Op. Ltr. 95-07 Report of Faculty Advisory Committee on Academic Freedom

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.

March 28, 1995

Mr. Paul C. Yuen
Senior Vice President
University of Hawaii at Manoa
Bachman Hall 202
2444 Dole Street
Honolulu, Hawaii 96822

Dear Vice President Yuen:

Re: Report of Faculty Advisory Committee on Academic Freedom

This is in reply to your letter dated April 25, 1994 to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the above-referenced matter.

You requested the OIP to advise you whether, under Part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), a report of the College of Arts and Humanities Faculty Advisory Committee on Academic Freedom ("Committee") dated November 17, 1993 must be made available for public inspection and copying.

The Committee was convened under article VII of the collective bargaining agreement between the University of Hawaii ("University") and the University of Hawaii Professional Assembly, to investigate whether a faculty member's right to academic freedom was violated by procedures used to investigate and process a sexual harassment complaint filed against the faculty member under the University's Sexual Harassment Policy and Complaint Procedure.

ISSUE PRESENTED

Whether, under Part II of the UIPA, entitled "Freedom of Information," the Committee's report must be made available for public inspection and copying upon request.

BRIEF ANSWER

The Committee's report contains substantial information concerning complaints of sexual harassment that were filed against an identified faculty member, and details associated therewith. Since these allegations have not led to the

imposition of disciplinary action involving a suspension or discharge, under section 92F-14(b)(4), Hawaii Revised Statutes, as amended by Act 191, Session Laws of Hawaii 1993, the faculty member identified in the Committee's report has a significant privacy interest in this information.

Furthermore, based upon federal court decisions under the "clearly unwarranted invasion of personal privacy" exemption in the federal Freedom of Information Act, it is our opinion that the segregation or deletion of individually identifiable information from the report will not be sufficient to prevent the likelihood of actual identification of the accused faculty member because the faculty member's identity is generally known within the University community. Accordingly, it is our opinion that the segregation of identifying information in the Committee's report will not be sufficient to avoid a clearly unwarranted invasion of the faculty member's personal privacy under section 92F-13(1), Hawaii Revised Statutes.

In contrast, it is our opinion that disclosure of sections 4 and 8 of the report, entitled "The Definition of Sexual Harassment" and "Recommendations," respectively, will not result in a clearly unwarranted invasion of the faculty member's personal privacy. These sections of the Committee's report do not reveal any information about the faculty member, but instead, set forth the Committee's recommendations for the improvement of the University's Sexual Harassment Policy and Complaint Procedure and a discussion and analysis of the definition of the term "sexual harassment."

Accordingly, it is our opinion that sections 4 and 8 of the Committee's report contain reasonably segregable information that is not protected from disclosure under section 92F-13, Hawaii Revised Statutes, and that these sections of the report, and these sections only, should be made available for public inspection and copying upon request.

FACTS

In 1993, three University students filed formal complaints against a University faculty member under the University's Sexual Harassment Policy and Complaint Procedure ("Policy and Procedure"). No disciplinary action has been taken against the faculty member as a result of the complaints that were filed under the Policy and Procedure, however, the complaints were investigated by an investigating panel, and the University's Vice President for Academic Affairs issued findings of fact and a no cause determination. These findings have been publicly reported as a result of a lawsuit brought against the University by one of

the complainants. See Injustice for All, *Honolulu* (February 1995).

Under article VIII C.2 of the 1993-1995 Agreement Between the University of Hawaii Professional Assembly and the Board of Regents of the University of Hawaii ("collective bargaining agreement") the faculty member filed a written complaint that the procedures used to investigate and process the complaints against the faculty member violated the faculty member's right to academic freedom. In accordance with the collective bargaining agreement, the Committee was convened to investigate this complaint and render a report to the University's Executive Vice President. Article XIII C. of the collective bargaining agreement provides:

> C. PROCEDURE FOR DEALING WITH ALLEGED INFRINGEMENTS
>
> 1. When there is belief that a Faculty Member's academic freedom is threatened by a possible violation of Paragraph A above, the Faculty Member may discuss the matter with the Department Chair or the appropriate administrative advisor.
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> 2. If a satisfactory adjustment of the matter does not result, the Faculty Advisory Committee of Academic Freedom will be convened by the appropriate Administrative Officer within fourteen (14) calendar days of the receipt of the written request from the Faculty Member. The Faculty Member may present a case, confidentially and orally, to the Faculty Advisory Committee on Academic Freedom, which will then informally inquire into the situation to determine whether there is a probable violation of the provision on

academic freedom, and attempt to effect an adjustment.

3. If the committee concludes that academic freedom is in jeopardy by the possible violation of Paragraph A above, and that no adjustment can be effected, it will then request a written statement from the complaining Faculty Member and proceed to collect all factual materials available relating to the case.

4. After consideration of these materials, the Faculty Advisory Committee on Academic Freedom committee will make a recommendation to the appropriate Administrative Officer within thirty (30) calendar days from the date in which the Committee was first convened. A copy of the report and recommendations shall be sent by the Administrative Officer to the appropriate Chancellor or Vice President and the Faculty Member.

