

OIP's Informal Guide to Processing Large or Complex UIPA Record Requests

(January 18, 2012)

Hawaii's Office of Information Practices (OIP) is often asked for advice on dealing with particularly large or complex record requests that agencies receive under the state's Uniform Information Practices Act (UIPA), Chapter 92F, Hawaii Revised Statutes. The fact that a request will require extensive agency efforts to respond is not, by itself, a basis for the agency to deny that request; however, OIP's rules set out at chapter 2-71, Hawaii Administrative Rules, do provide the agency some tools in handling such a request in a way that will not unreasonably interfere with the agency's normal functions. Although a complex request may have unique aspects for which an agency will require individual advice, there are many common issues that arise for agencies responding to such requests.

This informal guide is basically a compilation of general legal advice that OIP provides primarily through its Attorney of the Day service. Although OIP has provided references to the relevant rules where appropriate, this guide is intended as informal advice and is not intended to replace such sources as the rules themselves, the Impact Statement for the rules, or formal opinions that have interpreted the rules. Additional guidelines and forms to respond to record requests are also found in OIP's online [Open Records Guide to Hawaii's Uniform Information Practices Act](#), which can be found on OIP's website at <http://hawaii.gov/oip>.

Time to Respond

An **agency normally has 10 business days** from the date that a record request is received to send out its Notice to Requester. The Notice informs the requester as to whether records will be disclosed and in what way; what records are being withheld or redacted and the legal basis for doing so; estimated fees for processing the request; and whether a prepayment is required. For agencies' convenience, OIP has a model Notice available at <http://hawaii.gov/oip/forms.html>. HAR § 2-71-13 and -14.

When there are extenuating circumstances that prevent an agency from completing its Notice to Requester, an **agency may extend the time to provide the Notice to a total of 20 business days** from the request date. Two common types of **extenuating circumstances** that may apply to a large request are **(1) when the request "requires extensive agency efforts to search, review, or segregate the records, or otherwise prepare the records for inspection or copying"** and **(2) when the agency "requires additional time to respond to the request in order to avoid an unreasonable interference with its other statutory duties and functions."** HAR § 2-71-15(a)(2) and (a)(3). If the agency believes that one of these or another extenuating circumstance listed in HAR section 2-71-15 applies, the **agency must send the requester an Acknowledgment within 10 business days** from the request date. The Acknowledgment acknowledges receipt of the request, explains the extenuating circumstances that apply, and **advises that the Notice will be provided within 20 business days from the date of the original request**. OIP has a model Acknowledgment available at <http://hawaii.gov/oip/forms.html>. HAR § 2-71-13 and -15.

Typically, an agency must disclose the requested records within five business days of receiving any required prepayment from the requester, or if no prepayment or other action is required, within five business days of sending out the Notice to Requester. If the agency discloses the records in increments, then other time limits apply. See Incremental Disclosure infra; HAR § 2-71-13.

How to Estimate Search, Review, and Segregation Time

Be aware that **one purpose of the Notice is to inform the requester of the fees and costs that he or she can expect to pay for the agency to process the request.** Because a requester is not usually familiar with an agency's records, it is not uncommon for a requester to make what he or she assumes will be a small request, but which actually covers a large number of records. Similarly, because an agency's information retrieval needs do not always align with what a requester is interested in, the requester may make a request on the assumption that records addressing a particular issue or records of a given type will all be filed together, but the responsive records are actually scattered through the agency's files so that it will require extensive search to locate them.

In other words, a requester does not necessarily realize when a request will incur large fees, and it is for this reason that the **agency is required to notify the requester of estimated fees before actually processing the request. Before proceeding to actually process the request, the agency should spend only the time necessary to come up with a good faith estimate of the time that will be required to process the request, and should wait until the Requester has received the Notice and sent in any required prepayment.** It is possible that the requester may not want to proceed with the request after receiving the fee estimate. The requester may choose to narrow or otherwise modify the request, or may choose to withdraw or abandon it altogether. If the requester does not tender prepayment of fees, as instructed by the agency's notice, then the **requester will generally not be liable for fees for work the agency has already done prior to providing the Notice.** HAR § 2-71-14, -16, and -19. **The agency, therefore, should not begin its search, review, and segregation process until** it has given the requester the required Notice and the requester has sent in any required prepayment (or if no prepayment is required, until the requester has at least had the opportunity to review and potentially respond to the Notice).

