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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: Frederick Harris
Agency: University of Hawaii at Hilo, Office of Equal Opportunity
Date: June 29, 2018
Subject: Employment Records (U APPEAL 15-32)

Requester seeks a decision as to whether the Director of the Office of Equal Opportunity (OEO) at the University of Hawaii at Hilo (UHH) properly responded to his request for a successful applicant's records under Part II of the UIPA by claiming that some of the records were either not maintained or were not readily retrievable.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requester's email messages to OIP dated June 27, 2018, May 27, 2015 (with attachment), and May 26, 2015 (with attachment); and OEO's email messages to OIP dated June 26, 2018, June 8, 2018 (with attachment), and June 12, 2015 (with attachment).

Decision

Requester sought access to a search committee's written hiring recommendation for a successful applicant as well as employment cards and membership cards related to the applicant. The OEO conducted a reasonable search of its files, which resulted in no responsive records being found. Thus, OEO's assertion that it did not maintain the responsive records under section 92F-3, HRS, was proper, although it had cited to

the wrong statutory authority for nondisclosure of the written hiring recommendation.

Statement of Reasons for Decision

Requester made a written request addressed to the "AA/EEO Coordinator" of the UHH dated May 1, 2015, for access to the following records:

1. University of Hawaii Employment Application Form (APT) for a Public Information Specialist, per Susan Enright, dated May 12, 2014.
2. Curriculum Vitae of Susan Enright, pursuant to the University of Hawaii Employment Application Form (APT) for a Public Information Specialist, dated May 12, 2014.
3. Academic credentials of Susan Enright, pursuant to the University of Hawaii Employment Application Form (APT) for a Public Information Specialist, dated May 12, 2014.
4. Letter of employment offer from Donald Straney, pursuant to the University of Hawaii Employment Application Form (APT) for a Public Information Specialist, dated May 12, 2014.
5. Written hiring recommendation of the search committee chairman, Randy Hirokawa, pursuant to the University of Hawaii Employment Application Form (APT) for a Public Information Specialist, dated May 12, 2014.
6. Names of all members of the above-entitled search committee, pursuant to the employment of Susan Enright.
7. Copies of the employment cards and membership information cards related to Susan Enright and Hawaii Government Employees Association (HGEA) Unit 8, subsequent to and prior to the employment of Susan Enright, in any capacity in the University of Hawaii at Hilo, from January 2000 through to the present.

OEO's Notice to Requester dated May 13, 2015 (NTR) stated that the request could not be granted in its entirety and checked the form's boxes indicating that the "Agency did not maintain the records (HRS § 92F-3)" and "Request requires agency to create a summary or compilation from records not readily retrievable (HRS § 92F-11(c))." Although the first four items were provided to Requester, OEO did not disclose the last three items and provided the following statutes and justifications for its nondisclosure on its NTR form:

- Item 5. “Written Hiring Recommendation 92F-12 Not in official personnel file”
- Item 6. “Names of all members of the search committee 92F-11(c) Not readily retrievable”
- Item. 7 “Copies of the employment cards and membership cards 92F-3 Does not maintain this record”

In its responses to OIP’s notice of appeal, OEO explained its reasons for withholding the three items. Regarding Item 5, OEO explained that a written hiring recommendation by the search committee for Ms. Enright did not exist, even though the offer of employment letter from UHH had contained language stating, “Based on the recommendation of the search committee.” This was boiler-plate language used in other employment offer letters, and had not been removed from the offer letter to Ms. Enright.

Regarding Item 6, OEO explained that the names of the search committee members were not disclosed because they were not in Ms. Enright’s personnel file. UHH’s Vice Chancellor for Administrative Affairs had previously provided to Requester the names of the search committee members in a letter dated July 15, 2014, and an email to Requester dated July 17, 2014 from the chairperson of the search committee also contained the names of the members of the search committee. Thus, after receiving OEO’s NTR, Requester himself provided OEO with the names of the persons on the search committee.

Regarding Item 7, OEO explained that UHH did not maintain copies of the employment cards and membership information cards related to employees in any format.

In an email to OIP dated June 27, 2018, Requester confirmed that he was seeking OIP’s opinion only as to Items 5 and 7 above, as he had received the information in Item 6.

UIPA Requires an Agency to Conduct a Reasonable Search for Records

The UIPA provides that “[a]ll government records are open to public inspection unless access is restricted or closed by law.” HRS § 92F-11(a) (2012). A government record is defined as “information maintained by an agency in written, auditory, visual, electronic, or other physical form.” HRS § 92F-3 (2012). 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. However, an agency’s disclosure obligation applies only to those records it actually maintains; it is not required to provide records that it does not maintain, including records that do not exist. See

HRS §§ 92F-3 (definition of government record limited to records agency maintains) and 92F-11 (agency not required to create compilation or summary in response to UIPA request).

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).

A. Written Hiring Recommendation (Item 5)

In OEO's email to OIP dated June 8, 2018, OEO stated that there is no requirement that a written hiring recommendation be made. When such a document was not found in the personnel file of the selected candidate in this case, OEO asserted that the chairperson of the search committee was asked if there had been a written hiring recommendation. The chairperson responded that a list of strengths and weaknesses of the three finalists had been provided to the Chancellor for decision-making. In an email message on July 17, 2014 (found in attachment to OEO's June 12, 2015 email to OIP), the chairperson of the search committee explained to Requester:

Following completion of the reference checks, a summary of the strengths and limitations for the three APT applicants was sent to the Chancellor, with a copy sent to the EEO/AA officer. As per the instructions of the Chancellor, the search committee did NOT recommend a person for the position, nor were the three APT applicants ranked in any order.

Because no written hiring recommendation apparently existed or could be found in Ms. Enright's official personnel file, OEO justified the nondisclosure by correctly claiming on its NTR that the record was "Not in official personnel file," but inexplicably cited section 92F-12, HRS, which requires disclosure of certain records. An agency is not required to cite statutory authority for not disclosing a record that it does not maintain, although OEO could have cited to section 92F-3, HRS, when advising Requester that it did not "maintain" the requested record. Despite OEO's incorrect statutory justification for its nondisclosure, OIP concludes that it made a good faith effort to locate any written hiring recommendation made by the search committee and found that no such record existed, so OEO's nondisclosure of a written hiring recommendation did not violate the UIPA.

B. Employment Cards and Membership Information Cards (Item 7)

After conducting a search of its files, OEO sent Requester its NTR, which claimed that OEO did not maintain any copies of employment cards and membership cards and correctly cited section 92F-3, HRS.

In its June 8, 2018 email to OIP, OEO's Director further explained that

[t]he requested document is not maintained in any format by UH Hilo. It is not the policy of UH Hilo to maintain such a record. Review of Susan Enright's personnel file verifies that such a "card" is not a part of her personnel record, which is also in accord with our practice to not maintain such documentation.

OIP finds that OEO conducted an adequate search of the file and that there is a credible reason as to why the records did not exist. OIP thus concludes that the employment cards and membership information cards were not maintained by OEO and that its nondisclosure under section 92F-3, HRS, was proper.

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



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APPROVED:



Cheryl Kakazu Park
Director