OFFICE OF INFORMATION PRACTICES

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To: Senate Committee on Judiciary and Labor

From: Cheryl Kakazu Park, Director

Date: April 4, 2017, 9:45 a.m.
State Capitol, Conference Room 016

Re: Testimony on H.B. No. 1518, S.D. 1
Relating to Public Records

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices ("OIP") **supports the S.D. 1 version of this bill, which would allow an agency to seek relief in court when it believes a person is abusing the record request process.**

The S.D. 1 version of this bill would allow an agency to seek relief in court from a requester with a clear pattern of requests that are manifestly excessive or made in bad faith and interfere with an agency's responsibilities. **OIP recognizes that there can be real problems in very limited cases where individuals abuse the UIPA's process** as a personal vendetta and seek to punish an agency rather than act out of a legitimate desire to access information in government records. The UIPA, however, does not give OIP the discretion to grant any form of relief to an agency in such a situation.

The S.D. 1 would allow an agency to go not to OIP, but instead to the court, to seek such relief. OIP believes that giving the courts the power to grant an agency relief as provided in this bill is an appropriate way to deal with those rare situations where a requester is abusing the UIPA's process and interfering with an agency's responsibilities. As OIP's concerns with prior versions of this bill have been addressed, **OIP supports the S.D. 1 being considered by this Committee.**

HAWAII HEALTH SYSTEMS
C O R P O R A T I O N

"Quality Healthcare For All"

Senate Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Vice Chair

April 4, 2017
Conference Room 016
9:45 a.m.
Hawaii State Capitol

Testimony supporting House Bill 1518, House Draft 1, Senate Draft 1, Relating to Public Records. Provides that if a public agency is able to demonstrate that a records requester has established a clear pattern of conduct that amounts to an abuse of a process established by the Uniform Information Practices Act, the agency may bring an action in the circuit court. Repeals on June 30, 2020.

Linda Rosen, M.D., M.P.H.
Chief Executive Officer
Hawaii Health Systems Corporation

Hawaii Health Systems Corporation ("HHSC") strongly supports the purpose and the intent of the Uniform Information Practices Act ("UIPA"). Indeed, the public should have the right to scrutinize the records of government agencies, including HHSC. Notwithstanding the fact that we are a healthcare organization and subject to strict privacy regulations, there is no doubt that HHSC is obligated to be transparent within the confines of these regulations and consistent with chapter 92F, Hawaii Revised Statutes ("HRS").

HHSC strongly supports this bill as amended by the Senate Committee on Government Operations because HHSC has firsthand experience dealing with the few members of the public who have used 92F, HRS, to abuse and harass its employees. As just one example of HHSC's experience, I have attached the 21 page Memorandum of Opinion of the Office of Information Practices ("OIP") dated May 3, 2016 (the "Opinion") and three separate email strings from the three-month period November 2016 through January 2017, **all of which stem from the same event that occurred in February 2013**. I have no desire to single out any individual member of the public and so have taken the time to redact the identity of the requesters from the materials. I have not redacted any of the names of individuals who are employed by the State of Hawaii.

The second paragraph of the Opinion notes that it is based "solely upon the facts presented in Requesters' emails to OIP" and then proceeds to identify 30 pieces of correspondence (many with attachments) to and from the requesters to various agencies and individuals including OIP, 5 different HHSC employees, Representative Lowen, Senator Green, the University of Hawaii, and a private entity.

Under this bill, the onus will be on the agency to prove that it has responded to the request in compliance with the law. The time necessary to seek judicial review and the need to submit supporting evidence will certainly restrain agencies from using this provision as a tool to “blithely take[ ] away the public’s right of public access.” Civil Beat Testimony at 1.

Thank you for the opportunity to present this testimony.

DAVID Y. IGE
GOVERNOR

SHAN TSUTSUI
LIEUTENANT GOVERNOR

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CHERYL KAKAZU PARK
DIRECTOR

The Office of Information Practices (OIP) is authorized to issue decisions and advisory opinions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to HRS §§ 92F-27.5 and 92F-42, and chapter 2-73, Hawaii Administrative Rules (HAR). This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions.

MEMORANDUM OPINION

Requesters:
Entity: Alii Health Center
Date: May 3, 2016
Subject: Alii Health Center, LLC, is Not an "Agency" Subject to the UIPA (U RFO-P 13-4)

Requesters asked whether Alii Health Center, LLC (AHC), properly responded under Part III of the UIPA to 's request to amend his personal record maintained at AHC. In order to answer this question, the threshold question Requesters seek an opinion on is whether AHC is an agency subject to the UIPA.

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in Requesters' e-mails to OIP dated February 8, 11, 19, 20 (with attachments), 21 (with attachment), and 22 (with attachments), 2013; an e-mail from Requesters to OIP with attachments dated March 5, 2013; an e-mail from Requesters to OIP dated May 10, 2013; an e-mail from Requesters to OIP with attachments dated September 25, 2013; an e-mail from Requesters to OIP with attachment dated February 11, 2014; an e-mail from Requesters to OIP with attachment dated October 19, 2014; two e-mails from Requesters to OIP (one with attachments) dated February 24, 2015; e-mails from Requesters to OIP dated April 3, 10, and 20, 2016; an e-mail from Requesters with attachment to Hawaii Health Systems Corporation (HHSC) dated March 21, 2014; an e-mail with attachments from Requesters to Representative Nicole Lowen dated June 23, 2014; an e-mail from Requesters to Ms. Charla Ota, HHSC Acting General Counsel, dated July 20, 2014; an e-mail from Requesters to Mr. David Lassner, President, University of Hawaii System, dated August 6, 2014; a letter to OIP dated February 11, 2013, from Ms. Debra Sundberg, Executive Director of AHC, along with Articles of Incorporation of Alii Community Care (Alii) dba AHC (Alii's Articles); telephone conversations with Ms. Sundberg on April 21 and 25, 2016; a letter with attachments to OIP from Linda M. Rosen M.D., M.P.H., President of Alii's Board of Directors (Alii's Board) dated November 16, 2015; a letter to OIP from Bruce S. Anderson, Ph.D., President and Chief Executive Officer (PCEO) of HHSC, dated February 15, 2013, with an enclosed Memorandum;[1] an e-mail to OIP from Ms. Alice Hall, HHSC Acting PCEO, dated September 18, 2013; an e-mail to OIP dated July 16, 2015, from Ms. Ota; a telephone call with Ms. Ota on August 18, 2015; an e-mail with attachment from Mr. John Middleton, HHSC Chief Compliance and Privacy Officer, dated August 28, 2015; e-mails with attachments to OIP from Ms. Anne E. Lopez, HHSC Chief Operations Officer and General Counsel (HHSC's General Counsel), dated February 17 and 19, 2016; e-mails to OIP from HHSC's General Counsel dated March 10, and 19 (with attachment), 2016; e-mails from HHSC's General Counsel dated April 27 and 28, 2016; a letter to OIP from HHSC's General Counsel dated December 11, 2015; and letters to OIP from the Civil Beat Law Center for the Public Interest (Law Center)[2] dated November 18, 2015, and February 11, 2016.

Opinion

Using the standard set by the Hawaii Supreme Court in Olelo: The Corp. for Comm'ty Tel. v. Office of Info. Practices, 116 Haw. 337, 173 P.3d 484 (Haw. 2007) (Olelo), AHC does not meet the UIPA's definition of "agency" and is not subject to the UIPA. Accordingly, request to AHC to amend his personal record is not subject to the personal record correction provisions in Part III of the UIPA.

[1] Dr. Anderson's letter and Memorandum referred to AHC as "Alii Community Health Clinic" or "ACHC."

[2] The Law Center described itself as a "nonprofit organization dedicated primarily to promoting transparency and responsiveness in government for the benefit of the people of Hawaii." It is not a party to this request for an opinion. After reviewing certain documents in the file, the Law Center submitted its letters as it felt AHC misinterpreted both the standard for when a corporation qualifies as an agency under the UIPA, and Olelo: The Corp. for Comm'ty Tel. v. Office of Info. Practices, 116 Haw. 337, 173 P.3d 484 (Haw. 2007).

Statement of Reasons for Opinion

I. The Hawaii Supreme Court Has Ruled On How to Determine Whether an Entity is an "Agency" Under the UIPA

The threshold issue here, whether AHC is subject to the UIPA, hinges on whether AHC fits the UIPA's definition of "agency." The UIPA defines "agency" as "any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county[.]" HRS § 92F-3 (2012).

In the past, OIP has issued opinions on whether entities were agencies subject to the UIPA. For example, in OIP Opinion Letter Number 02-08, OIP determined that Olelo: The Corporation for Community Television (Olelo), which operates public, educational, and government (PEG) community access cable channels,[3] was an agency subject to the UIPA. In concluding that Olelo was an agency subject to the UIPA, OIP used its previously established "totality of circumstances" balancing test. OIP Op. Ltr. No. 02-08 at 2.

OIP's opinion was based in part on its finding that Olelo was created by the Department of Commerce and Consumer Affairs (DCCA) notwithstanding its status as a corporation; that franchise fees paid by Oceanic were public funds; that even though DCCA did not exercise "day-to-day control or management over the PEG Access Organizations," DCCA directly controlled Olelo through its power to appoint a majority of directors to the board; and that DCCA indirectly controlled Olelo through its authority to designate and fund PEG channels. OIP Op. Ltr. No. 02-08.

Olelo thereafter filed a lawsuit asking the First Circuit Court for declaratory judgment finding that it was not an agency under the UIPA. On appeal, the Hawaii Supreme Court rejected OIP's "totality of circumstances" balancing test. See Olelo, 116 Haw. at 337, 173 P.3d at 484. In Olelo, the Supreme Court first determined that:

> OIP's powers and duties include: providing guidance to the public and agencies as to when agency records should be opened to the public; monitoring agency compliance with UIPA; and adopting procedural rules related to the disclosure of agency records. Therefore, a matter such as balancing the public's interest in open government records

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[3] Operators of cable franchises are required to "designate three or more channels for public, educational, or governmental use[.]" Olelo, 116 Haw. at 340, 173 P.2d at 487, citing HRS § 440G–8.2. The operator in Olelo was Oceanic Time Warner Cable (Oceanic) and Olelo was the PEG operator.

against an individual's right to privacy under article I section 6 and section 7 of the Hawai'i Constitution is within OIP's designated area of expertise and is reviewed pursuant to the deferential abuse of discretion standard.

Conversely, **threshold issues that relate to the applicability of UIPA, such as the definition of "agency" or "government record," are not left to OIP's discretion.** Instead, they were explicitly defined by the legislature in HRS § 92F-3. *See Paul's Elec. Serv.*, 104 Hawai'i at 417, 91 P.3d at 499 "[A]dministrative agencies are created by the legislature, and the legislature determines the bounds of the agency's authority"); *Morgan v. Planning Dept., County of Kauai*, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004) ("'An administrative agency can only wield powers expressly or implicitly granted to it by statute.'") (quoting *TIG Ins. Co. v. Kauhane*, 101 Hawai'i 311, 327, 67 P.3d 810, 826 (App. 2003)).

Because the legislature has defined "agency" in UIPA, OIP's determination that 'Olelo was an agency subject to UIPA is not entitled to the deferential abuse of discretion standard on review. The circuit court thus correctly ruled that the issue of whether 'Olelo is an "agency," as defined by UIPA, is a question of law to be reviewed *de novo*.

