

December 30, 1994

Honorable Kenneth W. Mortimer
President
University of Hawaii
Bachman Hall
2444 Dole Street
Honolulu, Hawaii 96822

Attention: Ralph T. Horii, Jr.
Senior Vice President for Administration

Dear President Mortimer:

Re: Disclosure of Sexual Harassment Investigating Panel's
Fact-Finding Report to Complaining Student and
Respondent Faculty Member

This is in reply to your letter to Attorney General Robert A. Marks requesting an advisory opinion concerning the above-referenced matter. In accordance with established protocol, your opinion request was forwarded to the Office of Information Practices ("OIP") for a reply.

In a letter to you dated February 23, 1994, a copy of which is attached as Exhibit A, we advised you that the fact-finding report of the University of Hawaii's ("University") sexual harassment investigating panel should not be made available for public inspection and copying under part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), entitled "Freedom of Information." In our letter, we also informed you that, in a separate opinion, we would advise the University regarding whether the fact-finding report of the sexual harassment investigating panel must be made available for inspection and copying by the complaining student and the respondent faculty member, under part III of the UIPA, entitled "Disclosure of Personal Records."

OIP Op. Ltr. No. 94-27

Honorable Kenneth W. Mortimer
December 30, 1994
Page 2

ISSUE PRESENTED

Whether, under part III of the UIPA, entitled "Disclosure of Personal Records," a fact-finding report of the University's sexual harassment investigating panel must be made available for inspection and copying by the student-complainant and the respondent faculty member.

BRIEF ANSWER

Yes, once a final decision has been made by the Vice President. Based upon an examination of the fact-finding report, we believe that it is a "personal record" pertaining to the complainant and respondent. Under section 92F-23, Hawaii Revised Statutes, each agency must make an individual's personal records available for their review and copying, unless the personal record requested is exempt from disclosure to the individual to whom it pertains under section 92F-22, Hawaii Revised Statutes.

Only two of the exemptions in section 92F-22, Hawaii Revised Statutes, would arguably permit the University to withhold the fact-finding report of the investigating panel from the individuals to whom the report pertains.

Under part III of the UIPA, an agency is not required to disclose a personal record (or information contained therein) which "would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality." Haw. Rev. Stat. § 92F-22(2) (Supp. 1992 & Comp. 1993). The fact-finding report is devoid of any information that would substantiate that an express promise of confidentiality was extended to persons mentioned therein, or other evidence that would support finding the existence of an implied promise of confidentiality. In the absence of such indicia or evidence, we are constrained to conclude that this exemption does not apply to the fact-finding report.¹

Further, under part III of the UIPA, an agency may withhold "investigative reports and materials, related to an upcoming, ongoing, or pending . . . administrative proceeding against the

¹However, should the investigating panel have evidence that would support finding the existence of an implied assurance of confidentiality, and present this evidence to the OIP, the OIP shall reconsider its opinion.

Honorable Kenneth W. Mortimer
December 30, 1994
Page 3

individual." Haw. Rev. Stat. § 92F-22(4) (Supp. 1992 & Comp. 1993). In our opinion, the process created by the University's Complaint Procedure is an administrative proceeding, one that could lead to the imposition of disciplinary sanctions upon employees accused of violating the University's sexual harassment policies.

The legislative history of section 92F-22(4), Hawaii Revised Statutes, convinces us that it was intended to prevent a person from using the access provisions of part III of the UIPA to obtain premature access to evidence gathered by a government agency in connection with criminal, civil, or administrative proceedings against the person requesting access, until such proceedings have concluded. We believe that, under the University's Complaint Procedure, the Investigating Panel acts in an inquisitorial capacity, substituting for an investigation by the EEO/AA Office.

As such, we believe that until a cause or no cause determination is made by the Vice President based upon the investigation conducted by the investigating panel, the investigating panel's fact-finding report may be withheld from the respondent faculty member, to prevent the faculty member from gaining premature access to the University's evidence. Furthermore, since disclosure of the fact-finding report to other persons mentioned in the report would easily defeat the legislative intent underlying section 92F-22(4), Hawaii Revised Statutes, we believe that the University should withhold the report from the complainant and other individuals to whom it pertains, until a final decision has been made by the Vice President.

FACTS

The University has adopted policies and procedures for the filing, investigation, and disposition of complaints of sexual harassment against employees of the University. These policies are set forth in a document dated August 1, 1992, entitled "University of Hawaii-Manoa Campus Complaint Procedures for Executive Policy E1.203 Sexual Harassment Policy" (hereinafter "Complaint Procedure").

