III of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email to OIP dated July 11, 2019, and attached email chain; OIP's letter to KPCS dated August 5, 2019; KPCS's letter to OIP dated August 19, 2019; OIP's informal guidance¹ to Requester and KPCS dated September 5, 2019; Requester's email to OIP dated October 8, 2019, and attached email chain; OIP's letter to KPCS

¹ This appeal 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. After he received the informal guidance, Requester emailed OIP stating that he wished to "proceed with an appeal[,] " which OIP understands to be his request that OIP proceed with this decision because he did not believe the informal guidance had resolved his complaint.

dated October 25, 2019; and notes of a telephone conversation with Requester on November 18, 2019.

Decision

Requester seeks a copy of his personnel file from KPCS, which includes records for the school years 2010-11 and 2018-19. KPCS has not yet provided a copy even of the 2018-19 school year records it acknowledges it maintains, in violation of the UIPA's Part III.² Because there appears to be some question as to whether Requester seeks a copy of his entire file, KPCS and Requester should communicate in writing to set a new appointment to inspect to determine what Requester specifically wants copies of. KPCS may charge copy costs but may not charge any other fees to process requests under Part III.

KPCS did not show that it made a reasonable search for responsive records pertaining to the 2010-11 school year. It therefore failed to meet its burden under the UIPA to justify its partial denial of access to records on the basis it did not maintain them. HRS § 92F-15(c) (2012). KPCS should conduct a reasonable search and should inform Requester of the results of the search within in a reasonable time (see SPECIAL NOTICE at pages 8-9, infra, regarding the Governor's temporary suspension of the UIPA's time limits in light of the COVID-19 pandemic). If responsive records are found, KPCS should provide access to Requester in accordance with Part III of the UIPA within a reasonable time (see SPECIAL NOTICE at pages 8-9, infra).

There is no evidence to substantiate that Requester made a request for an accommodation asking that he not be alone with KPCS's Human Resources (HR) Clerk during inspection of his personnel file. KPCS's response to this appeal (Response) indicated that KPCS's Executive Director (ED) will allow inspection with the ED or a member of "HR staff." OIP finds that, to avoid future claims of an unreasonable bar to access under the UIPA, KPCS should allow Requester to schedule inspection with someone other than the HR Clerk.

² The UIPA's Part III requires that

[u]pon the request of an individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a copy made within ten working days following the date of receipt of the request by the agency unless the personal record requested is exempted under section 92F-22. The ten-day period may be extended for an additional twenty working days if the agency provides to the individual, within the initial ten working days, a written explanation of unusual circumstances causing the delay.

HRS § 92F-23 (2012).

Statement of Reasons for Decision

I. Request for a Copy and Subsequent Oral Requests to Inspect

Requester's record request dated April 25, 2019, was for a copy of everything in his personnel file, which is a personal record³ under the UIPA's Part III. After not receiving a response, Requester contacted OIP on June 4, 2019, and OIP opened a request for assistance file, U RFA-P 19-47.⁴

Requester, his union representative, and the ED met on June 6, 2019. During this meeting, Requester made an oral request to inspect his personnel file. Requester and KPCS disagree as to whether his oral request to inspect during the June 6 meeting was granted during the meeting. KPCS's Response stated that Requester "did in fact request to review his personnel file during a meeting with [the ED] and his union representative Tom Perry on June 6, 2019, and [the ED] responded to that request by retrieving his file and reviewing it with him and Mr. Perry." Further, KPCS's email to Requester dated June 24, 2019, stated that the 2018-19 personnel file was "shared with you on June 6, 2019."⁵ The Response suggested that OIP telephone the union representative "to determine who is telling the truth."

Requester asserted that he made several attempts to set an inspection appointment. He (1) telephoned the "HR consultant from Ho'okako'o in Honolulu" as instructed by KPCS, but did not receive a call back; (2) met with the ED and his HSTA union representative on June 6, 2019, at which time he asserts he was not allowed to review his records; and (3) emailed the ED as instructed on June 10, 2019, to schedule an appointment to review records, but the ED cancelled that meeting and emailed:

³ A personal record is:

any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

HRS § 92F-3 (2012) (definition of "[p]ersonal record").

⁴ U RFA-P 19-47 closed by a letter from OIP dated July 19, 2019, after Requester received the June 24, 2019, email (forty days after the request was sent) from KPCS responding to his April 25, 2019, record request. A copy of the records was not included with the response.

⁵ OIP notes that allowing a requester to inspect a record does not satisfy a request for a copy of the record.

Your personnel records are viewable with a staff member that I designate present, and if there are specific documents you'd like to copy at that time, we can arrange a time and location for that review. If you want an entire copy of your personnel file, the school will need to charge you for the time and expense of copying those records. I'll have to determine how that calculation will be made if you are still interested in receiving a full copy of your file. Please let me know if you still want a copy of your full file.

KPCS confirmed that it cancelled the June 10, 2019 appointment to inspect due to a "pressing matter." It also confirmed that it emailed the above quoted "procedures for the viewing and/or copying of personnel files." KPCS asserted that Requester never responded to the ED's request to "let me know if you still want a copy of your full file." Finally, the Response stated that, "[i]n any event, Mr. Smith has at all times been free to make another appointment with [the ED] to view his file, and has never done so."

