

September 9, 1997

Mr. David S. Ferguson

Dear Mr. Ferguson:

Re: Requests for Government Records Which Do Not Exist

This is in response to your request to the Office of Information Practices ("OIP") for an advisory opinion regarding disclosure of a memorandum by the Department of the Corporation Counsel, County of Maui ("Corporation Counsel").

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the Corporation Counsel must disclose a memorandum authorizing Mr. Joseph A. Wolsztyniak, Deputy Corporation Counsel ("Deputy Wolsztyniak"), to settle a dispute between Maui County and the operators of a bed-and-breakfast, when the Corporation Counsel asserts there is no such record in existence.

BRIEF ANSWER

No. There are no records in existence at the Corporation Counsel which would satisfy your request. The UIPA applies only to existing records and government agencies cannot be compelled to create requested records.

FACTS

You made a written request dated December 16, 1996, to Mr. Ralph Nagamine, Division Chief at the Land Use and Codes Administration, for several documents, including the "memorandum from Mr. Jencks to Mr. Wolsztyniak directing him to make a settlement" in a case brought against the operators of a bed-and-breakfast establishment operating on the Island of Maui. In a letter dated January 15, 1997, Mr. Charles Jencks, Director of the Department of Public Works and Waste Management ("Department of Public Works"), responded to your request. Mr. Jencks' letter stated, on page two, that he asked Deputy Wolsztyniak to respond to your request for a memorandum authorizing settlement.

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Accordingly, Deputy Wolsztyniak sent you a letter dated February 18, 1997. In this letter Deputy Wolsztyniak stated, in response to your request for a memorandum regarding authorization to settle:

You requested a copy of the memorandum from Mr. Jencks to me authorizing me to settle. Please be advised that this is confidential and privileged information covered under the attorney-client privilege. This information is not required to be disclosed under Rule 503 of the Hawaii Rules of Evidence.

Based on this representation by Deputy Wolsztyniak, you then made a written request to the Office of Information Practices ("OIP"), dated February 22, 1997, for an opinion as to whether a memorandum from Mr. Jencks to Deputy Wolsztyniak is a public document.

On March 6, 1997, the OIP asked Deputy Wolsztyniak to send a copy of the memorandum from Mr. Jencks authorizing settlement to the OIP for an *in camera* review to determine whether it is indeed a public document subject to disclosure under the UIPA. Deputy Wolsztyniak informed the OIP that there is no such memorandum in existence and there never was. He explained that the intent of the above-quoted passage of his letter to you was to convey that any information, written, verbal, or otherwise, which may exist regarding conversations between himself and his client, the Department of Public Works, is protected by the attorney-client privilege.¹ Deputy Wolsztyniak alleged that conversations were held with either Mr. Jencks, or Mr. Ralph Nagamine, or Mr. David Goode, the Deputy Director of the Department of Public Works, on the matter of settlement, but those conversations were never reduced to writing, nor were there any memoranda produced on the matter. Deputy Wolsztyniak went through his case file over the telephone with a member of the OIP staff, and asserted that he was unable to find any document therein which would satisfy your request. In addition, Deputy Wolsztyniak confirmed, via letter dated March 25, 1997, that "no written document ever existed" which would be responsive to your request.

¹If there had been a record in existence that satisfied your request, it may have been protected from public disclosure under section 92F-13(2) of the UIPA if it was indeed attorney-client privileged information as Deputy Wolsztyniak asserted in his letter. However, the burden to prove that such a requested record is indeed protected from disclosure under the UIPA would lie with the Corporation Counsel. Haw. Rev. Stat. § 92F-15(c) (1993).

A member of the OIP staff spoke to Deputy Wolsztyniak's secretary on May 13, 1997. She informed the OIP that the Corporation Counsel opens only one file for each case, and for each file they create a "CS No." for their computer system. The pleadings for the case are filed on the right side of the file folder, and correspondence and memoranda are filed on the left side.

DISCUSSION

I. INTRODUCTION

The Corporation Counsel is a department of the County of Maui and is, therefore, a government agency for UIPA purposes, as the UIPA's definition of an "agency" includes county departments and corporations owned, operated, or managed by any county. Haw. Rev. Stat. § 92F-3 (1993). A "government record" is defined as information maintained by an agency in written, auditory, visual, electronic, or other physical form. Haw. Rev. Stat. § 92F-3 (1993). Thus, any government record maintained by the Corporation Counsel is subject to disclosure provided no UIPA exceptions apply.

II. NO AGENCY DUTY TO CREATE OR MONITOR RECORDS

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"). Other laws may exist which require the creation or retention of records by government agencies, but the UIPA contains no such requirements. The OIP does advise, however, that government agencies should maintain existing records if there is a pending UIPA request, because to destroy records under such circumstances would not be an act of good faith. OIP Op. Ltr. No. 92-13 at 6, footnote 1 (Aug. 13, 1992) (discussing an audio tape recording of a public meeting).

Neither is an agency required to prepare a compilation or summary of its records unless the information is readily retrievable by the agency in the form in which it is requested. Haw. Rev. Stat. § 92F-11(c) (1993). The OIP reviewed section 92F-11(c), Hawaii Revised Statutes, in OIP Op. Ltr. No. 90-35 (Dec. 17, 1990):

Section 92F-11(c), Hawaii Revised Statutes, is identical to section 2-102(b) of the Uniform Information Practices Code (“Model Code”) drafted by the National Conference of Commissioners of Uniform State laws. The commentary [. . .] to this provision is instructive, and states that this provision “makes plain that the agency’s duty is to provide access to existing records; the agency is not obligated to create ‘new’ records for the convenience of the requester.”

