



**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: The Honorable Bob McDermott, Representative
State of Hawaii, House of Representatives
Agency: Department of Education
Date: October 13, 2017
Subject: Correspondence with Southern Poverty Law Center, and List of
Schools Utilizing "Teaching Tolerance" Materials (U APPEAL 15-1)

Requester seeks a decision as to whether the Department of Education (DOE) properly denied his request for records under Part II of the UIPA by claiming that some records did not exist and that others were not readily retrievable in the form requested.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's letter with enclosures to OIP dated July 1, 2014; OIP's Notice of Appeal to DOE dated July 3, 2014; OIP's letter to DOE dated August 22, 2017; and DOE's letters to OIP dated July 10, 2014, and September 14, 2017.

Decision

Requester sought access to all written correspondence between the Southern Poverty Law Center (SPLC) and DOE regarding a \$250 stipend offered by SPLC in relation to the "Teaching Tolerance" training that occurred in 2014, and its

implementation plan,¹ including emails, letters, and faxes (SPLC Correspondence). DOE provided evidence to support its assertion to Requester that it maintains no records responsive to this request. OIP finds that DOE's explanation of its search for responsive records shows that it was a reasonable search which resulted in no responsive records being found. Therefore, DOE's assertion that it does not maintain responsive records was proper.

Requester also sought the names of the DOE schools where SPLC's "Teaching Tolerance" materials are currently being utilized (List of Schools). DOE informed Requester that this information was not "readily retrievable." DOE provided evidence that it properly responded to this request and that the information sought is indeed not readily retrievable. DOE therefore has no further obligations under the UIPA regarding Requester's request.

Statement of Reasons for Decision

Requester made a written request to DOE dated May 1, 2014, for access to the following records:

- Copies of all written correspondence between the SPLC, the Department of Education (DOE) and the DOE's employees regarding the \$250 stipend offered in relation to the "Teaching Tolerance" training that occurred on February 28 and March 1, 2014 and its implementation plan.
 - (Written correspondence includes but is not limited to emails, letters, and faxes. If a piece of correspondence was sent via email, please also provide header information.)
- The names of the DOE schools where SPLC's "Teaching Tolerance" materials are currently being utilized.

DOE's Notice to Requester (NTR) dated May 16, 2014, informed Requester that DOE could not grant his record request because: (1) DOE does not maintain emails between SPLC and DOE regarding the \$250 stipend,² and (2) the request for the names of the DOE schools where "Teaching Tolerance" materials are being utilized requires DOE to create a summary or compilation from records that are not readily retrievable.

¹ Requester's record request sought an "implementation plan," however, it is not clear whether Requester is seeking DOE's or SPLC's implementation plan, or both.

² DOE's response to this appeal dated July 10, 2014, explained that its NTR incorrectly implied that only emails were searched; however, it "instead should have mentioned correspondence."

I. Search for Responsive Records

OIP has previously advised that when a requester contests an agency's response to a record request which states that no responsive records exist, OIP normally looks at whether the agency's search for responsive records was reasonable. OIP Op. Ltr. No. 97-8 at 4-6. 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).

Regarding Requester's request for SPLC Correspondence, DOE's letter to OIP dated July 10, 2014, stated that there are no correspondence records responsive to the request. DOE asserted that its employees who had direct contact with SPLC regarding training indicated that they never received any written communication from SPLC or any SPLC employee regarding a stipend. DOE's letter to OIP dated September 14, 2017, further stated that the DOE staff that conducted the search for records were the "office staff that would have had direct contact with SPLC. There would be no other location in which the records would exist."

Based on the information provided by DOE, it does appear that appropriate DOE staff conducted a reasonable search for SPLC Correspondence in the location where any responsive records were mostly likely to have been found. After no responsive records were found, DOE sent the NTR which indicated that DOE did not maintain the SPLC Correspondence. OIP finds that DOE's response was in compliance with the UIPA.

II. Readily Retrievable

Requester also sought access to the List of Schools where SPLC's "Teaching Tolerance" materials are currently being utilized (List of Schools). DOE's NTR stated that a List of Schools is not readily retrievable.

OIP has previously stated, regarding whether records are readily retrievable:

[a]n agency must compile information in response to a UIPA request if it is "readily retrievable." Section 92F-11(c), HRS, states that, "[u]nless the information is readily retrievable in the form in which it is requested, an agency shall not be required to prepare a compilation or summary of its records." Thus, even if an agency does not maintain a specific list of information requested, the agency would be required to compile such a list if it is readily retrievable given the agency's programming capabilities. *See* OIP Op. Ltr. No. 90-35 at 9-10 (given that the Commission on Water Resource Management, using existing programming capabilities, had routinely retrieved an electronic mailing list of persons filing a Declaration of Water Use for its own

use, OIP concluded that such information is “readily retrievable”). Whether information is “readily retrievable” presents a question of fact that must be determined on a case-by-case basis. Id.

OIP Op. Ltr. No. 10-02 at 3. OIP has also found that government agencies are not required to create new records in response to a UIPA request unless that data can be “routinely compiled” given the agency’s programming capabilities. OIP Op. Ltr. No. 97-8 at 4, citing OIP Op. Ltr. No. 92-7 at 10-12 (finding that a list of self-insured employers for workers’ compensation purposes was readily retrievable from existing electronic records, and recommending the agency make the information available after deleting information to which significant privacy interest attached).

DOE’s initial response to the appeal stated that there is no state-wide tracking mechanism to count how many schools would be utilizing SPLC materials, and that an “extensive teacher by teacher review would need to be conducted to see if any portion of SPLC material is being utilized in the classroom because SPLC materials are published freely on the SPLC website and any teacher can view/download their materials.”

OIP asked DOE to provide more information about why the List of Schools is not readily retrievable. DOE’s response stated that, because there is no state-wide tracking mechanism to count how many schools utilize SPLC Teaching Tolerance materials, DOE may have to conduct a state-wide search that may require communication with thousands of DOE teachers in order to create a responsive record. Based on this assertion, OIP finds that the requested List of Schools is not readily retrievable, and DOE has met its obligations under the UIPA in responding to the request for the List of Schools.

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-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.

OFFICE OF INFORMATION PRACTICES



Carlotta Amerino
Staff Attorney

APPROVED:



Cheryl Kakazu Park
Director