5. If the Administrative Officer takes action which does not satisfy the Faculty Member, and the Faculty Member believes the action violates Paragraph A above, the Faculty Member may file a grievance at Step 1 of the Grievance Procedure (Article XXI).

Additionally, Article XV, of the collective bargaining agreement, entitled "Disciplinary Actions," provides:

A. GENERAL

The Employer shall not discharge, suspend, or reduce the compensation of any Faculty Member for disciplinary reasons, or take other disciplinary action, except for proper cause and in accordance with the procedures set forth in this Article. <u>All matters under this Article, including investigations, shall be considered confidential. Information pertaining to disciplinary actions may be subject to disclosure under the provisions</u>

of Section [sic] 92F, Hawaii Revised Statutes. [Emphasis added.]

Finally, Article XXI of the collective bargaining agreement, entitled "Grievance Procedure," provides:

> A. DEFINITION
>
> A grievance is a complaint by a Faculty Member or the Union concerning the interpretation and application of the express terms of this Agreement. All matters under this Article, including investigations, shall be considered confidential. Information pertaining to the decision of an arbitrator may be subject to disclosure under the provisions of Section [sic] 92F, Hawaii Revised Statutes. [Emphasis added.]

In November 1993, the Committee delivered its report to the University's Executive Vice President. Subsequently, in July 1994, the University received a request from a member of the public for a copy of the report under the UIPA.

DISCUSSION

I. INTRODUCTION

Except as provided in section 92F-13, "each agency upon request by any person shall make government records available for inspection and copying." Haw. Rev. Stat. ə 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. ə 92F-3 (Supp. 1992); Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 376 n.10 (1993).

II. EFFECT OF COLLECTIVE BARGAINING AGREEMENT

The collective bargaining agreement does not expressly state that the report of the Committee shall be confidential. It does state that the faculty member shall be permitted to present a case, "confidentially and orally to the Committee," which will then "informally inquire into the situation." The collective bargaining agreement also provides that the investigation of a

grievance shall be considered confidential. Since the term "grievance" is broadly defined as a complaint by a faculty member or the union concerning the interpretation and application of the collective bargaining agreement, the faculty member's complaint alleging a violation of academic freedom arguably constitutes a grievance proceeding since proceedings resulted therefrom.

However, it is our opinion that the terms of a collective bargaining agreement between a government agency and a public employees' union cannot make government records confidential that are not protected from disclosure under section 92F-13, Hawaii Revised Statutes, since such provisions would be void as against public policy.

State courts have uniformly held that government agencies cannot enter into enforceable promises of confidentiality with respect to public records that must be available under federal and state open records laws. See Petkas v. Staats, 501 F.2d 887, 889 (D.C. Cir. 1974); Ackerly v. Ley, 420 F.2d 1226, 1340 n.10 (D.C. Cir. 1969); Robles v. EPA, 484 F.2d 843, 846 (4th Cir. 1973); Hechler v. Casey, 333 S.E.2d 799, 809 (Wa. V. 1985); State ex. rel. Sun Newspapers v. Westlake Bd. of Education, 76 Ohio App.3d 170, 601 N.E.2d 173 (Ohio Ct. App. 1991); Librach v. Cooper, 778 S.W.2d 351, 353 (Mo. Ct. App. 1989); Anchorage School Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989); KUTV, Inc. v. Utah State Board of Education, 689 P.2d 1357, 1361 (Utah 1984); Kureczka v. Freedom of Information Commission, 636 A.2d 777, 782 (Conn. 1994).

Collective bargaining agreements of public employees' organizations are no exception to this rule. See State ex rel. Dispatch Printing Co. v. Wells, 18 Ohio St.3d 382, 481 N.E.2d 632 (Ohio 1985); Mills v. Doyle, 407 So. 2d 348 (Fla. Dist. Ct. App. 1981) ("to allow the elimination of public records from the mandate of [the open records law] by private contract would sound the death knell of the Act"); Trombly v. Bellows Falls Union H.S.Dist., 624 A.2d 857 (Vt. 1993) (labor contract between school board and teachers' association purporting to make grievances confidential, could not override provisions of the Vermont Public Records Act making such records subject to public disclosure); Lieberman v. Bd. of Labor Relations, 716 Conn. 253, 579 A.2d 505 (Conn. 1990) (as with contracts generally, the collective bargaining process and resulting agreements are subject to restrictions of public policy as manifested in constitutions, statutes, and applicable legal precedents and the destruction of public employee disciplinary records is an illegal subject of bargaining); Toledo Police Patrolman's Association, Local 10, IUPA v. City of Toledo, 641 N.E.2d 799 (Ct. App. Oh. 1994) (compliance with collective bargaining agreement excused where it

makes confidential records that are public under the public records act).[1]

We now turn to an examination of whether any of the UIPA's exceptions in section 92F-13, Hawaii Revised Statutes, would apply to the information set forth in the facts presented.

III. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

A. The Faculty Member Has a Significant Privacy Interest in the Report

Under the UIPA, an agency is not required to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. ə 92F-13(1) (Supp. 1992 & Comp. 1993).

