

October 31, 2000

Arleone Dibben, Director
Nene O Moloka'i
HC-1 Box 243
Kaunakakai, Molokai, Hawaii 96748

Re: Department of Land and Natural Resources
State Historic Preservation Division Records

Dear Ms. Dibben:

This is in response to your request for assistance in obtaining records from the Department of Land and Natural Resources State Historic Preservation Division ("SHPD") of September 22, 1998.

ISSUE PRESENTED

Whether records requested from SHPD are public.

BRIEF ANSWER

Yes. SHPD has indicated that at least some of the information you requested is public. Despite numerous requests, SHPD has not provided the Office of Information Practices ("OIP") with any evidence to justify that the other records requested by you are not public. SHPD also has not indicated that it does not maintain any of the records you requested, aside from those listed in a letter to the OIP dated July 31, 2000. The OIP must therefore conclude that the records you requested are public and that SHPD is required by the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), to make them available for inspection and copying during regular business hours. You should call SHPD for an appointment if you wish to inspect the requested records.

FACTS

After your initial request to the OIP of September 22, 1998, for assistance in obtaining records from SHPD, the OIP wrote to SHPD's Administrator, Dr. Don Hibbard. In a letter dated September 23, 1998, the OIP asked that SHPD provide the OIP, by October 7, 1998, with the reasons for its denial of access to certain information you requested, or that SHPD make those records available to

you within a reasonable time. No response was received by the OIP and you advised, in a telephone conversation of November 2, 1998, that you had not received the records.

The OIP asked, in a letter addressed to SHPD's Cultural Historian, Kana'i Kapeliela, dated December 9, 1998, that SHPD respond to a September 24, 1998, record request from you. The OIP's letter asked that SHPD provide the statutory basis for the denial of access, or that SHPD disclose the records within a reasonable time. No response was received by the OIP.

In another letter to SHPD's Administrator dated December 9, 1998, the OIP asked that SHPD respond to a record request from you dated September 30, 1998. The OIP asked that access be provided within a reasonable time or that the OIP be provided with the statutory basis for the denials. No response was received by the OIP. You advised in a telephone conversation of March 12, 1999, that you had not received a response either.

On March 17, 1999, the OIP again wrote to SHPD's Administrator, asking that SHPD respond to the OIP's prior letter of December 9, 1998, within ten business days so that the OIP could proceed with a legal opinion. The OIP did not receive a response.

The OIP also wrote to SHPD's Cultural Historian on March 17, 1999, asking that SHPD respond to the OIP's letter of December 9, 1998. The OIP's letter asked that SHPD provide the statutory basis for its denial within ten business days so that the OIP could proceed with a legal opinion. No response was received.

On March 30, 1999, you received copies of some of the records you requested. You wrote a check and received a receipt for one hundred twenty-six photocopies at fifty cents each, and copies of twenty-six cassettes at one dollar and thirty-nine cents each, for a total of one hundred three dollars and thirty-one cents.

In a memorandum dated July 1, 1999, addressed to SHPD's Administrator, the OIP advised that during your visit to SHPD on March 30, 1999, you were given access to some but not all of the records you requested. The OIP asked SHPD for the statutory basis for this partial denial of access. Dr. Hibbard responded in a telephone call of July 13, 1999, that SHPD believed you had received all the information you requested except for active investigation reports from the Department of Land and Natural Resources Division of Conservation and Resources

Enforcement (“DOCARE”). Dr. Hibbard also left you a telephone message on this matter. You responded to Dr. Hibbard with a letter dated July 21, 1999, advising that you only were given access to files of Kai Markell and Eddie Ayau, and that you believed those were incomplete. You did not receive any follow-up from SHPD to this letter.

You advised the OIP that you continued to make other record requests to SHPD throughout this time that had not been responded to. The OIP asked you to indicate which record requests had not received responses. You provided the OIP with copies of twenty-seven letters addressed to SHPD from you requesting records. On June 21, 2000, the OIP again wrote to SHPD’s Administrator, this time listing the dates and subject matters of those twenty-seven letters that had not received responses as follows:

