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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 sections 92F-27.5 and 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: Donald Marks
Agency: Department of Public Safety
Date: November 23, 2018
Subject: No Duty to Search for Department of Public Safety Records That Do Not Exist (U APPEAL 17-21)

Mr. Donald Marks (Requester) is appealing the Department of Public Safety's (PSD) response to his request for records under Part III of the UIPA. Requester seeks a decision as to whether PSD properly responded to his request for his Prescriptive Plan Update and Exception Case Form by stating that it did not have the requested documents.

Unless otherwise indicated, this decision is based solely upon the facts presented in a written request to PSD from Requester dated November 9, 2015; a written response to Requester from PSD dated November 10, 2015; a letter to OIP from Requester dated October 1, 2016, with enclosure; Notice of Appeal dated October 18, 2016, with enclosures; an email to OIP from PSD dated November 3, 2016; a letter to PSD from OIP dated October 19, 2018; and a letter to OIP from PSD dated October 22, 2018.

Decision

Agencies are required to make any accessible personal record available to the individual to whom it pertains unless an exemption to disclosure applies. HRS § 92F-21 (2012). When an agency asserts that no responsive records exist, the issue

on appeal is whether the agency's search for a responsive record was reasonable. OIP Op. Ltr. No. 97-08. However, in rare instances, when OIP finds that an agency has actual knowledge that the requested record was never created, OIP will conclude that it was reasonable for the agency to respond based on its prior knowledge, and the agency is absolved from having to conduct an actual search for requested records it knows do not exist. OIP Op. Ltr. No. F16-03. Here, the requested records were created. However, OIP declines to opine that PSD must conduct a search for them because PSD made credible and good faith statements that it does not have Requester's Prescriptive Plan Update and Exception Case Form. PSD explained that the records were immediately destroyed after PSD realized that they were "inadvertently created" based on an error. OIP finds that because PSD had actual knowledge that the records were destroyed prior to PSD's receipt of Requester's record request, a search for responsive records was not necessary as it would have been fruitless. OIP further finds that PSD did not destroy the requested records in order to avoid its disclosure obligations. Consequently, OIP concludes that PSD's response to Requester's request was proper.

Statement of Reasons for Decision

Requester made a written request to PSD dated November 9, 2015, under Part III of the UIPA, for "a photocopy of PSD form 8202 Exceptional Case with [PSD's] denial as to [his] Exceptional Case override." On November 10, 2015, PSD responded, "[t]here is no denial form." Requester appealed PSD's response to OIP on October 1, 2016, explaining that he sought access to his Prescriptive Plan Update and Exception Case Form¹ and was denied. In response to the appeal, PSD reaffirmed that "PSD does not have the requested documents." Specifically, in PSD's letter to OIP dated October 22, 2018, PSD explained,

The documents referenced as a Prescriptive Plan Update (PPU) and Exception Case form (8202) that was inadvertently created, while inmate Marks was temporarily housed at Halawa Correctional Facility (HCF) for a court matter are not in the possess [*sic*] of PSD. According to HCF, these documents were mistakenly prepared to transfer inmate Marks to Saguaro Correctional Center (SCC). However, he was only temporarily housed at HCF for court reasons and he would be returned to SCC at the end of the court action without having to process the

¹ According to PSD, a Prescriptive Plan Update is "an update of an inmate's individualized assessment, which includes criminal and family history, programming requirements and status of completion, institutional behavioral adjustment concerns, pre-parole plans, and a summary of LSI-R risk factors." PSD did not define "LSI-R." An Exception Case Form is "an administrative action to override the comprehensive custody scoring to assure appropriate placement and to provide for the safety of staff, inmates, the community, while ensuring the good government and orderly running of the facility."

documentation. The Correctional Supervisor, Dovie Borges realized the error of her subordinate and advised the individual of the error, including instructions to cancel/destroy the PPU and exception case form.

Part III of the UIPA, which governs requests for personal records made to Hawaii State and county agencies, applies here. A "personal record" is

any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

HRS § 92F-3 (2012). In the instant case, the requested records, namely the Prescriptive Plan Update and Exception Case Form, are Requester's personal records because these records are about Requester and refer to Requester by name. See, e.g., OIP Op. Ltr. No. F13-01.