Olelo, 116 Haw. at 346, 173 P.3d at 493 (bold added, other emphases in original) (footnote omitted).

Applying the *de novo* standard of review, the Olelo Court then strictly read the term "corporation" in the UIPA's definition of "agency" to mean one that is (1) owned by the state; or (2) operated by the state; or (3) managed by the state; or (4) owned, operated, or managed on behalf of the state. Olelo, 116 Haw. at 349-351, 173 P.3d at 496-498; OIP Op. Ltr. No. 09-01 at 3. The Court concluded that Olelo was not an agency subject to the UIPA because it was not owned, operated, or managed by or on behalf of the State and it was purposely created by the DCCA to operate "separately and independently from the State." Olelo, 116 Haw. at 350-351, 173 P.2d at 497-498. Keeping this clear directive from the Supreme Court in mind, as explained in detail below, OIP opines that, under the standard set forth in Olelo, AHC is not an agency under the UIPA's definition. OIP's conclusion here is reviewable *de novo* by the courts.[4] Because of the *de novo* standard of review, and

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[4] Prior submitting this request for an opinion, Requesters had corresponded with OIP regarding AHC and were informed in an e-mail from OIP dated February 8, 2013:

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because of the significant drain on OIP's resources that an opinion of this nature can cause, OIP may decline in the future to issue opinions on whether entities are agencies subject to the UIPA. Based on OIP's understanding of the Olelo decision, whether an entity is an "agency" subject to the UIPA is a question more appropriate for the courts to decide.

II. Facts

A. Hawaii Health Systems Corporation (HHSC)

HHSC is "a public body corporate and politic and an instrumentality and agency of the State." HRS § 323F-2 (2010). HHSC's mission is to "provide accessible, high quality, cost-effective services which address the healthcare needs of Hawaii's unique island communities."[5] It is undisputed that HHSC is an "agency" under the UIPA's definition, and is subject to the UIPA.[6]

HHSC's letter of February 15, 2013, explained it was legislatively created in 1996 to own and operate hospitals and long term care facilities[7] that were previously run by

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For your information, a quick internet search found the following statement "Alii Health is a subsidiary of Hawaii Health Systems Corp., the state health system. The center is a private 501(c)(3), with a separate governing board from Kona Community Hospital. Center officials work with their own board and the health center board." See: http://www.hawaii247.com/2012107/26/alii-health-center-blessing-in-keauhou-july-27/

Please note that the Hawaii Supreme Court has stated that threshold issues that relate to the applicability of the UIPA, such as the definition of "agency" are not left to OIP's discretion, and may be reviewed by a court de novo. See Olelo: The Corporation for Community Television v Office of Information Practices, 116 Hawaii 337, 346 (2007).

With the knowledge that an OIP opinion on the threshold issue of whether AHC is an agency is subject to *de novo* review by the courts, Requesters nonetheless sought to proceed with this opinion request.

5 See http://www.hhsc.org/about-us/mission-and-vision/default.aspx, accessed April 22, 2016.

6 Section 323F-6, HRS, requires that HHSC is subject to the UIPA, with some listed exceptions.

7 Because HHSC stated it was created to run long term care facilities, OIP

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the Department of Health (DOH), Division of Community Hospitals. HHSC owns Kona Community Hospital, the only hospital in the Kona area.

When HHSC was created, the Legislature gave it broad powers. Under section 323F-7(c)(1), HRS, HHSC and its regional system boards[8] have the power to "plan, operate, manage, and control the system of public health facilities and services[;]" and each regional system board is responsible for its own policies, procedures, and rules necessary or appropriate to plan, operate, manage, and control public health facilities within its own regional system consistent with HHSC policies. HHSC's powers include evaluating the need for additional health facilities and services, and "[p]roviding health and medical services for the public directly or by agreement or lease with any person, firm, or private or public corporation, partnership, or association through or in the health facilities of [HHSC] or regional system boards or otherwise[.]" HRS §§ 323F-7(c)(2), -(24) (2010).

HHSC and its regional boards have the power to enter into contracts for "the performance of its purposes and responsibilities," with other entities, whether operated on a for-profit or not-for-profit basis, "provided that the transaction furthers the public interest[.]" HRS § 323F-7(c)(3). HHSC and the regional boards may also enter into business relationships creating various types of nonprofit corporations, including those "to be controlled wholly by [HHSC], any regional system board, or jointly with others; . . . provided that any corporation, venture, or relationship entered into under this section furthers the public interest[.]" HRS § 323F-7(c)(4).

HHSC may also execute "instruments necessary or appropriate in the exercise of any powers of" HHSC or regional system boards, and may enter into contracts or

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inquired about the difference between these facilities and "assisted living facilities," which are discussed in section B., infra. Dr. Rosen's letter of November 16, 2015, sent in her capacity as Alii's Board President, explained that she knows from her position as HHSC's CEO that HHSC operates both skilled nursing and intermediate care facilities. Dr. Rosen did not specifically use the term "long term care facilities," so OIP presumes, based on her response, that skilled nursing facilities and intermediate care facilities are different levels of care provided by long term care facilities. A skilled nursing facility provides skilled nursing and related services to patients who need twenty-four hours of skilled nursing care on an extended basis and regular rehabilitation services. Hawaii Administrative Rules (HAR) § 11-94-2. An intermediate care facility provides care to persons referred by a physician, and who need 24-hour assistance with normal activities of daily living; need care from a licensed nursing personnel and paramedical personnel on a regular, long-term basis; and who do not need skilled nursing or paramedical care 24 hours a day. Id.

[8] "Regional system board" means "a community-based governing board of directors of a regional system of" HHSC. HRS § 323F-1 (2010).

agreements "necessary or appropriate in the exercise of the powers granted in" chapter 323F, HRS. HRS § 323F-7(c)(6), -(14). HHSC and the regional boards may provide health and medical services for the public directly or "by agreement or lease with any person, firm, or private or public corporation, partnership, or association through or in the health facilities of [HHSC] or regional system boards or otherwise[.]" HRS § 323F-7(c)(24).

B. Alii Community Care, Inc. (Alii)

To determine whether AHC is an "agency" under the UIPA, OIP must look at its parent company, Alii. As explained in section C, infra, in 2007, Alii created AHC to provide physician services in Kona.

Dr. Rosen's letter of November 16, 2015, asserted that section 323F-7(c)(4), HRS, gives HHSC authority to create nonprofit corporations. In 1999, before creating AHC, HHSC created Alii to build, own, and operate Roselani Place, a private assisted living facility on Maui, based on the Maui community's need for an assisted living facility.[9] Alii's Articles at Article IV state that Alii is a nonprofit corporation under Hawaii law created to own, operate, and manage assisted living facilities.

In order to qualify as tax-exempt under the federal Internal Revenue Code, Alii's Articles at Article IV and Alii's Amended Articles[10] at Article IV both state that Alii is not organized for profit and will not issue stock, and that its assets will not be distributed to Members, directors, officers, or individuals. Alii received a determination letter from the United States Department of the Treasury Internal Revenue Service evidencing its non-profit federal tax status under 26 U.S.C. § 501(c)(3). Alii is listed with DCCA's Business Registration Division (DCCA-BREG) as a "domestic nonprofit corporation" whose purpose is "to own, manage and operate assisted living facilities and free standing health centers/clinics in the State of Hawaii." DCCA-BREG's website lists Alii's agent as Dr. Rosen.[11] Alii's address on file with DCCA-BREG is the same as HHSC's in Honolulu.

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[9] An "assisted living facility" provides housing, health care services, and supportive services including 24-hour care to allow residents to maintain an independent assisted living lifestyle when they can no longer live on their own. HRS § 321-15.1 (2010); HAR § 11-90-2. It is important to note an assisted living facility is different from a long term care facility (see footnote 7, supra). HHSC was created, in part, to own and operate long term care facilities. HHSC does not run assisted living facilities, and Roselani Place was created for that purpose.

[10] As explained in section C., infra, Alii amended its Articles in 2007 in contemplation of AHC's creation.

[11] See http://cca.hawaii.gov/breg/, accessed April 22, 2016.

HHSC is Alii's sole Member.[12] Alii's Bylaws state in Section 3.2 that HHSC is the sole Member of Alii, and if the Member resigns or ceases to exist and there are no other Members, the vacancy shall be filled by HHSC's board of directors. However, section 3.1 of Alii's Bylaws states that any person interested in promoting, fostering, and furthering Alii's purposes is eligible for membership. Section 3.12 of Alii's Bylaws also states that any Member may be removed by vote, and any Member may withdraw at any time, and additional Members may be admitted by a majority vote of all Members.

Regarding Alii's Board, there is no legal requirement that its members be HHSC employees. Although there have been periods when all of Alii's Board members were also HHSC employees, that is not currently and has not always been the case. In 2004, there were two "community members" on Alii's Board who were not HHSC employees, as is evidenced by minutes of Alii's Board meeting of December 13, 2004.[13] Current Alii Board member Lance Segawa was an HHSC employee. He stopped working for HHSC at the beginning of 2016 but remains on the Board.

Minutes of Alii's Board meeting of October 17, 2013, indicate that the Board was seeking members who were not HHSC employees and that the Board voted to "increase the size of the Board of Directors to up to nine (9) members, with HHSC's five (5) regional CEOs and PCEO serving as ex-officio and designating two seats for community members[.]"[14] Alii explained that this change was necessary because of its difficulty in filling a sufficient number of Alii Board positions to allow it to conduct business on a regular basis. Because of high turnover in HHSC's management, and rather than continuing to wait for individuals to be nominated and elected to serve on the Board, the 2013 amendments allowed it to link certain

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12 "Member" is defined, among other things, as "Parliamentary law. One of the individuals of whom an organization or a deliberative assembly consists, and who enjoys the full rights of participation in the organization – including the rights of making, debating, and voting on motions – except to the extent that the organization reserves those rights to certain classes of membership." Black's Law Dictionary 1005 (8th ed. 1999). "Member" is also defined as "[o]ne who belongs to a group or organization." Webster's II New College Dictionary 699 (3rd ed. 2005).

13 Minutes of Alii's Board meetings were provided to OIP in a redacted form as provenance of the composition of Alii's Board. HHSC's General Counsel provided OIP with a declaration stating that the portions redacted contain information that is not related to the purpose for which the minutes for provided.

14 "PCEO" was not defined in the minutes. OIP understands a common use of this acronym is "President and Chief Executive Officer," which is how it is used elsewhere in this opinion.

HHSC positions to *ex officio* membership on the Board without having to conduct new elections.[15]

While the Board is Alii's overall governing body, the actual management and operation of the corporation rests with Alii's President and Chief Executive Officer (PCEO). Section 5.2 of Alii's Bylaws states that the President of Alii is the CEO, and Dr. Rosen is current President of Alii's Board. The President presides at all meetings of the Members, and in the absence of the Chairman of Alii's Board, or if there is no Chairman, the President shall preside at all meetings of Alii's Board. Section 5.2 also gives Alii's PCEO charge of the general management, supervision, and control of all property and business affairs of Alii, including delegating duties to managers, appointing department heads, and discharging all employees, as well as fixing their duties and compensation, under the supervision of Alii's Board.

