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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 sections 92F-15.5, 92F-27.5 and 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

**OPINION**

**Requester:** Rex Shilo  
**Agency:** Department of Budget and Finance  
**Date:** June 21, 2024  
**Subject:** Interview Materials and Information (U APPEAL 21-21)

**REQUEST FOR OPINION**

Mr. Rex Shilo (Requester) seeks a decision as to whether the Department of Budget and Finance (B&F) properly responded to his requests for job interview materials and information under parts II and III of UIPA (respectively Part II and Part III).

Unless otherwise indicated, this decision is based solely upon the facts presented in an email to OIP from Requester dated January 19, 2021, with attached email thread and attachments; records mailed to OIP from Requester, with enclosed copy of emails to Requester from B&F dated November 12 and 25, 2020, and copy of envelopes mailed by B&F to Requester; an email to OIP from Requester dated February 8, 2021, with attached email thread; an email to B&F from OIP dated February 12, 2021, with attachments; an email to Requester from OIP dated February 12, 2021, with attachments; an email to OIP from B&F dated February 24, 2021, with attachments; an email to OIP from Requester dated April 1, 2021; an email to Requester from OIP dated April 14, 2021, with attached email thread and attachment; an email to OIP from Requester dated April 21, 2021 with attached email thread; an email to Requester from OIP dated April 22, 2021, with attached email thread and attachment; an email to OIP from Requester dated May 7, 2021,

with attached email thread and attachment; an email to Requester from OIP dated May 10, 2021, with attached email thread and attachments; an email to OIP from Requester dated May 10, 2021, with attached email thread; two emails to Requester from OIP dated May 11, 2021, both with attached email thread; an email to OIP from Requester dated May 11, 2021, with attached email thread; an email to Requester from OIP dated May 27, 2021, with attached email thread and attachments; an email to OIP from Requester dated May 27, 2021, with attached email thread and attachments; two emails to Requester from OIP dated May 28, 2021, both with attached email thread; an email to OIP from Requester dated May 28, 2021, with attached email thread and attachments; an email to OIP from Requester dated June 1, 2021, with attached email thread and attachments; an email to OIP from Requester dated June 1, 2021, with attached email thread; an email to Requester from OIP dated June 1, 2021, with attached email thread; an email to Requester from OIP dated June 2, 2021, with attached email thread; an email to Requester from OIP dated June 7, 2021, with attached email thread; an email to OIP from Requester dated June 7, 2021, with attachments; an email to B&F from OIP dated June 15, 2021, with attachments; an email to OIP from B&F dated June 15, 2021, with attached email thread; an email to Requester from OIP dated August 4, 2023, with attachment; an email to OIP from Requester dated August 9, 2023, with attached email thread; and an email to Requester from OIP dated August 9, 2023, with attached email thread.<sup>1</sup>

### **QUESTIONS PRESENTED**

1. Whether B&F properly responded to Requester's record request dated October 11, 2020 (October 2020 Request), and provided the records to which he was entitled under the UIPA.
2. Whether B&F properly responded to Requester's new request dated December 21, 2020 (December 2020 Request), for "all interview rating sheets for all applicants."
3. Whether the fees charged by B&F for review and segregation were proper under the UIPA.
4. Whether B&F's itemization of fees for review and segregation met the requirements in section 2-71-19(d), HAR, which requires agencies to "provide an itemized bill of all fees assessed."

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<sup>1</sup> Requester withdrew an email to OIP from Requester dated May 25, 2021, with attached email thread and attachments, which OIP did not consider in this appeal.

## BRIEF ANSWERS

1. Yes. As explained starting on page 8, except for the records that Requester stated that he did not want in his October 2020 Request, B&F provided him with copies of all government records and personal records it maintained, with appropriate redactions that did not include the information that OIP directed it to disclose in U MEMO 18-12 and that B&F agreed to disclose while U APPEAL 15-27 was pending.

2. Yes. As explained starting on page 10, B&F staff conducted a reasonable search for records in the locations where any responsive records were most likely to have been found, but no responsive records were found. B&F also provided evidence that the requested records were destroyed pursuant to B&F's retention policy and are no longer maintained. OIP therefore concludes that B&F's search for records was reasonable, and its response to Requester's December 2020 Request was proper under the UIPA.

3. Yes. As explained starting on page 14, B&F's fees for 0.25 hours for its search and three hours for its review and segregation were reasonable, not excessive, in this case, and were proper under the UIPA.

4. Yes. As explained starting on page 19, B&F met its obligation to "provide an itemized bill of fees assessed" to Requester under OIP's administrative rules.

## FACTS

### **I. Requester's First Appeal (U APPEAL 15-27)**

Requester applied for and interviewed for a position at B&F. After his job interview, Requester sent B&F a record request dated December 14, 2014, seeking the following information about his interview and B&F's job application process:

All records pertaining to my job application for the Program Specialist III position in the Unclaimed Property Program within the Financial Administration Division of the Department of Budget and Finance, including but not limited to:

1. All interviewers' notes
2. My overall score and ranking
3. All standards and procedures used for the scoring, ranking and final selection of candidates

4. All information requested and received by the Department via the release of information form I signed and submitted[.]

(December 2014 Request).

In response, B&F agreed to disclose Requester's score, but asserted that (1) section 92F-22(3), HRS, allowed it to withhold all interviewers' notes; (2) sections 92F-22(2) and 92F-22(3), HRS, allowed it to withhold his ranking;<sup>2</sup> and (3) section 92F-22(3), HRS, allowed it to withhold all standards and procedures. With regard to Requester's request for "[a]ll information requested and received by the Department via the release of information form I signed and submitted," B&F stated that "Budget and Finance did not conduct [a] reference check on the Requester because he was not being considered to fill the vacancy." Requester appealed these denials and OIP opened U APPEAL 15-27 (First Appeal).