Section III E of the Complaint Procedure is entitled "Formal Complaint Options," and provides:

E. FORMAL COMPLAINT OPTIONS

The formal complaint procedures in this policy require thorough investigations of all formal charges of sexual harassment. Formal complaint and investigation procedures will not protect the identity of the complainant from the respondent.

Any person who wishes to file a formal sexual harassment complaint is advised to do so as soon as possible after the harassment occurs. Complaints should be filed within 180 days of the last incident of harassment. . . .

Procedures

1. Formal complaints must be filed by the complainant with the EEO/AA Office. The complainant may choose one of two procedural options:

Option A

The complainant may choose to have the case heard by an investigating panel after an investigation by the EEO/AA Office. The appropriate Vice President will review the panel's findings and make a decision.

Option B

The complainant may choose to have the EEO/AA Office investigate the case and submit findings directly to the appropriate Vice President for decision, without a panel hearing.

. . . .

8. Upon completion of the EEO/AA Office's investigation of a formal complaint, all information compiled by the Office will be handled as follows:

Option A

Where a panel option has been selected, information compiled by the EEO/AA

Honorable Kenneth W. Mortimer
December 30, 1994
Page 5

Office is transferred to the Office of the Senior Vice President for Academic Affairs for transmittal to the investigating panel. The investigating panel will conclude the investigation by submitting its findings to the appropriate Vice President. See Sections V, VI, and VII. In this case the appropriate Vice President shall, within 10 working days of receipt of the investigating panel's findings report, render a decision as to "cause" or "no cause" and what sanctions will be imposed. See Sections VIII and IX.

Section V of the Complaint Procedure, entitled "The Investigating Panel," provides:

V. THE INVESTIGATING PANEL

An investigating panel will be selected from a pool of 30 members. This pool will be appointed by the Senior Vice President for Academic Affairs in consultation with the various unions, chartered student organizations, and other campus groups. The pool will consist of five undergraduate students, five graduate students, five faculty, five APT staff, five executive and managerial employees, and five civil service staff. Members will be familiarized with the interpersonal, institutional, and legal aspects of sexual harassment by the Student Advocate with assistance from the EEO/AA Office.

. . . .

Within five working days of receipt of the investigative file, the Office of Senior Vice President for Academic Affairs will select three members from the pools to constitute a panel. Before the panel is selected, the complainant and respondent may each strike the names of up to three persons from the pool. The panel of three will have one

member each from the peer group of the Complainant, from the peer group of the respondent, and from another category in the pool who shall serve as the presiding officer.

The panel will review the investigative file, consider all information related to the complaint, and may question any witnesses, the respondent and the complainant. The panel will make a report of findings of fact to the appropriate Vice President. Members of the investigating panel will act at all times to preserve the confidentiality of the investigation

Section VI of the Complaint Procedure generally provides that the investigating panel shall: (1) review the investigative file, and may question witnesses, including the complainant and the respondent; (2) maintain the confidentiality of the investigation by limiting attendance to members of the panel, the parties, their representatives, and witnesses; (3) permit the complainant and respondent to make oral and written statements and arguments on all issues involved; (4) question witnesses, and permit the complainant and respondent to question witnesses; (5) permit the complainant and respondent to submit additional signed statements before the conclusion of the investigation; (6) permit the parties to have one representative present at the hearing; (7) conduct closed deliberations, and (8) transmit a report of findings of fact to the appropriate Vice President within 20 working days following completion of deliberations.

Section VII, entitled "Transmittal of Fact Finding Report," provides that the EEO/AA investigating officer or the investigating panel will report findings of fact to the appropriate Vice President, and further provides, "[t]he complainant and the respondent shall each receive a copy of the findings report."

Section VIII, entitled "Vice President Decision," provides:

The appropriate Vice President reviews the investigative report and makes a "cause" or "no cause" determination.

A. NO CAUSE FINDING

A no cause finding will be based on the record as a whole and when the totality of circumstances do not support the complainant's allegations.

B. CAUSE FINDING

A cause finding will be based on the record as a whole and when the totality of circumstances support the complainant's allegations.

The Vice President determines the remedial action to be taken, provided that for civil service employees, if dismissal is warranted, the Vice President will recommend such action to the Director of Personnel.

The Vice President will render a written decision including recommended sanctions to the complainant, the respondent, and the EEO/AA Director, within ten working days of receiving the case file. The decision will be sent by certified mail to the complainant and respondent. [Emphases added.]