Documents provided by Requesters indicate that the State of Hawaii's budget lists "Alii (HHSC)" under hospital care and as program "HTH213." Alii's assets and liabilities are consolidated with HHSC's for accounting purposes as shown in the consolidated financial statements posted on HHSC's website.[16] However, according to Alii's Articles at Article XV, Alii is solely liable for its debts.

C. Alii Health Center, LLC (AHC)

AHC was created in 2007, when a primary care physician was closing her practice in Kona, leaving about five thousand people without a physician. While recognizing the negative impact of the loss of the physician in Kona, HHSC did not directly act, as it asserted that physician practices are not a government function, have not been traditionally owned and operated by the State, and have not historically been provided by the government.

Instead, to support the needs of Kona patients, Alii created AHC to provide physician services. As shown in Alii's Board meeting minutes of April 12, 2007, Alii's Board discussed and voted to operate a clinic as part of Alii. AHC was

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[15] "*Ex officio*" is defined as "[b]y virtue or because of an office; by virtue of the authority implied by office." Black's Law Dictionary 616 (8th ed. 1999).

[16] See http://www.hhsc.org/about-us/hhsc-reports/default.aspx, accessed April 22, 2016. The Law Center cited to the Government Accounting Standards Board (GASB) (see http://www.gasb.org/jsp/GASB/Page/GASBLandingPage&cid=1175804799024, accessed April 22, 2016), an "independent organization that establishes and improves standards of accounting and financial reporting for U.S. state and local governments," in support of its statement that government accounting standards do not require consolidated financial statements unless the primary government unit is virtually inseparable from the component unit. OIP was not provided with information as to whether HHSC follows GASB guidelines, but nonetheless finds this assertion not relevant based on the standard set forth in Olelo.

established to provide private physician services, where patients, normally via their insurance, pay for physician services. AHC was not established as a government sponsored clinic that provides free or reduced-cost services. Alii's Board also voted at that meeting to amend Alii's Articles (Alii's Amended Articles) to allow for creation of AHC, and to expand its mission to provide physician care in Kona. The same board minutes also show that Alii's Board intended that AHC would be independent of Kona Community Hospital (an HHSC hospital), with "separate payroll, benefits, and other services." Thereafter, Alii created AHC and took over the departing physician's practice. Alii described AHC as a registered trade name[17] owned by Alii. AHC now includes about ten physicians.

AHC's website states "Alii Health Center was formed in 2007, as a private non-profit 501 (c)(3) [sic] organization and an affiliate of the Hawaii Health Systems Corporation."[18] HHSC asserted that use of the term "affiliate" by HHSC and AHC signifies that AHC is a "related entity," but is not owned or controlled by HHSC. While HHSC operates hospitals and long term care facilities, AHC provides private physician services. HHSC asserted that Alii and AHC do not operate on behalf of HHSC. Rather, Alii, the private corporation, owns, operates, and manages AHC; Alii's Board oversees AHC and its employees; and all of AHC's employees and contractors work for Alii, not HHSC.

Requesters' documents show that the first pages of HHSC's cover letters to the Governor and Legislature for some of HHSC's annual reports include AHC as an HHSC facility, and AHC along with Roselani Place are listed in certain HHSC annual reports as being HHSC facilities. AHC receives the majority of its funding from patient revenues and insurance reimbursements, but HHSC also provides about ten percent of AHC's funding, which is derived from patient revenues of Kona Community Hospital, to cover AHC's deficits.[19] AHC's finances are discussed in meetings by HHSC's West Hawaii Regional Board.

AHC's Executive Director explained that when she was a candidate for hire for the position, she was interviewed in person in Kona by AHC physicians and staff, along

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[17] "Tradename" is defined, among other things, as "the name under which a business operates." Black's Law Dictionary 1533 (8th ed. 1999). "Trade name" is also defined as the "name under which a business firm operates." Webster's II New College Dictionary 1195 (3rd ed. 2005).

[18] See http://aliihealth.com/index.htm, accessed April 22, 2016.

[19] HHSC asserted that, due to the fact that physicians were needed in the Kona community in order for its hospital to function, there is a public purpose in its support of AHC which amounts to a legitimate use of HHSC funds. OIP understands that chapter 42F, HRS (which covers grants from the Legislature), and the State Procurement Code, at section 103F-403, HRS (which governs purchase of health and human services), allow the State to provide funding to AHC, as it could for other providers.

with HHSC's Regional Chief Executive Officer (Regional CEO), who worked out of Kona Community Hospital and acted as liaison for Alii's Board during the hiring process. The Regional CEO is also an Alii Board member. One other Alii Board member participated by video conference in the Executive Director's employment interview. Since being hired, the Executive Director's job performance is conducted by the Regional CEO, based on input from AHC physicians and staff. Like the other AHC employees, the Executive Director is an employee of Alii, not the State.

According to AHC's Executive Director, all day-to-day operations and management of AHC rests with her. AHC's Executive Director's business contact with the Alii Board is largely limited to quarterly video conferenced Board meetings, for which she provides financial and business reports. The Executive Director stated that she has never met in person any of Alii's Board members, except for the Regional CEO in Kona. The Executive Director further asserted that she rarely, and certainly not daily, interacts with the PCEO or any other Alii Board members and that she does not need to obtain the PCEO's or Board's prior approval for "99.5%" of her decisions. AHC's litigation and risk management issues are the only matters turned over to Alii to centrally handle.[20] AHC's Executive Director conducts all other day-to-day management and operation of AHC, including hiring and firing decisions, without the Board's prior input, review, or approval. The Executive Director makes purchases for AHC, which are not subject to the State Procurement Code. Human resources, accounting, purchasing, and bill payment are outsourced by AHC to local companies in Kona, with oversight by the Executive Director.

D. Threshold Issue

On December 6, 2012, Requesters submitted to AHC a request to amend personal records, which they do not believe was properly responded to. Requesters asked OIP whether AHC violated the UIPA.[21] Before answering that question, the threshold issue addressed by this opinion is whether AHC is subject to the UIPA. Requesters essentially argue that AHC is an agency subject to the UIPA because of its relationship with HHSC, while HHSC and AHC dispute that AHC is subject to the UIPA.

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20 HHSC's General Counsel informed OIP that she does not advise Alii or AHC, and minutes of Alii's Board meeting of June 12, 2007, corroborate that a private attorney was the "legal resource" to respond to questions about AHC. However because Requestors' complaints about AHC became a risk management issue, the matter was eventually referred to HHSC's Corporate Director of Risk Management, Mr. Vincent A. Rhodes.

21 Under the UIPA, a person requesting records about himself (i.e., a personal record requester) has the right to request to an agency maintaining his personal records that the personal records be corrected or amended if the personal record requester believes they contain errors; and the agency must respond within the statutory time limits. See HRS §§ 92F-24; -25 (2012).

III. Applying the Olelo Standard to AHC

To determine whether AHC is subject to the UIPA, we must look at the UIPA's definition of "agency" in section 92F-3, HRS. Specifically, it must be determined whether AHC is a "corporation" that is (1) owned by the state; or (2) operated by the state; or (3) managed by the state; or (4) owned, operated, or managed on behalf of the state. Olelo, 116 Haw. at 349-351, 173 P.3d at 496-498.[22]

In an attempt to show that AHC's parent, Alii, is actually owned by HHSC and thus by the State, the Law Center cited to Supreme Court's "corporate alter ego analysis"[23] in Robert's Haw. Sch. Bus. Inc., v. Laupahoehoe Transp. Co., 91 Haw. 224, 242, 982 P. 2d 853, 871 (1999), superseded on other grounds by HRS § 480-2 (2008). OIP understands, however, that piercing of a corporate veil is done in rare circumstances in cases of wrongdoing. There is no allegation of wrongdoing here as Requesters merely seek a determination as to whether AHC is subject to the UIPA because would like AHC to amend personal records about him maintained at AHC that he believes are not accurate. Furthermore, it is for the courts, not OIP, to decide alter ego issues. An alter ego analysis by OIP in this case is inappropriate in light of the Supreme Court's straightforward standard for determining whether an entity is an "agency" under the UIPA. For that reason, OIP declines to address in detail the Law Center's arguments on piercing the corporate veil.

A. AHC is Not Owned by HHSC

OIP looks to the Olelo opinion for instruction on determining whether AHC is "owned" by HHSC, which is a State agency. The word "owned" is not defined in the UIPA, so the Supreme Court in Olelo looked to dictionary definitions "as extrinsic aids to determine its meaning." Olelo, 116 Haw. at 349, 173 P.3d at 496. The Court used Black's Law Dictionary 1105 (6th ed. 1990), which defines "own" as "[t]o have good legal title; to hold as property; to have a legal or rightful title to; to have; to possess;" and Webster's Third New International Dictionary 1612 (1993), which defines "own" as "to have or hold as property or appurtenance: have a rightful title to, whether legal or natural."

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[22] The UIPA's full definition of "agency" is on page 3, supra.

[23] "Alter ego" is defined as "[a] corporation used by an individual in conducting personal business, the result being that a court may impose liability on the individual by piercing the corporate veil when fraud has been perpetrated on someone dealing with the corporation." Black's Law Dictionary 86 (8th ed. 1999). "Piercing the corporate veil" is defined as "the judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." Black's Law Dictionary at 1184.

To determine whether AHC is "owned" by the State, OIP must look at whether AHC's parent company, Alii, is "owned" by the State. In Olelo, all of Olelo's equipment and leases were in Olelo's name, and Olelo retained the intellectual property rights to its programming, logo, and other material it developed. Olelo, 116 Haw. at 341, 173 P.2d at 488. The Supreme Court found that, despite the potential for Olelo to be required in the future to relinquish facilities and equipment acquired with PEG fees provided by DCCA, DCCA did not have any present rights in Olelo's property, and Olelo was the sole title owner of its equipment and the lessee of the its offices and facilities. Id., 116 Haw at 349, 173 P.2d at 496.

The Law Center argued that HHSC, through its senior leadership, has "absolute and present control over all [Alii's] property." However, like the DCCA with Olelo, HHSC created Alii, and apparently played a role in creating AHC. But while HHSC is clearly a state agency, Alii was separately established as a private nonprofit corporation. AHC is a wholly owned subsidiary of Alii. Despite Alii's and AHC's dealings with HHSC, and AHC's partial funding by HHSC, Alii and AHC are separate legal entities and HHSC has no present rights to AHC's assets. In the event of Alii's dissolution, Alii's Articles at Article XIII require that any remaining assets be distributed to a nonprofit fund or foundation or corporation, not to HHSC. Only Alii, not HHSC, is listed as the sole title owner of equipment and as the lessee of AHC's offices and facilities. Besides being the sole owner of AHC's assets, Alii is also solely liable for its own debts according to Article XV.