In U APPEAL 15-27, OIP issued a memorandum opinion on June 28, 2018 (U MEMO 18-12).<sup>3</sup> OIP concluded that with respect to Requester's personal records<sup>4</sup> request, B&F was authorized to withhold the interview questions and interviewers' notes under section 92F-22(3), HRS. As to the government records<sup>5</sup> responsive to Requester's request for standards and procedures, OIP concluded that the other applicants' names on the Selection Report could be withheld under section 92F-13(3), HRS, but the Guidelines for Recruitment Process, Introduction Sheet, and Interview Ratings must be disclosed as no exception in Part II of the UIPA

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<sup>2</sup> Although B&F initially asserted that sections 92F-22(2) and 92F-22(3), HRS, allowed it to withhold Requester's ranking, it later withdrew this argument and agreed to disclose Requester's ranking.

<sup>3</sup> OIP informal opinion letters or memorandum opinions are not precedent and generally should not be cited to, except in unusual situations such as the instant one where an informal opinion is directly related to the current appeal.

<sup>4</sup> "Personal record" is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency." HRS § 92F-3 (2012). It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or refer to the individual's name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. *Id.*

<sup>5</sup> "Government record" is defined as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." HRS § 92F-3.

authorized nondisclosure.<sup>6</sup> Moreover, information identifying position titles, position numbers, departments, and names of government employees must be disclosed under section 92F-12(a)(14), HRS.

Following the issuance of U MEMO 18-12, Requester did not contact B&F regarding the records required to be disclosed under that opinion for over two years, until he telephoned B&F's Human Resources staff on September 9, 2020, to say that he wanted the records. According to B&F, Requester stated during the telephone call that he did not follow through with his original request due to personal circumstances. B&F agreed to provide the records, and sent Requester a Notice to Requester dated September 29, 2020 (September 29 NTR) on that date.<sup>7</sup>

## **II. Requester's Second Appeal (U APPEAL 21-21)**

Requester thereafter emailed to B&F a new October 2020 Request, which he intended to serve as his revised December 2014 Request, seeking the following:

- A. Government Records:
  - 1. Guidelines for Recruitment Process
  - 2. Interview Ratings
  - 3. Information identifying position titles, position numbers, departments and names of governmental employees
- B. Personal Records:
  - 1. Personal interview ratings and scores
  - 2. Personal interview ranking

Requester also stated that he was not requesting the following:

- 1. Introduction Sheet

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<sup>6</sup> The Selection Report, Guidelines for Recruitment Process, and Interview Ratings are part of the responsive records disclosed by B&F and are discussed more fully in the Discussion section I starting on page 8.

<sup>7</sup> The fee estimate in the September 29 NTR that B&F sent Requester was \$32.50. The estimate did not include costs, the amount of which was still uncertain because Requester had not yet selected whether he wanted B&F to mail or email the records. B&F sent Requester a subsequent NTR also dated September 29, 2020, on October 26, 2020 (October 26 NTR), after Requester notified B&F via email on October 22, 2020 that he wanted the records mailed to him. The estimated fees and costs in the October 26 NTR were \$33.35.

2. The DHRD items #2 - #6 stated in footnote #2 on page 3.<sup>8</sup>

On November 12, 2020, B&F responded to Requester's October 2020 Request by mailing him a copy of: (1) Guidelines for Recruitment Process (As of June 4, 2014), (2) his Interview Ratings sheets from three B&F staff members who were on Requester's interview panel, and (3) a Selection Report dated November 26, 2014, which identified the names and job titles of the government employees who were on Requester's interview panel. On November 25, 2020, B&F mailed Requester a copy of a Selection Report dated November 26, 2014, which contained the personal interview ratings, scores and ranking of Requester and the four other applicants, with the names of other applicants redacted.

By email dated November 29, 2020, Requester notified B&F about "what [he] believe[d] should have been included in [its] mailings, which [he] did not receive so far" which consisted of: (1) "[t]he interview rating sheets for all the other applicants" and (2) "all the information regarding the interviewers." Requester noted that B&F provided the names and the position titles of the interviewers, but that he "did not receive the position numbers and their respective State employed departments." As explained more fully starting on page 9, on December 2, 2020, B&F emailed Requester and provided him with the requested information about the interviewers, explained that the applicant rating sheets for the other applicants were not included in the original search, and offered to conduct a search for these records upon Requester's confirmation that he wanted B&F to do so.

Requester submitted a separate record request dated December 21, 2020 for:

All interview rating sheets for all applicants (not including those of Rex Shilo) completed by all interview panel members, as referenced in the OIP Memorandum Decision dated 6-28-2018 with Subject: Interview Materials (U APPEAL 15-27) and also stated in the email dated 12-4-2020 from Rex Shilo to Lori Ann K. Ikenaga, I am NOT requesting interview ratings sheets for applicant Rex Shilo. DO NOT include interview rating sheets for applicant Rex Shilo.

(December 2020 Request).

B&F responded to the December 2020 Request in a letter dated January 4, 2021, in which B&F informed Requester that it was "unable to locate the requested documents," that "the records are no longer in existence at the B&F," and "there are no government records available to satisfy [his] request." B&F asserted that it

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<sup>8</sup> This reference relates to footnote 2 on page 3 of U MEMO 18-12 which is not at issue in this appeal.

conducted a search for the requested records but was unable to locate them because they had been destroyed in accordance with State General Records Schedules No. 1-11, 2002, Revised 5/06.<sup>9</sup> A copy of B&F's Records Destruction Report dated February 1, 2018, indicates that the requested records were destroyed on February 9, 2018, along with other records.