Date	Addressee	Requested Records
12/18/97	Kai Markell	Molokai Island Burial Council (“MIBC”) minutes ¹ for 9/97 and 11/19/97 meetings, letter summarizing recommendations made at 12/2/97 meeting
12/20/97	Kai Markell	contact individuals and fax numbers for Hui Malama I Na Kupuna ‘O Hawai’i Nei - Kaua’i, O’ahu, Moloka’i, Maui, Lana’i, and Hawai’i
12/22/97	Kai Markell	documentation that the remains on TMK 5-6-7-08: 76 Mapulehu Glass House were properly identified and inventoried prior to reinterment; verification of actual number of individuals reinterred
12/31/97	Kai Markell	minutes of 12/2/97 MIBC meeting; second request for contact individuals and fax numbers for Hui Malama I Na Kupuna ‘O Hawai’i Nei - Kaua’i, O’ahu, Moloka’i, Maui, Lana’i, and Hawai’i
1/5/98	Don Hibbard	12/2/97 MIBC meeting minutes, recommendations made at meeting

¹ Section 92-9, Hawaii Revised Statutes, requires that minutes of public meetings shall be public records and shall be available within thirty days after the meeting except where such disclosure would be inconsistent with section 92-5.”

1/6/98	Kai Markell	all archeological and anthropological reports on examination, inventory, and documentation of skeletal remains and artifacts found at 1991 burial disturbance of Site 50-60-05-1851
1/12/98	Kai Markell	advising never got response to letters of 12/20/97, 12/31/97, and 1/6/98
1/26/98	Kai Markell	advising never got response to letters of 12/20/97, and 1/6/98
2/1/98	Kai Markell	Burial Treatment Plan made part of Settlement Agreement in Civ. No. 93-0598 <u>State v. Osborne</u> ; asks again for reports, and responses to previous requests
2/23/98	Kai Markell	inventory of what was found at disturbance site, number of individuals involved, and quantity and dimensions of reburial baskets
2/24/98	Kai Markell	inventory of what was found at disturbance site, number of individuals involved, and quantity and dimensions of reburial baskets
2/24/98	Kai Markell	copy of oral testimony of Charles Crane
2/27/98	Kai Markell	advising never received response to any request made over past several months
2/27/98	Kai Markell	copy of 1/28/98 and 12/2/97 MIBC meeting minutes
8/5/98	Kai Markell	taped copies of meetings of: 10/23/91, 1/27/92, 2/19/92, 3/18/92, 5/20/92, 11/18/92, 12/16/92, 1/20/93, 2/2/93, 9/21/93, 10/20/93, 5/17/95, 11/21/95, 3/20/96, 9/11/97, 11/19/97, 12/2/97, 12/30/97, and 1/28/98
9/3/98	Kai Markell	asks again for all correspondence to and from SHPD on TMK 5-6-7-08: 76; copies of audio tapes for MIBS meetings: 10/23/91, 1/27/92, 2/19/92, 3/18/92, 5/20/92, 11/18/92, 12/16/92, 1/20/93, 2/2/93, 9/21/93, 10/20/93, 5/17/95, 11/21/95, 3/20/96, 9/11/97, 11/19/97, 12/2/97, 12/30/97, and 1/28/98

9/16/98	Kai Markell	copies of 8/26/98 and 9/16/98 MIBC minutes
9/24/98	Kai Markell	taped copies of 8/26/98 and 9/16/98 MIBC meetings
9/24/98	Kana'i Kapeliela	information on lineal and cultural descendents of TMK 5-6-7-08: 76 or the ahupua'a it falls into, including: names of individuals who responded to Notice of Unmarked Burial Sites in The Maui News and Honolulu Advertiser for the week of 11/19/97; documentation to claim lineal or cultural descent; documentation that demonstrates direct or collateral genealogical connection; facilities and/or sources checked by staff to verify claims to descendency; written staff analysis and determination of each individual who submitted credentials to claim descendency; and report provided to MIBC for 8/26/98 and 9/16/98 meetings; except as the above information is excluded from disclosure by section 13-300-35(c), Hawaii Administrative Rules
9/30/98	Don Hibbard	letter of 10/2/92 from Charles Crane
3/20/99	Kai Markell	seeks compliance w/previous requests; all file folders regarding Mapulehu Glass House property, including active Mapulehu files currently located at downtown office and all files from 1991 through 1996/97 at Kapolei or downtown office; all correspondence received or sent on the property (except those to or from Nene O Moloka'i) including correspondence by Mr. Eddie Ayau; previously requested tapes and minutes of MIBC meetings; copy of 1/21/99 MIBC meeting and partial or complete typed transcript requested by Jim Mee in 3/10/99 letter to Margery Bronster
3/25/99	Don Hibbard	previously requested records, tapes
5/24/99	Don Hibbard	GIS map data on Mapulehu and Kawela
5/25/99	Don Hibbard	correspondence to Petro family on site visit

		to Hoahanau o Mapulehu Church and Cemetery
6/24/99	Don Hibbard	2nd request for GIS information on Mapulehu and Kawela
7/8/99	Don Hibbard	3rd request for GIS information on Mapulehu and Kawela
7/21/99	Don Hibbard	advised folders she reviewed on 7/13/99 were incomplete.