AHC is not supported primarily by HHSC or taxpayer funds. The majority of AHC's funds come from fees paid by patients for its services, and ten percent comes from HHSC's special funds derived from Kona Community Hospital's patient revenues. The special funds are provided by HHSC to assist in covering AHC's operating shortfall in providing physician services, and HHSC does not receive in return any equitable interest in AHC's assets or other benefit that OIP is aware of.[24] Under these circumstances, OIP cannot conclude that HHSC's provision of ten percent of AHC's funding constitutes a purchase of any equitable interest in AHC that would result in any ownership interest of AHC by the State. Despite the State's involvement through HHSC in the creation of Alii, and HHSC's ongoing interaction with Alii and AHC, the facts show that Alii, and later AHC, were established with the intent that they be private corporations with non-profit tax status and as legal entities distinct from HHSC. Further, Alii is listed as the sole owner of all assets and Alii is solely liable for its own debts. Based on these facts, it is clear that HHSC does not have legal, natural, or rightful title to AHC, does not possess AHC, does not hold AHC as property, and does not have any present interest in AHC's assets. Using the standard in Olelo, OIP is thus of the opinion that HHSC does not own AHC.

[24] Olelo was not directly supported by taxpayer funds. Its funds came from cable provider Oceanic through access fees paid by viewers. Olelo, 116 Haw. at 348, 173 P.3d at 495.

B. AHC is Not Operated by HHSC

The Supreme Court in Olelo again used dictionary definitions for the term "operate," which is not defined in the UIPA. "Operate" means "[t]o perform a function, or operation, or produce an effect," and "to manage and put or keep in operation whether with personal effort or not." Olelo, 116 Haw. at 349-350, 173 P.2d at 496-497, citing Black's Law Dictionary at 1091, and Webster's Third New International Dictionary at 1580–81. The Court found that Olelo was not operated by DCCA because DCCA did not perform the function of providing PEG access and because it did not manage or control Olelo's day-to-day operations. Id., 116 Haw. at 350, 173 P.2d at 497. The Court also noted that Olelo's employees were not State employees. Id.

The facts here show that HHSC is Alii's sole Member and Dr. Rosen, who is HHSC's CEO, is also President of Alii's Board and CEO of Alii. Nevertheless, the facts also show a clear intent by HHSC to establish Alii as a separate, private non-profit corporation with employees who are not HHSC or State employees.. Alii contracts with a management company to operate its assisted living subsidiary, Roselani Place, and the employees of both Roselani Place and Alii are not HHSC or State employees.

As was the case in Olelo, where the Court found DCCA did not control Olelo's day-to-day operations, there is no evidence here of management or control of day-to-day operations of either Alii or AHC by HHSC or the State. Olelo, 116 Haw. at 349-350, 173 P.3d at 496-497. Despite the involvement of HHSC employees as *ex officio* members of the Alii Board, AHC's Executive Director has never met in person the PCEO (Dr. Rosen) or any other Alii Board member except for the Regional CEO in Kona, and she does not consult with the Alii Board to carry on AHC's day-to-day operations. Instead, the evidence shows that the AHC's Executive Director makes the final decisions on day-to-day running of AHC, including all hiring and firing decisions, and AHC's purchases are not subject to the State Procurement Code. The provision of private physician practices is not an HHSC or State function, and AHC's employees are not HHSC or State employees. Based on the Olelo standard, OIP opines that AHC is not operated by the State through HHSC.

C. AHC is Not Managed by HHSC

The term "managed," is not defined in the UIPA, so the Olelo Court cited the following dictionary definitions:

> [t]o control and direct, to administer, to take charge of. To conduct; to carry on the concerns of a business or establishment. Generally applied to affairs that are somewhat complicated and that involve skill and judgment.

> Black's Law Dictionary at 960. *Webster's* defines "manage," as it relates to an entity, as "to direct or carry on business or affairs." *Webster's Third New International Dictionary* at 1372.

Olelo, 116 Haw. at 350, 173 P.3d at 497. The undisputed facts in Olelo showed that the State (DCCA) did not control, direct, administer, take charge of, or exercise skill or judgment over Olelo's activities or business affairs. Id.

Alii's Bylaws state in Section 3.2 that HHSC is the sole Member of Alii, and if the Member resigns or ceases to exist and there are no other Members, the vacancy shall be filled by HHSC's board of directors. However, section 3.1 of Alii's Bylaws states that any person interested in promoting, fostering, and furthering Alii's purposes is eligible for membership. Section 3.12 of Alii's Bylaws states that any Member may be removed by vote, and any Member may withdraw at any time, and additional Members may be admitted by a majority vote of all Members. Alii's Bylaws do not limit membership to HHSC.

The Law Center argued that HHSC does not have express statutory authority to create a nonprofit corporation over which it has no control, and cited to section 323F-7(c)(4)(A), HRS,[25] in support of its position. HHSC rebutted this argument, citing to section 323F-7(c)(4)(B), HRS, which allows HHSC to establish, subscribe to, and own stock in business corporations individually or jointly with others. HHSC asserted that the Legislature intended to authorize it to enter into arrangements with private entities or to create private entities, which is what it did when it created Alii. OIP does not have jurisdiction[26] to opine whether HHSC's statutory powers include or exclude the ability to create wholly independent nonprofit corporations, but section 323F-7(c)(4)(B), HRS, does not appear to restrict HHSC to "establish" only corporations that it does control to some degree.

Requesters noted that the Chair of Alii's Board (AHC's parent corporation) is also the CEO of HHSC.[27] Similarly, The Law Center argued that HHSC "wholly

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[25] Section 323F-7(c)(4)(A), HRS, states that, notwithstanding any other law to the contrary, HHSC and any regional system board has the power to conduct activities and enter into business relationships as deemed necessary or appropriate, including but not limited to "[c]reating nonprofit corporations, including but not limited to charitable fund-raising foundations, to be controlled wholly by the corporation, any regional system board, or jointly with others[.]"

[26] OIP's powers and duties are set forth in sections 92-1.5 and 92F-42, HRS.

[27] Requesters filed a complaint with Dr. Rosen's predecessor, Dr. Anderson, against AHC's Executive Director after a contractual relationship with Requesters was terminated by AHC. Dr. Anderson's response dated February 22, 2013, corroborated the

(continued on next page)

controls" Alii, because it controls the Members, Alii's Board, and the officers of Alii, and noted that Alii's Bylaws give its Members sole authority to elect and remove Alii Board members and to inspect Alii's books and records of account and meeting minutes.

The Law Center acknowledged, however, that in Olelo, DCCA had authority to appoint and remove six of nine Olelo directors, but in practice it merely approved names submitted to it by Olelo. Specifically, DCCA's director had the authority to appoint six of Olelo's nine Board members, with one of DCCA's appointee positions reserved for a person elected by PEG users and approved by the DCCA director. Olelo, 116 Haw. at 341, 173 P.2d at 488. Under Olelo's bylaws in effect at that time, the Olelo board had to furnish DCCA's director and Oceanic with a slate of recommendations to fill board vacancies. Id., 116 Haw. at 341, 173 P.2d at 488. If DCCA's director or Oceanic chose to appoint an individual not on the slate, they had to first consult with Olelo's board. Id. The Court found that any control of Olelo by the State through its appointment powers was mitigated by the involvement of Olelo's board in the selection of new appointees. Id., 116 Haw. at 350, 173 P.2d at 497. Thus, the State's right to appoint the majority of the board in Olelo was not dispositive of the management issue.

The Law Center also cited to Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P. 2d 564, (Silver), in support of its position that "Alii is a State instrumentality subject to the UIPA." In Silver, a physician successfully sued a private hospital and others for conspiracy, defamation, and antitrust violations after his privileges were not renewed by the hospital board. The Law Center cited to the Silver Court's statement that:

> [t]he principal distinguishing feature of a hospital that is characterized as being private is that it as an entity has the power to manage its own affairs and is not subject to the direct control of a governmental agency. Such a private identity is usually evidenced by the fact that under the hospital's charter or corporate powers granted, it has the right to elect its own board of officers and directors.

Silver, 53 Haw. at 481, 497 P. 2d at 569.

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Executive Director's decision and was written on stationery that reads "Alii Community Care, Inc.," at the top, lists HHSC's address at the bottom, and was mailed in an HHSC envelope. Requesters alleged that Dr. Anderson's letter shows that he used HHSC time to perform work in his capacity as Alii's PCEO, which they believe showed that HHSC essentially runs AHC. OIP disagrees. The fact HHSC's CEO and Alii's PCEO are the same person, and Dr. Anderson responded to Requestors' inquiry regarding a risk management issue, does not, even with the other facts presented, indicate operation or management of AHC by HHSC under the Olelo standard.

HHSC's letter of December 11, 2015, countered that the Law Center failed to state why Silver, which was decided 24 years before HHSC's creation, is relevant. OIP agrees that Silver is not on point. Silver involved a hospital, not a clinic, and hospitals provide much greater equipment and services and are subject to more intensive government licensing, accreditation, and certificate of need procedures. Additionally, Silver involved a claim for various tort and antitrust violations not found in the present case. If anything, Silver supports HHSC's and Alii's positions because it noted that one identifying factor of a private hospital, as opposed to a public one, is its right to elect its own board officers and directors, which is a right that Alii exercises under Alii's Articles at Article 5.

Alii's Bylaws do not require HHSC to maintain the majority of Alii's Board's seats. The Bylaws at Section 4.2 state that Alii's Board shall, at each annual meeting, fix the number of Board members for the ensuing year. Alii's Board has voted to admit new Board members. Minutes of Alii's Board meeting of October 17, 2013, indicate that the Board was seeking members who were not HHSC employees and that the Board voted to "increase the size of the Board of Directors to up to nine (9) members, with HHSC's five (5) regional CEOs and PCEO serving as ex-officio and designating two seats for community members[.]" Alii explained that this change was necessary because of its difficulty in filling a sufficient number of board positions to allow it to conduct business on a regular basis. Because of high turnover in HHSC's management, and rather than continuing to wait for individuals to be nominated and elected to serve on Alii's Board, the 2013 amendments allowed it to link certain HHSC positions to *ex officio* membership on the Alii Board without having to conduct new elections.

Requesters and the Law Center essentially argued that HHSC controls Alii and thus AHC because all Alii's Board members are HHSC employees and are serving on Alii's Board in their capacities as state employees.[28] However, not all of Alii's Board members have been HHSC employees. In 2004, there were two "community members" on Alii's Board who were not HHSC employees, as is evidenced by

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[28] If HHSC employees are serving on Alii's Board in their personal capacities, the Law Center contended it would raise issues under the Hawaii State Ethics Code, chapter 84, HRS (Ethics Code), and referred to the State Ethics Commission's (SEC) Resolution of Charge 2015-3. The Ethics Code is inapplicable to this case, and the facts of Resolution of Charge 2015-3 are different from those here. HHSC provided a copy of an advice letter it received from the SEC (Advice Letter), which directly discussed the ethical issues involved when HHSC employees sit on Alii's Board. It concluded that the Ethics Code did not prohibit an HHSC employee from using State time and resources to sit on Alii's Board. The Advice Letter did not address whether HHSC employees were required to serve on the Alii Board as part of their State duties. HHSC asserted that the fact that Alii's Articles at Article X indemnify its directors or officers made a party to a proceeding by the fact that they are Alii Board members is evidence at Alii Board members serve in their personal capacities. HHSC claims that if they were serving in their capacities as State employees, they would be protected by the State's sovereign immunity, which they are not.

minutes of Alii's Board meeting of December 13, 2004. A current Alii Board member was an HHSC employee, but stopped working for HHSC at the beginning of 2016 and remains on the Board. A majority of the Alii's Board's membership of nine currently consists of *ex officio* directors who are HHSC employees, however, Alii's Articles and Bylaws and its past practices make clear that Alii's Board is empowered to change the number and qualifications of its Board members.

