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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).

OPINION

Requester: Tom and Christine Russi
Agency: Hawaii Health Systems Corporation, West Hawaii Regional Board of Directors
Date: May 6, 2016
Subject: No Duty to Search for Records that Do Not Exist (APPEAL 14-6)

REQUEST FOR OPINION

Requesters seek a decision as to whether the Hawaii Health Systems Corporation (HHSC) West Hawaii Regional Board (WHRB) properly responded to a request for records under Part II of the UIPA by claiming the records did not exist.

Unless otherwise indicated, this decision is based solely upon the facts presented in Requesters' e-mail with attachment dated September 2, 2013, and a letter with attachment to OIP from HHSC dated September 16, 2013.

QUESTION PRESENTED

Whether WHRB properly responded to the record request for a recording of WHRB's meeting by indicating the record does not exist.

BRIEF ANSWER

Yes. Agencies must make government records available for inspection and copying during regular business hours under section 92F-11(b), HRS. When an agency's response to a record request states that no responsive records exist, the issue on appeal normally is whether the agency's search for a responsive record was reasonable. Here, there was no search for an audio or video recording of WHRB's meeting because HHSC knew that it is not WHRB's practice to record its meetings. A search for responsive records was not necessary because it would have been fruitless. HHSC's statement that no recording was made was based on information from employees who would have known whether WHRB meetings were recorded and was made properly and in good faith under the UIPA.

FACTS

One of the Requesters made an e-mail request dated June 17, 2013, to the WHRB Chair for copies of or to inspect the audio and/or video recordings of the March 13, 2013 WHRB meeting. Requesters received a response from HHSC's Corporate Director of Risk Management (CDRM), dated June 17, 2013, which stated that the request was being denied because no audio or video recording was made of the meeting. Requesters asked to appeal HHSC's response based on their "distrust" of the CDRM.

HHSC provided OIP with evidence to show that WHRB does not make audio or video recordings of its meetings. HHSC's letter of September 16, 2013, explained that WHRB's secretary at the time of the record request informed the CDRM that there were no audio or video recordings of WHRB meetings made by her or any other employees or WHRB members. Further, at the time that HHSC responded to this appeal, it confirmed that it was still WHRB's practice to not record meetings. This information was confirmed by the HHSC Kona Community Hospital Regional Chief Executive Officer and his Executive Assistant in e-mails to HHSC on September 13 and 16, 2013, copies of which were provided to OIP.

DISCUSSION

Part II of the UIPA, which governs requests for government records made to Hawaii State and county agencies, applies here. Agencies have affirmative disclosure responsibilities under the UIPA. Agencies must make government records available for inspection and copying during regular business hours under section 92F-11(b), HRS. 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 record in the format requested unless doing so might significantly risk damage, loss, or destruction of the original records. OIP Op. Ltr. No. 97-8 at 4, *citing* OIP Op. Ltr. No. 90-35 at 13.

However, the Hawaii Supreme Court has 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 (Haw. 1996); see also Molfino v. Yuen, 134 Haw. 181, 186, 339 P.3d 679, 684 (Nov. 13, 2014) (noting that there is no express record keeping requirement in the UIPA). Other laws may exist which require the creation or retention of records by government agencies, but the UIPA contains no such requirements.¹

In cases such as this one when an agency’s response to a record request states that no responsive records exist and that response is appealed, OIP normally looks at whether or not the agency’s search for a responsive record was reasonable. OIP Op. Ltr. No. 97-8. Here, there was no search for records because the agency receiving the request knew, as current and former HHSC employees have asserted, that it is not WHRB’s practice to record its meetings. OIP therefore declines to advise that HHSC or WHRB should engage in a search for responsive records knowing that a search for responsive records would be fruitless. In this case, because HHSC knew there would be no recordings found, no search for recordings was required. See Espino v. DOJ, 869 F. Supp. 2d 25, 28 (D.D.C. 2012) (upholding agency’s action in not searching for records when agency declarations stated that agency did not maintain requested records); Thomas v. Comptroller of the Currency, 684 F. Supp. 2d 29, 33 (D.D.C. 2010) (affirming agency’s decision not to search when it determined that given its system of records, “there was no reasonable expectation of finding responsive documents”); American-Arab Anti-Discrimination Comm. v. DHS, 516 F. Supp. 2d 83, 87-88 (D.D.C. 2007) (finding sufficient agency’s statement that it “does not maintain [requested] information” and ruling search “unnecessary” since affiant spoke to several employees and as “Deputy Assistant Secretary for Operations, . . . [was] presumed able to familiarize himself with what statistics [the agency] does and does not maintain”). OIP finds the assertions by HHSC employees that no responsive record exists were produced in good faith and further finds that a search of WHRB records is not likely to uncover relevant documents. Thus, HHSC’s response to Requesters request for an audio or video recording of the meeting was proper.

OIP emphasizes that in most cases when an agency claims a record does not exist, it must first conduct a reasonable search. This decision is not intended to lessen or overrule the general requirement that agencies conduct a reasonable search for responsive records when receiving requests. In rare cases, such as here, an agency’s staff may have actual knowledge that the type of record requested was

¹ The Sunshine Law, Part I of chapter 92, HRS, governs meetings of Hawaii State and county boards. The Sunshine Law does require that boards prepare written meeting minutes, but does not require meetings to be audio or video recorded. HRS § 92-7 (2012).

never created. Only in these rare cases is an agency absolved from having to conduct a search reasonably likely to produce the requested records.

RIGHT TO BRING SUIT

Requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, 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 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 appeal. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

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APPROVED:

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