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November 30, 2011

Mr. Daniel Gluck, Esq.
Senior Staff Attorney
ACLU of Hawaii
Post Office Box 3410
Honolulu, Hawaii 96801

Re: Waiver of Fees in the Public Interest (CORR 2011-1012-01)

Dear Mr. Gluck,

The Office of Information Practices (OIP) received your letter, dated October 10, 2011, requesting OIP's assistance with your records request to the Honolulu Police Department (HPD) under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (UIPA). Specifically, you asked OIP to review HPD's apparent denial of your request for a waiver of fees in the public interest and the email correspondence, dated October 3, 2011, from Deputy Corporation Counsel Duane W.H. Pang, Esq., concerning HPD's denial of the fee waiver.

As you explained in your letter to OIP, you made a records request to HPD that included a request for a waiver of search, review, and segregation fees (fees waiver) and a statement of facts showing how the fees waiver would serve the public interest. HPD's Notice to Requester indicated that HPD granted you the \$30 fees waiver that is given to all requesters, not the \$60 "public interest" fees waiver. When you had inquired about not getting the higher fees waiver amount, Mr. Pang wrote in his email response:

It is almost impossible for any governmental entity, including HPD as well as our office, to make a determination on a requester's "primary intent." Thus, no determination is made by HPD on a requester's intent. We invite all requesters to seek the determination of the Office of Information Practice[sic]. If OIP thus determines the "primary intent" of the requester, HPD will comply with that determination.

By copy of this letter to HPD and Deputy Corporation Counsel Pang, OIP provides guidance that should enable HPD to make its own determination as to whether a fees waiver would be in the public interest under the criteria set forth in section 2-71-32, Hawaii Administrative Rules (HAR). Notably, since HPD has not made a determination, OIP's guidance provided in this letter does not serve as OIP's review of an agency's decision about whether to grant the fees waiver.¹ This letter, however, will provide HPD and other agencies with guidance on an issue of first impression regarding whether it is "impossible" to determine a requester's "primary intention . . . to widely disseminate information from the government record to the public at large."

Under OIP's administrative rules adopted in 1999, an agency "may charge the requester . . . (f)ees for searching for, reviewing, and segregating the record; provided that these fees shall be assessed in accordance with this chapter." HAR § 2-71-19(a)(1) (1999) (emphasis added). While it is optional for an agency to charge these fees, the fees that may be charged must comply with the requirements of Title 2, chapter 71, HAR, including granting a fees waiver when the public interest is served. HRS § 92F-42 (13) (1993) (OIP "[s]hall adopt rules that set forth the fees and other charges that may be imposed for searching, review, or segregating disclosable records, as well as to provide for a waiver of such fees when the public interest would be served"); HAR § 2-71-31(d)(2) ("No fees may be assessed by the agency under this section for the search for, review, or segregation of a record when . . . [t]o the extent permitted by section 2-71-32, the agency finds that the public interest would be served by a waiver of these fees"). If an agency disregards the "public interest" fees waiver mandate by declining to make a determination on the requested fees waiver, the agency is not authorized to assess the fees. See id.

When a "public interest" fees waiver under the UIPA is sought, the requester must submit a statement of facts, including the requester's identity, to support the request for this fees waiver. OIP drafted the fees waiver criteria set forth in section 2-71-32, HAR, so that agencies, not OIP, must review the records requester's statement and make the determination of whether the requester fulfills these three criteria. See Impact Statement for Proposed Rules of the Office of Information Practices on Agency Procedures and Fees for Processing Government Record Requests (rev. 1/12/98) (Impact Statement) at 42 ("[t]he agency has the burden of determining whether the requester qualifies for the waiver in accordance with subsection (b) of this proposed rule").

Because the Legislature did not provide guidance to OIP as to when providing a fees waiver would serve the public interest, OIP explained in the Impact Statement that it looked at the stated purposes and policies behind the UIPA as well as the similar "public interest" standard for the waiver of fees assessed by federal agencies on public records requesters under the federal Freedom of Information Act, 5 U.S.C. § 552 et. seq. (FOIA). Id., 5 U.S.C. § 552(a)(4)(A)(iii)

¹ Where an agency has actually rendered a finding about whether to grant a fees waiver in the public interest, OIP will generally decline to review the agency's finding. Thus, as your letter to OIP had noted, OIP's form entitled "Request for Assistance to the Office of Information Practices" does state, "Denials or granting of fee waivers in the public interest under section 2-71-32, Hawaii Administrative Rules, are at the discretion of the agency receiving a record request and will not be addressed."

