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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.

MEMORANDUM DECISION

Requesters: Friends of Lanai and Mr. Robin Kaye
Agency: State Energy Office, Department of Business, Economic Development and Tourism
Date: February 6, 2015
Subject: Documents Pertaining to a Wind Farm on Lanai (APPEAL 13-19)

Requesters seek a decision as to whether the Department of Business, Economic Development and Tourism (DBEDT) properly responded to their requests for records of the DBEDT State Energy Office (SEO) under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requesters' e-mail correspondence and attached materials dated November 30, 2012, and December 18, 2012; letters to OIP from DBEDT dated December 17, 2012, March 28, 2013, and October 23, 2014 (with attachments); a telephone conversation with Deputy Attorney General Gregg Kinkley on October 1, 2014; e-mail strings to OIP (some with attachments) from Ms. Susan Grey-Ellis of DBEDT on December 15 and 18, 2014, and January 15, 2015; a letter with attachment to Requesters from DBEDT dated December 18, 2014; and a telephone call with Ms. Grey-Ellis on January 16, 2015.

Requesters made four separate but related record requests to SEO.¹ Requesters did not appeal the responses to the First and Third Requests; however, the Third Request

¹ OIP refers to these as the First Request, Second Request, Third Request, and Fourth Request, respectively, and each is discussed in detail below.

is relevant to the appeal of DBEDT's response to the Second Request. The responses to the Second and Fourth Requests are the subject of this appeal.

Decision

Requesters appealed DBEDT's response to the Second Request, claiming that the documents provided were not responsive. DBEDT confirmed that it has no records responsive to the Second Request, and suggested that Requesters were perhaps looking at records provided in response to the Third Request when they alleged that the records provided in response to the Second Request were not responsive. OIP agrees with DBEDT that the records deemed "nonresponsive" by Requesters to the Second Request were actually provided in response to the Third Request. OIP therefore finds that DBEDT's response to the Second Request (that it has no responsive records) was in fact a proper response to the Second Request.

Requesters appealed the adequacy of DBEDT's search for records responsive to the Second Request. Based on the information provided by DBEDT in good faith, OIP finds that DBEDT's search was adequate as it involved a search of relevant electronic and physical files.

Requesters also appealed the adequacy of DBEDT's search for records responsive to the Fourth Request. Based on DBEDT's explanations of the searches conducted for responsive records, OIP finds that DBEDT asserted in good faith that the records produced in response to the Fourth Request were the only responsive records. OIP further finds that DBEDT's search was adequate as it involved a search of relevant electronic and physical files.

Statement of Reasons for Decision

I. Facts

Requesters made the First Request to the SEO on October 31, 2012. OIP did not receive a copy of the First Request from either party, but DBEDT described it as "a very broad OIP request seeking full communications access of all DBEDT employees to or from other governmental or private sector entities." DBEDT asserted that, after receiving the First Request, its Information Officer telephoned Requesters to explain that the Request was "quite broad and would be very costly to fill." DBEDT further asserted that "Mr. Kaye acknowledged his acceptance of this advice and declared that he was willing to work with DBEDT to narrow the search to the targeted information desired." Requesters did not express a wish to appeal DBEDT's handling of the First Request.

Requesters thereafter made the Second Request (or "Retention Rights Request") to SEO on November 2, 2012, which stated:

It is submitted as an amendment to the request we submitted on October 31, 2012, but in no way waives any right to seek additional information on this or other matters in the future.

We respectfully request that the following records be made available for inspection and copying:

Any and all government records, emails, or other communications between February 1, 2012 and the date of this request to or from Mark Glick, Director of the Hawaii State Energy Office (HSEO) and the Office of the Governor, Hawaiian Electric Inc, or any subsidiary if HEI (HECO, MECO, or HELCO), the Federal Department of Energy and/or David Murdock/Castle and Cooke/any subsidiary of Castle and Cooke or any individual formerly or presently employed by Castle and Cooke or its subsidiaries that mentions in any way retention or rights(s) to develop a wind project on the island of Lana'i.

(Emphasis in original).

Requesters made the Third Request (or "Murdock Request")² on November 8, 2012, for:

Any and all government records, emails, or other communications between February 1, 2012 and the date of this request to or from Mark Glick, Director of the Hawaii State Energy Office (HSEO) and the Office of the Governor, Hawaiian Electric Inc, or any subsidiary of HEI (HECO, MECO, or HELCO), the Federal Department of Energy and/or David Murdock/Castle and Cooke/any subsidiary of Castle and Cooke or any individual formerly or presently employed by Castle and Cooke or its subsidiaries that mentions David Murdoch, Castle and Cooke and a wind farm on Lana'i.

