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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: Gordon Cordeiro
Agency: Maui Police Department
Date: September 14, 2018
Subject: Information Related to Paid Informants Not in Agency Records
(U APPEAL 17-34)

Mr. Gordon Cordeiro (Requester) is appealing the Maui Police Department's (POLICE-M) response to his request for records under Part II of the UIPA. Requester seeks a decision as to whether POLICE-M properly responded when it stated that it does not maintain records that are responsive to Requester's request for information related to paid informants.

Unless otherwise indicated, this decision is based solely upon the facts presented in a letter to POLICE-M from Requester dated November 23, 2016; POLICE-M's Notice to Requester dated December 5, 2016; a letter to OIP from Requester dated January 18, 2017, with enclosures; Notice of Appeal dated January 25, 2017, with enclosures; and a letter to OIP from POLICE-M dated February 7, 2017, with enclosures.

Decision

Upon OIP's review of POLICE-M's explanation of POLICE-M's searches for responsive records, OIP finds that POLICE-M's searches were reasonable. In addition, OIP finds reasonable POLICE-M's explanation that due to the age of the requested files, POLICE-M is unable to determine whether the requested

information ever existed, and if the information ever existed, it was likely disposed of in accordance with the County of Maui's Records Disposition Schedule. Therefore, OIP concludes that POLICE-M's assertion that it does not maintain responsive records was proper.

Statement of Reasons for Decision

In Requester's letter to POLICE-M dated November 23, 2016, Requester sought under Part II of the UIPA the following information regarding all paid informants who worked for Detective Antonio Funes from January 1, 1994 until January 1, 1999:

1. Names of all paid informants from those dates. (Item 1)
2. Which cases were they working on? (Item 2)
3. How were they paid? (Item 3)
4. How much were they paid? (Item 4)
5. Did any of them receive any deals from the State in exchange for their information? (Item 5)
6. Did any of them provide materials that would fall under the Discovery rule in any criminal prosecutions they worked on? (Item 6)

POLICE-M responded in its Notice to Requester dated December 5, 2016, that "[t]here are no records responsive to your request."

On January 18, 2017, Requester appealed POLICE-M's denial of the requested records to OIP. In POLICE-M's letter to OIP dated February 7, 2017, POLICE-M reaffirmed, "[POLICE-M] does not have the request [sic] files in our custody." As to each record requested, POLICE-M provided further explanation. With respect to Item 1, POLICE-M explained,

[POLICE-M]'s Criminal Investigations Division (CID) Commander has checked the Division's Confidential Informant (CI) files and was not able to locate any CI files submitted by Detective Antonio Funes to his command during the specified time frame. Submitted CI files in [POLICE-M's] custody dates back as far as 2003 to present and are stored in a locked safe within the Division. They are not accessible by CID personnel other than the sitting Commander. Procedures for Confidential Informant Management and Control are specified in [POLICE-M's] General Order 402.2 which was revised in 2002. This document, if released to a requestor, would need to be redacted to [sic] in accordance with HRS §92F-13(3).

Regarding Items 2, 4, 5, and 6, POLICE-M stated, "Without files responsive to [Item 1], this question may not be specifically answered."¹ Only as to Item 3 did POLICE-M provide the requested information, stating, "All confidential informants are paid in cash only."

POLICE-M further noted, "It is not possible to determine whether the requested files did exist at some time and/or whether they were submitted to Detective Funes' command as required by [POLICE-M] policy." It then concluded by explaining its compliance with the County of Maui's Records Disposition Schedule. Specifically,

[i]n accordance with Maui County Resolution 10-36² . . . and HRS §46-43³ County Records, files of this specific nature need only be maintained for a period of 7 fiscal years (finance-related files), or 5 fiscal years for paid consultant records etc. The resolution does not specify a retention period for confidential informant files.

