



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: Julie W. Suen, Esq.
Agency: Department of Facility Maintenance
Date: March 27, 2019
Subject: Sufficiency of Search for Records (U APPEAL 17-48)

Requester seeks a decision as to whether the City and County of Honolulu (City) Department of Facility Maintenance (MAINT-HON) conducted a proper search for responsive records pursuant to a request by her law firm, Greater Pacific Law Office, LLC (Greater Pacific), for records under Part II of the UIPA.

Unless otherwise indicated, this decision is based solely upon the facts presented in OIP's letter to Requester dated April 10, 2017; an email from the City Department of the Corporation Counsel (CORP CNSL-HON) to MAINT-HON dated March 8, 2017; Requester's letter to OIP with enclosure dated April 17, 2017; OIP's notice of appeal with enclosures dated April 19, 2017; emails from MAINT-HON to OIP and CORP CNSL-HON dated March 10 and April 3, 2017; emails from OIP to MAINT-HON dated March 22, April 5, and April 19 (with attachments), 2017; an email from MAINT-HON to Greater Pacific dated April 5, 2017; letters from MAINT-HON to OIP dated May 2 and July 20, 2017, and March 14, 2019; and letters from OIP to MAINT-HON dated July 6, 2017, and March 8, 2019.

Decision

MAINT-HON's explanation of its search for responsive records shows that it conducted a reasonable search, which resulted in 4 responsive records being found.

Therefore, MAINT-HON's assertion that it does not maintain additional responsive records was proper.

Statement of Reasons for Decision

In a letter dated January 4, 2017, Greater Pacific made a record request to MAINT-HON for:

public records pertaining to and/or regarding any and all alleged and/or investigated violations of any law, code, ordinance, or rule of any kind made with your agency against the Subject Property [2836 and 2840 Kapiolani Boulevard, Honolulu, Hawaii, tax map key (TMK) (1) 2-7-27-003/002] and/or EKC USA, INC., a Hawaii Corporation dba Gazen (hereinafter "Gazen"), including but not limited to any and all complaints and/or alleged violations under the Hawaii Revised Statutes (HRS), the Hawaii Administrative Rules (HAR), and/or Revised Ordinances of Honolulu (ROH).

The request specifically includes all relevant Government Records [footnote omitted], including but not limited to:

- 1) Notice(s) of Violation made against the Subject Property and/or Gazen;
- 2) Complaints made against the Subject Property and/or Gazen; and
- 3) Documents and communications regarding the investigation of any and all complaint(s) made against the Subject Property and/or Gazen, regardless as to if the investigation resulted in the issuance of a Notice of Violation.

This demand explicitly includes but is not limited to Government Records regarding and/or pertaining to the investigation by Engineering Support Technician Lomana K. Ortiz regarding an alleged complaint filed with the City and County of Honolulu, Environmental Services, Storm Water Quality Branch (SWQ) regarding allegations of an unlicensed private drain connection.

After the record request was made, Greater Pacific sought OIP's assistance in obtaining a response from MAINT-HON and file number U RFA-P 17-60 was opened. While U RFA-P 17-60 was pending, CORP CNSL-HON¹ denied access in letters to Greater Pacific dated February 7 and 22, 2017, under section 92F-13(2),

¹ Requester's appeal asserted that CORP CNSL-HON interfered with the record request. While CORP CNSL-HON's initial basis for denial is unsupported and its involvement did perhaps complicate matters, OIP was not presented with evidence to show that it inappropriately interfered so as to effectively deny access to records.

HRS,² on the basis that the records were part of an ongoing legal dispute to which the City was a party. Requester thereafter filed this appeal.

MAINT-HON revised its position after this appeal was filed, and provided a Notice to Requester (NTR) dated April 5, 2017, in which it informed Greater Pacific that it was not withholding any records, that it was providing 4 pages of responsive records,³ that it did not maintain other responsive records, and that it believed the City Department of Planning and Permitting (DPP-HON) may maintain responsive records.⁴

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(c) (agency not required to create compilation or summary in response to UIPA request).

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,

² Section 92F-13(2), HRS, allows an agency to withhold government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable.

³ OIP understands from MAINT-HON’s letter dated March 14, 2019, that a subsequent or modified record request was submitted by Greater Pacific on July 27, 2017, and that Greater Pacific paid \$2.50 in costs and was provided with the 8 responsive pages.

⁴ The appeal included assertions that MAINT-HON failed to state what documents it believes DPP-HON maintains and failed to explain why it believes DPP-HON maintains responsive records. OIP finds that MAINT-HON was not required to do so because chapter 2-71, HAR, does not require that an agency receiving a record request provide this type of information. Further, providing such information could require an agency to speculate as to just what records another agency maintains, and could inadvertently lead to providing a requester with inaccurate information.

using methods which can be reasonably expected to produce the information requested.” Id. at 5 (citations omitted).

In response to this appeal, MAINT-HON explained that, when it received the request, it contacted its Design and Construction Branch Engineer from the Storm Water Quality Branch (SWQ). A search was performed using the property TMK numbers. SWQ thereafter found 4 responsive pages that were eventually provided to Greater Pacific. Because a MAINT-HON Public Works Investigator’s name was listed in the 4 documents found through the TMK search, he was also consulted but did not have additional responsive records. The Investigator suggested that DPP-HON and CORP CNSL-HON may also have responsive records. MAINT-HON asserted that it does not maintain any other responsive records.

Based on the information provided by MAINT-HON, it does appear that appropriate staff conducted a reasonable search for responsive records in the locations where any responsive records were mostly likely to have been found. OIP therefore finds that MAINT-HON’s search for records was reasonable, and its ultimate response, the NTR, 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 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