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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: Fulfilling the Law Ministries
Agency: Judiciary and House of Representatives, State of Hawaii
Date: June 28, 2019
Subject: Oaths of Office (U APPEAL 17-27 and 17-53)

Requester seeks a decision as to whether the Judiciary and the Chief Clerk of the House of Representatives for the State of Hawaii (respectively Judiciary, House Clerk, and House) properly denied his requests for records under Part II of the UIPA. Because Requester's complaints contain similar issues and facts, OIP is consolidating these two appeals in accordance with section 2-73-15(g), HAR, which authorizes consolidation of appeals that have "similar issues or facts, or similarly situated parties."

Unless otherwise indicated, this decision is based solely upon the facts presented in (for U APPEAL 17-27) Requester's emails to OIP dated December 14 and 23, 2016, and attached materials, a letter from the Judiciary to OIP dated December 22, 2016, and attached materials, Requester's email to OIP dated April 6, 2017, and attached materials, and an email from OIP to Requester dated April 6, 2017; and (for U APPEAL 17-53) Requester's emails to OIP dated May 29 and 31, 2017, and attached materials, a letter from the House Clerk to OIP dated June 8, 2017, and attached materials, an email from the House Clerk to OIP dated June 20, 2017, and attached materials, an email from Requester to OIP dated June 22, 2017, and an email from the House Clerk to OIP dated June 26, 2017, and attached materials.

Decision

The UIPA does not require an agency to provide certified copies of records it maintains, so even assuming for the sake of argument that the oaths of office would otherwise be “government records” subject to the UIPA, the Judiciary properly responded that for the purpose of the UIPA it could not provide the certified copies Requester sought because it did not maintain them. See HRS § 92F-11 (2012).

The House Clerk was not required to perform a search for records because he had actual knowledge that no responsive records existed, and he responded properly under the UIPA by advising Requester that no responsive records existed. See HRS § 92F-11.

Statement of Reasons for Decision

In an email sent December 1, 2016, Requester asked the Judiciary for “all Four (4)¹ of YOUR STAFF ATTORNEY’S OATH OF OFFICE. All Four (4) Oath of Office must be ‘Certified [all sic].” The Judiciary advised him in an email sent December 9, 2016, that the oaths were “court records and not administrative records under the UIPA.” Although the Judiciary advised Requester that it did not maintain responsive records that were subject to the UIPA, it nonetheless offered to provide certified copies of the oaths to Requester subject to its court fee schedule, for a total cost of \$24.00 to retrieve, copy, and certify the three oaths Requester sought. In further email correspondence sent that same day, Requester asserted that the oaths were in fact subject to the UIPA; the Judiciary asked him to confirm that he was seeking certified copies of the oaths for three specified attorneys; and Requester responded by confirming that he was seeking certified copies of the oaths for those attorneys.

In a Request to Access a Government Record sent May 25, 2017, Requester asked the House Clerk for copies² of the oaths of office for three members of the House of Representatives and five members of the Senate. Through a telephone conversation with the House Clerk, Requester clarified that what the request was seeking for each listed member was a document on which the oath was printed followed by the member’s signature. The House Clerk responded on May 26, 2017, by notifying Requester that the records could not be disclosed because they did not exist. As the House Clerk explained,

¹ Although Requester indicated that there were four attorneys whose oaths he sought, subsequent correspondence confirmed that there were only three attorneys whose oaths were encompassed by his request.

² Requester did not ask for certified copies of these oaths of office.

First, please note that I can only provide records for members of the House of Representatives.

Second, although the oath of office is administered to all members pursuant to the Hawaii State Constitution, Article XVI, Section 4, the House of Representatives does not issue certifications of the oath, nor are we required to by the Hawaii State Constitution or the Hawaii Revised Statutes.

In an email to the House Clerk dated May 30, 2017, Requester explained that he interpreted Article XVI, Section 4, of the Hawaii State Constitution to require senators and representatives to write or sign their names under a copy of the oath of office.

Requester appealed both agencies' responses to OIP, and both agencies sent letters to OIP in response. The Judiciary, in its response, stated that although it had copies of oaths for the specified attorneys, they were not certified copies and thus the Judiciary would need to create certified copies to fulfill the request. It argued that the request for certified copies of the oaths was not subject to the UIPA because (1) the UIPA does not require an agency to certify records in response to a request, as the Judiciary would have to do to fulfill the request here; and (2) the oaths of office were not "government records" subject to the UIPA because they were part of the nonadministrative functions of the courts and as such excluded from the UIPA's definition of "government records."

The House Clerk explained in his response that his office does not maintain records of Senators at all, including of oaths taken by Senators, and does not issue written oaths of office to or for individual House members. Rather, the House Clerk explained that based on his personal knowledge of the process as well as consultation with his predecessor, for at least 21 years leading up to Requester's request the process has been that an oral oath is administered to all members of the House together and is memorialized in the House Journal, which in turn is annually certified by the House Clerk and the Speaker of the House. The House Clerk provided a copy of the relevant section of the House Journal for 2015, which reflected the oral administration of the oath of office to all House members together by the Chief Justice of the State of Hawaii, and a draft of the relevant section of the House Journal for 2017, which reflected the same process.