In a letter dated June 21, 2000, the OIP asked that SHPD respond in writing by July 3, 2000, by either providing you with access to the records listed above, or by providing the OIP with the statutory exceptions claimed for each record. On July 20, 2000, the OIP received a voicemail message from SHPD Burial Sites Program Director Kai Markell advising that SHPD would be responding to the OIP's letter of June 21, 2000.

A written response from Dr. Hibbard dated July 31, 2000, was received by the OIP on August 3, 2000. To paraphrase, Dr. Hibbard's letter made the following statements regarding information requested by you:

- some of the information you requested was maintained by the former Director of the Burial Sites Program, by the Burial Sites Program's two locations in Honolulu and Kapolei, and by the archeological branch;
- you had already been given access to "all identified files pertaining to Mapulehu" in March 1999;
- much of the information you requested pertaining to identification and inventorying of remains, the number of individuals disturbed and/or reinterred, and the dimensions of reburial sites, was contained in a DOCARE report regarding the original disturbance that was earlier made available to you;
- "other specific information requested pertains to cultural matters and reburial specifics maintained by cultural community groups. This type of cultural information regarding the reburial of ancestral Native Hawaiian remains by a Native Hawaiian organization in [sic] not specifically maintained by the SHPD;"

- meeting minutes are regularly made available to the public, and that to the best of his knowledge, you have been receiving copies of meeting minutes requested;
- you were advised that not all of the audio tapes of meetings may still be in existence, and for tapes that are, staff time would have to be compensated for making duplicates.² Dr. Hibbard indicated that you were provided with copies of tapes in 1999;
- genealogical information pertaining to Mapulehu, and staff recommendations made to the Molokai Island Burial council are public and readily available, but specific genealogical information submitted by individuals and received by in-house staff are returned to those individuals pursuant to chapter 13-300, Hawaii Administrative Rules, due to the sensitive nature of family information pertaining to burials and Hawaiian issues. SHPD does not actively maintain this information; and
- requests for names and contact information of Hui Malama I Na Kupuna O Hawaii Nei members on all islands are forwarded to the proper organization, as SHPD does not actively maintain information on membership.

After receiving a copy of the July 31, 2000, letter from Dr. Hibbard, you advised the OIP, in a telephone conversation of August 9, 2000, that the only records you got copies of were the audio tapes.

At this point, the OIP was of the opinion that SHPD had still failed to respond to some of the information requested by you in accordance with the UIPA and the OIP's administrative rules. The OIP followed up with another letter to Dr. Hibbard dated August 16, 2000, explaining the proper way to respond to a record request under the UIPA and the OIP's administrative rules, and asking that SHPD either provide access to the records or provide the OIP with the statutory authority for each denial by August 31, 2000. The OIP did not receive a response to this letter.

² Section 92-21, Hawaii Revised Statutes, requires that government agencies charge not less than five cents per page for photocopies of government records. The OIP's administrative rules allow agencies to charge for the search, review, and segregation of records. See § 2-71-31, HAR. Agencies are also allowed to charge any other fees allowed by law, but the OIP does not have sufficient information to opine whether "staff time" in this instance is an allowable fee. As the OIP may only opine on fees to be charged under its rules, we recommend government agencies consult with their legal counsel on charging of other fees.

You advised the OIP on October 24, 2000, that you still had not received any response from SHPD.

DISCUSSION

I. THE UIPA

The UIPA places the following duties upon agencies:

§ 92F-11 Affirmative agency disclosure responsibilities. (a) All government records are open to public inspection and copying unless access is restricted or closed by law.

(b) Except as provided in section 92F-13, each agency, upon request by any person shall make government records available for inspection and copying during regular business hours.

...

(d) Each agency shall assure reasonable access to facilities for duplicating records and for making memoranda or abstracts.

Haw. Rev. Stat. § 92F-11 (1993).

The UIPA contains five exceptions to the general rule of disclosure in section 92F-11(a), Hawaii Revised Statutes. Government agencies need not disclose the following:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

- (2) 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) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;
- (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and
- (5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

Haw. Rev. Stat. § 92F-13 (1993).

A. Denial of Access to Records

When an agency intends to deny access to a government record, the burden is on the agency to justify the nondisclosure. Haw. Rev. Stat. § 92F-15(c) (1993). In this instance, you have not been provided with access to all the requested information, and the OIP has not been presented with any position at all from SHPD on whether an exception to disclosure applies to some of the records you requested, despite numerous opportunities to do so. Those record requests remain unanswered. For other record requests, the responses that the OIP has received from SHPD indicate that at least some of the records you requested are public. For others, you asked for copies and SHPD's response was that the information is public, or that it had already been provided to you, or that it is not maintained by SHPD.

