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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 but is binding upon the parties involved.

MEMORANDUM DECISION

Requester: John Hoff
Agency: Department of Planning, County of Kauai
Date: December 28, 2017
Subject: Agency Claim That Requested Records Do Not Exist (APPEAL 18-10)

Requester seeks a decision as to whether County of Kauai Department of Planning's (PLAN-K) claim that the requested record does not exist was proper under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in a letter and enclosures from Requester to OIP dated October 16, 2017; an email from PLAN-K to OIP dated October 17, 2017; and a letter with enclosures to OIP from the Kauai County Office of the County Attorney (CORP CNSL-K) on behalf of PLAN-K to OIP dated November 28, 2017.

Decision

Generally, agencies must make government records available for inspection and copying during regular business hours under section 92F-11(b), HRS. When an agency's response to a record request states that no responsive records exist, the issue on appeal normally is whether the agency's search for a responsive record was reasonable. PLAN-K described the search it made for the requested Notice of Violation. In addition, a PLAN-K employee familiar with the type of record requested made credible and good faith statements that the requested record was never created. OIP therefore concludes that the search for responsive records was

reasonable and PLAN-K has no further obligations regarding this record request under the UIPA.

Statement of Reasons for Decision

Requester made a written request to PLAN-K on October 13, 2017, for a copy of “the ‘Notice of Violation’ issued to Dan and Patricia Hempey which is referred to in the May 27, 2015 ‘The Garden Island’ newspaper. The article, ‘B&B permit granted’ reports that the Hempey’s [sic] actions as being the ‘First application approved by planning commission since 2004’[.]”¹ PLAN-K’s Notice to Requester dated October 16, 2017, stated that the request could not be granted because PLAN-K does not maintain the requested record. Requester appealed PLAN-K’s response to OIP.

Part II of the UIPA, which governs requests for government records made to Hawaii state and county agencies, applies here. Agencies have affirmative disclosure responsibilities under the UIPA, which include making government records available for inspection and copying during regular business hours under section 92F-11(b), HRS. So long as an agency maintains the information in the form requested by a requester, the agency must generally provide a copy of that record in the format requested unless doing so might significantly risk damage, loss, or destruction of the original record. OIP Op. Ltr. No. 97-8 at 4, citing OIP Op. Ltr. No. 90-35 at 13.

The Hawaii Supreme Court has stated, however, that the UIPA does not impose an affirmative obligation on government agencies to maintain records. State of Hawaii Organization of Police Officers v. Society of Professional Journalists—University of Hawaii Chapter, 83 Haw. 397, 927 P.2d 386, 401 (Haw. 1996); see also Molfino v. Yuen, 134 Haw. 181, 186, 339 P.3d 679, 684 (Nov. 13, 2014) (finding that there is no express record keeping requirement in the UIPA). OIP notes that while the UIPA does not require the creation or retention of records by government agencies, there may be other laws that have such requirements.

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. 97-8 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).

In response to this appeal, CORP CNSL-K asserted that, upon receipt, Requester’s request was assigned to Michael Laureta, the PLAN-K Enforcement Section’s Planning Program Manager. Mr. Laureta has been employed by PLAN-K for

¹ Both Requester and CORP CNSL-K provided OIP with copies of the article. The article does not state that the Hempeys were issued a Notice of Violation.

approximately 25 years, including 2 years as Program Manager and 5 prior years in a position where he managed and processed transient vacation rental applications. In response to the request, he inquired with PLAN-K's three Transient Vacation Rental inspectors and one Comprehensive Zoning Ordinance inspector. All four inspectors confirmed that there is not an enforcement file under the Hempeys' names or under the tax map key number for their property. Because a Notice of Violation, if it existed, would be maintained in an enforcement file in PLAN-K's Enforcement Section, OIP finds that PLAN-K's search for responsive records was reasonable.

While OIP finds the assertions made by PLAN-K to be sufficient to justify its position, OIP also notes that, 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.² OIP Op. Ltr. No. F16-03. Based on his experience, institutional knowledge, and personal knowledge, Mr. Laureta asserted that the Hempeys were never issued a Notice of Violation. OIP finds Mr. Laureta's statements to be credible and made in good faith. OIP believes that a further search for responsive records would be fruitless and concludes that PLAN-K's Notice to Requester was proper under the UIPA.

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

² OIP emphasizes that in most cases when an agency claims a record does not exist, it must conduct a reasonable search. This decision is not intended to lessen or overrule the general requirement that agencies conduct a reasonable search for responsive records when receiving requests. In rare cases, an agency's personnel may have actual knowledge that the record requested was never created. Only in these rare cases is an agency absolved from having to conduct a search reasonably likely to produce the requested records.

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