



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 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: Zachary Bliss
Agency: County of Hawaii Department of Finance
Date: July 8, 2020
Subject: Video Camera Footage (U APPEAL 20-5)

Requester seeks a decision as to whether the County of Hawaii Department of Finance (FIN-H), Vehicle Registration and Licensing Division, 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 email with attachments to OIP dated July 31, 2019; a letter with exhibits from FIN-H to OIP dated August 15, 2019; OIP's informal guidance¹ dated August 22, 2019; Requester's email to OIP dated August 29, 2019; OIP's email to Requester dated August 30, 2019, with attached email thread; Requester's emails to OIP dated September 18 and 20, 2019, both with attached email threads; OIP's

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 did not wish to accept OIP's informal guidance as resolving this appeal.

email to FIN-H dated September 18, 2019; and OIP's email to Requester dated September 20, 2019, with attached email thread.

Decision

FIN-H's response to the record request complied with the notice provisions in section 2-71-14(c)(1), HAR. FIN-H did maintain the record, a video, at one time and attempted to make a copy of it in response to the record request, but found the video had been overwritten and no longer exists. FIN-H's actions in attempting to copy the video were in good faith and did not violate the UIPA, although quicker action may have prevented the unintentional destruction of the record.

Statement of Reasons for Decision

I. Response to Request Complied with Section 2-71-14(c)(1), HAR

Requester made a written UIPA request to FIN-H dated June 30, 2019, for a copy of "security camera video footage from County of Hawaii Vehicle Registration and Licensing Division, Waimea Center, 65-1158 Mamalahoa Hwy, Ste 1-A, Kamuela, Hawaii 96743, from June 24, 2019, from 9:00 to 12 pm" (Video Footage). After first sending an acknowledgment to Requester, FIN-H informed him in a letter dated July 24, 2019, that "[d]ue to unforeseen circumstances the tape is no longer available." Requester appealed FIN-H's response.

OIP finds that FIN-H's written response to the record request followed the notice requirements of section 2-71-14(c)(1), HAR. This section requires that when an agency is unable to disclose a record because it does not have any responsive record, the agency's notice shall state that the agency is unable to disclose the record because the agency "does not maintain the record[.]" HAR § 2-71-14(c)(1).

II. FIN-H is Not Required to Provide Access to Records it Does Not Maintain

The UIPA's definition of "government record" includes records "maintained" by an agency in physical form. HRS § 92F-3 (2012). Agencies are required to make government records available for inspection and copying, except as provided by law. HRS § 92F-11(a), (b) (2012 and Supp. 2019).

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. 95-8 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).² The agency has the burden of proof to establish justification for nondisclosure. HRS § 92F-15(c) (2012).³

Here, OIP finds that FIN-H did initially maintain the Video Footage and it had retrieved the location within its electronic storage system containing the Video Footage, but subsequently discovered that the file containing the Video Footage was no longer stored there because, as explained in section III, *infra*, the Video Footage had been overwritten for an unknown reason before a copy could be made. OIP finds that FIN-H’s search of the location that should have contained the Video Footage was reasonably calculated to uncover the Video Footage, and that FIN-H has established that it no longer maintains the record. OIP therefore concludes that FIN-H has no duty under the UIPA to provide access to a record it no longer maintains. HRS § 92F-11, *see also* OIP Op. Ltr. No. 97-8 at 6 (“UIPA applies only to government records maintained by an agency”).

III. FIN-H Made Good Faith Attempts to Copy the Video Footage, But the Delay in Seeking Assistance of the Department of Information Technology May Have Allowed for Unintentional Destruction

When an agency receives a request for a record that is public, it would be improper for the agency to avoid its UIPA disclosure obligations by intentionally or knowingly destroying the requested record. OIP Op. Ltr. No. 99-7 at 6, *citing* OIP Op. Ltr. No. 92-13 at 6 n. 1.

The information relied upon by OIP is as follows.⁴ FIN-H’s response to this appeal (Response) explained that on July 8, 2019, FIN-H’s Division of Vehicle Registration

² In rare instances, when OIP finds that an agency has actual knowledge that the requested record was never created, OIP will conclude that the agency is absolved from having to conduct a search reasonably likely to produce the requested records. OIP Op. Ltr. No. F16-03.

³ Requester’s response to the informal guidance asked whether FIN-H has to “show burden of proof to corroborate their claims[.]”