The UIPA only requires an agency subject to the UIPA to provide access to government records it maintains. As OIP has previously stated

Government agencies have affirmative disclosure responsibilities as set forth in section 92F-11, Hawaii Revised Statutes. Government agencies must "make government records available for inspection and copying during regular business hours" under section 92F-11(b),

Hawaii Revised Statutes, and “shall assure reasonable access to facilities for duplicating records and for making memoranda or abstracts” under section 92F-11(d), Hawaii Revised Statutes.

However, the Hawaii Supreme Court stated 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 (Hawaii 1996) (“SHOPO”).

OIP Op. Ltr. No. 97-08 at 3. The Hawaii Supreme Court has reiterated since then that the UIPA does not impose an affirmative obligation on government agencies to maintain records, either by creating records or by keeping records it at one point possesses. Nuuanu Valley Ass’n v. City of Honolulu, 119 Haw. 90, 194 P.3d 531 (Haw. 2008); see also Molfino v. Yuen, 134 Haw. 181, 339 P. 3d 679 (Haw. 2014) (agency does not have a duty to maintain government records in complete condition).

The UIPA’s definition of an “agency” subject to the UIPA specifically excludes “the nonadministrative functions of the courts.” HRS § 92F-3 (2012) (definition of “agency”). The UIPA’s definition of a “government record” is limited to records “maintained by an agency.” *Id.* (definition of “government record.”) Thus, records maintained by the Judiciary as part of its “nonadministrative functions” (such as case files) are not maintained by an “agency” as defined in the UIPA, so they are not “government records” subject to the UIPA. Requests for such records fall instead under the court’s own rules for access to documents.

As the Judiciary correctly noted in its response, the Judiciary’s function of admitting attorneys to the bar is something OIP has previously recognized as being a nonadministrative function of the Judiciary, meaning that records relating to it are not subject to the UIPA. OIP Op. Ltr. No. 93-8 (bar examination scores and records pertain to the nonadministrative functions of the courts so are not subject to the UIPA). The oaths of office, which are also part of the Judiciary’s function of admitting attorneys to the bar, thus would appear to be excluded from the OIP’s definition of a “government record” because they were created as part of the nonadministrative functions of the courts. However, OIP does not need to reach the issue of whether the oaths of office are “government records” subject to the UIPA in the first place because, as discussed below, Requester specifically sought certified copies of the requested records, which the UIPA does not require an agency to provide.

OIP has previously observed:

There is a distinction between a copy and a certified official record. A copy is defined as “[a]n imitation or reproduction of an original.” Black’s Law Dictionary 410 (10th ed. 2014). In contrast, a certified

record additionally requires an “attest[ation] as being true or as meeting certain criteria” while an official record is defined as “[a] legally recognized original document, [usually] prepared or recorded by someone with authority, that establishes a fact.” Id. at 275, 1465.

OIP Op. Ltr. No. F15-03 at 6. Based on that distinction, OIP concluded in that opinion that an agency’s creation of a certified copy of a record “involves more than simply making a reproduction of an existing record,” but instead “requires the creation of a new, original document, rather than a simple copy of an existing record.” Id. Thus, “the UIPA does not compel an agency to provide a certified or official record to any requester.” Id.

Because the UIPA does not require an agency to provide certified copies of records it maintains, even assuming for the sake of argument that the oaths of office would otherwise be “government records” subject to the UIPA, OIP concludes that the Judiciary properly responded that for the purpose of the UIPA it could not provide the certified copies Requester sought because it did not maintain them. See HRS § 92F-11. OIP further notes that the Judiciary did in fact offer to provide certified copies of the oaths to Requester, but under the rules applicable to requests for court records (for a total fee of \$24), in an effort to make them available to Requester despite the fact that it did not have a legal obligation under the UIPA to do so.

The House Clerk, by contrast, has asserted that the requested printed and signed oaths of various House and Senate members do not exist at all, for which reason the House Clerk is unable to provide them to Requester. When a requester appeals an agency’s statement that it has no records responsive to a record request, OIP normally looks at whether the agency’s search for a responsive record was reasonable. OIP Op. Ltr. No. F16-03 at 3, citing OIP Op. Ltr. No. 97-8. However, when an agency’s staff has actual knowledge that it does not maintain the type of records being requested, the agency is not required to search for such records. OIP Op. Ltr. No. F16-03. Here, the House Clerk has actual knowledge that no written oaths of office were created for House members, and that for at least the past 21 years the practice instead has been that an oral oath is administered to all members and memorialized in the House Journal, which is then certified by the House Clerk and the Speaker of the House. The House Clerk also has actual knowledge that the House has no responsibility for administering oaths of office to Senate members and in fact does not administer such oaths. OIP therefore finds that the House Clerk was not required to perform a search because he had actual knowledge that no responsive records existed, and OIP concludes that the House Clerk responded properly under the UIPA by advising Requester that no responsive records existed. See HRS § 92F-11.

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).

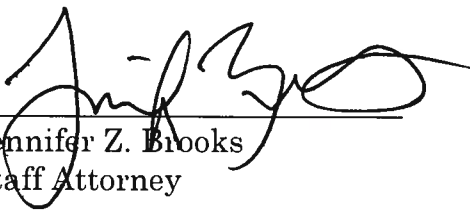
For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

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:



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