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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-27.5 and 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR). This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions or decisions.

MEMORANDUM OPINION

Requester: Lonnie Larson
Agency: Department of the Attorney General
Date: March 16, 2015
Subject: Certified Mail Documents Not in Agency Records (U APPEAL 14-7)

Request for Opinion

Requester has appealed the Department of the Attorney General's (AG) response to his personal records request under Part III of the UIPA. Requester seeks a decision as to whether AG properly responded when it stated it does not maintain records that are responsive to his request for his discovery request and the envelope containing his discovery request, both of which Requester asserts that he mailed to AG on May 12, 2009.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's Request to Access a Government Record dated June 26, 2013; Requestor's Request for Assistance to OIP dated June 26, 2013; Requester's letter to OIP along with enclosed materials dated July 1, 2013; AG's letter to OIP along with enclosed materials dated September 24, 2013; and a telephone conversation between Deputy Attorney General Stella Kam and OIP Staff Attorney Mimi Horiuchi on September 26, 2013.

Opinion

AG's response indicating that it does not maintain the requested records was proper because, after several searches, it appears no responsive records exist.

Statement of Reasons for Opinion

In December 2008, Requester filed a lawsuit against the Director of the State Department of Labor and Industrial Relations (DLIR) in federal district court (Court). AG represented DLIR. Requester claimed that in May 2009, he sent by certified mail "discovery questions" to AG, addressing the envelope to Deputy Attorney General John M. Cregor, Jr.[1] When Requester did not receive a reply to his "discovery questions," he followed up with his Motion to Compel Discovery on June 26, 2009. Thereafter, AG filed its Response to Plaintiff's Motion to Compel Discovery on July 1, 2009, stating that AG "has not received any discovery requests nor is there any reference, evidence or certificate of service for such requests filed with the Court" and that "Defendant's attorney and staff have made a diligent search of their files and can say with a high degree of confidence that they have not received Plaintiff's discovery requests." Subsequently, on July 7, 2009, the Court denied Requester's Motion to Compel Discovery, finding that AG "has not received the discovery requests." On October 5, 2009, Requester's lawsuit was dismissed for failure to state a claim.

Thereafter, Requester sent a letter to AG dated May 4, 2010, requesting access to the discovery request and envelope containing the discovery request, which he asserts he mailed to AG on May 12, 2009 by certified mail. In a series of letters,[2] the most recent of which was dated December 28, 2012, Requester again requested access to these mailed documents. AG's responses to Requester's requests consistently explained that it did not have the requested records.[3]

In addition, AG's letter to Requester dated March 24, 2011, explained to Requester that AG "did not receive any discovery requests from you on or about [May 15, 2009]." AG further represented that its search of all documents received from Requester in May 2009

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[1] These "discovery questions" were allegedly sent to Deputy AG Cregor because he was assigned to represent DLIR. Requester provided OIP with a copy of a certified mail receipt dated May 12, 2009 that showed a package was sent. He also provided OIP with a copy of a letter from the United States Postal Service (USPS) to Requester dated May 4, 2010 that confirmed delivery on May 15, 2009 at 8:51 a.m.. It was not clear from the certified mail receipt or the USPS letter that the contents of the package mailed were in fact the "discovery questions."

[2] OIP received copies of twelve record requests from Requester to AG. After May 4, 2010, Requester made additional requests dated February 2, 2011; July 9, 2011; February 27, 2012; April 3, 2012; April 17, 2012; October 20, 2012; October 25, 2012; November 5, 2012; December 11, 2012; December 26, 2012; and December 28, 2012. All requests essentially repeated the record request for the mailed documents.

[3] OIP received copies of ten correspondences from AG to Requester dated April 27, 2010; May 18, 2010; May 20, 2010; March 24, 2011; January 31, 2012; March 15, 2012; October 16, 2012; October 22, 2012; November 9, 2012; and December 24, 2012. OIP did not receive a copy of AG's response to Requester's most recent request. Regardless, all of AG's prior responses essentially stated that it did not have the requested records.

uncovered only a three-page document titled, "Praecipe." AG asserted it did not keep the envelope that transmitted the "Praecipe" document. The "Praecipe" document was received on May 15, 2009. AG claimed it did not receive anything from Requester that was dated May 12, 2009. AG provided copies of the "Praecipe" document to Requester.

On June 26, 2013, Requester appealed AG's denial of the requested records to OIP.[4] In its letter to OIP dated September 24, 2013, responding to the appeal, AG reaffirmed that after a search through its records, it was unable to locate either Requester's discovery request or the envelope that contained the discovery request.