⁴ After receiving the informal guidance, Requester asked OIP: (1) what evidence FIN-H has that shows the malfunction of the recording device; (2) whether OIP has evidence that the apparent destruction of the Video Footage while the record request was pending was not intentionally or knowingly done; (3) what evidence was used to determine that FIN-H acted in good faith; (4) how OIP can claim FIN-H acted in good faith if it is unknown and still being investigated as to when and why the premature overwriting occurred; (5) who had access to the recording device; and (6) whether the employee, “Stallone, who violated my rights on June 24, 2019,” has access to this device. If Requester continues to question OIP’s factual findings and conclusions in this opinion, he has the option to file a lawsuit for access as explained at the end of this opinion.

and Licensing (DVRL) informed Requester that a copy of the video would be provided.⁵ On July 12, 2019, DVRL unsuccessfully tried to copy the video onto a thumb drive. On July 23, 2019, DVRL sought the assistance from the Hawaii County Department of Information Technology (IT-H) to copy the Video Footage onto a thumb drive. FIN-H did not specify whether IT-H attempted to copy the record on July 23 or July 24, but while IT-H was attempting to copy the Video Footage onto a thumb drive, the employee making that attempt discovered that the video system had already overwritten the Video Footage. The specifications for the video surveillance system calls for the system to record on a continuous 30-day loop, so video recorded 29 days previously should have been still available based on how FIN-H understood the system to work and it is unknown why the footage was no longer there.

After receiving FIN-H's July 24, 2019, letter stating that "[d]ue to unforeseen circumstances the tape is no longer available[,]" Requester sent an email asking what was meant by "unforeseen circumstances." DVRL replied that the Video Footage was automatically overwritten. DVRL responded to Requester's further

⁵ The record request was dated June 30, 2019, and the envelope it was mailed in was postmarked July 1, 2019. OIP presumes FIN-H received the request no earlier than July 2, 2019. FIN-H's administrator "informed" Requester on July 8, 2019, that video of the "non-secure lobby area would be provided and [he] agreed that would be adequate." It is unclear whether this July 8 communication was oral or written. Had the July 8 communication been written, it would likely have amounted to a notice to requester under section 2-71-13(b), HRS, which would then have triggered the deadline of five business days to provide the record.

Assuming the July 8 communication was oral, FIN-H did send a timely acknowledgment on July 11, 2019, as allowed by section 2-71-13(c), HAR, when an agency needs to extend the deadline to provide a notice to requester based on extenuating circumstances. It was then required to provide a notice to requester by July 31, 2019 (its response was dated July 24, 2019), and then disclose the record within five business days of the notice (i.e., August 7, 2019, which was impossible as the Video Footage had been overwritten by that time) or within five business days of receiving prepayment, if required. HAR § 2-71-13(b).

Regardless of whether FIN-H's effort to copy the Video Footage so it could be provided to Requester was actually late based on being more than five business days after a written notice to requester sent June 8, or was part of their work to create a notice to requester within the acknowledgment period, OIP takes note that FIN-H did wait until the last minute to copy the Video Footage before it was scheduled to be overwritten. Although that would have been just in time based on how FIN-H understood the system to work, it nevertheless appears that a greater sense of urgency given the anticipated overwrite of the Video Footage might have allowed it to be copied before it was prematurely overwritten. FIN-H apparently realized this on its own, however, and addressed it by setting a new policy of immediately copying the record for future requests for video footage as discussed below.

inquiry stating that the “NVR” video record was reportedly designed to maintain records for 30 days but for some unknown reason the system began overwriting prior to the 30th day of recording and before the copy could be made. DVRL expected the system to retain the video for the specified 30 days and was surprised at the loss. The Response stated that when and why the premature recording over occurred is unknown but is being investigated, that the camera has been replaced due to this incident, that policies for same day copying of videos upon receiving a UIPA request have been instituted,⁶ and copying will occur before a decision is made as to whether the video is public.

OIP finds credible FIN-H’s assertion that it intended to provide Requester with a copy of the Video Footage and made two attempts to copy it to a thumb drive. OIP also finds credible FIN-H’s explanation of why the Video Footage is no longer maintained, and thus, OIP finds that FIN-H did not intentionally or knowingly destroy it. OIP further finds that FIN-H’s subsequent investigation and institution of a same day copying policy shows FIN-H took steps to determine what happened and to prevent it from happening again. OIP therefore concludes that FIN-H acted in good faith.⁷

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).

⁶ Requester’s response to the informal guidance asked why the policy that was already in place for same day copying was not followed. Requester apparently misunderstood FIN-H’s explanation. As OIP understands it, after this incident when it was discovered that the equipment prematurely overrode footage, FIN-H instituted a “same day copying of videos” policy.

⁷ Requester’s response to the informal guidance asked OIP: (1) what individual or individuals at DVRL is conducting the investigation; and (2) where is the original video recording device that is the subject of this appeal. OIP does not have information that would answer these questions, but also finds them not relevant for purposes of determining whether FIN-H acted in good faith when responding to the record request.

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 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

Handwritten signature of Carlotta Amerino in blue ink, written over a horizontal line.

Carlotta Amerino
Staff Attorney

APPROVED:

Handwritten signature of Cheryl Kakazu Park in blue ink, written over a horizontal line.

Cheryl Kakazu Park
Director