

**Op. Ltr. 93-23 HGEA/AFSCME v. University of Hawaii, et al.,
Civil no. 91-0074-01**

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

November 22, 1993

Charles K.Y. Khim, Esq.
City Financial Tower, Suite 1620
201 Merchant Street
Honolulu, Hawaii 96813

Dear Mr. Khim:

Re: HGEA/AFSCME v. University of Hawaii, et al.,
Civil No. 91-0074-01

This is in response to your verbal request made at the July 28, 1993 settlement conference before the Honorable Karen N. Blondin, Judge, First Circuit Court, in the above-referenced matter, for the Office of Information Practices ("OIP") to issue an advisory opinion letter addressing Plaintiff Hawaii Government Employees' Association, AFSCME Local 152, AFL-CIO's ("HGEA/AFSCME") right to request the disclosure of certain government information from the Defendant University of Hawaii ("University") in the future.

ISSUE PRESENTED

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the HGEA/AFSCME may request, and the University must make available for inspection and copying, a UIPA requester's written request to inspect or copy a government record regarding any disciplinary action that was taken against a University employee for allegations of sexual harassment between July 1, 1989 and the date of the execution of the settlement agreement in HGEA/AFSCME v. University of Hawaii, et al., Civil No. 91-0074-01.

BRIEF ANSWER

Yes. Written requests received by the University seeking access to records or information under the UIPA, are themselves "government records" for purposes of the UIPA. In accordance with section 92F-11(b), Hawaii Revised Statutes, such written requests, if maintained by the University, must be made available for inspection and copying except as provided in section 92F-13, Hawaii Revised Statutes.

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Only the UIPA's clearly unwarranted invasion of personal privacy exception, section 92F-13(1), Hawaii Revised Statutes, would arguably permit the University to withhold access to a person's written request under part II of the UIPA to inspect and copy government records maintained by the University. The UIPA's personal privacy exception applies only to information in which an individual, or natural person, has a "significant" privacy interest.

Based upon principles set forth in a previous OIP opinion letter, we conclude that it would be only in extraordinary and compelling situations that an "individual" would have a significant privacy interest in the fact that the person has made a request to an agency under part II of the UIPA. As such, we conclude that if the University has received a written request under part II of the UIPA seeking access to information concerning disciplinary action taken against a University employee, that request must be made available for public inspection and copying, upon request, after the University segregates, or deletes the home address or home telephone number of any UIPA requester who is a natural person.

UIPA requesters other than natural persons, such as corporations, partnerships, labor unions, and government agencies, do not have a privacy interest in the fact that they have made a request to inspect and copy records under part II of the UIPA and, consequently, their entire written request (including name, business address, and business telephone number) must be disclosed upon request.

FACTS

You have requested this OIP opinion on behalf of your client, HGEA/AFSCME. At the July 28, 1993 settlement conference before Judge Blondin regarding HGEA/AFSCME v. University of Hawaii, et al., Civil No. 91-0074-01, the parties agreed that the OIP would render an advisory opinion letter regarding the above-stated issue before the execution of a formal settlement agreement in this case.

DISCUSSION

The UIPA, the State's open records law, generally provides that "[a]ll government records are available for public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1992). More specifically, section 92F-11(b), Hawaii Revised Statutes, states "[e]xcept as provided in section 92F-13, each agency upon request by any person shall

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make government records available for public inspection and copying during regular business hours." [Emphasis added.]

The UIPA defines the term "government record" as "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992); Kaapu v. Aloha Tower Development Corp., 74 Haw. 365 (1993). Because the University is an "agency" for purposes of the UIPA,¹ and because a letter or other document requesting information about University employees who have been suspended or discharged as a result of allegations of sexual harassment constitutes "information maintained by an agency in written . . . or other physical form," we conclude that such written requests constitute "government records." Therefore, we find that the rights of the HGEA/AFSCME, or any other person, to inspect and copy such records are governed by the provisions of the UIPA.

The UIPA further provides that unless one of the five exceptions contained in section 92F-13, Hawaii Revised Statutes, authorizes an agency to withhold access to government records, an agency must make its records available for inspection and copying upon request by any person. Haw. Rev. Stat. § 92F-11(b) (Supp. 1992).² The only exception that would arguably apply to the identity of a requester under part II of the UIPA, is that which does not require an agency to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1992).

Under the UIPA's personal privacy exception, only "natural persons" have a cognizable privacy interest. See Haw. Rev. Stat. §§ 92F-3 and 92F-14(a), (b) (Supp. 1992) ("individual" means

¹We have previously found that the University is an "agency" within the meaning of the UIPA definition of this term set forth at 92F-3, Hawaii Revised Statutes, and thus, subject to the provisions of the UIPA. See OIP Op. Ltr. Nos. 89-9 (Nov. 20, 1989); 90-11 (Feb. 26, 1990); 90-16 (April 24, 1990).