In Olelo, the Court rejected OIP's conclusion that the DCCA directly controlled Olelo through its power to appoint a majority of directors to the board when it was clear that DCCA did not exercise "day-to-day control or management over the PEG Access Organizations." OIP Op. Ltr. No. 02-08 at 14-17; Olelo, 116 Haw. at 350, 173 P.3d at 498. Here, Alii's Articles, Bylaws, and past and current practices show that, while the HHSC has the power to appoint the majority of the directors to Alii's Board as well as the PCEO, the day-to-day management of AHC's private physician practice is carried out by AHC's Executive Director and her management team employed by AHC, who are Alii employees and are not HHSC or State employees.

Although two of Alii's Board members were involved in the initial hiring of AHC's Executive Director, Alii does not control, direct, or carry on the business of AHC. Since being hired, the Executive Director's business contacts with the Alii Board have been largely limited to video conferenced board meetings, for which she provides financial and business reports. The Executive Director has no daily interaction with Alii's PCEO or any other Board members, and has only met one Board member in person. Although the Executive Director's job evaluations are conducted by an Alii Board member, significant input is provided by AHC physicians and staff who, unlike Alii's Board, actually work with the Executive Director on a day-to-day basis.

Despite the majority control of Alii's Board by HHSC's *ex officio* members, there is no evidence that HHSC or the Alii Board actually exercise control, direction, or administration of AHC's activities or business affairs. To the contrary, AHC's letter to OIP dated February 11, 2013, asserted that it is managed by its own employees and governed by a corporate board. While the Alii Board reviews AHC's monthly financial and business reports, the evidence is clear that the actual administration and management of the private physicians' services being provided by AHC have been left solely to the skill and judgment of AHC's Executive Director, who is not an HHSC or State employee. With the exception of litigation and risk management issues that are centrally handled by Alii, AHC's Executive Director directs and controls AHC's business decisions and carries on AHC's affairs without having to obtain the approval of Alii's PCEO or Board. Consequently, OIP opines that HHSC does not manage AHC under the standard set forth in Olelo.

D. AHC is Not Owned, Operated, or Managed "on Behalf of" the State

The Supreme Court noted that the phrase "on behalf of" is not defined in the UIPA and referred to the dictionary definition "on behalf of" as "in the interest of: *as the representative of*: for the benefit of." Olelo, 116 Haw. at 350, 173 P.2d at 497 (citing Webster's Third New International Dictionary at 198) (alteration in original). The Court stated that the definitional phrase most relevant to whether Olelo operates "on behalf of" the State is whether Olelo is a "representative of" the State. Id. "Representative" is defined as an "agent, deputy, *substitute*, or delegate usually being invested with the authority of the principal." Id., (citing Webster's Third New International Dictionary at 1926–27) (alteration in original). The Court then stated that "[i]t would thus appear that an entity is a representative of the State when it substitutes for the state in the performance of a governmental function." Id. In Olelo's procedural history, the circuit court found that Olelo's activities are not a required function of any government agency. Id., 116 Haw. at 350, 173 P.2d at 497. And, the Supreme Court found that DCCA purposely created PEG facilitators like Olelo with the intention that they would operate "separately and independently from the State." Id., at 351, 498.

With respect to AHC, OIP must look at whether it is substituting for the State, i.e., HHSC, in the performance of a governmental function. HHSC was created to own and operate hospitals and long term care facilities. As set forth in section I., supra, HHSC may enter into business relationships creating various types of nonprofit corporations, including those "to be controlled wholly by [HHSC], any regional system board, or jointly with others; . . . provided that any corporation, venture, or relationship entered into under this section furthers the public interest[.]" HRS § 323F-7(c)(4). HHSC's powers also include evaluating the need for new health facilities and services, and providing health and medical services for the public by agreement with another entity. HRS §§ 323F-7(c)(2), -(24).

HHSC does not own or operate assisted living facilities, so it created Alii to run Roselani Place, a private assisted living facility. Later, Alii created AHC to take over a private physician practice.[29] OIP takes notice of the fact, as asserted by HHSC, that physician services do not constitute a government function nor have they historically been provided by the government.

The Law Center argued that "[e]very indicia of ownership, operation, and management for Alii points to HHSC[.]" Like the DCCA with Olelo, HHSC played a large role in creating AHC. However, because provision of physician services is not a traditional State function and is not a required function of HHSC, OIP does not

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[29] For work performed by AHC physicians at Kona Community Hospital, such as taking emergency room calls, AHC and KCH have a contract whereby KCH pays for the physicians' services.

believe AHC, as a provider of physician services, is substituting for the State in the performance of a governmental function. AHC is not owned, operated, or managed on behalf of the State, and, as such, is not an "agency" under the UIPA. OIP opines that, despite the level of interaction between HHSC and AHC, AHC does not fit the UIPA's definition of "agency" under the standard set in Olelo. OIP's understanding of Olelo is that hybrid entities such as Olelo and AHC are not clearly subject to the UIPA.[30]

IV. Part III of the UIPA Does Not Apply to [redacted] Request to Amend Personal Records Maintained by AHC

Because OIP has concluded that AHC is not an "agency" under the UIPA, it need not address Requesters' second issue, whether [redacted]s request to AHC to amend his personal record was in compliance with the UIPA.

Right to Bring Suit[31]

Requester is entitled to seek assistance directly from the courts after Requester has exhausted the administrative remedies set forth in section 92F-23, HRS. 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).

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).

If the court finds that the agency knowingly or intentionally violated a provision under Part III 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 the requester when it finds the charges brought against the agency were frivolous. HRS § 92F-27(e).

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

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[30] The Olelo Court also noted that there have been cases in which entities were found to be "state actors" for one purpose are "not necessarily 'agencies' for purposes" of the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. Olelo, 116 Haw. at 348, 173 P.3d at 495.

[31] In an e-mail dated July 28, 2015, Requesters asked "[a]re we understanding that we cannot appeal an OIP opinion?" This section responds to Requesters' e-mail. OIP's Director has the discretion to reconsider any final opinion rendered for a request for opinion file based on a change in the law, a change in the facts, or other compelling circumstances.

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. However, the Supreme Court has stated that it will review OIP opinions on whether an entity is an "agency," as defined by UIPA *de novo* as this is a question of law. Olelo, 116 Haw. at 346, 173 P.3d at 493.

This letter also serves as notice that OIP is not representing anyone in this request for opinion. OIP's role herein is as a neutral third party.

OFFICE OF INFORMATION PRACTICES

Carlotta Amerino
Staff Attorney

APPROVED:

Cheryl Kakazu Park
Director

Anne E Lopez

From:
Sent: Friday, December 16, 2016 3:12 PM
To: com; Anne E Lopez
Cc: Jay E. Kreuzer; Gino Amar; Josh Green, M.D.; 'OIP'; Ginny Pressler; LAO.auditors@hawaii.gov; Linda Rosen
Subject: Re: 2nd request Re: Request for Consideration for the Safety of the General Public and the completion of the Records Request KCH and Kohala Hospital

-------- Original message --------
From
Date: 12/09/2016 9:06 AM (GMT-10:00)
To Anne E Lopez <aelopez@hhsc.org>
Cc "Jay E. Kreuzer" <jkreuzer@hhsc.org>,Gino Amar <ginoa@hhsc.org>,"Josh Green, M.D." <sengreen@capitol.hawaii.gov>,'OIP' <oip@hawaii.gov>,Ginny Pressler <ginny.pressler@doh.hawaii.gov>,LAO.auditors@hawaii.gov,Linda Rosen <lrosen@hhsc.org>
Subject Re: 2nd request Re: Request for Consideration for the Safety of the General Public and the completion of the Records Request KCH and Kohala Hospital

---

From:
To: Anne E Lopez <aelopez@hhsc.org>
Cc: Jay E. Kreuzer <jkreuzer@hhsc.org>; Gino Amar <ginoa@hhsc.org>; "Josh Green, M.D." <sengreen@capitol.hawaii.gov>; 'OIP' <oip@hawaii.gov>; Ginny Pressler <ginny.pressler@doh.hawaii.gov>; "LAO.auditors@hawaii.gov" <LAO.auditors@hawaii.gov>; Linda Rosen <lrosen@hhsc.org>
Sent: Wednesday, December 7, 2016 9:03 AM
Subject: 2nd request Re: Request for Consideration for the Safety of the General Public and the completion of the Records Request KCH and Kohala Hospital

Hi Anne,

Once again, during our half hour visit to the State Capitol, last week, we had the opportunity to run into Senator Josh Green. We are requesting that you respond to our November 26th email directly below because Senator Green, once again, kicked this important issue about Kohala Hospital, and the surgery centers, to the curb. Could you please address the highlighted portion of our letter?

Thank you,

From:
To: Anne E Lopez <aelopez@hhsc.org>
Cc: Jay E. Kreuzer <jkreuzer@hhsc.org>; Gino Amar <ginoa@hhsc.org>; "Josh Green, M.D." <sengreen@capitol.hawaii.gov>; 'OIP' <oip@hawaii.gov>; Ginny Pressler <ginny.pressler@doh.hawaii.gov>; "LAO.auditors@hawaii.gov" <LAO.auditors@hawaii.gov>; Linda Rosen <lrosen@hhsc.org>
Sent: Saturday, November 26, 2016 12:47 PM
Subject: Re: Request for Consideration for the Safety of the General Public and the completion of the Records Request KCH and Kohala Hospital

November 26, 2016

Anne E Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel

Re: Request for Consideration for the Safety of the General Public and the completion of the Records Request KCH and Kohala Hospital

Aloha Anne,

Thank you very much for your response and for not defending the actions of former HHSC employees and Director Park. Your response directly below prompted us to review communications we received from Les Kondo, as the former Executive Director of the Hawaii State Ethics Commission. Because former state employees can be held accountable for ethics violations, we will be filing three of them.

Also, are you and Dr. Rosen aware that Kohala Hospital, and possibly others, have not been inspected in accordance with state licensing laws and they are not eligible for the Joint Commission to accredit? Even though Mr. Ridley believes that just renewing licenses is good enough, as members of the public, we disagree. Unless a licensed state inspector, inspects these facilities every two years, they may be jeopardizing the safety of the general public. This is why we requested Senator Green to get involved. Could you and Dr. Rosen please consider joining our "bandwagon," on behalf of the general public?

Again, thank you for your honesty and thank you for fulfilling our records requests to Mr. Kreuzer and Mr. Amar.

Mahalo,

From: Anne E Lopez <aelopez@hhsc.org>
To: ...om>
Cc: Jay E. Kreuzer <jkreuzer@hhsc.org>; Gino Amar <ginoa@hhsc.org>; "Josh Green, M.D." <sengreen@capitol.hawaii.gov>; 'OIP' <oip@hawaii.gov>; Ginny Pressler <ginny.pressler@doh.hawaii.gov>
Sent: Saturday, November 26, 2016 5:18 AM
Subject: Re: Records Request KCH and Kohala Hospital

Good Morning

I appreciate your explanation and understand your frustration. I can only be responsible for your experience in my shop under my watch and I recognize and accept that I am fully accountable to the public for our actions. It is for this reason that I find it helpful to streamline UIPA requests through my office.