(providing a fees waiver “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government”). When drafting its administrative rule establishing the “public interest” fees waiver, OIP concluded, in the Impact Statement at page 43, that “the public interest served by the UIPA is, generally, the meaningful public participation in governmental processes” and “the free flow of information held in government records so as to further the public’s understanding of the policies and actions of government.” While this public interest is inherently served by the “free flow of information through the news media channels which broadly transmit or disseminate information to the public,” OIP explained that “the criteria for this waiver was intended to be broad enough to encompass requesters such as non-profit organizations, public interest media groups, community newsletters, etc., **so long as the requester can show ‘the primary intention and the actual ability to widely disseminate information from the government to the general public at large.’**” See Impact Statement at 44; Amendments to Proposed Rules of the Office of Information Practices on Agency Procedures and Fees for Processing Government Record Requests (rev. 9/16/98) at 14-15 (emphasis added).

Essentially, an agency’s ability to determine whether a requester has “the primary intention and the actual ability to widely disseminate information” relies fully upon the adequacy of the facts provided in the requester’s statement to “show” that a fees waiver meets this and the other “public interest” criteria set forth in OIP’s rules. Even under FOIA, in order to qualify for the similar “public interest” fees waiver, a requester must specifically explain its intention to widely disseminate the requested records to the public. See, e.g., McClellan Ecological Seepage Situation v. Carlucchi, 835 F.2d 1282 (9th Cir. 1987).² In McClellan, the court affirmed a federal agency’s denial of a fees waiver by explaining:

Even if requesters have the ability to convey information to the public, they give no details about their intention to do so. For instance, requesters do not suggest on what basis they might sue to ensure the base’s compliance with particular federal laws or regulations. Likewise requesters do not name a public institution to which they might donate information from the FOIA request. Without more specific information, which was not on the record before the agency, we have no reason to conclude that disclosure of the information will have much significance [to public understanding of the government].

Id. at 1286.

Likewise, under the UIPA, in cases where a requester only offers conclusory or general information in its statement to support a request for a fees waiver--in other words, the request lacks specific details about the requester’s “primary intent” or “actual ability” to widely disseminate information from the disclosed government records to the public--an agency may

² OIP does look at FOIA case law for guidance when discussing a UIPA provision where there is a similar counterpart provision in the FOIA. E.g., OIP Op. Ltr. No. 07-05 (looking at FOIA case law in analyzing how the UIPA’s “frustration” exception applies to particular types of records).

find that the requester does not sufficiently show a fees waiver to be in the “public interest” and may appropriately deny the fees waiver request. Thus, in your request to HPD, the statement that “[t]he ACLU is a nonprofit, public-interest law firm” and “has the primary intention and the actual ability to disseminate widely this information to the public at large” may need to be revised to further describe the “intent” and “ability” for broad public dissemination of the information so as to enable HPD to fully assess whether the fees waiver for this particular records request is in the public interest.³

After HPD receives the guidance provided in this letter, HPD should review the statement provided by the ACLU in support of its fees waiver request in order to assess and determine whether a fees waiver to the ACLU, for its particular request in this case, fulfills all three criteria for a fees waiver in the public interest as set forth in section 2-71-32, HAR. OIP is confident that HPD will be able to reach a decision about whether to grant the waiver based fully on the facts presented in the ACLU’s statement, including being able to evaluate whether the requester has the requisite “intent” to broadly disseminate the information to the public.

Very truly yours,



Lorna L. Aratani
Staff Attorney

cc: The Honorable Louis M. Kealoha, Police Chief
Honolulu Police Department

Mr. Duane W. H. Pang, Deputy Corporation Counsel
Department of the Corporation Counsel, City and County of Honolulu

APPROVED:



Cheryl Kakazu Park
Director

³ Similarly, under FOIA, nonprofit organizations and public interest groups do not automatically qualify for the “public interest” fees waiver when making records requests to federal agencies. See generally The United States Dep’t of Justice Guide to the Freedom of Information Act (2009 ed.) at 131 (“while nonprofit organizations and public interest groups often are capable of disseminating information, they do not presumptively qualify for fee waivers; rather they must, like any requester, meet the statutory requirements for a full waiver of all fees”).