Until the SHPD justifies its withholding of the records you requested under section 92F-13, Hawaii Revised Statutes, the OIP opines that they should be available for public inspection and copying during regular business hours in accordance with section 92F-11, Hawaii Revised Statutes. The OIP strongly recommends that SHPD provide you with copies of the information requested or make other arrangements for copies to be made. If you wish to personally inspect the records, SHPD should let you set an appointment, because under section 92F-11, Hawaii Revised Statutes, access includes both inspection and

copying of records. The OIP recommends that if you wish to personally inspect the requested records, you call SHPD for an appointment.

In addition, the OIP recommends that SHPD supplement its letter of July 31, 2000, by providing you with the following information.

B. Records Maintained by Another Unit of the Same Agency

SHPD stated that some of the information you requested was maintained by the former Director of the Burial Sites Program, by the Burial Sites Program's two locations in Honolulu and Kapolei, and by the Archeological Branch. SHPD should respond to requests for records that are maintained by other units of the Department of Land and Natural Resources in accordance with the OIP's administrative rules, which state that:

when a unit of an agency receives a request for a record that should have been otherwise directed to another unit of the same agency for a response, the unit receiving the request shall promptly forward the request to the head of the unit's department.

§ 2-71-13, H.A.R. The appropriate unit should then respond to your record request. However, since the Archeological Branch and the Burial Sites Program are branches within SHPD, the OIP believes the burden is still on SHPD to respond to request for records held in those branches.

C. Requests for Records to Which the Requester Has Already Been Given Access

SHPD advised that you already had been given access to files pertaining to Mapulehu, information in the DOCARE report, and meeting minutes. The OIP opines that even if a record requester has already been provided with access to a record, if the requester later requests the same record again, it should be treated as a new record request. In such a situation, SHPD should respond by providing

access again, rather than by merely advising that you have already received the information. SHPD would be entitled to charge fees allowed by law for a new request for previously requested records.

II. TIME LIMITS FOR DISCLOSURE

Chapter 2-71, Hawaii Administrative Rules, provides generally that records should be made available to record requesters within ten business days of the request. These rules do, however, allow additional time limits for agencies to provide access under the circumstances set forth in the rules. Since more than ten business days have elapsed since your record requests were made, SHPD should make the records you requested immediately available.

III. FEES

The OIP's administrative rules allow government agencies to charge fees for the search, review, and segregation of records. If SHPD intends to charge you these fees, it should be in accordance with chapter 2-71, Hawaii Administrative Rules. SHPD may also charge no less than five cents per page for photocopies, in accordance with section 92-21, Hawaii Revised Statutes, as well as any other lawful fees.

IV. REMEDIES

The UIPA allows a record requester who has been denied access to a government record to bring an action to compel disclosure against the agency at any time within two years after the agency denial. Haw. Rev. Stat. § 92F-15(a) (1993). In such an action, opinions and rulings of the OIP are admissible, and the burden of proof is on the agency to justify the nondisclosure. Haw. Rev. Stat. § 92F-15(b), (c) (1993). If the record requester prevails, the court shall assess reasonable attorney's fees and other reasonable expenses against the agency. Haw. Rev. Stat. § 92F-15(e) (1993). Such a lawsuit should be filed in the circuit where the record request was made, where the requested record is maintained, or where the agency's headquarters are located. Haw. Rev. Stat. § 92F-15(e) (1993).

Arleone Dibben
October 31, 2000
Page 12

CONCLUSION

The UIPA operates under the presumption that all government records are public, unless an exception to disclosure applies. SHPD has not made any assertions that any of the information requested by you is exempt from disclosure. SHPD should, therefore, provide you with access to and copies of records during regular business hours, and within the time periods provided for in chapter 2-71, Hawaii Administrative Rules.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

Moya T. Davenport Gray
Director

CMD: ran

cc: Timothy E. Johns, Chair
Department of Land and Natural Resources
Arleone Dibben
Don Hibbard, Ph.D, Administrator
Department of Land and Natural Resources
State Historic Preservation Division
Kai Markell, Burial Site Program Director
Department of Land and Natural Resources
State Historic Preservation Division
Kana'i Kapeliela, Burial Historian
Department of Land and Natural Resources
State Historic Preservation Division
Dawn Chang, Deputy Attorney General