In an email dated January 19, 2021, Requester appealed B&F's response to his October 2020 and December 2020 Requests. As discussed more fully below, Requester alleged that B&F: (1) "did not honor [his] request for records," (2) charged "excessive" fees for review and segregation, and owes him a "partial yet substantial refund," and (3) did not provide an adequate response to his "request for a complete and thorough itemization" of how it calculated its review and segregation fees.

In response to this appeal and as discussed more fully starting on page 8, B&F explained that it had provided Requester with copies of its "Guidelines for Recruitment Process," "Interview Ratings for Mr. Shilo," "Information Identifying Governmental Employees," and "Personal interview rating, scores and ranking" on November 12, November 25 and December 2, 2020. In addition, B&F's October 26 NTR granted in part his request for government records and included total estimated fees and costs of \$33.35 to produce copies of the records.

In response to the claim that B&F's estimated fees to review and segregate the responsive records was excessive, B&F summarized its email to Requester of December 18, 2020, which broke down its review and segregation time to "09/14/20 = 2.5 hours, 09/16/20 = .5 hours." B&F further explained that it took a "considerable amount of time to review the files" to ensure proper release of the documents because "substantial time had passed from the original 2014 request and original 2018 appeal." B&F asserted that it made a good faith effort to conduct an appropriate and reasonable search for the requested documents which included: (1) an inspection of files related to Requester's initial December 14, 2014 Request to Access Government Records and the original U APPEAL 15-27; (2) a search through recruitment files; and (3) an inquiry with the program that conducted this position's job interviews in 2014 for copies of the selection records.

B&F further stated that the 2014 recruitment and selection records no longer exist, and that Requester was informed by letter dated January 4, 2021, that there are no records to satisfy his request. B&F's January 4 letter explained that the records were destroyed pursuant to the State General Records Schedules No. 1-11, 2002, Revised 5/06 (GRS), which provides the record retention and disposition schedules for Civil Service Employee Selection Records such as interview questions

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<sup>9</sup> The UIPA does not govern record retention. OIP does not have jurisdiction over agencies' record retention policies, and therefore, B&F's record retention schedule will not be addressed in this opinion.

and applicant evaluation records. B&F's January 4 letter also explained that according to the GRS, Civil Service Employee Selection Records are retained for 2 years from the date of record creation or personnel action involved or final disposition of charges, whichever occurs later, and disposed of or destroyed after said retention period.

## DISCUSSION

Part II of the UIPA generally provides that government records are public unless an exception to disclosure applies. HRS § 92F-11 (2012). Part III of the UIPA generally requires an agency to make an accessible personal "record available to the individual to whom it pertains[,]" unless a Part III exemption applies. HRS § 92F-21 (2012).

B&F provided OIP with copies of the records that it sent Requester for *in camera* review. After reviewing the records and in accordance with OIP Opinion Letter Number F13-01, OIP finds that some of records are "about" Requester, and thus are Requester's personal records, which may be withheld only if a Part III exemption applies. OIP also finds that some of the records are not specifically about Requester and are not Requester's personal record. These records are government records and may be withheld only if a Part II exception applies.

### **I. B&F Properly Responded to the October 2020 Request in Accordance with U MEMO 18-12**

In response to Requester's October 2020 Request, B&F sent Requester the September 29 NTR and October 26 NTR as discussed in footnote 7 above. After Requester paid B&F \$17.10 for 50% of the fees and 100% of the costs set forth in the October 26 NTR, on November 12, 2020, B&F mailed Requester copies of: (1) Guidelines for Recruitment Process (As of June 4, 2014); (2) his Interview Ratings sheets from three B&F staff members who were on Requester's interview panel; and (3) a redacted version of the Selection Report dated November 26, 2014, which identified the names and job titles of the government employees who were on Requester's interview panel but redacted the names and scores of other applicants. On November 25, 2020, B&F mailed Requester another copy of the same Selection Report dated November 26, 2014, but with fewer redactions (contained his personal interview ratings, scores and rank, and the scores of the four other applicants, with their names redacted). On December 21, 2020, B&F received \$16.25 from Requester, which was the balance owed for the remaining fees set forth in the October 26 NTR.



After receiving the responsive records, Requester notified B&F by email on November 29, 2020 that B&F failed to include in its mailings: (1) “[t]he interview rating sheets for all the other applicants,” and (2) “all the information regarding the interviewers.” Requester noted that B&F disclosed the names and the position titles of the interviewers, but did not provide the interviewers’ position numbers and “their respective State employed departments.” This request for the interview rating sheets of all other applicants was essentially a new request as Requester had not sought this information in his previous record request at issue in U MEMO 18-12.

In response, on December 2, 2020, B&F emailed Requester and provided him with the position numbers of the three interviewers and the State department where they were employed. B&F also explained that the applicant rating sheets for the other applicants were not included in the original search, and offered to conduct the search upon Requester’s confirmation that he wanted B&F to “proceed with the search, review and segregation of these records.” B&F also advised Requester that “[t]he search will affect the balance due.”

Requester asserted that B&F “did not honor [his] request for records.” He also argued that B&F’s “overall handling of [his] record request was unacceptable,” and claimed that B&F failed to disclose additional records responsive to his October 2020 Request. However, Requester did not identify these missing records, except for the “rating forms” of the “other applicants” sought in his new request, which is discussed in section II below. In support of his assertions, Requester instead raised numerous issues and questioned B&F’s response. OIP will address only those issues and questions that are relevant to this appeal.