The search, review, and segregation time listed on the Notice is intended to be an estimate, not a record of time actually spent. **This estimate must be made in good faith, but it should not require an agency to spend significant time to put it together.** Thus, for instance, an office receiving a large request will go through the largely mental process of thinking, "Do we have any responsive records? If yes, where would they be likely to be? Are they filed all in one place, or will this require searching multiple files; and will they be filed under a certain topic, or will we have to look through everything in every file?" Similarly, when an agency's director receives a request intended to cover every division and every office within the agency, it is likely that someone from each office within the agency will go through that same process. Based on the answers to those questions, the person doing the estimate will make an educated guess as to how long it will take someone to simply locate all the responsive records, which constitutes the **search time estimate.** If the request is likely to produce only records that are fully public, the process may end there. But if the request is likely to produce records that include

information falling under an exception to disclosure, the estimator should proceed with making an educated guess as to how long it will take someone to read through all the records, locate information to be redacted, and redact it – this is the **review and segregation time estimate**. In the course of estimating review and segregation time, the estimator may sometimes need to look at a sample record or two to get a better sense for what sort of information is likely to need close review. The estimator should not spend significant time on doing so, however, because at this stage in the process, **all that is required is a good faith estimate of time**. HAR § 2-71-14 and -19.

Search, Review, and Segregation Fees

An agency's charges for its time spent in processing a request come in the form of fees for search, review, and segregation time. **The search, review, and segregation fees are as set by OIP's rules, and work out to \$10/hour for search time, which is typically done by clerical staff, and \$20/hour for review and segregation time, which is typically done by managerial or professional (including legal) staff.** OIP's model Notice to Requester includes a fee-calculation section with the appropriate ¼-hourly multipliers to ease the fee estimation process for agencies. **An agency can also charge "other lawful fees," which would include photocopy costs, postage costs, and other external costs, such as having a videotape copied. An agency's fee estimate will include the estimated search, review, and segregation fees, minus the automatic \$30 waiver that automatically applies to UIPA requests; plus, the estimated copy charges or similar costs (which are not subject to waiver).** HAR § 2-71-19 and -31.

As an **alternative** to the automatic \$30 waiver of search, review, and segregation fees, a requester may instead ask for the **\$60 public interest fee waiver**. **This public interest fee waiver is not based on the requester's identity as a media source or a public interest group, but instead applies whenever the requested record (1) pertains to an agency's operation or activities, regardless of the record's relative importance to the public; (2) is not readily available in the public domain; and (3) the requester has the primary intention and the actual ability to widely disseminate information from the government record to the general public at large.** HAR § 2-71-32(b). **The requester must include in its request a statement of facts supporting a public interest fee waiver.** Thus, an agency receiving a public interest fee waiver request should look at what facts the requester has offered to support the request and grant the \$60 fee waiver if the requester has met the requirements listed above. If the requester has not met those requirements – for instance, if the requester has not demonstrated that it has the ability to widely disseminate the information, or the record pertains mainly to a private individual rather than to the operation or activities of an agency – then the agency should grant only the automatic \$30 fee waiver. HAR § 2-71-12 and -32. **Note that the agency, not OIP, must determine the facts and whether a request for a public interest fee waiver should be granted.** See OIP letter to ACLU dated November 30, 2011 (CORR 2011-1012-01) at <http://hawaii.gov/oip/guidance%20fee%20waiver.pdf>.

Other Lawful Fees

The search, review, and segregation fees and the public interest fee waiver do not apply to **other lawful fees, such as copying, materials (e.g., CDs, videotape), and postage or delivery charges,** for records provided to the requester. HAR § 2-71-19(a)(2); HRS § 92-21. **An agency may also require prepayment**

of 100% of the estimated copying and delivery fees, as well as all outstanding fees from current or previous requests, including requests abandoned after the requester had agreed to pay fees and costs specified in a Notice. HAR § 2-71-19(a)(2). The charge to make physical copies of documents shall be not less than 5 cents per page. HRS § 92-21. But when an agency must first make a copy of a document to redact, and then make a second copy of the redacted record to give to the requester, the agency can only charge for one copy of the record.

