

PHONE (808) 594-1888

FAX (808) 594-1865



**STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
560 N. Nimitz Highway
Honolulu, Hawai'i 96817**

May 21, 2018

VIA E-MAIL: request+b2cdb9ump3@

Ms. Anita Hofschneider

RE: UIPA Request dated May 15, 2018

Dear Ms. Hofschneider,

This acknowledges receipt of your email dated May 15, 2018, which the Office of Hawaiian Affairs ("OHA") received on May 15, 2018. In your email, you made a request for government records pursuant to Hawai'i Uniform Information Practices Act 9 ("UIPA"), Hawai'i Revised Statutes ("HRS") Chapter 92F.

In your email, you requested the following:

Thanks for getting back to me. I'd like to still see the trustee allowance reports from 2013 up to the latest available quarter in 2018. I understand it will take time to gather the records. Do you have an estimate for how long it will take?

I will formulate a separate request for the CEO expense information.

See Attachment (email request).

You made an initial request for "trustee allowance expense reports submitted between 2013 and 2018" and for "expense reports submitted by the chief executive officer" in a UIPA request that the OHA acknowledged receiving from you on February

Ms. Anita Hofschneider

May 21, 2018

Page 2

14, 2018. At that time, the OHA responded to you by providing you with a Notice to Requester, dated February 21, 2018 ("Notice"). See Notice attached hereto. You did not respond or otherwise provide the prepayment within twenty business days as requested in the Notice. As such, pursuant to Haw. Admin. Rules § 2-71-16(b), you were presumed to have abandoned your February 14, 2018 request, and the OHA had no further duty to process your request.

Since February 21, 2018, events have occurred such that pursuant to the relevant statutory and legal authorities discussed below, the OHA will not be producing the "trustee allowance reports from 2013 up to the latest available quarter in 2018" or "the CEO expense information" that you have requested in your second UIPA request dated May 15, 2018.

Relevant Statutory and Legal Authorities

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. ("HRS") § 92F-11(a). The UIPA restricts access to five categories of government records as enumerated under HRS § 92F-13. Relevant here are the following UIPA exceptions to the disclosure of government records:

- (1) HRS § 92F-13(1) which restricts disclosure of "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- (2) HRS § 92F-13(2) which permits agencies to withhold access to government records "pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent such records would not be discoverable";
- (3) HRS § 92F-13(3) which restricts disclosure of "records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function"; and
- (4) HRS § 92F-13(4) which provides that "[g]overnment records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure."

Under the UIPA, an individual has a significant privacy interest in “[i]nformation identifiable as part of an investigation into a possible violation of criminal law, except to the extent disclosure is necessary to prosecute the violation or to continue the investigation.” HRS § 92F-14(b)(2).

Under the federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, an individual possesses a substantial privacy interest in information that identifies an individual of suspected wrongdoing, who has neither been arrested nor charged with an offense. The disclosure of the name of an individual who is merely suspected of criminal activity would constitute a clearly unwarranted invasion of personal privacy under the UIPA. See Office of Information Practices (“OIP”) Op. Ltr. No. 92-19 (Oct. 7, 1992); OIP Op. Ltr. No. 95-21 (Aug. 25, 1995); see also *Baez v. U.S. Dep’t of Justice*, 647 F.2d 1328, 1338 (D.C. Cir. 1980) (the disclosure of the names of third persons who had been investigated by the F.B.I. would constitute an unwarranted invasion of privacy); *Kiraly v. F.B.I.*, 728 F.2d 273, 277 (6th Cir. 1984) (The agency could properly withhold the names of those being investigated for suspected criminal activity. The disclosure of such information could subject a person to embarrassment, harassment, and even physical danger).

Based upon federal court decisions under the FOIA and HRS § 92F-14(a), an individual’s significant privacy interest in information identifying the individual in a criminal investigation is not outweighed by the public interest in disclosure.

Furthermore, the OHA is not required by the UIPA to disclose “[g]overnment records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function.” HRS § 92F-13(3).

Examples of records that may be excluded from public disclosure under HRS § 92F-13(3) include law enforcement records where disclosure could reasonably be expected in some particular, discernable way to interfere with pending law enforcement proceedings. The OIP has relied upon FOIA’s Exemption 7 for guidance in construing the UIPA exception for law enforcement records:

Exemption 7(A) of FOIA permits the withholding of records or information compiled for law enforcement purposes to the extent the disclosure could reasonably be expected to interfere with enforcement proceedings. The application of this Exemption requires the agency to establish that: (1) a law enforcement proceeding is pending or prospective; and (2) disclosure of the

Ms. Anita Hofschneider

May 21, 2018

Page 4

documents, would, in some particular, discernable way, disrupt, impede, or otherwise harm the enforcement proceeding.

See OIP Op. Ltr. No. 95-21 (citing *North v. Walsh*, 881 F.2d 1088, 1097(D.C. Cir. 1989).