Under Part III of the UIPA, agencies must disclose an individual's accessible personal records to the individual to whom it pertains upon request unless an exemption to disclosure applies. HRS § 92F-21 (2012). 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.

However, 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 recordkeeping requirement in the UIPA). In some instances, other laws outside the UIPA require the creation or retention of records, but neither Requester nor PSD has asserted that such a law applies here.

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. 97-08. However, in rare instances, when OIP finds that an agency has actual knowledge that the requested record was never created, OIP will conclude that it was reasonable for the agency to respond based on its prior knowledge, and the agency is absolved from having to

conduct an actual search for requested records it knows do not exist. OIP Op. Ltr. No. F16-03.

Here, although the requested records were created, OIP finds PSD's statements regarding their destruction prior to the record request to be credible and made in good faith. PSD affirmed in three separate instances (*i.e.*, PSD's written responses dated respectively November 10, 2015, November 3, 2016, and October 22, 2018) that it does not have the requested documents and provided an explanation as to why they do not exist. Normally, these documents are prepared to override a custody assignment. In this case, PSD initially created the documents to override Requester's custody placement at Halawa Correctional Facility in Hawaii so that Requester would instead be placed at Saguaro Correctional Center in Arizona. However, upon discovering that Requester's custody assignment was, in fact, Saguaro Correctional Center and he was only temporarily housed at Halawa Correctional Facility for a court matter in Hawaii,² PSD immediately destroyed the unnecessary forms because, as PSD explained to OIP, they were "inadvertently created" based on an error.

OIP finds that this situation, where an agency has actual knowledge that the requested records were created and then immediately destroyed, is analogous to the situation where an agency has actual knowledge that the requested records were never created. Moreover, because the records were destroyed prior to PSD's receipt of the record request, OIP finds that PSD's destruction of the records was not an intentional or knowing effort to avoid PSD's disclosure obligations. See OIP Op. Ltr. No. 92-13 at 6, n.1 (stating, "For purposes of complying with the UIPA, we believe that when a government agency receives a request for the disclosure of a record that is required to be made available for public inspection, it would be improper for the agency to avoid its disclosure obligations by intentionally or knowingly destroying the requested record."). Accordingly, as PSD has confirmed the destruction of Requester's Prescriptive Plan Update and Exception Case Form and OIP finds that PSD did not destroy the requested records in order to avoid its disclosure obligations, OIP concludes that PSD was not obligated to conduct a search for responsive records knowing that it would be fruitless and thus, PSD's responses to Requester's request for his Prescriptive Plan Update and Exception Case Form were proper under the UIPA.

² OIP concludes that this transfer from Halawa Correctional Facility to Saguaro Correctional Center did, in fact, occur as OIP received a letter from Requester dated November 2, 2016, informing OIP of his subsequent custody placement at Saguaro Correctional Center on October 13, 2016. The letter supports PSD's assertion that Requester was housed at Saguaro Correctional Center. While OIP understands Requester is currently back at Halawa Correctional Facility, OIP has no reason to believe that Requester has been housed at Halawa Correctional Facility this entire time, or that PSD did not destroy the requested records immediately after the mistake was discovered, and prior to its receipt of Requester's record request. See Current Custody Status of Donald B. Marks at www.vinelink.com (last visited on November 21, 2018).

Right to Bring Suit

Requester is entitled to seek assistance directly from the courts after Requester has exhausted the administrative remedies set forth in section 92F-23, HRS. HRS §§ 92F-27(a), 92F-42(1) (2012). An action against the agency denying access must be brought within two years of the denial of access (or where applicable, receipt of a final OIP ruling). HRS § 92F-27(f).

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).

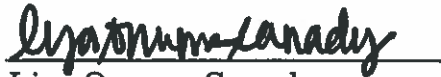
If the court finds that the agency knowingly or intentionally violated a provision under Part III of the UIPA, the agency will be liable for: (1) actual damages (but no less than \$1,000); and (2) costs in bringing the action and reasonable attorney's fees. HRS § 92F-27(d). The court may also assess attorney's fees and costs against the agency when a requester substantially prevails, or it may assess fees and costs against the requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e). If Requester decides to file a lawsuit, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This opinion 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-3(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 request for assistance. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES



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APPROVED:



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