I believe that we have fulfilled your requests to HHSC to date. If that is not the case please let me know.

Regards,

Anne

-------- Original Message --------

Subject: Re: Records Request KCH and Kohala Hospital

From.

Date: Nov 25, 2016, 7:26 PM

To: Anne E Lopez <aelopez@hhsc.org>

November 25, 2016

Anne E Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel

Re: Records Request KCH and Kohala Hospital

Aloha Anne,

We hope you also enjoyed your Thanksgiving and thank you for your email today.

This is the point where we usually apologize, however, instead, we would like to provide you with all the unfortunate communications we had to endure from Alice Hall, HHSC, her ex-husband, Vincent Rhodes, HHSC and Director Park, OIP, for over 6 months. The person that told us, that all of our communications about being denied access to AHC were to be directed to Ms. Hall and Mr. Rhodes, HHSC, was Executive Director, Debra Sundberg, AHC. (attachments) The ironic thing about Mr. Rhodes, he got paid over $78,000, with tax dollars, plus vacation, for only six months of work at HHSC simply to harass us. If you get a chance, please check his work product for those months, as we were it.

Our use of the word delusion, stems from our frame of mind, four years ago, when we thought the system, and then the government, would take care of the retaliation we faced from HHSC and AHC. Maybe our meeting with Special Agent Michael Rotti today, will give us closure.

However, with all due respect to you, you did not fly from Kona to Oahu, rent a car and drive to Kapolei to the OHCA office and you were not in that office last Friday, to witness how we were treated, even though we had an appointment and a right to inspect records under the UIPA. Mr. Ridley had one goal. To continue Vincent Rhodes's work, so we do apologize to you, if you were offended. But we do not apologize for our use of the word as far as Mr. Ridley. It was not our intent to have you instruct Mr. Ridley on how to do his job. What we were trying to imply, was that Mr. Ridley used your involvement to deny us the right to inspect and we thought you had a right to know. Further, when we make this same request to inspect, along with Ka'u Hospital, we wanted Mr. Ridley to understand, your involvement does not change our right to inspect.

Sincerely,

attachments

From: Anne E Lopez <aelopez@hhsc.org>
To: "
Cc: Jay E. Kreuzer <jkreuzer@hhsc.org>; Amar <noa@hhsc.org>; "Josh Green, M.D." <sengreen@capitol.hawaii.gov>; 'OIP' <oip@hawaii.gov>; Ginny Pressler <ginny.pressler@doh.hawaii.gov>
Sent: Friday, November 25, 2016 9:40 AM
Subject: RE: Records Request KCH and Kohala Hospital

Good Morning

I hope that you had an excellent Thanksgiving holiday.

In your email of 11/22/16 you asked "can you offer us a reasonable explanation about why you did not copy them on your response to us?" Certainly. I simply did not believe it was necessary. I had informed Mr. Kreuzer and Mr. Amar that I was going to send you the documents and that I would let them know when I had.

In addition, in that email you asked whether Mr. Ridley had informed me of your visit to his office to inspect records. Mr. Ridley did inform me that you were at his office and that you requested to inspect records. I do not know the details of your request or your visit. Regardless of what I do or do not know, I do not believe that it is appropriate for me to instruct Mr. Ridley on how to do his job. What I do know is that the records that I sent you were copies of documents that I received from Mr. Ridley's office, each of which was reviewed by Mr. Kreuzer and Mr. Amar to ensure that I was sending you the correct records. I also reviewed the documents to ensure that, if necessary, each was properly redacted.

As we have discussed in the past, I believe it is incumbent upon all of us to remember that our communications should be guided by respect, even when we are frustrated. Your use of the derogatory term "delusion" is objectionable to me regardless of whether it is directed at someone else. When I have communicated with you, I have always done so with respect. I request that you do so with me and that includes the way you talk about others.

Regards,

Anne

Anne E Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel
(808) 733-4034

destroy all copies of the original message.

From:
Sent: Tuesday, November 22, 2016 7:16 AM
To: Anne E Lopez
Cc: Jay E. Kreuzer; Gino Amar; Josh Green, M.D.; OIP; Ginny Pressler
Subject: Re: Records Request KCH and Kohala Hospital

November 22, 2016

Anne E. Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel

Dear Anne,

We're not sure if Mr. Ridley shared with you, our unfortunate experience with him, in regards to him denying us the right to inspect records. Mr. Ridley was under the delusion, because of your position at HHSC and your involvement in our records requests to Jay Kreuzer and Gino Amar, that he could deny us inspecting records, even though we had an appointment.

Could you please be so kind as to inform Mr. Ridley, that your position and involvement, had nothing whatsoever to do with our right to inspect records at his office, under the UIPA? However, until we hear back from Director Park, we're not sure if there is a provision for Mr. Ridley to deny us inspecting records and we will not be surprised if there is.

Also, since you were responding to records requests that we made to Mr. Kreuzer and Mr. Amar, can you offer us a reasonable explanation about why you did not copy them on your response to us?

Sincerely,

(Ombuds #17-01196 (GL))

Anne E Lopez

From: Anne E Lopez
Sent: Tuesday, January 17, 2017 5:01 PM
To:
Cc: Office of Information Practices; Office of the Ombudsman
Subject: Re: The Opportunity to Present Information to the HHSC Board of Directors for Consideration of Agenda Items

Good Afternoon

I will just briefly respond to a couple of the issues you raised.

You write "Are we understanding that after the agenda and location is posted, you can change it? Are we understanding that unless, we email you in advance of our attendance, we will not know where you are?"

The answers are no and no.

No, we cannot change locations once are agenda is posted. But the agenda is posted 7 days in advance. I invited you to contact me so that if you need or want to make travel arrangements sooner than the posted agenda I could assist by confirming the location.

With respect to determining what issues are on the agenda, my statement did not imply anything. Rather, I clearly stated, after he review of and approval from Chair Van Camp, that the issues you identified will not be agenda items.

I will respond to your other points at a later date.

Regards,

Anne

-------- Original Message --------

Subject: Re: The Opportunity to Present Information to the HHSC Board of Directors for Consideration of Agenda Items

From:

Date: Jan 17, 2017, 3:54 PM

To: Anne E Lopez <aelopez@hhsc.org>

January 17, 2017

Dear Anne,

Thank you again, for the information. However, we still believe a response to your January 14, 2017 email is very important and we are working on that. We do not believe Chair \

or the Board members have to have an understanding and familiarity with various statutes and rules to write to us.

Considering what HHSC did to us 20 years ago and again, in 2013, five minutes just won't be enough. As you said, as a member of the public, we are allowed five minutes on every agenda item, including public testimony.

Thank you for your invitation to email you when we are planning to attend an HHSC board meeting. Are we understanding that after the agenda and location is posted, you can change it? Are we understanding that unless, we email you in advance of our attendance, we will not know where you are?

We do not believe, as general counsel to this board, you have the authority to make a decision about what does or does not go on the HHSC board agenda, as you implied. However, we do believe you have the authority to advise the chair and board on your legal expertise.

Once again, we are requesting a communication from Chair after communicating with you about our request for agenda items, so that she can communicate her decision to us? What you are interfering with, is our right to receive communications from the Chair and Board of HHSC.

Sincerely,

From: Anne E Lopez <aelopez@hhsc.org>
To:
Cc: OIP <oip@hawaii.gov>
Sent: Tuesday, January 17, 2017 2:34 PM
Subject: Re: The Opportunity to Present Information to the HHSC Board of Directors for Consideration of Agenda Items

Good Afternoon

Thank you for copying me on your email to Chair and the members of the HHSC Board.

As the General Counsel for HHSC, I represent the Board and it is my responsibility to respond to communications such as your request for consideration of agenda items. As you are aware, the members of the Board are volunteers. Communications, such as those I have with you, require an understanding and familiarity with various statutes and rules to a degree that most volunteer board members do not have. Thus, all communications from the HHSC Board will be through me.

I can assure you that prior to sending my last email response to you, I sent it to Chair and Dr. Rosen, both of whom approved and instructed me to send the email to you. Similarly, both have reviewed and approved this email.

With respect to your email below, pursuant to section 92-3, Hawaii Revised Statutes (HRS), members of the public are welcome to attend open meetings. Members of the public may submit comments, data, etc. on any agenda item and "boards shall afford all interested persons an opportunity to present oral testimony on any agenda item." Section 92-3, HRS. You may attend and present oral testimony and if you wish you may submit written materials.

My invitation for you to send materials was just that, an invitation. You need not submit additional materials to provide oral testimony. I was simply trying to be helpful in the event you had materials that you wished to share.

To be clear, you are welcome to testify during the 5 minute allotment on the items contained in your email, including the addition of your 9th topic. These items will not, however, be included as agenda items.

Chair will not be sending you a letter as you request. As I noted above, she has approved this correspondence.

As I noted in an earlier email, we are sometimes required to change the location of our Board meetings, as is the case for the January 26 meeting. If you will be attending a meeting in the future, please feel free to email me in advance so that I can be sure that you are aware of the correct location.

Regards,

Anne

-------- Original Message --------

Subject: Re: The Opportunity to Present Information to the HHSC Board of Directors for Consideration of Agenda Items

From:

Date: Jan 16, 2017, 8:24 AM

To: Anne E Lopez <aelopez@hhsc.org>

January 16, 2017

– Chair
HHSC Board of Directors

Re: The Opportunity to Present Information to the HHSC Board of Directors for Consideration of Agenda Items

Dear Chair and Board Members,

This will acknowledge the receipt of an email from Anne Lopez, dated January 14, 2017, thank you.

Are we understanding, that the information we provided the Board, will not be considered for an agenda item unless we provide more information, as indicated by Ms. Lopez?

Are we also understanding, that as Chair of the HHSC Board, you will not be communicating with us directly? In other words, can you please send us a letter on HHSC letterhead, that confirms Ms. Lopez's first statement? The reason we make this request, is because as members of the public, we must make sure our rights to this democratic process are not compromised. We also understand that this further request to you, will delay us from participating in the January 26, 2017 Board meeting.

As a courtesy to Anne, for the time she put in her January 14th response to us, we will respond accordingly. However, based on Anne's response to topic 1, we have a ninth topic for the Board to consider for an agenda item.

9. The "disingenuous" response to the OIP by HHSC, in regards to whether Alii Health Center (AHC) is a State Agency, that greatly influenced the biased Memorandum Opinion by the OIP.

Thank you,

From: Anne E Lopez <aelopez@hhsc.org>
To:
Cc: OIP <oip@hawaii.gov>
Sent: Saturday, January 14, 2017 7:59 AM
Subject: RE: The Opportunity to Present Information to the HHSC Board of Directors for Consideration of Agenda Items

Good Morning M

, the Chair of the HHSC Corporate Board of Directors (the "Board") has referred your request to address the Board to me for response. As I set forth in my email to you dated August 9, 2016, Chair has said that you are welcome to attend a Board meeting and provide public testimony. She instructed me to remind you that you are welcome to submit testimony or information in writing in advance so that the Board members have the opportunity to be briefed on the subject of your testimony. Oral testimony is strictly limited to 5 minutes per person.