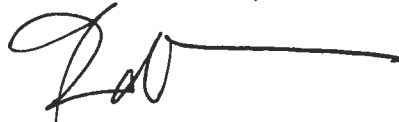
The Records You Requested Will Not Be Disclosed in Accordance with the UIPA Exceptions under HRS §§ 92F-13(1), 92F-13(2), 92F-13(3), and 92F-13(4) and the Legal Authorities Cited Above

The OHA has been served with a Subpoena from the Attorney General's office for the records that you have requested. The OHA has a legitimate government function to comply with the Subpoena for records that may consequently implicate or otherwise identify individuals as targets and witnesses. Disclosure of the information you requested could potentially subject witnesses or others providing information to reprisal and harassment; stigmatize witnesses or suspects of an investigation and unwarrantedly place the individuals in the position of having to defend themselves in the public forum; and chill the willingness of individuals to provide information. See *North*, 881 F.2d at 1097-98.

Disclosing the information and records you requested would frustrate OHA's legitimate government function to comply with the Subpoena and to protect the privacy interests of the OHA Trustees, OHA employees, and other individuals who may be witnesses and/or targets.

For the foregoing reasons and authorities, the OHA will not produce the documents you requested.

'O wau iho nō,



Raina P.B. Gushiken

Assistant Senior Legal Counsel

Attachments as noted

c: Robert G. Klein, Esq. (w/attach.)

From: Anita Hofschneider
To: [Raina Gushiken](#)
Subject: UIPA Request dated February 14, 2018 [#100]
Date: Tuesday, May 15, 2018 1:10:47 PM

Aloha e Raina,

Thanks for getting back to me. I'd like to still see the trustee allowance reports from 2013 up to the latest available quarter in 2018. I understand it will take time to gather the records. Do you have an estimate for how long it will take?

I will formulate a separate request for the CEO expense information.

Best regards,
Anita

NOTICE TO REQUESTER

TO: Anita Hofschneider
(Requester's name)

FROM: Raina Gushiken; Office of Hawaiian Affairs; telephone: 594-1772; email: rainag@oha.org
(Agency, and agency contact person's name, telephone number, & email address)

DATE THAT THE RECORD REQUEST WAS RECEIVED BY AGENCY: February 14, 2018

DATE OF THIS NOTICE: February 21, 2018

GOVERNMENT RECORDS YOU REQUESTED (attach copy of request or provide brief description below):

1. "[A]ll trustee allowance expense reports submitted between 2013 and 2018"
2. "[A]s well as expense reports submitted by the chief executive officer for the same time period."
- 3.
- 4.

THIS NOTICE IS TO INFORM YOU THAT YOUR RECORD REQUEST:

Will be granted in its entirety.

Cannot be granted. Agency is unable to disclose the requested records for the following reason:

Agency does not maintain the records. (HRS § 92F-3)

Other agency that is believed to maintain records: _____

Agency needs further clarification or description of the records requested. Please contact the agency and provide the following information:

The Chief Executive Officer (CEO) does not have a separate, segregated expense or allowance account similar to the Trustee Sponsorship and Allowance Fund (TSAAF), documents of which you have requested in Request Item No. 1 above. So for example, if the CEO must arrange for work-related travel, all such travel arrangements and expenses are centralized with Travel Services and paid for by OHA. Please identify which specific expenses of the CEO that you seek.

As to Request Item No. 1, the Trustee Allowance expense reports will take some time to search, review, and segregate given the time period requested. The expense reports must be reviewed for and redacted of any personal and/or confidential information. For your information, OHA's fiscal year is July 1 of the preceding year to June 30 of the current year. So FY 2018, which you requested, spans from July 1, 2017 to June 30, 2018. So for 2018, you may only receive trustee allowance reports for the first two quarters of FY 2018.

Request requires agency to create a summary or compilation from records, but requested information is not readily retrievable. (HRS § 92F-11(c))

Will be granted in part and denied in part, **OR** Is denied in its entirety

Although the agency maintains the requested records, it is not disclosing all or part of them based on the exemptions provided in HRS § 92F-13 and/or § 92F-22 or other laws cited below.

(Describe the portions of records that the agency will not disclose.)

RECORDS OR
INFORMATION WITHHELD

APPLICABLE
STATUTES

AGENCY
JUSTIFICATION

REQUESTER'S RESPONSIBILITIES:

You are required to (1) pay any lawful fees and costs assessed; (2) make any necessary arrangements with the agency to inspect, copy or receive copies as instructed below; and (3) provide the agency any additional information requested. If you do not comply with the requirements set forth in this notice within 20 business days after the postmark date of this notice or the date the agency makes the records available, you will be presumed to have abandoned your request and the agency shall have no further duty to process your request. Once the agency begins to process your request, you may be liable for any fees and costs incurred. If you wish to cancel or modify your request, you must advise the agency upon receipt of this notice.