Part III of the UIPA, which governs requests for personal records made to Hawaii state and county agencies, applies here. 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). In the instant case, the requested records, namely the discovery request and the envelope, are Requester's personal records because these records are about Requester and refer to Requester by name. See, e.g., OIP Op. Ltr. No. F13-01.

Agencies have affirmative disclosure responsibilities under Part III of the UIPA upon receipt of personal record requests. Section 92F-21, HRS, states that "[e]ach agency that maintains any accessible personal record shall make that record available to the individual to whom it pertains, in a reasonably prompt manner and in a reasonably intelligible form."

However, 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 (2014) (noting that there is no

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[4] Thereafter, Requester contacted OIP eleven additional times, either by letter or e-mail, dated July 1, 2013; August 17, 2013; September 12, 2013; September 26, 2013 twice; October 3, 2013; October 7, 2013, October 8, 2013; October 31, 2013, November 7, 2013; and December 19, 2013. These correspondences requested updates, provided OIP with further information, or sought assistance regarding additional issues. In e-mails dated November 6, 2013 and November 20, 2013, OIP clarified that its focus at this time is limited to only "the envelope [Requester] sent by certified mail on or about May 12, 2009, and the contents thereof." Other matters raised by Requester in his correspondence to OIP are not addressed in this appeal.

express record keeping requirement in the UIPA). Other laws may require the creation or retention of records by government agencies, but the UIPA contains no such requirements. Id. 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)).

AG asserted that it does not maintain records that are responsive to Requester's personal records request. In a telephone conversation with OIP on September 26, 2013, Deputy AG Kam explained that AG's standard practice is to create only one physical file for each case it pursues. The file would identify the party and contain the records and documents relating to the party's case.

Based on the evidence provided, it appears that at least three searches were conducted by AG of the one physical file created for Requester's litigation. The first search was conducted in June 2009 in order to properly respond to Requester's Motion to Compel Discovery. Deputy AG Cregor's Response to Plaintiff's Motion to Compel Discovery dated July 1, 2009, maintained that he and his staff "made a diligent search of their files and can say with a high degree of confidence that they have not received Plaintiff's discovery requests." Moreover, in May 2010, the messenger at AG who retrieved the mail from the downtown post office on May 15, 2009, was questioned. As explained in AG's letter to Requester dated May 20, 2010, this messenger could not recall the specific envelope from Requester because AG receives "buckets" of mail each day. The second search was conducted on September 10, 2013 in order to prepare a response to OIP's Notice of Appeal from Denial of Access to Personal Records. AG again claimed, "[W]e reviewed the files concerning this matter, which included the voluminous correspondence between Larson and the Department, and we were unable to locate any documents responsive to Larson's request dated November 5, 2012." The third search was conducted on September 26, 2013, upon request by OIP. Deputy AG Kam again searched the one and only physical case file opened for Requester's litigation. She asserted that she looked through the file "page-by-page." She also confirmed that there were no "scanned records" of the file. None of AG's searches produced records dated May 12, 2009[5] that would be responsive to the personal records request.

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[5] As noted earlier, AG's searches uncovered only one document that was sent by certified mail by Requester to AG between May 12 through 15, 2009, a three-page document titled, "Praecipe," which was received on May 15, 2009. AG asserted that it did not keep the envelope that transmitted the "Praecipe" document. AG provided copies of the "Praecipe" document to Requester.

In the instant case, based on AG's explanation that its standard practice is to create only one physical file for each case, and its assertion that only one physical file was created for Requester's case and searched at least three separate times, OIP finds that AG's searches were reasonable. While the copy of a certified mail receipt dated May 12, 2009 and the copy of a letter from USPS to Requester dated May 4, 2010 suggested that a delivery was made of mail from Requester to AG, it cannot be confirmed as to what was actually delivered. Further, even if AG did receive the discovery requests but lost, misplaced, or disposed of them prior to Requester's UIPA requests, the UIPA itself does not create a requirement for an agency to retain records. If an agency does not have a record that it should have,[6] its UIPA obligation is met by stating that it does not maintain the record and its failure to maintain the record does not violate the UIPA. Thus, OIP finds that AG's searches were reasonable and finds no evidence to refute AG's assertions that it is unable to locate and, therefore, does not maintain the requested records.

OIP believes AG asserted in good faith that no responsive records exist, and OIP further finds that any additional search in the one relevant file is unlikely to produce responsive documents, specifically, the requested records. Therefore, AG's response indicating that it does not maintain the requested records was proper.

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 no 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

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[6] OIP is not here making a finding that AG should have retained the requested records.

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

OFFICE OF INFORMATION PRACTICES

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APPROVED:

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