

December 30, 1994

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

Attention: Mr. Tatsuki Shiramizu, Secretary  
State Post-Secondary Education Commission

Dear President Mortimer:

Re: List of Hawaii WICHE Program Participants

This is in response to a letter dated June 17, 1994 from Mr. Tatsuki Shiramizu, Secretary of the State Post-Secondary Education Commission, requesting an advisory opinion from the Office of Information Practices ("OIP") concerning the public disclosure of the above-referenced matter.

**ISSUE PRESENTED**

Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), a list of the Hawaii participants in the Western Interstate Commission for Higher Education ("WICHE"), Professional Student Exchange Program ("PSEP") must be made available for public inspection and copying upon request.

**BRIEF ANSWER**

Yes. In previous OIP advisory opinions, we found that the public has a strong public interest in information which reveals the expenditure of public funds. Moreover, even if the PSEP participants have a significant privacy interest, under section 92F-14(b)(6), Hawaii Revised Statutes, in the fact that they were selected for PSEP support, we believe that this privacy interest is outweighed by the strong public interest in disclosure. Accordingly, in our opinion, the disclosure of the list of PSEP participants would not constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised

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Statutes. In addition, because none of the other UIPA exceptions apply to protect it from disclosure, this list of PSEP participants must be made available for inspection and copying upon request.

### FACTS

WICHE is the administrative agency for the Western Regional Education Compact, which is comprised of 13 member states and two affiliate member states.<sup>1</sup> WICHE's purpose is to expand the higher education opportunities for students of its member states. For example, one of the WICHE programs, the Professional Student Exchange Program ("PSEP"),<sup>2</sup> enables students of participating member states to enroll in selected out-of-state professional programs when those fields of study are not available at public institutions in their home states.

To become a participant in the PSEP, a student applies to the state WICHE office for certification that the student is a resident of the state and is eligible for participation in the PSEP. After the student receives certification and is accepted at a school in one of the participating states, the student must notify the home state WICHE office of the acceptance.

Each field of study has a certain number of openings and if there are more applicants than there are openings, which is often the case, the WICHE headquarters in Boulder, Colorado will obtain the students' education records and rank the students so that the state agency administering the WICHE programs may fill the openings in accordance with the ranking.<sup>3</sup> If the student is selected for the PSEP, the student pays reduced levels of tuition and the home state pays a support fee to the admitting schools to help cover the cost of the student's education.<sup>4</sup>

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<sup>1</sup>The member states of WICHE are: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. North Dakota and South Dakota are affiliate member states of WICHE.

<sup>2</sup>Other WICHE programs include the Western Undergraduate Exchange, the Western Regional Graduate Program, and the Scholars Program. However, this opinion addresses only the disclosure of the list of PSEP participants.

<sup>3</sup>Selection of PSEP participants is not based upon financial need.

<sup>4</sup>Funds for WICHE programs are derived in part through state

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A student in the PSEP will continue to receive support from WICHE until the student completes the field of study program. WICHE's PSEP Manual states that:

After a student is certified and supported, the state assumes the obligation to continue support for that student through the normal duration of the program, subject to appropriation of necessary funds and provided the student remains in good standing. Except as provided to the contrary by formal legal interpretation of constitutional or statutory provisions, or published policy in the sending state, this obligation continues even if the student changes legal residence to another state.

Western Interstate Commission for Higher Education, Professional Student Exchange Program Manual 14 (July 1993).

WICHE programs in Hawaii are administered by the Hawaii State Post-Secondary Education Commission ("HSPEC"). Section 305H-1, Hawaii Revised Statutes, establishes the HSPEC and places it within the University of Hawaii for administrative purposes.<sup>5</sup>

Section 305H-2, Hawaii Revised Statutes, as amended by Act 189, Session Laws of Hawaii 1994, states in pertinent part:

**§305H-2 Commission's powers and authority.**

The commission may cooperate with the federal government in order to qualify the State to receive funds made available under the Higher Education Act of 1965, as amended by P.L. 92-318, and as it may be amended from time to time and in addition may serve as the state agency for the receipt of federal funds where the federal legislation dealing with higher education or post-secondary education requires as a condition of state receipt of such funds, the designation of a state agency which is broadly representative of the general public and of post-secondary education in the State and where agencies other than the commission created by this chapter may not qualify. The commission shall

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legislative appropriations.

<sup>5</sup>Sections 305H-1 and 305H-2, Hawaii Revised Statutes, were amended by Act 189, Session Laws of Hawaii 1994.

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establish appropriate rules and regulations not inconsistent with this chapter as may be required to administer this chapter. . . .

Act approved June 21, 1994, ch. 189, 1944 Haw. Sess. Laws 440.

The HSPEC maintains a list of Hawaii students who are attending schools on the mainland through PSEP support.<sup>6</sup> This list contains the names of all the PSEP participants grouped by field of study. Each year, approximately 45 students, all of whom must be Hawaii residents, are selected for the PSEP. Because WICHE continues to provide support until the students have completed their programs, the HSPEC informed the OIP that there is a total of approximately 100 Hawaii students currently receiving WICHE support through the PSEP.

## DISCUSSION

### **I. FERPA**

Under the UIPA, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1992). However, section 92F-4, Hawaii Revised Statutes, provides:

**[§ 92F-4] Funding, services, and other federal assistance.** Where compliance with any provision of this chapter would cause an agency to lose or be denied funding, services, or other assistance from the federal government, compliance with that provision shall be waived but only to the extent necessary to protect eligibility for federal funding, services, or other assistance.