Part II of the UIPA, which governs requests for government records made to Hawaii State and county agencies, applies here.⁴ Under section 92F-11(b), HRS, agencies have affirmative disclosure responsibilities under the UIPA, which include making government records available for inspection and copying during regular business hours unless an exception to disclosure applies. So long as an agency maintains the information in the form requested by a UIPA requester and no exception applies, 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 records. OIP Op. Ltr. No. 97-08 at 4, citing OIP Op. Ltr. No. 90-35 at 13.

¹ Only as to Item 4, POLICE-M added, "As a general rule, the amount paid to an informant may be based on the value of the informant's information as it applies to the successful prosecution of the case."

² See County of Maui's "Resolution No. 10-36" at www.mauicounty.gov/DocumentCenter/View/11524/Reso-10-036?bidId= (last visited September 6, 2018), authorizing the adoption of a revised Records Disposition Schedule for POLICE-M pursuant to section 46-43, HRS. "Resolution No. 10-36" also includes the Records Disposition Schedule that is referred to throughout the body of this Opinion.

³ Section 46-43, HRS, provides each county's legislative body the authority to create a records disposition schedule. Specifically, the director of finance for each county, with the approval of the legislative body and the legal advisor of the county must "determine whether, and the extent to which, the county shall create, accept, retain, or store in electronic form any records and convert records to electronic form," along with "the care, custody, and disposition" of county records. HRS § 46-43 (2012). For those records that are required to be retained, the legislative body must designate a minimum retention period. Id.

⁴ Section 92F-3, HRS, defines a "government record" as "information maintained by an agency in written, auditory, visual, electronic, or other physical form."

OIP has previously advised that when a requester contests an agency's response to a record request stating that no responsive records exist, OIP normally looks at whether the agency's search for responsive records was reasonable. OIP Op. Ltr. No. 97-08 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).

Here, it appears that at least two separate searches were conducted by POLICE-M, both of which found no responsive records. The first search was conducted in December 2016 in order to properly respond to Requester's letter dated November 23, 2016. After this first search, POLICE-M concluded, "There are no records responsive to your request." The second search was conducted in February 2017 in order to prepare its response to OIP's Notice of Appeal. Again, POLICE-M asserted, "[POLICE-M] does not have the request [*sic*] files in our custody." It further explained that its Criminal Investigations Division Commander, the only person who has access to such records, searched for the requested information in the locked safe where confidential informant files are normally maintained and found no responsive records.

There is no evidence that responsive records ever existed. As POLICE-M stated, "It is not possible to determine whether the requested files did exist at some time and/or whether they were submitted to Detective Funes' command as required by [POLICE-M] policy." Even if the records had been created, given the age of the files, POLICE-M explained that they had likely been disposed of in accordance with the County of Maui's Records Disposition Schedule. Although the disposition schedule does not specifically identify and provide for the retention of "confidential informant files," due to the nature of the files POLICE-M noted that "finance-related records" have a retention period of seven fiscal years and "paid consultant records" have a retention period of five fiscal years. As the requested files were over sixteen years old at the time the request was made, and the disposition schedule indicated a retention period of no longer than seven years, POLICE-M had likely disposed of the files, if they ever existed.

Based on POLICE-M's explanation that the only person who had access to the requested records searched twice in the only area where the confidential informant files are normally maintained, OIP finds that POLICE-M's searches were reasonable. Moreover, OIP accepts as reasonable POLICE-M's explanation that it is unable to determine whether the requested records ever existed, and if they ever existed, had been likely disposed of in accordance with the County of Maui's Records Disposition Schedule as the requested files were over sixteen years old. As the UIPA does not specifically require agencies to retain records in the absence of pending requests, an agency's failure to maintain a requested record does not

violate the UIPA. Accordingly, OIP concludes that POLICE-M's assertion that it does not maintain responsive records 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).

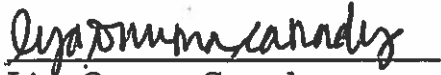
For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

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 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
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