OIP Op. Ltr. No. 90-35 at 9 (Dec. 17, 1990) (emphasis added; footnote in original omitted). So long as an agency maintains the information in the form requested by a UIPA requester, the agency must generally provide a copy of that government record in the format requested by the public unless doing so might significantly risk damage, loss, or destruction of the original records. Id. at 13.

The OIP again discussed section 92F-11(c), Hawaii Revised Statutes in OIP Opinion Letter No. 92-7 (June 29, 1992). The OIP found that government agencies are not required to create new records in response to a UIPA request unless that data can be “routinely compiled” given the agency’s programming capabilities. OIP Op. Ltr. No. 92-7 at 10-12 (June 29, 1992) (discussing list of self-insured employers for workers’ compensation purposes). In the facts of that opinion letter, the information requested was readily retrievable from existing electronic records, and the OIP recommended the agency make the information available after deleting information to which significant privacy interest attached. Id. at 12.

III. AGENCY DUTY TO PERFORM REASONABLE RECORD SEARCH TO RESPOND TO REQUEST

The Corporation Counsel alleges that it was unable to find any record that would be responsive to your request. Therefore, the OIP looks at whether or not the Corporation Counsel’s search for a responsive record was reasonable. Hawaii case

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law is sparse on what constitutes a “reasonable search.” While the OIP could find no cases interpreting “reasonable search” under the UIPA, this term was defined in a case involving real estate title searches. The Hawaii Supreme Court held in Chun v. Park, 51 Haw. 462, 464 (1969), that the defendant title company owed a duty to use “reasonable or ordinary care” in making a title search, but did not further define the term “reasonable or ordinary care.”

Looking to federal case law for guidance in this area, the D.C. Circuit has ruled that a “reasonable search” for public records is one “reasonably calculated to uncover all relevant documents.” Nation Magazine v. U.S. Customs Service, 71 F.3d 885, 890 (D.C. Cir. 1995) (citing Truitt v. United States Dep’t of State, 283 U.S. App. D.C. 86, 897 F.2d 540 (D.C. Cir. 1990) (quoting Weisberg v. United States Dep’t of Justice, 227 U.S. App. D.C. 253, 705 F.2d 1344, 1351 (D.C. Cir 1983) (Weisberg II)). Further, 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. (quoting Oglesby v. United States Dep’t of Army, 287 U.S. App. D.C. 126, 920 F.2d 57 (D.C. Cir. 1990) (citing Weisberg II, 705 F.2d at 1351)).

The Corporation Counsel’s standard practice is to create only one file for each case it pursues, with court pleadings located on the right side of the file and the other documents located on the left side of the file. Deputy Wolsztyniak searched the file which was created by the Corporation Counsel for the investigation of the bed-and-breakfast establishment. As Deputy Wolsztyniak searched the only file created for the case, the OIP believes his search was one “reasonably calculated to uncover all relevant documents” and which can be “reasonably expected to produce the information requested.” Nation Magazine v. U.S. Customs Service, 71 F.3d 885, 890 (D.C. Cir. 1995) (citing Truitt v. United States Dep’t of State, 283 U.S. App. D.C. 86, 897 F.2d 540 (D.C. Cir. 1990) (quoting Oglesby v. United States Dep’t of Army, 287 U.S. App. D.C. 126, 920 F.2d 57 (D.C. Cir. 1990) (citing Weisberg II, at 1351)).

The most likely location for a memorandum such as the one you requested would have been in the case file as the Corporation Counsel only creates one file for each case. A search of the case file revealed no such memorandum. In addition, the OIP believes the written assertion by Deputy Wolsztyniak that no memorandum exists was produced in good faith in an effort to clarify his earlier letter dated February 18, 1997, which, due to its ambiguity, implied that there was a memorandum.

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The facts of Opinion Letter No. 92-7 which addressed electronic records and is discussed above, can be distinguished from the facts here because the requester in OIP Opinion Letter No. 92-7 sought a list of names. While the information was maintained in an electronic database, no record existed in the form the requester asked for. However, the agency was able to create an electronic printout of a more comprehensive list which contained the requested information. In this case, the request is for a specific record that apparently does not exist.

In addition, the Hawaii Supreme Court recently held there is no exception to the disclosure requirements of the UIPA for burdensome requests, see SHOPO at 402, 404 (1996),² the facts of SHOPO are clearly distinguishable from the facts here. Unlike the Honolulu Police Department which was the subject of the SHOPO case, here the Corporation Counsel does not maintain the requested information in any physical form, whether written, visual, audio, or electronic, from which a summary could be created. Therefore, it is OIP's opinion that the Corporation Counsel does not maintain the requested information as a government record and that the agency need not create such a record under the UIPA.

The UIPA applies only to government records maintained by an agency as defined above. Accordingly, the UIPA is not applicable in this instance because, based on a reasonable search for records, there is no record that would be responsive to your request. The UIPA does not apply to oral conversations unless there is some physical record of them.

CONCLUSION

The UIPA provides that information contained in government records is open for public inspection and copying unless some exception to disclosure applies. Based on what the OIP believes was a reasonable search by Deputy Wolsztyniak, the OIP concludes that the Corporation Counsel does not maintain the information you requested as a government record. The UIPA applies only to existing records. As there are no records which memorialize the authority to settle, the UIPA is not applicable and the Corporation Counsel is not required to create a summary.

Very truly yours,

²In SHOPO, the Hawaii Supreme Court upheld a First Circuit Court Order, mandating that the Honolulu Police Department either create a summary of the information requested, or produce all documents pertaining to the request, whichever method was more expedient. SHOPO at 404.

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