Except for the records that Requester stated he did not want in his October 2020 Request, OIP finds that B&F properly disclosed to Requester redacted copies of all government and personal records as directed by OIP in U MEMO 18-12 and agreed upon by B&F in U APPEAL 15-27. OIP further finds that B&F also properly disclosed the names, position titles, and position numbers of the three interviewers and the State department where they were employed. OIP therefore concludes that B&F properly responded to Requester’s October 2020 Request and provided the records and information to which he is entitled under the UIPA as directed by U MEMO 18-12 and agreed upon by B&F in U APPEAL 15-27.

## II. Interview Rating Sheets for All Applicants Requested in December 2020 Request Not Maintained by B&F

As noted above, Part II of the UIPA generally provides that government records are public unless an exception to disclosure applies. HRS § 92F-11. However, an agency's obligation to disclose records only applies to the records it actually maintains; it is not required to provide records that it does not maintain, including records that do not exist. See HRS §§ 92F-3 (defining "government record" as records maintained by an agency), 92F-11(c) (providing that an agency is not required to create "a compilation or summary of its records" unless the information is "readily retrievable"); see also State of Hawaii Organization of Police Officers v. Society of Professional Journalists – University of Hawaii Chapter, 83 Haw. 378, 393, 927 P.2d 386, 401 (Haw. 1996) (opining that the UIPA does not impose an affirmative obligation to maintain records).

Normally, when an agency's response to a record request states that no responsive records exist and that response is appealed, OIP assesses whether the agency's search for a responsive record was reasonable. OIP Op. Ltr. No. 97-8 at 4-6. A reasonable search is one "reasonably calculated to uncover all relevant documents," and 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. at 5 (citations omitted).

With respect to Requester's December 2020 Request, B&F informed Requester that

The B&F conducted an inspection of files related to your U APPEAL 15-27 of April 17, 2015 concluded with an Office of Information Practices Memorandum Decision dated June 28, 2018; searched for recruitment/selection records pertaining to your job application for the Program Specialist III position in the Unclaimed Property Program within the Financial Administration Division (FAD) of the B&F; and made an inquiry to the FAD if copies of the recruitment/selection records existed. However, we are unable to locate the requested documents.

Pursuant to the State General Records Schedules No. 1-11, 2002, Revised 5/06; the retention and disposition for Civil Service Employee Selection Records such as interview questions and application evaluation records are as follows:

- Retention: 2 years from date of record creation or personnel action involved or final disposition of charges, whichever occurs later.
- Disposition: Destroy after cited retention.

Therefore, the requested records are no longer in existence at the B&F, as such, there are no government records available to satisfy your request.

In response to this appeal, B&F further elaborated that it

made a good faith effort to conduct an appropriate and reasonable search for the requested documents which included (1) an inspection of files related to Mr. Shilo's initial December 14, 2014 Request to Access Government Records and the original U APPEAL 15-27; (2) a search through recruitment files; and (3) an inquiry with the program that conducted this position's job interviews in 2014 for copies of the selection records. However, this 2014 recruitment/selection records are no longer in existence. On January 4, 2021, Mr. Shilo was informed that there are no records to satisfy his request as the records are no longer in existence pursuant to the State General Records Schedules No. 1-11, 2002, Revised 5/06 (GRS) which states the retention and disposition for Civil Service Employee Selection Records such as interview questions and applicant evaluation records are, retention - 2 years from date of record creation or personnel action involved or final disposition of charges, whichever occurs later, and disposition - destroy after cited retention.

B&F also described its search for responsive records, and stated that "we conducted an appropriate and reasonable search in the most likely locations in the B&F including the HR office and the hiring program." B&F offered the following explanation:

First, our HR Specialist searched through multiple files related to Mr. Shilo's initial December 14, 2014 Request to Access Government Records and the original U APPEAL 15-27 located in the HR office such as Mr. Shilo's request, B&F responses including all attachments. However, only Mr. Shilo's interview rating sheets were located. The interview rating sheets for all other applicants were not found in these files. It is reasonable to surmise that because Mr. Shilo's original December 14, 2014 request for government records references the requestors [sic] access to "records pertaining to my [Mr. Shilo's], job application, and the June 28, 2018 OIP Memorandum Decision (U APPEAL 15-27) references access to "all records pertaining to [his] application...", [sic] it is more than likely the other applicants' interview and evaluation records were not extracted for consideration in the initial request and subsequent appeal, and therefore, were not found in the records request and appeal files.

Next, the HR Specialist made a request to another HR Specialist who handles recruitment responsibilities for B&F to make a diligent examination of all recruitment files maintained at the HR office to locate the interview records for the Program Specialist III, Position No. 120196. The HR Recruitment Specialist looked through all recruitment records that were housed at the HR office and reported that she couldn't locate recruitment file for the Program Specialist III, Position No. 120196 that was conducted in 2014 where Mr. Shilo and other applicants were interviewed. She stated that while the GRS retention for recruitment files is two (2) years, the B&F's HR office standard practice is to retain its recruitment files for at least three (3) years before destroying the recruitment files.

As these 2014 recruitment records were not located in the HR office, the HR Specialist made a further attempt to search for the responsive records by making an inquiry with the Secretary of the hiring program that conducted the job interviews for this position in 2014 to see whether the program kept copies of the selection records. The program Secretary responded that she submitted all recruitment documents for PN 120196, Program Specialist III to the HR office in 2014 and did not retain any copies relating to this recruitment. However, the program Secretary offered to check with the hiring manager to see if the hiring manager kept any copies of this recruitment. The program Secretary later informed the HR Specialist that the hiring manager did not keep any copies of this recruitment.