²Based upon this UIPA provision and court decisions interpreting similar open record statutes, we have previously noted that for requests made under part II of the Act: (1) a requester's identity generally has no bearing upon the merits of the individual's request, and (2) requesters are generally not required to identify themselves when making a request to inspect a government record which is "public." See OIP Op. Ltr. Nos. 90-29 (Oct. 5, 1990); 90-34 (Dec. 10, 1990); 90-37 (Dec. 17, 1990).

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"natural person"). Thus, UIPA requesters who are other than natural persons, such as corporations, partnerships, labor unions, and government agencies, do not have a privacy interest in the fact that they have made a request under part II of the UIPA. Consequently, such a UIPA requester's written request to inspect or copy a government record regarding any disciplinary action that was taken against a University employee for allegations of sexual harassment between July 1, 1989 and the date of the execution of a settlement agreement in HGEA/AFSCME v. University of Hawaii, et al., Civil No. 91-0074-01, must be made available upon request for inspection and copying, including the requester's name, business address, and business telephone number.

Additionally, as a threshold matter, the UIPA's personal privacy exception only applies to information in which an individual ("natural person") has a "significant" privacy interest. See S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H.R. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988) ("[o]nce a significant privacy interest is found, the privacy interest will be balanced"). In section 92F-14(b), Hawaii Revised Statutes, the Legislature set forth examples of information in which a person is deemed to have a "significant privacy interest." These statutory examples are silent as to information which identifies an individual as having made a request under part II of the UIPA. However, the commentary to section 3-102 of the Uniform Information Practices Code, upon which the UIPA was modeled, indicates that this "enumeration is not intended to be exhaustive."

In OIP Opinion Letter No. 90-37 (Dec. 17, 1990), we thoroughly examined whether a UIPA requester's letter to an agency is a government record that is public under the UIPA. In the facts presented in that case, pursuant to the provisions of part II of the UIPA, entitled "Freedom of Information," a member of the public requested the Department of Commerce and Consumer Affairs' Regulated Industries Complaints Office ("RICO") to disclose whether any complaints had been filed with the RICO against a property management corporation and its president.

In response to this request, RICO mailed the UIPA requester a description of the substance of all complaints against the licensees and the dispositions of the complaints. The affected licensees then requested RICO to disclose the identity of the person who made the request for a copy of the licensees' complaint history.

After thoroughly reviewing case law under the federal Freedom of Information Act, 5 U.S.C. § 552 (Supp. 1988), an open

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records decision of the Texas Attorney General, and the UIPA, we concluded that:

[O]nly in rare and compelling situations does an individual have a significant privacy interest in the fact that the individual has made a request to an agency under part II of the UIPA. Therefore, we conclude that as a general rule, an agency's disclosure of the fact that an individual has made a request for a government record under part II of the UIPA would not "constitute a clearly unwarranted invasion of personal privacy."

However, because we have previously opined that the disclosure of such information as an individual's home address and home telephone number would be "clearly unwarranted" under section 92F-13(1), Hawaii Revised Statutes, this information should be deleted from any correspondence to an agency requesting to inspect government records, before the correspondence is made available for inspection and copying by the public.

OIP Op. Ltr. No. 90-37 at 5-6 (Dec. 17, 1990) (citations and footnote omitted).

In applying the general rule set forth in OIP Opinion Letter No. 90-37 to the facts before us, we conclude that except in extraordinary situations not present here, the University must disclose, upon request by the HGEA/AFSCME or any other person, copies of any request it has received requesting to inspect or copy any government record under the freedom of information provisions of part II of the UIPA pertaining to alleged sexual harassment by any University employee. However, consistent with previous OIP opinion letters, the University should segregate or delete an "individual" requester's home address and home telephone number before disclosing the individual's written request under the freedom of information provisions of part II of the UIPA.³

CONCLUSION

Under the UIPA's personal privacy exception, only "natural persons" have a cognizable privacy interest. See Haw. Rev. Stat.

³We observe that if a person requesting information about University employees has not identified themselves in the written request, the University would be unable to disclose the identity of the requester to the HGEA/AFSCME, but nonetheless, must disclose the written request upon request.

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§ 92F-3 and 92F-14(a), (b) (Supp. 1992). Thus, any UIPA requester who is not a natural person, such as a corporation, partnership, labor union, or government agency, does not have a privacy interest in the fact that it has made a request for records or information under part II of the UIPA. Consequently, upon request by the HGEA/AFSCME, the University must make such record requests available for public inspection and copying by HGEA/AFSCME.

We further conclude that except in extraordinary situations, the University must disclose, upon request by any person (including the HGEA/AFSCME), the identity of individuals who have requested to inspect or copy government records under the freedom of information provisions of part II of the UIPA involving allegations of sexual harassment by any University employee.

If you should have any questions about the advice contained in this opinion letter, please do not hesitate to contact me at 586-1413.

Very truly yours,

Kathleen A. Callaghan
Director

KAC:sc

c: Honorable Patrick K.S. Yim
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