METHOD & TIMING OF DISCLOSURE:

Records available for public access in their entireties must be disclosed within a reasonable time, not to exceed 10 business days from the date the request was received, or after receipt of any prepayment required. Records not available in their entireties must be disclosed within 5 business days after this notice or after receipt of any prepayment required. HAR § 2-71-13(c). If incremental disclosure is authorized by HAR § 2-71-15, the first increment must be disclosed within 5 business days of this notice or after receipt of any prepayment required.

Method of Disclosure:

- Inspection at the following location: _____
- As requested, a copy of the record(s) will be provided in the following manner:
 - Available for pick-up at the following location: _____
 - Will be mailed to you.
 - Will be transmitted to you by other means requested: _____ Electronic mail _____

Timing of Disclosure: All records, or the first increment if applicable, will be made available or provided to you:

- On _____, 20____.
- After prepayment** of 50% of fees and 100% of costs, as estimated below.

For incremental disclosures, each subsequent increment will be disclosed within 20 business days after:

- The prior increment (if one prepayment of fees is required and received), or
- Receipt of each incremental prepayment, if prepayment for each increment is required.

Records will be disclosed in increments because the records are voluminous and the following extenuating circumstances exist:

- Agency must consult with another person to determine whether the record is exempt from disclosure under HRS chapter 92F.
- Request requires extensive agency efforts to search, review, or segregate the records or otherwise prepare the records for inspection or copying.
- Agency requires additional time to respond to the request in order to avoid an unreasonable interference with its other statutory duties and functions.
- A natural disaster or other situation beyond agency's control prevents agency from responding to the request within 10 business days.

ESTIMATED FEES & COSTS AND PAYMENT:

FEES: For personal record requests under Part III of chapter 92F, HRS, the agency may charge you for its costs only, and fee waivers do not apply.

For public record requests under Part II of chapter 92F, HRS, the agency is authorized to charge you fees to search for, review, and segregate your request (even if a record is subsequently found to not exist or will not be disclosed in its entirety). The agency must waive the first \$30 in fees assessed for general requesters, OR in the alternative, the first \$60 in fees when the agency finds that the request is made in the public interest. Only one waiver is provided for each request. See HAR §§ 2-71-19, -31 and -32.

COSTS: For either personal or public record requests, the agency may charge you for the costs of copying and delivering records in response to your request, and other lawful fees and costs.

PREPAYMENT: The agency may require prepayment of 50% of the total estimated fees and 100% of the total estimated costs prior to processing your request. If a prepayment is required, the agency may wait to start any search for or review of the records until the prepayment is received by the agency. Additionally, if you have outstanding fees or costs from previous requests, including abandoned requests, the agency may require prepayment of 100% of the unpaid balance from prior requests before it begins any search or review for the records you are now seeking.

The following is an itemization of what you must pay, based on the estimated fees and costs that the agency will charge you and the applicable waiver amount that will be deducted:

For public record requests only:

Fees: Search	Estimate of time to be spent: <u>3</u> hours (\$2.50 for each 15-minute period)	\$ <u>30.00</u>
Review & segregation	Estimate of time to be spent: <u>12</u> hours (\$5.00 for each 15-minute period)	\$ <u>240.00</u>
Fees waived	<input type="checkbox"/> general (\$30), OR <input checked="" type="checkbox"/> public interest (\$60) (Only one waiver per request)	<\$ <u>60.00</u> >
Other	_____	\$
	(Pursuant to HAR §§ 2-71-19 & 2-71-31)	
Total Estimated Fees:		\$ <u>210.00</u>

For public or personal record requests:

Costs: Copying	Estimate of # of pages to be copied: _____ (@ \$ _____ per page, pursuant to HRS § 92-21)	\$
Delivery	Postage	\$
Other	_____	\$
Total Estimated Costs:		\$

TOTAL ESTIMATED FEES AND COSTS from above: \$

The estimated fees and costs above are for the first incremental disclosure only. Additional fees and costs, and no further fee waivers, will apply to future incremental disclosures.

PREPAYMENT IS REQUIRED (50% of fees + 100% of costs, as estimated above) **\$105.00**

UNPAID BALANCE FROM PRIOR REQUESTS (100% must be paid before work begins) \$

TOTAL AMOUNT DUE AT THIS TIME **\$105.00**

Payment may be made by: cash
 personal check payable to __Office of Hawaiian Affairs_____
 other _____

For questions about this notice or the records being sought, please contact the agency person named at the beginning of this form. Please note that the Office of Information Practices (OIP) does not maintain the records of other agencies, and a requester must seek records directly from the agency it believes maintains the records. If the agency denies or fails to respond to your written request for records or if you have other questions regarding compliance with the UIPA, then you may contact OIP at (808) 586-1400, qip@hawaii.gov, or 250 South Hotel Street, Suite 107, Honolulu, Hawaii 96813.