B&F also stated that it

made a sincere good faith effort to conduct a reasonable search for responsive records (i.e. other applicants' rating forms) as requested by Mr. Shilo in his December 20, 2020 Request to Access A Government Record. Had the subject records been available, we would have satisfied his request accordingly. I can assure you the requested records were not intentionally destroyed in relations [sic] to the request, but rather were disposed of in compliance with the GRS.

Requester disputed B&F's assertion that some of the records he requested were purged in accordance with B&F's retention schedule. He asked why only his records and a portion of the government records [which were at issue in U APPEAL 15-27] were retained when the records of the other job applicants were not retained, among other questions. Specifically, Requester argued that

[t]he retention schedule is cited as the reasoning. Why were my records and a portion of the Government Records available? Weren't

these subject to the same retention schedule? How is it that some of the records were retained but not all? It may appear on the Selection Report within the mailing of 11-25-2020 that none of the applicants were selected/hired because none of us were adequately qualified. Yet you keep my records but none of the other applicant records – Why was that? Why wouldn't you purge all of the records?

In his rebuttal dated May 28, 2021, to B&F's response to his appeal, Requester also argued that B&F's response "does not state and may not recognize or acknowledge that U Appeal 15-27 renders an opinion on ALL records I requested, which included other applicant records." OIP notes, however, that Requester's original December 2014 Request sought, in part, "[a]ll records pertaining to **my job application**" (emphasis added). OIP therefore finds that B&F reasonably understood Requester's December 2014 Request to be for his personal records, i.e., records about **his** job application, and not records of other applicants for the same job. OIP further finds that Requester did not request the records for "all interview rating sheets for all applicants" until December 2020.

The disposal of government records is generally governed by chapter 94, HRS, entitled "Public Archives; Disposal of Records." Because the retention and destruction of government records are outside the scope of the UIPA, questions on these matters should generally be directed to the Department of Accounting and General Services Archives Division. However, when an agency has a pending request for government records, it would be improper to destroy those requested records, even when the records would otherwise be allowed by law to be destroyed, or even if there is eventually a ruling that those requested records are not public. OIP Op. Ltr. No. 99-7 at 6; see also OIP Op. Ltr. No. 92-13 at 6 n.1 (stating that, when an agency receives a record request, it would be improper to avoid its disclosure obligations by intentionally or knowingly destroying the requested record).

According to the Records Destruction Report provided by B&F dated February 1, 2018, the records responsive to Requester's December 2020 Request were destroyed along with other B&F employee application records on February 9, 2018, pursuant to its record retention policy. In his May 28, 2021 rebuttal to B&F's response to his appeal, Requester asked whether the "chronology<sup>10</sup> [of events] accurately indicate that the records were destroyed after B&F was informed by OIP

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<sup>10</sup> The relevant events and dates that Requester listed in relation to his questions about the chronology are: (1) "Records Request to B&F: 12-14-2014," (2) "OIP's Notice of Appeal to B&F: 4-17-2015," (3) "Records Destroyed: 2-19-2018," and (4) "OIP Memorandum Decision: 6-18-2018." OIP notes that B&F's Records Destruction Report indicates that the records at issue were destroyed on February 9, 2018, and not February 19, 2018, as stated by Requester in his rebuttal.

of any appeal, while the appeal was in progress, prior to OIP's Memorandum Decision[,]” and if so, “isn't this a violation?” Requester also asked about the “significance of the [date] stamp ‘Received B&F 2018 Jan 31 AM 11:06’ on [the Records Destruction Report] and does it matter? Does it indicate B&F had ample opportunity prior to the record destruction date to check whether the records should have been held for safe keeping and NOT purged?”

Although the records relating to Requester's December 2020 Request were destroyed on February 9, 2018, prior to the issuance of U MEMO 18-12 on June 28, 2018, OIP finds that the destruction was not improper under the UIPA because the December 2014 Request could not reasonably be read to encompass the records of other job applicants and thus at the time of destruction, the records were not the subject of a pending request by Requester. OIP also finds that B&F properly maintained the requested records that were the subject of U APPEAL 15-27 while that appeal was pending.

Based on the information provided by B&F, OIP finds that appropriate staff conducted a reasonable search for records in the locations where any responsive records were most likely to have been found. OIP therefore concludes that B&F's search for records was reasonable, and its response to Requester's December 2020 Request was proper under the UIPA.

### **III. Fees Charged by B&F Were Reasonable, Not Excessive, and Proper Under the UIPA**

B&F's October 26 NTR granted in part Requester's request for government records and provided him with an estimate of fees and costs along with payment information. For the government record portion of the request, B&F charged Requester for (1) 0.25 hours of search time (\$2.50), and (2) three hours of review and segregation time (\$30 after applying the \$30 fee waiver), for a total of \$32.50 in fees. As for costs, B&F charged Requester for six copies at \$0.05 per page (\$0.30) and \$0.55 for postage, for a total of \$0.85 in costs. Requester disputed B&F's fee estimate and sought an itemization of fees (itemization is discussed in section IV, below). Specifically, Requester argued that the fees charged for review and segregation were “excessive” and three hours to review and segregate was “astronomical.” Requester further argued that he was entitled to a “partial yet substantial refund” of the \$33.35 he paid in fees and costs. In addition to his other assertions, Requester stated he found it “very questionable that the estimate of fees matches exactly and precisely right to the exact same identical minutes as the

actual charge.”<sup>11</sup> He also stated that B&F’s estimated fees were based on either OIP’s decision (in U MEMO 18-12) or his modified request. Requester asserted that B&F should have known that the records were unavailable before the search was actually undertaken, or at the time that the search was conducted, and therefore, the actual fees should be reduced because there was less to review and segregate.