Prepayment of Estimated Fees

The agency can require a requester to prepay a portion of the estimated fees before the agency begins work on the request, and in the case of a large or complex request, it is usually a good idea to do so to make sure that the requester is indeed aware of the size of the request and is serious about pursuing it before the agency begins work on processing it. **An agency can require prepayment of up to half of its estimated search, review, and segregation fees, and all of its estimated “other lawful fees.”** HAR § 2-71-19.

The **prepayment is based on an estimate** of time required and of other costs (such as for photocopies) to be incurred. Assuming the requester follows through with the request, **the final charge for the request will be based on actual time spent and other costs**, not on the estimate. **The agency should track its actual time spent processing the request. After the request is completed, the agency should reconcile actual time with the estimated time before billing requester for balance.** Thus, for example, if the total estimated time minus fee waiver resulted in an estimated fee of \$200 plus \$25 in copy fees, and requester prepaid \$125 based on that (1/2 of estimated search, review, and segregation fees plus the full estimated copy fees), but the actual cost turned out to be \$180 of staff time plus \$30 in copy fees, then agency would bill requester for \$85 (\$210 minus the prepaid \$125), not for \$100 (the original estimate of \$225 minus the prepaid \$125). HAR § 2-71-19 and -31.

Incremental Disclosure

Although an agency must partially disclose the requested records within five business days of sending the Notice or receiving prepayment, **the agency has the option to disclose the records in monthly increments in the case of a very large request.** In that case, what the agency discloses within five business days will be only a portion of the requested records. How large each increment is will depend on the circumstances of the office doing the work; incremental disclosure basically follows a rule of reasonableness. **An office should devote a reasonable amount of time per month to working on the request**, and the amount of time that is reasonable for a three-person office will be considerably less than the amount that is reasonable for a fifty-person office. HAR § 2-71-13 and -15.

If the agency chooses to disclose incrementally, it has the option of calculating fees on a monthly basis and may require prepayment based on the estimated fees for the first month. When that first increment has been disclosed, the agency may bill the requester for the balance due for the second month plus prepayment for the second month, and so forth in ensuing months. If the requester has prepaid for only the first month’s increment, then the second month’s increment will be due 20 business

days (about a month) after the agency has settled up for the first month's increment and received the second month's prepayment.

Alternatively, the agency has the option of calculating its estimated fees for the entire request, and requiring prepayment of half the estimated search, review, and segregation fees, and the entirety of the 'other legal fees,' for the whole request. HAR § 2-71-15. If the requester has prepaid based on the estimated fees for the entire request, then each increment is due 20 business days after disclosure of the previous increment. HAR § 2-71-15.

There is no automatic cap on the length of time that an incremental disclosure can take. As stated previously, an agency must devote a reasonable length of time per increment to processing the request; however, in the case of a small staff dealing with a truly voluminous request, incremental disclosure could go on for many months or years. The process ends when all responsive records have finally been disclosed (or withheld based on applicable exceptions), unless the requester chooses to abandon the request before that time. HAR § 2-71-15.

Final Notes

Any requester has a right to make very large and complex requests under the UIPA, and if the requester is willing to pay the required fees, to ultimately have those requests processed and the records provided to the degree they are public. The fact that a request will require extensive efforts by the agency to respond is not, by itself, a reason to deny that request. **However, a requester does not have the right to disrupt an agency's normal functioning and supersede its priorities in order to have agency personnel drop everything to process a voluminous or complex request.** Instead, OIP's rules under the UIPA set forth a balance. **The agency, through its Notice to Requester, must alert the requester as to what sort of fees the request will entail, whether the agency will use incremental disclosure, and what sort of information will be withheld, if anything.** The requester can choose to proceed with the request, even if the agency's Notice indicates that the request will require substantial time to process, but the agency can charge fees (as its Notice advised the requester it would) based on its time spent processing the request and the agency can use incremental disclosure to avoid unreasonable interference with its usual functions. Assuming the requester is willing to pay those fees and to wait for each increment, the requester is ultimately entitled to obtain all the public records that are not subject to the UIPA's exceptions to disclosure.