The next Board meeting is January 26, 2017 at 9:00 at the Airport Honolulu Hotel. Public testimony is generally the first item on the agenda. The agenda has not yet been finalized, but I will be happy to send it to you when it is ready to be posted. In addition, the agenda for each meeting is posted on the State of Hawaii calendar seven (7) days' prior to the meeting and on HHSC website at http://www.hhsc.org/.

If you would like to submit written testimony in advance of attending the meeting, please feel free to send it to me no later than January 18 so that I can be sure that it is included in the documents provided to the Board members in advance of the meeting.

With respect to the issues that you would like to address, I have a few comments below. Given the time limitations and the number of issues, I hope that these comments will provide you with relevant information so that you are able to address the issues that are within the Board's purview. You are of course free to disregard these thoughts.

You write in your email "The topics we would like to present are:"

1. "Whether Alii Health Center (AHC) is a State Agency". The Board believes that this issue has been finally resolved by the Office of Information Practices ("OIP") Memorandum Opinion dated May 3, 2016, the subject of which was "Alii Health Center, LLC is Not an 'Agency' Subject to the UIPA (U RFO-P 13-4)" (the "OIP Opinion"). Based on the OIP Opinion, the Board no longer considers this an open issue. You are, of course, welcome to testify on this issue.

2. "The behavior of Jay Kreuzer towards us, as Administrator of Kona Community Hospital". The Board will

certainly hear public testimony about one of HHSC's employees.

3. "The behavior of Richard Taaffe towards us as Executive Director of West Hawaii Community Health Center and as a member of the WHRB". The Board will certainly hear public testimony about one of its Board members. Please know that while Mr. Taaffe is a Board member, the West Hawaii Community Health Center and Mr. Taaffe's actions as its ED do not fall under the HHSC Board's purview, therefore the Board has no authority to assist you with the health center issues or Mr. Taaffe's role as ED.

4. "West Hawaii Regional Board (WHRB)". In my email communication to you dated July 26, 2016, I stated that "[w]hile the West Hawaii Region is a part of HHSC, by statute, the each regional board has autonomy to operate its region. The corporate office generally and the general counsel in particular have no authority to require that the board take any action." Similarly, the Board cannot direct the actions of the regional boards. I provide this information so that you are aware that while the Board will certainly hear your public testimony, it does not have the authority to intervene in the West Hawaii Regional Board's actions.

5. "HHSC providing legal services to AHC (Federal OCR investigations)". The Board will hear your public testimony on this matter. Given the fact, however, that you have filed a complaint with the Attorney General's office on this matter, I will instruct the Board to not respond to any question or comment that you make with respect to this topic.

6. "Lack of a timely state inspection at Kohala Hospital in the interest of public safety". The Board will certainly hear your public testimony on this matter.

7. "All Board members of AHC as state employees". As noted in Item #1 above, the Board believes that the OIP Opinion has fully resolved these issues.

8. "Violation of the UIPA by HHSC employees". The Board will certainly hear your public testimony on this point.

Please note that the time limit on public testimony is strictly enforced because the Board generally has a great deal of business to complete, therefore, the meeting must be adjourned early enough to allow its members sufficient time to catch their flights home.

Just as the Board members and the HHSC staff present at the meeting are expected to treat each other and their guests with respect and to listen to one another attentively, the Board has the same expectations of members of the public present at the meeting.

Once again, please feel free to send me any materials that you would like the Board members to receive no later than January 18 so that I can include these materials in the Board packet.

Please feel free to email if you have any questions.

Regards,

Anne

From:
Sent: Tuesday, January 10, 2017 2:23 PM
To: Anne E Lopez
Subject: Re: The Opportunity to Present Information to the HHSC Board of Directors for Consideration of

Agenda Items

Dear Anne,

Attached directly below is our request to the HHSC Board.

Mahalo,

attachment

January 10, 2017

- Chair
HHSC Board of Directors

Re: The Opportunity to Present Information to the HHSC Board of Directors for Consideration of Agenda Items

Dear Chair VanCamp and Board Members,

We respectfully request the opportunity to present information to you, for your consideration. We have attempted for over four years, to have this situation of ours addressed and resolved, by anyone with the authority, both state or federal, with absolutely no success. Recently, we requested Governor Ige, as citizens of Hawaii, to look into our situation and the injustices we have uncovered, with no response. We come to you with these topics that you have jurisdiction over.

The topics we would like to present are:

1. Whether Alii Health Center (AHC) is a State Agency

2. The behavior of Jay Kreuzer towards us, as Administrator of Kona Community Hospital

3. The behavior of Richard Taaffe towards us as Executive Director of West Hawaii Community Health Center and as a member of the WHRB

4. West Hawaii Regional Board (WHRB)

5. HHSC providing legal services to AHC (Federal OCR investigations)

6. Lack of a timely state inspection at Kohala Hospital in the interest of public safety

7. All Board members of AHC as state employees

8. Violation of the UIPA by HHSC employees

Sincerely,

Confidentiality Notice: This email message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

Anne E Lopez

From:	
Sent:	Tuesday, November 22, 2016 7:16 AM
To:	Anne E Lopez
Cc:	Jay E. Kreuzer; Gino Amar; Josh Green, M.D.; OIP; Ginny Pressler
Subject:	Re: Records Request KCH and Kohala Hospital
Attachments:	8-24-12 Kohala Hospital (CAH) Statement of Deficiency and Plan of Correction.pdf; 4-9-09 Kona Community Hospital (CAH) Redacted Statement of Deficiency and Plan of Correction.pdf; Kohala Hospital 2012-08-30 OHCA Inspection 8-24-12 survey.pdf; Kona Hospital 2009-04-21 State Re-licensure survey completed on 4-9-09.pdf

November 22, 2016

Anne E. Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel

Dear Anne,

We're not sure if Mr. Ridley shared with you, our unfortunate experience with him, in regards to him denying us the right to inspect records. Mr. Ridley was under the delusion, because of your position at HHSC and your involvement in our records requests to Jay Kreuzer and Gino Amar, that he could deny us inspecting records, even though we had an appointment.

Could you please be so kind as to inform Mr. Ridley, that your position and involvement, had nothing whatsoever to do with our right to inspect records at his office, under the UIPA? However, until we hear back from Director Park, we're not sure if there is a provision for Mr. Ridley to deny us inspecting records and we will not be surprised if there is.

Also, since you were responding to records requests that we made to Mr. Kreuzer and Mr. Amar, can you offer us a reasonable explanation about why you did not copy them on your response to us?

Sincerely,

(Ombuds #17-01196 (GL))

From: Anne E Lopez <aelopez@hhsc.org>
To:
Cc: "Ridley, Keith R. (Keith.Ridley@doh.hawaii.gov)" <Keith.Ridley@doh.hawaii.gov>; Anne E Lopez <aelopez@hhsc.org>

Sent: Thursday, November 17, 2016 3:03 PM
Subject: RE: Records Request KCH and jurisdiction over Kona Surgery Center

Good Afternoon

Below, I have listed the documents attached to this email that I believe are responsive to your request for the most recent OHCA licensure inspections for Kona Community Hospital and Kohala Hospital. If you have any questions, please do not hesitate to contact me.

1. April 9, 2009 Kona Community Hospital Statement of Deficiencies and Plan of Correction;
2. April 21, 2009 Kona Community Hospital OHCA Cover letter re inspection;
3. August 24, 2012 Kohala Hospital Statement of Deficiencies and Plan of Correction; and
4. August 30, 2012 Kohala Hospital OHCA Cover letter re inspection.

Regards,

Anne

From
Sent: Friday, November 11, 2016 7:16 AM
To: Anne E Lopez
Subject: Re: Records Request KCH and jurisdiction over Kona Surgery Center

Hi Anne,

Thank you for staying in touch. Have a nice weekend.

From: Anne E Lopez <aelopez@hhsc.org>
To:
Sent: Friday, November 11, 2016 6:25 AM
Subject: Re: Records Request KCH and jurisdiction over Kona Surgery Center

Good Morning

I wanted to touch base with you before the weekend to let you know that we are making progress.

Yesterday evening, I sent documents to Mr. Amar and Mr. Kreuzer for their review and confirmation that they are the documents you seek.

I do not know their schedules given that today is a holiday. As soon as I receive their confirmation, the next step is for me to review them. My review is solely for the purpose of ensuring that I redact, if any, personal health information or personal identifying information.

Once completed, I will send the documents to you via email so that there will be no copying charges.

Regards,

Anne

-------- Original Message --------

Subject: Re: Records Request KCH and jurisdiction over Kona Surgery Center

From:

Date: Nov 7, 2016, 7:38 PM

To: Anne E Lopez <aelopez@hhsc.org>

November 7, 2016

Anne E. Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel

Re: Records Request KCH and jurisdiction over Kona Surgery Center

Dear Ann,

Thank you for your email this evening. If it is okay with you, we have taken the liberty to attach the email chain in regards to KCH and KSC. At this point, after four years, on a weekly basis, we communicate with over 25 different people and agencies, federal, state and county, and it is the only way we can keep an accurate record of the issue at hand. Please do not remove the email chain from your response.

Your understanding of our original and specific records request, to Mr. Kreuzer, is correct. What is confusing to us with your further explanation, is why Mr. Kreuzer would send this to you for a response, when he is well aware of his "autonomy" and that he maintains his own records. In our experience, Mr. Kreuzer knew exactly and specifically what we wanted. At the time of the request in September, the record didn't exist.

We do understand and accept the accreditation by the Joint Commission, certifying that the hospital is safe. That is not our concern. Rather, our concern, is that all the stand alone surgery centers in the state, have not been inspected by OHCA, some for over six years, including KSC, and the Joint Commission accreditation program does not cover them. So, as tax payers and members of the public that use these facilities, we're trying to find out what OHCA actually gets paid for.

And now with Mr. Kreuzer's behavior, our request to Gino Amar at Kohala Hospital and Senator Green's unethical behavior, we believe none of the hospitals in the state have been inspected/surveyed by OHCA, in many, many years. And do you know what really infuriates us, is whenever we find someone doing something wrong, we're always required to name the law they broke. In this case, we named the licensing laws that are being broken, but no one cares. However, according to Medicare, a facility cannot treat Medicare beneficiaries, if state licensing laws are not in compliance.

In our phone conversation last week, you also informed us, that HHSC has no authority over KSC. If you can confirm that, we see no reason to approach the HHSC Board on that issue?

As you are aware, we are very patient, as long as we know someone has the intent to communicate with us.

Mahalo.

From: Anne E Lopez <aelopez@hhsc.org>

To:
Sent: Monday, November 7, 2016 6:53 PM
Subject: HHSC - Kona Community Hospital

Good Evening

Please bear with me as I try to make sure that I correctly understand your request. Please let me know if my understanding, as set forth below, is correct and if not, help me understand what I am missing so that I might bring this issue to a close for you.

I have reviewed the various emails related to your request to Mr. Kreuzer. Your question seems quite simple if I properly understand it:

you are asking for the date of the last inspection conducted by the Office of Health Care Assurance ("OCHA") of Kona Community Hospital ("KCH") including its operating rooms. In conjunction with this, you would like whatever documentation exists that evidences the inspection.

I also understand from reading the emails that you are aware that section 321-14.5, Hawaii Revised Statutes ("HRS"), authorizes OCHA to exempt a hospital from a licensing inspection provided that the hospital submits a certified copy of its official accreditation from the joint commission, the hospital continuously holds the accreditation, and the hospital holds a valid state license.