Haw. Rev. Stat. § 92F-4 (Supp. 1992).

Under the federal Family Educational Rights and Privacy Act, 20 U.S.C. 1232g ("FERPA"), educational institutions, in order to receive federal funds, must comply with the provisions of FERPA which restrict the disclosure of "education records." Because the determination of whether the provisions of FERPA apply to the list of WICHE participants is outside the scope of the OIP's jurisdiction, we requested the U.S. Department of Education,

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<sup>6</sup>The Hawaii WICHE PSEP programs are: dentistry, occupational therapy, optometry, osteopathic medicine, pharmacy, physical therapy, and veterinary medicine.

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Family Policy Compliance Office, for an advisory opinion concerning this matter.

In its response, a copy of which is attached as Exhibit "A", the Family Policy Compliance Office opined that although the HSPEC administers the WICHE programs, the HSPEC is not an "educational agency or institution" under FERPA with respect to the records it maintains on WICHE program participants." Letter from LeRoy S. Rooker, Director of the Family Policy Compliance Office, to OIP Staff Attorney Stella M. Lee (Sept. 21, 1994). Thus, even if the HSPEC receives federal funds, these funds will not be jeopardized under FERPA by the disclosure of the list of PSEP participants. Moreover, although the HSPEC is administratively attached to the University of Hawaii, which is an educational agency or institution subject to disclosure restrictions under FERPA, the PSEP participant list does not reveal information about University of Hawaii students. Consequently, the disclosure of the PSEP participant list also would not jeopardize the University of Hawaii's federal funding.

Therefore, in order to determine whether the list of PSEP participants is public under the UIPA, we must now turn to examine the exceptions to required agency disclosure contained in section 92F-13, Hawaii Revised Statutes. Based upon the facts presented, only one of the UIPA's exceptions, the UIPA's personal privacy exception, may possibly apply to the disclosure of the list of WICHE participants.

## **II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY**

Section 92F-13(1), Hawaii Revised Statutes, provides that agencies are not required to disclose government records which, if disclosed, "would constitute a clearly unwarranted invasion of personal privacy." The Legislature also provided further guidance on the application of this personal privacy exception by stating that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1992).

Section 92F-14(b), Hawaii Revised Statutes, sets forth a list of examples of information in which an individual has a significant privacy interest. Section 92F-14(b)(6), Hawaii Revised Statutes, provides that an individual has a significant privacy interest in "[i]nformation describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness." It is arguable that participation in the PSEP indicates "financial

activity" under section 92F-14(b)(6), Hawaii Revised Statutes. However, we find it significant that applicants for the PSEP are not selected based upon economic need; therefore, the fact that they are PSEP participants does not indicate their economic status.

On the public interest side, however, we believe that there is a strong public interest in knowing the names of students selected for the PSEP and their fields of study. In previous OIP advisory opinions, we have stated that the public has a strong public interest in the disclosure of information concerning the expenditure of public funds. See OIP Op. Ltr. No. 94-18 (Sept. 20, 1994); OIP Op. Ltr. No. 94-17 (Sept. 12, 1994); OIP Op. Ltr. No. 94-15 (Aug. 30, 1994); OIP Op. Ltr. No. 91-19 (Oct. 18, 1991); and OIP Op. Ltr. No. 90-21 (June 20, 1990). We believe that the disclosure of the names of PSEP participants would shed substantial light on the HSPEC's performance of its statutory purposes, and would also prevent possible favoritism in the expenditure of public funds. See also OIP Op. Ltr. No. 93-1 at 9 (April 8, 1993) (Native Hawaiian Revolving Loan Fund); OIP Op. Ltr. No. 92-11 at 11 (Aug. 12, 1992) (Section 8 Waiting List); and OIP Op. Ltr. No. 89-4 at 6 (Nov. 9, 1989) (Hawaiian Home Land Waiting List).

In our opinion, the strong public interest in disclosure outweighs any privacy interest the students have in the fact that they are PSEP participants and in their particular field of study.<sup>7</sup> We therefore conclude that disclosure of the list of PSEP participants does not constitute a "clearly unwarranted invasion of personal privacy" under the UIPA. Further, based upon the facts presented in this situation, we do not believe that any of the other UIPA exceptions in section 92F-13, Hawaii Revised Statutes, apply to protect this list from public disclosure.

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<sup>7</sup>In comparison, we note that FERPA permits educational institutions to make student directory information public, provided that the students or their parents are given the chance to "opt out" and keep this information confidential. 20 U.S.C. § 1232g (a)(5). The term "directory information" under FERPA is defined as the following: "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." 20 U.S.C. § 1232g (a)(5)(A) (emphases added).

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**CONCLUSION**

The list of Hawaii students who receive support for their education through the PSEP is not protected by any of the UIPA exceptions in section 92F-13, Hawaii Revised Statutes. Thus, under the UIPA, this list must be made available for public inspection and copying upon request.

Very truly yours,

Stella M. Lee  
Staff Attorney

APPROVED:

Kathleen A. Callaghan  
Director

SML:sc  
Attachment

c: Senator Malama Solomon  
Lloyd Nekoba  
Russell Suzuki, Deputy Attorney General