First, with respect to the oral request to inspect, OIP notes that record requesters may only appeal written, not oral, record requests. HAR § 2-73-12(a)(1). There is no evidence that Requester made a separate written request to inspect his personnel file, so OIP treats his oral request to inspect while his written request for a copy was still pending, and subsequent emails between him and KPCS regarding inspection, as an arrangement between them for him to first inspect in order to determine what specific part of the records he wants a copy of. Submittals by both parties show one appointment was cancelled by KPCS, and that both KPCS and Requester may not have made sincere attempts to reschedule an inspection appointment or to otherwise determine what pages Requester wants copies of.

KPCS's response to Requester's written request for a copy of his personal records violated section 92F-23, HRS (see note 2, supra), because, even if KPCS had invoked the twenty working day extension therein, its written response was sent more than thirty working days after the request. OIP therefore concludes that KPCS should provide Requester with a copy of his 2018-19 school year personnel file within a reasonable time (see SPECIAL NOTICE at pages 8-9 infra). In order to determine what specifically Requester wants a copy of, OIP recommends that both parties make a good faith effort to schedule and keep a future appointment to inspect, and both parties should correspond in writing to set a mutually agreeable appointment time.

KPCS indicated that it intends to charge for "time and expense of copying" if Requester wants a copy of his personnel file. As set out in section 2-71-19(a), HAR, OIP's administrative rules allowing an agency to charge search, review, and segregation (SRS) fees for processing record requests apply only to government

record⁶ requests made under the UIPA's Part II, not to personal record requests made under the UIPA's Part III. It would therefore not be proper for KPCS to assess any SRS fees for "time" when providing a copy of his personnel file since the request was a personal record request made under the Part III.⁷ KPCS may charge copy fees in accordance with section 92-21, HRS, which is outside of the UIPA.

II. Reasonable Search Required When Agency Claims Records Not Maintained

Requester made a request for a copy of everything in his personnel file. KPCS responded that the only records that could be located were the "current 18/19 personnel file that was shared with you on June 6, 2019. Our two clerical staff have also been included in the efforts to located [sic] these documents requested by you." It appears there were two sets of responsive records, one for the school year 2010-11 and one for the school year 2018-19, but that KPCS was unable to locate the records from the 2010-11 school year.

Normally, when an agency's response to a record request states that no responsive records exist and that response is appealed, OIP assesses whether the agency's search for a responsive record was reasonable. OIP Op. Ltr. No. 97-8 at 4. A reasonable search is one "reasonably calculated to uncover all relevant documents" and an agency must make "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Id.* at 5 (citations omitted).

In its Response, KPCS stated that Requester's personnel file for the 2010-11 school year was transferred by KPCS to the Kawaikini Public Charter School (Kawaikini) when he was hired by that school, and that no employment records were transferred to KPCS when he was rehired in 2018. KPCS suggested Requester make a record request to Kawaikini for those records.

KPCS did not provide any information to describe its search for responsive records, despite two requests from OIP. OIP's informal guidance stated:

⁶ A government record is "information maintained by an agency in written, auditory, visual, electronic, or other physical form." HRS § 92F-3 (definition of "[g]overnment record").

⁷ OIP is required to "adopt rules . . . establishing procedures necessary to implement or administer [Part III], which the agencies shall follow, in order to ensure uniformity among state and county agencies." HRS § 92F-26 (Supp. 2019). OIP has drafted administrative rules that will set forth SRS procedures for processing personal record requests under Part III, including SRS fees, but the draft rules have not yet been set for public hearing and adoption. As such, agencies currently are not authorized to charge any SRS fees for personal record requests.

Since KPCS has not provided any information to determine whether KPCS conducted any search, OIP is inclined to find that KPCS did not conduct a reasonable search. If KPCS has conducted a search, it should provide an explanation to OIP as to what steps KPCS took in searching for the records that KPCS could not find. If it has not conducted a search, KPCS should do so immediately.

Similarly, OIP's letter to KPCS dated October 25, 2019, stated:

OIP notes that KPCS never provided OIP with a response to OIP's letter of September 5, 2019. Because KPCS's response to this appeal indicated that it does not maintain a portion of the requested records, KPCS's response should have described the search that was undertaken for the responsive records or provided evidence that the requested records were never created.

Normally, when an agency's response to a record request states that no responsive records exist and that response is appealed, OIP assesses whether the agency's search for responsive records was reasonable. For example, in previous OIP opinions, copies of which are enclosed for your reference, OIP concluded that agencies had conducted reasonable records searches based upon the agencies' descriptions of their searches, such as computerized searches by name (U Memo 19-1), property TMK number (U Memo 19-9), or searches of a past administration's records conducted by current agency staff (U Memo 19-12).