Section X of the Complaint Procedure provides that the complainant and respondent shall have access to an appeals procedure, and that the Vice President's decision may be appealed in writing by the complainant or the respondent to the President within ten working days of receipt of the decision.

Finally, Section XII entitled "Release of Information," provides:

To safeguard individual privacy, dissemination of information relating to complaints of discrimination should be limited to those individuals necessary to the informal or formal proceedings. However, complete confidentiality cannot be maintained in the process of handling informal and formal complaints. Certain information may be disclosed to appropriate administrators,

Honorable Kenneth W. Mortimer
December 30, 1994
Page 8

the respondent, and witnesses, among others, in order to conduct fact finding, institute remedial action, or informally resolve a complaint. Also, certain information may be disclosed if required by law, rule, regulation, or order of a court of competent jurisdiction.

In the spring of 1993, an undergraduate student at the University filed a formal complaint of sexual harassment against a University faculty member, and elected to have the complaint investigated by an investigating panel.

After interviewing witnesses, including the complainant and respondent, and conducting a hearing in November of 1993, the investigating panel submitted a twenty-seven page fact-finding report to Dr. Paul Yuen, University Vice President for Academic Affairs ("Vice President"). The fact-finding report found cause to believe that: (1) the faculty member engaged in sexual contact with the complainant; (2) the sexual contact was unwelcome; and (3) the complainant submitted to the sexual contact because she felt obligated to the faculty member as a result of financial and other assistance provided by the faculty member. The investigating panel also found insufficient evidence to find cause to believe that the faculty member created a hostile environment within the faculty member's classroom.

The Vice President reviewed the fact-finding report and investigation file, and found no cause to believe that the faculty member violated the University's Complaint Procedure. This decision has been appealed by the complainant to the University President.

In a letter to the Attorney General dated January 13, 1994, the University requested an opinion concerning the disclosure of the investigating panel's fact-finding report in light of section 92F-14(b)(4), Hawaii Revised Statutes, as amended by Act 191, Session Laws of Hawaii 1993.

In a letter to Honorable Kenneth W. Mortimer dated February 23, 1994 (attached as Exhibit "A") we advised the University that under part II of the UIPA, as amended by Act 191, Session Laws of Hawaii 1993, the fact-finding report of the investigating panel should not be made available for public inspection and copying, since at that point in the process of the University's Complaint Procedure, the faculty member had not been

either suspended or discharged. We also informed the University that, in a separate opinion, we would advise the University whether, under part III of the UIPA, the fact-finding report must be made available for inspection and copying by the complainant and respondent faculty member.

DISCUSSION

I. INTRODUCTION

Part III of the UIPA, entitled "Disclosure of Personal Records," sections 92F-21 through 92F-28, Hawaii Revised Statutes, governs an individual's right to inspect, copy, and request correction or amendment of the individual's "personal records." The individual's right to inspect, and request correction and amendment of the individual's personal records serves two important policies underlying the UIPA, namely, "[t]o make government accountable to individuals in the collection, use, and dissemination of information relating to them," and "[t]o provide for accurate, relevant, timely, and complete government records." Haw. Rev. Stat. § 92F-2 (Supp. 1992).² The UIPA's legislative history reflects that:

The bill will recodify major portions of

²The prefatory note to the Uniform Information Practices Code ("Model Code") drafted by the National Conference of Commissioners on Uniform State Laws, and upon which the UIPA was modeled, provides:

In order to accomplish these goals the Code requires (1) the right of an individual to see and copy personal data records relating to self, (2) the opportunity to have those records corrected or amended, (3) government to maintain no secret systems of records concerning an individual, (4) government to limit the types of information it can collect, and (5) government to limit the manner of collection, use and disclosure of individually identifiable information.

Model Code Prefatory Note at 4 (1980).

Honorable Kenneth W. Mortimer
December 30, 1994
Page 10

Chapter 92E, HRS, in Sections -21 to -28 except that these provisions will be limited to handling an individual's desire to see his or her own record. All other requests for access to personal records (i.e. by others) will be handled by the preceding sections of the bill. In this way, the very important right to review and correct one's own record is not confused with general access questions.

S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw, S.J. 689, 691 (1988); H.R. Conf. Comm. Rep. No. 112-88, Haw. H.J. 817, 818 (1988) (emphasis added).