Notwithstanding the statutory licensing exemption, you are simply interested in knowing when OCHA last conducted an inspection of KCH for licensing purposes, as opposed to relying on the joint commission accreditation for issuing the state license.

I reviewed the files of the HHSC corporate office and was not surprised to find that we do not maintain such records in our office. This is so because each of the regional systems operate with autonomy and maintain their own records. I have reached out to Mr. Kreuzer. While I know that you have emailed him previously and have been dissatisfied with his response, i.e., receiving copies of the current license and joint commission accreditation, when what you want is the last inspection by OCHA, I believe that I am now on track and will have a response in the next couple of days.

As you may be aware, election day is a holiday for state and county employees and I am not sure whether I will be able to connect with Mr. Kreuzer before Wednesday.

Thank you very much for your patience.

Regards,

Anne

Anne E Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel

(808) 733-4034

From:
To: Anne E Lopez <aelopez@hhsc.org>
Sent: Friday, November 4, 2016 8:33 PM
Subject: Re: Records Request KCH and jurisdiction over Kona Surgery Center

November 4, 2016

Anne E Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel

Dear Anne,

Please have a good weekend. Next week will be fine.

Sincerely,

From: Anne E Lopez <aelopez@hhsc.org>
To:
Sent: Friday, November 4, 2016 5:00 PM
Subject: HHSC - Kona Hospital

Dear

As always, I appreciate your patience while waiting for me to respond. I am afraid that I got behind this morning and then the day snowballed on me. I must attend a family event this evening and will plan on responding to you tomorrow.

Once again, I apologize for the delay and appreciate your patience.

Regards,

Anne

Anne E Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel
(808) 733-4034

From:
To: Anne E Lopez <aelopez@hhsc.org>; "Ridley, Keith R." <Keith.Ridley@doh.hawaii.gov>
Cc: Jay E. Kreuzer <jkreuzer@hhsc.org>; Ginny Pressler <ginny.pressler@doh.hawaii.gov>; Linda Rosen

<lrosen@hhsc.org>; OIP <oip@hawaii.gov>; Mike McCartney <mike.mccartney@hawaii.gov>
Sent: Friday, November 4, 2016 7:05 AM
Subject: Re: Records Request KCH and jurisdiction over Kona Surgery Center

November 4, 2016

Anne E. Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel

Aloha Anne,

Thank you and we appreciate your input as General Counsel of HHSC and we understand, you will not be responding for Keith Ridley, DOH/OHCA.

In reviewing our emails, we came across an email we sent to you on October 19, 2016 relevant to your response today, which we have attached directly below. We have highlighted our statements that we ask for you to please address.

As for Mr. Kreuzer violating the UIPA, we have attached a letter from the OIP, in regards to the Governor's lack of a respectful, professional response under the UIPA. As you can see, Mr. Kreuzer, or anyone else who violates the UIPA from this day forward in regards tc [redacted], should not be concerned. It is ironic, that Director Cheryl Park, has chosen to use her authority against two citizens, who have been victims of state agency violators of the UIPA, but she will not use her authority to discipline these violators and maybe stop our many requests for assistance, to the OIP. It has been our experience, when people in the position of a Director Park, undermine their own integrity, they usually move on in a short time. This is government at its "finest."

However, we've been pursuing this injustice for over four years, so we will have to deal with Director Park's unfair decision, bestowed on us for yet another year.

Sincerely,

[redacted]

==

From: [redacted]
To: Anne E Lopez <aelopez@hhsc.org>
Cc: Linda Rosen <lrosen@hhsc.org>; Jay E. Kreuzer <jkreuzer@hhsc.org>; Keith R. Ridley <keith.ridley@doh.hawaii.gov>; Pressler Virginia Ginny M.D. <ginny.pressler@doh.hawaii.gov>; OIP <oip@hawaii.gov>
Sent: Wednesday, October 19, 2016 6:20 AM
Subject: Re: Records Request KCH and Overdue Inspections of Statewide Surgery Centers

October 19, 2016

Anne E Lopez
Hawaii Health Systems Corporation
Chief Operations Officer / General Counsel

Aloha Anne,

Thank you for taking our phone call, Monday. In response to your third paragraph below, everyone's interpretation of "profanity" is different and we did not use profanity. Although we take full responsibility for our frustrated attitudes, in regards to any derogatory statements, please accept our apologies, but we have a right to express what we have experienced, personally. And as we mentioned, it was an HHSC employee, who informed us about Alice Hall's ex-husband, so every time we call HHSC, it brings up some very bad feelings.

We believe an easy way to alleviate our frustration and phone calls, is that when we write to someone at HHSC, a timely response or acknowledgement, would take care of it.

In regards to KSC, you informed us, HHSC has no authority over them and we will address our concerns to the board and their director, thank you.

Lastly, as for Kona Hospital and Mr. Kreuzer, a communication from Keith Ridley, did not resolve our September 17, 2016 records request to Mr. Kreuzer, for either the date of the most recent inspection or a copy of the inspection, by the State of Hawaii (DOH or OHCA), signed by an authority of KCH. We appreciate you offering to assist us with getting a response, since Mr. Kreuzer sent this request to you.

Mahalo,

From: Anne E Lopez <aelopez@hhsc.org>
To: >; "Ridley, Keith R." <Keith.Ridley@doh.hawaii.gov>
Cc: Jay E. Kreuzer <jkreuzer@hhsc.org>; Ginny Pressler <ginny.pressler@doh.hawaii.gov>; Linda Rosen <lrosen@hhsc.org>
Sent: Thursday, November 3, 2016 8:04 PM
Subject: Re: Information for the State Ombudsman (Inspections/Surveys)

Good Evening

I will respond to you on behalf of HHSC, Dr. Rosen, and Mr. Kreuzer with respect to Kona Community Hospital.

I will be certain to email you before end of business tomorrow.

Regards,

Anne

-------- Original Message --------

Subject: Re: Information for the State Ombudsman (Inspections/Surveys)

From:

Date: Nov 3, 2016, 6:56 PM

To: "Ridley, Keith R." <Keith.Ridley@doh.hawaii.gov<mailto:Keith.Ridley@doh.hawaii.gov>>

November 3, 2016

Since we didn't hear back from Gino Amar, after speaking to him this morning at 7:45 am, we must assume your information is in lieu of that communication we were expecting from him. Thank you.

We apologize for our ignorance, but as members of the public, we assume that government will provide us with accurate answers. After all these many months, here is what we believe we have learned.

The stand alone Surgery Centers, have not been inspected/surveyed by the State of Hawaii, or anyone, some for over 6 years. The reason. The DOH does not have enough money. The DOH has not had enough money for 6 years. Or, the DOH does have the money to perform these inspections/surveys and the truth of why they haven't been done, will be revealed when the news media is off your payroll.

As for the Community Hospitals, once again we understand, the DOH does not have enough money to inspect them upon license renewals every two years. But the law allows the Joint Commission's accreditation inspections/surveys to suffice. One problem, Kohala Hospital fell through the cracks. In other words, Kohala Hospital does not fall under the Joint Commission and of course, the State is not timely.

For everyone copied on this, we still have not received answer to the following question. When was the last time the State of Hawaii, DOH, and/or the OHCA inspected/surveyed Kona Community Hospital?

As for the August 24, 2012 Kohala Hospital survey, we would like to inspect that record, during the week of November 14, 2016? Can you please let us know a time and date to inspect, during that week?

Lastly, thank you for inspecting/surveying the Kohala Hospital skilled nursing facility. We are sure one of us will need it someday.

Mahalo,

From: "Ridley, Keith R." <Keith.Ridley@doh.hawaii.gov<mailto:Keith.Ridley@doh.hawaii.gov>>
To:

>
Cc: Anne E. Lopez <aelopez@hhsc.org<mailto:[illegible]@hhsc.org>>
Sent: Thursday, November 3, 2016 10:37 AM
Subject: Re: Information for the State Ombudsman (Inspections/Surveys)

Dear

Kohala Hospital was last surveyed by our office on 8/24/12. As best we know, they are not accredited by the Joint Commission so the Joint Commission has not surveyed them.

Our office inspected the Kohala Hospital skilled nursing facility in December 2015.

Keith Ridley

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UNIVERSITY OF HAWAIʻI SYSTEM
Legislative Testimony

Testimony Presented Before the
Senate Committee on Judiciary and Labor
April 4, 2017 at 9:45 a.m.
By
Carrie K. S. Okinaga
Vice-President for Legal Affairs and University General Counsel
University of Hawaiʻi

HB 1518 HD1 SD1 – RELATING TO PUBLIC RECORDS

Chair Keith-Agaran, Vice-Chair Rhoads, and Committee Members:

Thank you for the opportunity to submit testimony ***in support*** of this measure ***with the amendment referenced herein***.

The University of Hawaiʻi ("University") supports this bill, but respectfully requests that this committee delete the requirement that the declaratory action be initiated in the "circuit court of the circuit in which the records requester resides[.]" The University requests that the declaratory action be filed in the circuit in which the agency is situated.

The University receives requests from requesters who reside in other states. The current draft arguably requires the agency to subject itself to the laws and jurisdiction of another state. In addition, if the requester is from another county, it places an undue burden and cost upon the agency to litigate the civil action in another circuit. This burden and cost may exceed the cost of producing records for an otherwise manifestly excessive request.

We believe that with the deletion of the referenced language above, this bill will effectively balance the public's right to government records and the government's interest in efficiently allocating its resources and personnel.

Michael J Leong
POB 10282
Honolulu, H. 96816
808 551 7896
mleonginhawaii@gmail.com

April 4, 2017

Senator Gilbert S.C. Keith-Agaran, Chair
Senate Committee on Judiciary and Labor
Hawaii State Capitol #221
Honolulu, HI. 96813

Dear Chair Keith-Agaran:

I am writing in opposition of HB1518 HD1 SD1 as an individual. Vexatious is defined as causing annoyance, in legal terms it is considered an argument brought without sufficient grounds. Having worked for the City Council and the Legislature, public access to government records and transparency is part of our constitutional process. I am not aware that it has become government's role to assess, profile, and make judgements about constituents or others based on their requests for information. Is it the intent of this bill to block public access to information based on the comfort level of agency staff to deal with the public? If so, **HB1518 HD1 SD1** could set a dangerous precedent for other "definitions" to categorize, and/or single out another particular group(s) from requesting public records.

Thank you for the opportunity to submit testimony.

Sincerely,

Michael J Leong

TO: Members of the Committee on Judiciary and Labor

FROM: Natalie Iwasa
Honolulu, HI 96825

HEARING: 9:45 a.m. Tuesday, April 4, 2017

SUBJECT: HB 1518, HD1, SD1 Public Records & Vexatious Requestors - **COMMENTS**

Aloha Chair and Committee Members,

Thank you for allowing me the opportunity to provide testimony on HB 1518, HD1, SD1 which provides a mechanism for government agencies to deal with vexatious public records requestors. The **current version of this bill is a huge improvement over the original bill**.

My main concern with respect to the original version was that government agencies would deny records requests without reasonable and/or adequate justification. The current version seems to provide a reasonable mechanism to handle vexatious requesters without denying the public access to public records.