DBEDT's responses to the Second and Third Requests are discussed below, starting at section II. On November 30, 2012, Requesters appealed DBEDT's response to the Second Request, asserting: (1) that the records provided are not responsive to the request, and (2) it is not credible that there were only three communications on this subject.

On December 18, 2012, Requesters sent an e-mail with attachments to OIP regarding the Fourth Request (set forth in section V., below), which has been incorporated into this appeal. This decision therefore addresses issues raised in Requesters' appeal and subsequent e-mail on December 18, 2012.

² Requesters' apparently misspelled David Murdock's last name as "Murdoch" at times.

II. Whether Records Provided in Response to Second Request (Retention Rights Request) Are Responsive

On November 7, 2012, DBEDT sent an e-mail to Requesters responding to the Second Request, and explaining that DBEDT had found no records that “mention in any way the retention of rights to develop a wind project on the island of Lana’i.” Requesters appealed DBEDT’s response to the Second Request on the basis that the records provided were not responsive to the request. DBEDT confirmed in its letter to OIP dated December 17, 2012, that there are no e-mails responsive to the Retention Rights Request.

After reviewing a copy of the appeal and the materials provided to OIP by Requesters, DBEDT asserted that the documents which Requesters claim are not responsive to the Second Request are the records that were provided by DBEDT in response to the Third Request. OIP reviewed the documents that Requesters indicated were provided in response to the Second Request, and they indeed appear to be responsive to the Third Request as DBEDT asserted.

As no documents were provided in response to the Second Request, OIP cannot conclude that any documents were not responsive to Requesters’ Second Request. Rather, the controlling issue is whether DBEDT engaged in an adequate search for records, which is discussed next.

III. Adequacy of Search for Second Request

Requesters’ contend that a search for documents responsive to the Second Request should have produced more than what was provided,³ because the

request was for communications to or from the Director of the State’s Energy Office regarding a wind project on Lana’i within a ten (10) month timeframe. The proposed Lanai wind project is a topic that has been in the public domain for at least the past 5 years, and an issue for which DBEDT has publicly taken a leadership role. Contained within that timeframe was the completed sale of the island of Lana’i from Castle & Cooke/David Murdock to Larry Ellison, also a well-publicized event. As a part of that sale, Murdock “retained the rights” to develop his wind power plant (“Big Wind”) on Lana’i. Given the importance of Big Wind on Lana’i to energy planning within DBEDT and more specifically HSEO, it is incomprehensible that the attached three emails “found” by DBEDT completely and accurately respond to my request. Surely, the relevance of who now “owns” the site for Big Wind

³ As noted in section II, it appears that no records were provided in response to the Second Request.

would have involved communications between “Mark Glick, Director of the Hawaii State Energy Office (HSEO) and the Office of the Governor, Hawaiian Electric Inc, or any subsidiary of HEI (HECO, MECO or HELCO), the Federal Department of Energy and/or David Murdock/Castle and Cooke/any subsidiary of Castle and Cooke or any individual formerly or presently employed by Castle and Cooke or its subsidiaries...”

DBEDT, the State Energy Office, Hawaiian Electric Inc. the Governor of Hawaii, and Castle & Cooke have been active, vocal supporters of Big Wind on Lana'i for several years. For the State's Energy Office to have submitted only three emails, none responsive to my request, unfortunately suggests willful and potentially illegal withholding of public information.

I am therefore requesting an intervention by OIP to determine whether or not the law was followed by DBEDT, and in addition seeking a full, comprehensive response to my request.

(Emphasis in original).

The Hawaii Supreme Court has 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, 927 P.2d 386, 401 (Hawaii 1996); *see also Molfino v. Yuen*, 134 Haw. 181, ___, 339 P.3d 679, 684 (Nov. 13, 2014) (noting that there is no express record keeping requirement in the UIPA). Other laws may exist that require the creation or retention of records by government agencies, but the UIPA contains no such requirements. OIP Op. Ltr. No. 97-8 at 3. The UIPA only requires that agencies provide access to their existing records unless an exception or exemption to disclosure applies.