Additionally, the Model Code commentary reflects that Article III of the Model Code "establishes a statutory framework similar to the Federal Privacy Act." Model Code § 3-101 commentary at 21 (1980). The legislative history of the federal Privacy Act of 1974 ("Privacy Act") concerning the importance of an individual's access to records that are about them, provides:

The Committee believes that the size of the Federal Government, the sheer number of personal records it must handle, and the growing complexities of information technology require that the full protections against abuses of the power of the government to affect the privacy of the individual and the confidentiality of personal information must depend in part upon the participation of the individual in monitoring the maintenance and disclosure of his own file.

To this end, we agree with members of the numerous respected study bodies that an individual should have the right to discover if he is the subject of a government file, to be granted access to it, to be able to assure the accuracy of it, and to determine whether the file has been abused by improper disclosure.

The Committee agrees with the conclusion of one government study that "In the majority of cases, the citizen's right of access to

Honorable Kenneth W. Mortimer
December 30, 1994
Page 11

information kept on him by the Federal Government will not interfere with the ongoing program of the agency. In addition, giving the individual a right of access will often be a desirable adjunct to any other system designed to insure file accuracy."

Furthermore, your Committee adopts the timely observation by one scholar from the Council on Science of Technology study that "giving the individual maximum ability to examine what the Government knows on the person should help promote citizen confidence in activities of the Federal Government and is essential to assure that notions of due process are employed when decisions are made on the basis of personal information."

S. Rep. No. 93-1183, 93rd Cong., 2d Sess. (1974).

Additionally, during the Proceedings of the Constitutional Convention of the State of Hawaii of 1978 ("Proceedings"), the Committee of Rights, Suffrage and Elections noted, in discussing a proposed privacy amendment to the Constitution of the State of Hawaii, that "the right to privacy should ensure that at the least an individual shall have the right to inspect records to correct information about himself." Standing Committee Report No. 69, Vol. I Proceedings at 674 (emphasis added).

Under the UIPA, the term "personal record," means:

[A]ny item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education, financial, medical, or employment history, or items that contain or make reference to the individual's name, identifying particular assigned to the individual, such as a fingerprint or voice print or a photograph.

Haw. Rev. Stat. § 92F-3 (Supp. 1992) (emphases added).

The definition of the term "personal record" is nearly identical to the definition of the term "record" set forth in the

Honorable Kenneth W. Mortimer
December 30, 1994
Page 12

federal Privacy Act of 1974, 5 U.S.C. § 552a(a)(4) ("Privacy Act").³ As noted above, the commentary to the Model Code reflects that Article III of the Model Code establishes a statutory framework similar to the federal Privacy Act. Federal courts examining this definition have found that to be a "record" under the Privacy Act, the information must identify an individual.

Guidelines issued by the U.S. Office of Management and Budget do not limit the term "record" to information that is "personal" or specifically about an individual's characteristics or qualities:

[Record] includes individual identifiers in any form including, but not limited to, fingerprints, voice-prints and photographs
. . . .

The term "record" was defined "to assure the intent that a record can include as little as one descriptive item about an individual. (Congressional Record, p. S21818, December 17, 1974 and p. H12246, December 17, 1974).

OMB Guidelines, 40 Fed. Reg. 28,948, 28,951-52 (1975).

Consistent with the OMB Guidelines, the Court of Appeals for the Third Circuit recently held that the term "record" "encompasses any information about an individual that is linked to that individual through an identifying particular" and is not

³Under section 552a(a)(4) of the Privacy Act, the term "record" means:

[A]ny item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

Honorable Kenneth W. Mortimer
December 30, 1994
Page 13

"limited to information which taken alone directly reflects a characteristic or quality." Quinn v. Stone, 978 F.2d 126, 133 (3rd Cir. 1992) (out-of-date home addresses on roster and time card information held to be records covered by the Privacy Act).

Nonetheless, several courts have adopted a narrow construction of the term, such that a "record" "must reflect some quality of characteristic of the individual involved." Boyd v. Secretary of the Navy, 709 F.d 684, 686 (11th Cir. 1983); see also Topurdize v. U.S. Information Agency, 772 F. Supp. 662, 664 (D.D.C. 1991); Unt v. Aerospace Corp., 765 F.2d 1440, 1448-49 (9th Cir. 1985).

Furthermore, federal court decisions under the Privacy Act also indicate that a "record" is about an individual, even if the record contains information about third persons. In Voelker v. IRS, 646 F.2d 333-35 (8th Cir. 1981), the court held that "there is no justification for requiring that information in a requesting individual's record meet some separate 'pertaining to' standard before disclosure is authorized [and i]n any event, it defies logic to say that information properly contained in a person's record does not pertain to that person, even if it may also pertain to another individual." See also Topurdize v. USIA, 772 F. Supp. 662 (D.D.C. 1991).