Alternatively, an agency is absolved from conducting a record search when "an agency has actual knowledge that the requested record was never created." Thus, in previous opinions, which are enclosed for your reference, OIP concluded that agencies need not search for records when they provided evidence of their "actual knowledge" that such records were never maintained, for example, by confirming that records such as written oaths of office by Hawaii Legislators (U Memo 19-16) and audio recordings of meetings (OIP Op. Ltr. No. F16-03) were never created, and that certain inmate records (U Memo 19-4) were created and then immediately destroyed.

In its preliminary review of this appeal, OIP initially believes that KPCS's response does not provide sufficient information to allow OIP to find that either that KPCS's record search was reasonable or that KPCS has "actual knowledge" that a responsive record was not created. Without this information, as explained in the enclosed inclinations, it appears unlikely that KPCS will prevail as to that issue when OIP issues an opinion letter.

Because KPCS did not respond to OIP's requests for more information, OIP must find that it did not conduct a reasonable search. HRS § 92F-15(c) ("agency has the burden of proof to establish justification for nondisclosure"). OIP further finds that KPCS must conduct a search "reasonably calculated to uncover all relevant documents . . . using methods which can be reasonably expected to produce the information requested." OIP Op. Ltr. No. 97-8 at 4-5 (citations omitted). KPCS should inform Requester of the results of the search, and, if responsive records are found for the 2010-2011 school year, KPCS should allow requester to inspect and copy the records within a reasonable time, (see SPECIAL NOTICE at pages 8-9, infra).

III. Request for Accommodation

Requester also alleged that he asked KPCS for an accommodation, specifically, that he not be alone with the HR Clerk during the record inspection. Requester asserted that the ED was "extremely dismissive" of these concerns.⁸ Conversely, KPCS asserted that no accommodation was requested, but Requester did ask in April 2019 that an HR specialist not be allowed to access his personnel file, which was "rejected as unreasonable and without merit." Requester's request for a copy of his personnel file dated April 25, 2019, included a statement that "this is sufficient information to warrant me asking that [the HR Clerk] not open, touch, or otherwise have access to any of my HR personnel files." The information provided by Requester therefore corroborates that he did request that the HR Clerk not have access to his file, but does not show he requested an accommodation for a record inspection.

An agency may take reasonable measures to protect its records. See, e.g., OIP Op. Ltr. No. 10-02 at 3-4 citing OIP Op. Ltr. No. 90-35 at 10-14 ("An agency must generally provide access to a government record in the physical form requested . . . unless doing so might significantly risk damage, loss, or destruction of the original record.") KPCS can therefore take steps to protect original records by having an employee present during Requester's inspection. KPCS's Response confirmed its policy is "personnel files are only to be viewed in a private location and that either [the ED] or a member of HR staff is to be present at all times." OIP presumes Requester's statement that there was a prior incident between Requester and the HR Clerk to be true. OIP cannot find that Requester requested not to be alone in the room with the HR Clerk while inspecting his personnel file because there is no evidence of such a request. However, through this appeal, Requester has made clear that a prior incident makes him uncomfortable being alone with the HR Clerk. OIP therefore recommends that KPCS have someone other than the HR Clerk present for his inspection in order to avoid any potential future issues in this case.

⁸ OIP does not have jurisdiction to resolve any claims of discrimination raised by Requester.

Right to Bring Suit

Requester is entitled to seek assistance directly from the courts after Requester has exhausted the administrative remedies set forth in section 92F-23, HRS. HRS §§ 92F-27(a), 92F-42(1) (2012). An action against the agency denying access must be brought within two years of the denial of access (or where applicable, receipt of a final OIP ruling). HRS § 92F-27(f).

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).

If the court finds that the agency knowingly or intentionally violated a provision under Part III of the UIPA, the agency will be liable for: (1) actual damages (but in no case less than \$1,000); and (2) costs in bringing the action and reasonable attorney's fees. HRS § 92F-27(d). The court may also assess attorney's fees and costs against the agency when a requester substantially prevails, or it may assess fees and costs against the requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e). If Requester decides to file a lawsuit, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This opinion 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 request for assistance. OIP's role herein is as a neutral third party.

SPECIAL NOTICE: During the COVID-19 pandemic, Hawaii's Governor issued his Supplementary Proclamation 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 provided 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 OIP, relating to requests for government records and/or complaints to OIP.” SP7, Exhibit H. On May 18, 2020, the Governor’s Eighth Supplementary Proclamation (SP8) at Exhibit H, continued the modified suspension of the UIPA provided in SP7. On June 10, 2020, the Governor’s Ninth Supplementary Proclamation (SP9) at Exhibit H, continued the modified suspension of SP8, Exhibit H.

The UIPA’s part IV sets forth OIP’s powers and duties in section 92F-42, HRS, which give OIP authority to resolve this appeal and have been restored by SP7 through SP9, except for the deadline restriction. Thus, for OIP’s opinions issued while SP9 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 SP9 after July 31, 2020, unless SP9 is terminated or extended by a separate proclamation of the Governor. Agencies wishing to appeal an OIP 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 SP9 after July 31, 2020, unless terminated or extended by a separate proclamation of the Governor.

OFFICE OF INFORMATION PRACTICES



Carlotta Amerino
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director