When an agency claims a requested record does not exist, OIP looks at whether the agency's search for a responsive record was reasonable; *i.e.*, a search “reasonably calculated to uncover all relevant documents.” OIP Op. Ltr. No. 97-8 at 5, *citing Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995) (*citing Truitt v. United States Dep't of State*, 283 U.S. App. D.C. 86, 897 F.2d 540 (D.C. Cir. 1990) (*quoting Weisberg v. United States Dep't of Justice*, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir 1983) (Weisberg II)).

DBEDT explained to OIP that, in response to the Second Request, two SEO staff members conducted a word search of Mr. Glick's e-mails using the terms: David Murdoch, Larry Ellison, Mirikitani, Lanai Holdings, Harry Saunders (Castle and Cooke employee), Carlton Ching (Castle and Cooke employee), Lanai Development, Lanai Wind Development, Castle & Cooke, Castle and Cooke, and C&C. DBEDT

stated these searches resulted in no relevant documents, and it informed Requesters of this fact in an e-mail on November 7, 2012.

OIP asked DBEDT to affirm whether it searched other records besides e-mails in response to this request. Ms. Grey-Ellis confirmed that she spoke with the individuals who conducted the search, and was informed that physical files were also searched, and no responsive records were found. Based on DBEDT's explanations of the searches conducted for responsive records, OIP finds that DBEDT's search was reasonable. OIP finds that DBEDT asserted in good faith that no responsive records for the Second Request exist. OIP further finds that DBEDT's search was adequate as it involved a search of relevant electronic and physical files.

IV. Adequacy of Search for Third Request (Murdock Request)

Requesters' appeal did not ask OIP to make any finding regarding the Third Request. However, Requesters' e-mail to OIP of December 18, 2012, asserted that "for there to have been only one e-mail -- and that one withheld -- in response to the Third Request is unbelievable." And, DBEDT's responses to this appeal included explanations of how it handled the Third Request. Accordingly, OIP will discuss the Third Request.

A. Records Provided in Response to Third Request

The Third Request asked for SEO records "that mention[] David Murdoch, Castle and Cooke and a wind farm on Lana'i." Based on use of the word "and" OIP understands that Requesters' Third Request sought records that included "David Murdoch" *and* Castle and Cooke, *and* a "wind farm on Lanai." DBEDT stated that, in response to the Third Request, staff searched all Mr. Glick's e-mails using the terms: Wind, Wind Farm, Lanai, Murdoch, Castle and Cooke, and Castle & Cooke. This search did find documents responsive to the Third Request.

DBEDT confirmed that in response to the Third Request all responsive e-mails were sent by e-mail to Requesters on November 29, 2012, except for one, which was withheld under the UIPA's exception to disclosure at section 92F-13(3), HRS.⁴ As noted above, DBEDT stated that it appears Requesters thought the records provided in response to the Third Request were being provided in response to the Second Request.

OIP reviewed six pages of documents provided by Requesters as evidence that the Second Request was not properly responded to. These are the same documents that

⁴ Section 92F-13(3), HRS, states that government agencies are not required to disclose "[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function[.]"

DBEDT explained are responsive to the Third Request. These six pages consisted of three documents. The documents each contain some combination of the terms “David Murdock,” Castle and Cooke, and “wind farm on Lanai.” The first document, a one page letter, contained references to Mr. Murdock and a wind farm on Lanai. The remaining five pages consisted of two e-mails. The e-mail dated 09/04/2012 contained “Murdock” and “wind farm.” The e-mail dated 8/27/2012, contained “Castle & Cooke’s” and “wind farm.”

OIP asked DBEDT to affirm whether it searched other records besides e-mails in response to this request. Ms. Grey-Ellis confirmed that she spoke with the individuals who conducted the search, and was informed that physical files were also searched, and no responsive records were found. Based on DBEDT’s explanations of the searches conducted for responsive records, OIP finds that DBEDT’s search was reasonable. OIP finds the assertions by DBEDT that no responsive records for the Second Request exist were produced in good faith. OIP further finds that DBEDT’s search was adequate as it involved a search of relevant electronic and physical files.

B. Record Withheld in Response to Third Request

The record responsive to the Third Request that was withheld was described as the “Robbie Alm – Scenario Study” (Alm Record). DBEDT explained that the subject matter and most of the e-mail related directly to an active RFP with Hawaiian Electric Company; and that it contained “sensitive and confidential pricing information . . . which, if publically disclosed, would affect the outcome of the RFP and frustrate the State’s ability to be involved in RFPs of this type and be trusted with custody of such sensitive pricing information.”