Having examined that fact-finding report of the investigating panel, however, we find that even if we were to narrowly construe the term "personal record," in the same manner that the term "record" is construed by some federal courts, the fact-finding report constitutes a "personal record" of both the complainant and respondent. The fact-finding report does reflect on qualities, characteristics, and personal affairs of both of these individuals, and does refer to them by name throughout the report. Furthermore, our conclusion that the fact-finding report is a personal record of the complainant and respondent is consistent with the UIPA's express definition of the term "personal record," and is fully consistent with the policies that underlie part III of the UIPA.

With regard to the disclosure of personal records to the individuals to whom they pertain, section 92F-23, Hawaii Revised Statutes, describes an agency's affirmative duties, in pertinent part, as follows:

**92F-23 Access to personal record;
initial procedure.** Upon the request of an

individual to gain access to the individual's personal record, an agency shall permit the individual to review the record and have a copy made within ten working days following the date of the request unless the personal record requested is exempted under section 92F-22

Haw. Rev. Stat. § 92F-23 (Supp. 1992).

Based upon our examination of the fact-finding report prepared by the investigating panel, we believe that only two of the exemptions in section 92F-22, Hawaii Revised Statutes, would arguably permit the University to withhold the report from the individuals to whom it pertains. We address these two exemptions below.

II. INVESTIGATIVE REPORTS AND MATERIALS IN UPCOMING, ONGOING, OR PENDING ADMINISTRATIVE PROCEEDINGS AGAINST THE INDIVIDUAL

Under part III of the UIPA, an agency is not required to disclose "investigative reports and materials, relating to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against the individual." Haw. Rev. Stat. § 92F-22(4) (Supp. 1992 & Comp. 1993) (emphases added).

Section 92F-22(4), Hawaii Revised Statutes, has no comparable provision in Article III of the Model Code. Rather, section 92F-22(4), Hawaii Revised Statutes, was taken verbatim from former section 92E-3(4), Hawaii Revised Statutes. This section of chapter 92E, Hawaii Revised Statutes, now repealed, was created by the House Committee on Judiciary in amendments to 1980 House Bill No. 501. House Standing Committee Report No. 614-80, reflects:

(e) Exemption (4) in the original bill--personal records relating to an upcoming, civil or criminal action against the person--has been renumbered as exemption (5) and amended to protect against disclosure, as personal records of investigative reports and materials relating to an upcoming, ongoing, or pending civil or criminal action or administrative proceeding against the individual. This amendment takes into account the concern expressed by the

Honorable Kenneth W. Mortimer
December 30, 1994
Page 15

Department of Regulatory Agencies to protect
against disclosure, as personal records, of
investigative materials related to an
upcoming disciplinary administrative
proceeding against the individual.

H. Stand. Com. Rep. No. 614-80, 10th Leg., 1980 Reg. Sess., Haw.
H.J. 1560, 1565 (1980) (emphasis added).

While this provision was added largely at the request of the then Department of Regulatory Agencies to protect from disclosure investigative reports and materials relating to administrative disciplinary proceedings against professional and vocational licensees, we see no reason why similar policy concerns are not present with respect to agency personnel investigations that may lead to disciplinary proceedings against State or county employees: giving the target of a proceeding premature access to the government's evidence. While the University's Complaint Procedure indicates that the "case is to be heard" by the Investigating Panel, and it is to provide a written report of its findings to the University Vice President, the investigating panel's duties are really inquisitorial in nature, in that it substitutes for an investigation by the EEO/AA Office should the complainant select "Option A" under Section III E of the Complaint Procedure. Accordingly, it is our opinion that the process created by the University's Complaint Procedure is an "administrative proceeding" within the meaning of section 92F-22(4), Hawaii Revised Statutes.⁴

Moreover, because this exemption was intended to prevent a target of a civil or criminal action or administrative proceeding from obtaining premature access to the government's evidence, we believe that the legislative policies underlying this exemption would be defeated were other persons mentioned in the

⁴Black's Law Dictionary 43 (5th ed. 1979) defines the term "administrative procedure" as "[m]ethods and processes before administrative agencies as distinguished from judicial procedure which applies to courts." Similarly, it defines the term "administrative remedy" as a "[n]on-judicial remedy provided by an agency, board, commission, or the like." Id. While the University's Complaint Procedure does not involve a formal "contested case" hearing under chapter 91, Hawaii Revised Statutes, we believe that it is nonetheless an "administrative proceeding."