In his May 28, 2021 rebuttal to B&F’s response to the appeal, Requester asserted:

Maybe this observation will be helpful to your analysis and rendering a decision: Both references [B&F’s response to OIP dated February 24, 2021 and B&F’s email response to Requester dated December 14, 2020] reveal that the review and segregation took place PRIOR to the fee estimate provided to me from B&F on 9-29- 2020. Thus, it seems reasonable to conclude that B&F knew what their search uncovered and already had completed their review and segregation at the time they provided me this estimate on 9-29-2020. The fact by B&F’s own admission, that their estimate equalled [sic] to the very minute the actual time spent adds to the justification of this conclusion.

Last line of Reference #1: “...it took a considerable amount of time to review the files.” The search for the records took 15 minutes. This means all the records pertaining to my record request was [sic] in B&F’s hands in 15 minutes. Page 4, 2nd paragraph, line 6 of Reference #1, mentions “recruitment file”. So what files needed to be reviewed that took considerable time? Or is B&F using “reviewing”

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<sup>11</sup> Section 2-71-31, HAR allows agencies to charge search, review, and segregation fees “per fifteen minutes or fraction thereof.” Section 2-71-19(b), HAR, allows agencies to require requesters to prepay “[f]ifty percent of the total estimated fees for searching for, reviewing, and segregating records when the estimated fees exceed \$30” and “[o]ne hundred percent of other estimated lawful fees [allowed under section 2-71-19(a)] for other services to prepare and or transmit the record.”

OIP notes that because the prepayment amount charged by an agency is an estimate, the final amount of fees may, and often will, differ from the estimated amount. An agency cannot charge a requester for time it did not actually spend processing the request. However, the fact that an agency’s final tally did not change from its estimate is not evidence in and of itself that the agency is charging for time it did not spend. In a request requiring a relatively small amount of time, such as this one, the agency may find that its original time estimate was on target. Further, an agency that finds it spent more time than it originally estimated may prefer to charge for only the time that was originally estimated rather than revise its final tally and increase its fees, which would require additional time to calculate and would be more likely to result in a complaint from the requester.

when they actually mean “searching”? And again, no applicant rating forms other than mine needed to be reviewed – B&F didn’t have them. And note that B&F in stating this “considerable amount of time” does not mention segregating as part of that time spent. Finally, just because “substantial time had passed...” how is this relevant and how does this justify the 3 hours estimate? The 2018 OIP Decision and my 9-2020 record request should easily guide what to search for and what to review.

Also, let’s not lose sight of this: The description of the search beginning on page 3 of reference #1 extending to page 4, is for the search initiated in Dec 2020 and NOT for the search taking place in 9-2020, which took a measly 15 minutes.

The UIPA permits an agency to charge fees for search, review and segregation functions, as well as “other lawful fees” such as the copy charges and costs permitted by section 92-21, HRS. OIP Op. Ltr. No. 04-03 at 7; see also HAR § 2-71-19(a) (authorizing agencies to charge fees for searching for, reviewing and segregating the record, and any other lawful fees when a person requests access to a government record under Part II of chapter 92F, HRS). In addition, section 2-71-33, HAR, allows an agency to assess and collect fees for the search or review of a government record in accordance with section 2-71-31, HAR, if the agency reasonably believed that the requested record would be disclosable before searching for or reviewing it. The allowable fees for search,<sup>12</sup> review<sup>13</sup> and segregation<sup>14</sup> are: \$2.50 per fifteen minutes to search for the record; and \$5.00 per fifteen minutes to review and segregate the record. HAR § 2-71-31(a).

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<sup>12</sup> “Search” means “to look for a government record, including page-by-page or line-by-line identification of a government record.” HAR § 2-71-2. A search may be performed manually or by computer using existing retrieval or programming capabilities. Id.

<sup>13</sup> “Review” means “to examine a government record, in response to a request for access to the record, in order to determine which portions, if any, of the record are exempt from disclosure by law.” HAR § 2-71-2. Review does not include the time spent by the agency, or another person, to resolve issues of general law or policy regarding the applicability of exceptions to disclosure under chapter 92F, HRS. Id.

<sup>14</sup> “Segregate” means “to prepare a government record for disclosure by excising any portion of the record that will not be disclosed under chapter 92F, HRS.” HAR § 2-71-2.



In OIP Opinion Letter Number F22-03 (Opinion F22-03),<sup>15</sup> OIP analyzed whether an agency provided a requester with a good faith estimate of fees in response to his request. In that case, OIP stated that an agency's written response to a record request is required to include a "good faith estimate of all fees that will be charged to the requester under section 2-71-19, [HAR,]" which authorizes fees for an agency's search, review, and segregation of records. HAR § 2-71-14(a)(2)(A). OIP also explained that the UIPA's legislative history reflects the intent of the legislative committee that added those fees to the bill that became the UIPA:

It is the intent of your Committee that such charges for search, compilation, and segregation shall not be a vehicle to prohibit access to public records. It is the further intent of your Committee that the Office of Information Practices move aggressively against any agency that uses such charges to chill the exercise of first amendment rights.