On October 1, 2014, OIP contacted the Department of the Attorney General to ask whether there was still a need to withhold the Alm Record. DBEDT responded in a letter dated October 23, 2014, stating that, due to the passage of time, DBEDT was now able to disclose the Alm Record. DBEDT provided the Alm Record to Requesters on December 18, 2014. Although Requesters did not expressly appeal the withholding of the Alm Record, OIP finds that DBEDT has now provided all records responsive to the Third Request to Requesters.

V. Adequacy of Search for Fourth Request

On December 18, 2012, Requesters sent an e-mail with attachments to OIP regarding the Fourth Request (or “Wind Farm Request”), which has been incorporated into this appeal. The Fourth Request was for:

Any and all government records, emails, or other communications between February 1, 2012 and December 3, 2012 to or from Tan Yan

Chen, Maria Tome, and Cameron Black of the Department of Business, Economic Development and Tourism (DBEDT) and the Office of the Governor, or Hawaiian Electric Companies Inc, (or any subsidiary of HEI – HECO, MECO or HELCO), or the Federal Department of Energy or David Murdock/Castle and Cooke/any subsidiary of Castle and Cooke or any individual formerly or presently employed by Castle and Cooke or its subsidiaries, that mentions in any way a wind farm/wind power project on the island of Lana'i.

Requesters informed OIP that on December 18, 2012, they received an e-mail with attachments from DBEDT in response to the Fourth Request, which Requesters also wished to contest. The attachments in DBEDT's response to the Fourth Request consisted of copies of eight e-mails and one Public Utilities Commission (PUC) docket document. Requesters assert that it is difficult to believe that the eight e-mails and one PUC docket document are the only records responsive to the Fourth Request.

Requesters' e-mail to OIP of December 18, 2012, stated that the "Big Wind on Lana'i is the cornerstone of the State of Hawaii's energy planning. It is in most DBEDT publications; touted whenever they talk about how we will reach our Renewable Portfolio Standards and Hawaii Clean Energy Initiative goals." Accordingly, Requesters believe that it is "highly unbelievable that there are only eight e-mails from February 1 to December 3, 2012, regarding this subject. In addition, Requesters stated that the "recent sale of Lana'i and Mr. Murdock's announced retention of rights to develop a wind farm on Lana'i makes this manini response to my request ever more hard to believe."

DBEDT's response to the Fourth Request on December 17, 2012, explained that DBEDT searched for

records, emails or other communications from February 1, 2012, forward to or from Tan Yan Chen, Maria Tome and Cameron Black and (1) the Office of the Governor, (2) the HECO Companies, (3) the Federal Department of Energy, and/or (4) David Murdock/Castle and Cooke/any subsidiary of Castle and Cooke or any individual formerly or presently employed by Castle and Cooke or its subsidiaries that "mentions in any way a wind farm/wind power project of the island of Lanai."

In response to this appeal, DBEDT stated that it "is not relying on some legal theory to withhold information; DBEDT produced to FOL what documents it had in its possession."⁵ DBEDT further stated that there were "simply no additional responsive documents to be found other than those previously submitted to FOL."

⁵ "FOL" refers to Requester "Friends of Lanai."

OIP asked DBEDT to affirm whether it searched other records besides e-mails in response to this request. Ms. Grey-Ellis confirmed that she spoke with the individuals who conducted the search, and was informed that physical files were also searched, and no responsive records were found. Specifically, Ms. Grey-Ellis noted that: (1) Ms. Tan confirmed that she remembered searching the physical files and found nothing responsive; (2) Mr. Black recently moved offices and went through all his files during the move, but did not find additional responsive records; and (3) Mr. Glick searched again for responsive records after Ms. Grey-Ellis' inquiry, and found no additional records responsive to the request. Ms. Tome is no longer with DBEDT. Ms. Grey-Ellis recently re-searched all Ms. Tome's old physical files but found no responsive records.

Based on DBEDT's explanations of the searches conducted for records responsive to the Fourth Request, OIP concludes that DBEDT's searches were reasonable and made in good faith. OIP finds credible the assertions by DBEDT that the records produced in response to the Fourth Request were the only responsive records found. OIP further concludes that DBEDT's search was adequate as it involved a search of relevant electronic and physical files.

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-3(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 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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