Honorable Kenneth W. Mortimer
December 30, 1994
Page 16

fact-finding report provided with access to the same while the proceeding remains "upcoming, ongoing, or pending."

Accordingly, it is our opinion that under section 92F-22(4), Hawaii Revised Statutes, an agency may withhold investigative reports from an individual against whom the proceeding is brought, as well as other persons mentioned in the reports.

Also, because the investigating panel does not make the cause or no-cause determination, but the Vice President does, we believe that the administrative proceeding is no longer "pending" for purposes of this exemption after the Vice President issues a cause or no cause determination under Section VIII of the Complaint Procedure.⁵ Accordingly, we conclude that after the Vice President makes a cause or no cause determination, the fact-finding report should be made available for inspection and copying by the individuals to whom it pertains, the complainant and respondent.

III. IDENTITY OF SOURCE WHO PROVIDED INFORMATION UNDER AN EXPRESS OR IMPLIED PROMISE OF CONFIDENTIALITY

Under part III of the UIPA, an agency is not required to disclose personal records or information therein "[t]he disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality." Haw. Rev. Stat. § 92F-22(4) (Supp. 1992 & Comp. 1993).

In OIP Opinion Letter No. 92-24 (Dec. 2, 1992), we examined this exemption and based upon case law under a similar exemption in the Privacy Act, we noted that this exemption generally only applies to information that would reveal the identity of a confidential source, and does not apply to information furnished by such source. See OIP Op. Ltr. No. 92-24 at 11 (Dec. 2, 1992).

Our examination of the fact-finding report at issue suggests that none of the persons mentioned therein furnished information

⁵Although the University's Complaint Procedure provides that the complainant and respondent shall be provided with a copy of the investigating panel's report, it does not specify the point at which the report must be disclosed. Accordingly, we do not believe that the University's Complaint Procedure conflicts with the conclusion set forth in this opinion.

to the investigating panel under an express promise of confidentiality. With respect to whether any of these individuals furnished information under an implied promise of confidentiality, in OIP Opinion Letter No. 92-24, quoting a federal court decision, we observed that:

Verification of the fact of such a[n] [implied] promise of confidentiality may vary in extent depending on the type of information, the circumstances under which it was gathered, and other factors, but some effort beyond mere observations that the document contain comments on a prospective employee's character and other personal assets or shortcomings, and that they were supplied by acquaintances and business associates, must be made to enable a determination of exactly what kinds of assurances, if any, were given to the providers of the information. An implied promise of confidentiality is established only as a logical deduction from the circumstances shown, and from one set to another the result indicated expectably may differ

OIP Op. Ltr. No. 92-24 at 9 (Dec. 2, 1992), quoting Londrigan v. FBI, 670 F.2d 1164, 1173 (D.C. Cir. 1984).

While the investigating panel's fact-finding report contains quotations from the statements of students and other witnesses related to the acts of alleged sexual harassment, and some (but not all) of these students are identified by name, the fact-finding report is devoid of any evidence that assurances of confidentiality were made to these witnesses, or that an assurance of confidentiality may reasonably be implied.

In the absence of such indicia or evidence, we are constrained to conclude that this exemption does not apply to the fact-finding report. However, should the investigating panel present the OIP with evidence that would support the existence of an express or implied promise of confidentiality, we shall reconsider our opinion in this regard.

CONCLUSION

Honorable Kenneth W. Mortimer
December 30, 1994
Page 18

Based upon an examination of the investigation panel's fact-finding report, it is our opinion that this report is a "personal record," pertaining to the complainant and respondent, as this term is defined in section 92F-3, Hawaii Revised Statutes.

Furthermore, for the reasons set forth above, it is our opinion that once a cause or no cause decision is made by the Vice President, the fact-finding report must be made available for inspection and copying by the complainant and respondent. Until such time, however, we find that the report is protected from disclosure to the individuals to whom it pertains under section 92F-22(4), Hawaii Revised Statutes, since it is an investigative report relating to "an upcoming, ongoing, or pending" administrative proceeding.

Furthermore, because we have not been presented with any evidence that would reasonably support a finding that individuals identified in the report furnished information under an express or implied promise of confidentiality, see section 92F-22(2), Hawaii Revised Statutes, we find that the report must be disclosed to the complainant and respondent in its entirety.

Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
Attachment

c: T. Anthony Gill, Esq.
Sherri Ann Loo, Deputy Attorney General