OIP Op. Ltr. No. F22-03 at 19, citing H. Stand Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 969, 972 (1988). OIP noted that OIP's Impact Statement accompanying the draft rules that were promulgated as chapter 2-71, HAR, stated that "[w]hen informed of the estimated fees in the notice, the requester may choose to modify or abandon the request to reduce the fees that will be assessed." § 5-41-14,<sup>16</sup> OIP, Impact Statement for Proposed Rules of the Office of Information Practices on Agency Procedures and Fees for Processing Government Record Requests (1998), <https://oip.hawaii.gov/impact-statementfor-oips-administrative-rules/> (Impact Statement). In other words, the clear purpose of the "good faith estimate of fees is to provide a requester with sound information about the anticipated agency time required and fees to be paid to process the request as submitted, so the requester can make an informed choice whether to pursue, modify, or even abandon it. Id.

The total actual fees and costs at issue are \$33.35 (\$32.50 for fees and \$0.85 for costs). The purpose of a search is to locate records and determine if any responsive records exist. As noted above, in most cases when an agency claims that a record does not exist, it must first conduct a reasonable search. However, in rare

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<sup>15</sup> Opinion F22-03 involved a record request to the Employees' Retirement System relating to its former chief investment officer's departure. OIP concluded that it did not need to find a deliberate intent to inflate its estimate by an agency to conclude that the estimate was not made in good faith; rather, a failure to make even a cursory effort to accurately estimate the volume of responsive records an agency maintains is sufficient by itself to support the conclusion that the agency failed to provide the requester a good faith estimate as required by rule, and thus violated the UIPA.

<sup>16</sup> OIP's draft rules contained a different numbering system but refer to the same substance as the rules that were eventually adopted.

cases, when an agency's staff has "actual knowledge that the type of record requested was never created," the agency is "absolved from having to conduct a search reasonably likely to produce the requested records." OIP Op. Ltr. No. F16-03 at 3-4. OIP finds that Requester's assertion that B&F should have learned of the unavailability of the records before the search was actually undertaken is illogical because the purpose of a search is to locate records, if any responsive records exist, and it would be unreasonable to expect an agency to learn that records are not available before conducting a search.

OIP next finds that, although B&F disclosed only six pages of records, with redactions, B&F's explanation that a "considerable amount of time" was spent reviewing the files because Requester sought the records over two years after OIP compelled disclosure in U MEMO 18-12, and a substantial period of time passed since his original 2014 request and OIP's issuance of U MEMO 18-12, is credible. OIP notes that given the passage of time and the multiple issues involved, B&F staff reviewing the records would have likely been required to become reacquainted with the file and all records, and could be expected to need to do a close review of these materials with reference to the December 2014 Request, U MEMO 18-12, the October 2020 Request and the records B&F agreed to disclose in U APPEAL 15-27 to ensure they were properly disclosing what was required. B&F was not required by the UIPA to consider his record request as still pending for that length of time. HAR § 2-17-16(a) and (b). OIP also finds that B&F's final tally of 0.25 hours to search for all records in response to the December 2014 Request, OIP's 2018 decision in U MEMO 18-12, the October 2020 Request, and the records it agreed to disclose in U APPEAL 15-27 does not lead to the conclusion that the fees were excessive, because the time required to locate records does not necessarily correlate to the time required to review them. For instance, when all responsive records are kept together in a single file the time required to pull that file may be minimal even if the volume of records is large and thus requires substantial time for review and segregation. Similarly, OIP further finds that B&F's final tally of three hours to review and segregate all records in response to the December 2014 Request, OIP's 2018 decision in U MEMO 18-12, the October 2020 Request, and the records B&F agreed to disclose in U APPEAL 15-27, does not lead to the conclusion that the fees were excessive. In addition, OIP finds that the amount charged was not inconsistent with the legislative intent that charges "shall not be a vehicle to prohibit access to public records." Thus, OIP concludes that the fees charged for 0.25 hours for search and three hours for review and segregation were reasonable,

not excessive, in this case, did not create a barrier to access in violation of the UIPA, and were proper under the UIPA.<sup>17</sup>

#### IV. Itemization of Fees

In B&F's October 26 NTR, granting in part Requester's request for government records and including estimated fees and costs and payment information, it estimated search time of 0.25 hours (\$2.50); review and segregation of three hours (\$30 after applying the \$30 fee waiver), copying costs for six pages at \$0.05 per page (\$0.30), and postage (\$0.55). In response to Requester's request for more information on how the review and segregation amounts were calculated, on December 18, 2020, B&F provided Requester with the following breakdown for its review and segregation of records: "09/14/20 = 2.5 hours, 09/16/20 = .5 hours." B&F also explained, "[a]s substantial time had passed from the original 2014 request and original 2018 appeal, to ensure proper release of the documents, it took a considerable amount of time to review the files."

Requester stated that he requested the itemization "to get a better understanding of how in the world the fee could possibly clock in at an astronomical 3 hours to review and segregate a miniscule number of pages." Requester asserted that, "I see their response as falling way short of my request for a complete and thorough itemization." Requester asked OIP to determine if the following are "supposed to be added in the 3 hours" estimated by B&F:

How much time was spent separately on the review, and segregation and the redacting of personal data? List all the individuals with their job titles involved in the review and segregation and how much time did each individual spend? [sic] List all those individuals and their titles, who were involved in the approval of the final product whether they were management, administration, Director, assigned attorney general, etc. How much time was included for employees to study policy and procedures related to how to conduct review and segregation? How much time was included in the filing or making copies of what was reviewed and segregated? How was the time tracked, documented and the accuracy verified?

In his May 28 rebuttal to B&F's response to his appeal, Requester also asserted that, "I find B&F's itemization response to be very brief, so excruciatingly brief, that

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<sup>17</sup> OIP notes that B&F could have charged Requester an additional amount for search fees relating to the time spent in response to his December 2020 Request, but did not do so. Prior to conducting the search, B&F asked Requester to confirm that he wanted it to proceed with the search, review and segregation of the new records and informed him that the search would affect the balance due.

it is my contention that neither I nor OIP can properly assess its accuracy and reasonableness and therefore cannot be assessed as a good faith response or a worthwhile justification for the time they reportedly spent.”

Section 2-71-19(d), HAR, requires agencies to “provide an itemized bill of all fees assessed.” The Impact Statement provides:

#### ITEMIZATION OF FEES

The proposed rule requires an agency to provide an itemized bill of fees assessed when asked by the requester to do so. This requirement enables the requester to find out how fees were assessed without having to file an appeal.

Notably, section 2-71-19, HAR, provides for multiple types of fees and costs that could be assessed to a requester. The requests at issue herein involved fees for search, review, and segregation of the current request and “other lawful fees” (such as for copy charges or postage or other costs incurred by the agency), which are authorized by subsections 2-71-19(a) and (b), HAR. However, subsection 2-71-19(b) also authorizes an agency to require prepayment of “[o]ne hundred percent of the estimated fees from previous requests, including abandoned requests, in accordance with subsection (d).” Subsection 2-71-19(d), HAR, not only sets out the requirement to provide an itemized bill upon request, but also states that a “requester is liable for and shall pay any fees outstanding for services rendered by an agency to respond to any previous or current request.” In other words, the itemized bill requirement is set out specifically in the context of a requester’s obligation to pay outstanding fees for past requests, which could be included in the prepayment an agency required for a new request.

Since the term “itemize” is not specifically defined by the UIPA, OIP looks to the common dictionary definition of the word. See HRS § 1-14 (2009) (addressing statutory interpretation, “[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning”); see also OIP Op. Ltr. No. F19-01 at 6-7 (stating “[w]hen a term is not specifically defined by the UIPA, OIP must look to the common dictionary definition of the word”); see also OIP Op. Ltr. 05-04 at 8, citing Ross v. Stouffer Hotel Co. (Hawaii) Ltd., Inc., 76 Haw. 454, 461 (1994) (“we give the operative words their common meaning, unless there is something in the statute requiring a different interpretation”).

Black’s Law Dictionary defines the term “itemize” as “[t]o list in detail; to state by items.” Itemize, Black’s Law Dictionary (11th ed. 2019). Similarly, Merriam-Webster defines itemize “to set down in detail or by particulars.” Itemize,

Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/itemize> (last visited June 18, 2024).

Considering the context of the itemized bill requirement in section 2-71-19(d), HAR, together with OIP's guidance in Opinion Letters Number F19-01 and 05-04, and the definition of "itemize" in the Black's Law Dictionary and Merriam-Webster, OIP concludes that the itemization requirement is satisfied when an agency indicates what record request each portion of the bill pertains to and how much of the amount chargeable for each request is respectively due to search, review, and segregation time (with the amount of time indicated) or to other lawful fees (with an explanation of each type of cost such as postage or copy charges and a multiplier as appropriate). OIP further concludes that OIP's rules do not require an agency to include in its itemization a list of all individuals with their job titles involved in the review and segregation and how much time each individual spent; a list of individuals and their titles who were "involved in the approval of the final product;" how much time was included for employees to study policy and procedures related to how to conduct review and segregation (this is not chargeable time); how much time was included in the filing or making copies of what was reviewed and segregated (also not chargeable time); or how time was "tracked, documented and the accuracy verified." Additionally, OIP's rules do not require an agency to include in its itemization how much time was spent separately on the review, segregation and redacting of "personal data" which is not chargeable time. The itemized bill requirement was not intended to require agencies to produce something similar to a legal timesheet to be presented to clients, but instead is meant to ensure that a requester presented with a bill that might cover both current and past requests, could obtain basic information about how much of the bill was attributable to which request, and how much of that was for each category of fee or cost.

Based on this standard, OIP finds that B&F met its obligations under section 2-71-19(d), HAR, by providing the information Requester sought on how it calculated the review and segregation fees of \$30 in the manner it did. The information provided by B&F enabled Requester to "to find out how fees were assessed without having to file an appeal." In this case, Requester inquired only about the review and segregation fees for a single request, so there was no need for B&F to break down which fees were attributable to which request or to address amounts charged for search fees or copy or postage charges. While different circumstances might require an agency to provide a greater level of detail in its itemization of the review and segregation fees for a single request (for example, a complex request listing many different categories of records and requiring many hours to search or segregate), that is not the case here, and the level of detail provided by B&F is sufficient under the UIPA. OIP therefore concludes that B&F met its obligation to "provide an itemized bill of fees assessed" to Requester under OIP's administrative rules.

## RIGHT TO BRING SUIT

Requester is entitled to seek assistance directly from the courts when Requester has been denied access to a personal record. HRS §§ 92F-27(a), 92F-42(1) (2012). An action against the agency denying access must be brought within two years of the denial of access (or where applicable, receipt of a final OIP ruling). HRS § 92F-27(f).

If the court finds that the agency knowingly or intentionally violated a provision under Part III, the personal records section of the UIPA, the agency will be liable for: (1) actual damages (but in no case less than \$1,000); and (2) costs in bringing the action and reasonable attorney's fees. HRS § 92F-27(d). The court may also assess attorney's fees and costs against the agency when a requester substantially prevails, or it may assess fees and costs against Requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e).

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 opinion 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.

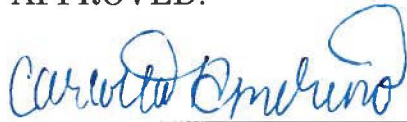
**OFFICE OF INFORMATION PRACTICES**



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