Under the UIPA, the "[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. ə 92F-14(a) (Supp. 1992). Under this balancing test, "if a privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw S.J. 689, 690 (1988). Indeed, the legislative history of the UIPA's privacy exception indicates this exception only applies if an individual's privacy interest in a government record is "significant." See id. ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure").

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[1]Also, the Honorable John S.W. Lim, Circuit Court Judge, First Circuit, State of Hawaii, in ruling upon a motion for preliminary injunction filed by the State of Hawaii Organization of Police Officers ("SHOPO"), held "under reasonable interpretation of the override provision of Chapter 89, [Hawaii Revised Statutes] no agency and its public employees can bargain away the explicit and specific provisions of [the UIPA]." Transcript of Proceedings, March 30, 1994, State of Hawaii Organization of Police Officers v. City and County of Honolulu, et. al., Civil No. 94-0547, Circuit Court, First Circuit, State of Hawaii. Under its supervisory powers over lower courts, the Hawaii Supreme Court stayed the order denying SHOPO's motion for preliminary injunction pending a trial on the merits.

During the 1993 session of the Seventeenth Legislature, the Legislature adopted, and the Governor approved, an Act effective June 9, 1993, ch. 191, 1993 Haw. Sess. Laws 290 ("Act 191"). Act 191 amended section 92F-14(b), Hawaii Revised Statutes, which contains a list of government records, or information contained therein, in which an individual is deemed to have a "significant" privacy interest. As amended by Act 191, section 92F-14(b)(4), Hawaii Revised Statutes, provides:

> (b) The following are examples of information in which the individual has a significant privacy interest:
>
> . . . .
>
> (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, <u>except</u>:
>
> (A) Information disclosed under section 92F-12(a)(14); and
> (B) <u>The following information related to employment misconduct that results in an employee's suspension or discharge</u>:
> (i) The name of the employee;
> (ii) The nature of the employment related misconduct;
> (iii) The agency's summary of the allegations of misconduct;
> (iv) Findings of fact and conclusions of law; and
> (v) The disciplinary action taken by the agency;
>
> when the following has occurred: the highest non-judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision; provided that this

> subparagraph shall not apply to a county police department officer with respect to misconduct that occurs while the officer is not acting in the capacity of a police officer.

Haw. Rev. Stat. ∋ 92F-14(b)(4) (Comp. 1993) (emphases added).

In United States Department of State v. Washington Post, 456 U.S. 595 (1982), the U.S. Supreme Court held that information could be protected from disclosure under Exemption 6 of the federal Freedom of Information Act, 5 U.S.C. ∋ 552(b)(6) (1988) ("FOIA"), even though the information was not contained in a "personnel and medical files and similar files," language found within the text of FOIA's Exemption 6.[2] In doing so, the Court reasoned that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information." 456 U.S. at 601. As such, the fact that the Committee's report is not contained in the faculty member's personnel file does not, in our opinion, mean that the faculty member does not have a significant privacy interest in personnel related information in the report.

Based upon our examination of the Committee's report, in the context of determining whether the faculty member's academic freedom was violated, the report contains substantial discussion of the allegations of misconduct against the faculty member involving complaints of sexual harassment against students. None of these allegations have led to the imposition of disciplinary action against the faculty member.

The legislative history of Act 191 demonstrates that it intended to clarify the extent to which information concerning employment-related misconduct by an agency employee must be publicly accessible under the UIPA. The report of the conference committee assigned to resolve differences between the House and Senate versions of the bills that led to the adoption of Act 191 provides:

> The purpose of this bill is to amend section 92F-14, Hawaii Revised Statutes (HRS), the Uniform Information Practices Act

[2]FOIA's Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

> (Modified) to clarify what type of information, regarding employment-related misconduct, may be disclosed and when such disclosure may be made.
>
> Your Committee finds that the current law regarding disclosure of public employee misconduct has led to confusion, uncertainty and controversy.
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> A balance needs to be drawn between the public's right to know about government functions and the public employee's right to privacy.
>
> Your Committee notes that this measure appropriately distinguishes between minor and more serious misconduct by focusing on the disciplinary consequences, and protects the employee from the disclosure of information while formal grievance procedures are still in progress. Yet the bill also serves the public at large by refusing to provide further protection from disclosure of misconduct when the employee has exhausted non-judicial grievance adjustment procedures, and has been suspended or discharged.
>
> Your Committee also finds that because of the unique responsibilities of police officers, special care must be taken to clearly delineate private conduct from conduct as a government employee.

S. Conf. Comm. Rep. No. 61, 17th Leg., 1993 Reg. Sess., Haw. S.J. 764, Haw. H.J. 900 (1993)(emphases added).

Since the University has not taken disciplinary action against the faculty member involved, let alone suspended or discharged the faculty member, we believe the faculty member has a significant privacy interest in information set forth in the Committee's report. Furthermore, except as noted below, we believe that the disclosure of the Committee's report would constitute a clearly unwarranted invasion of the faculty member's privacy under section 92F-13(1), Hawaii Revised Statutes.

B. Whether Segregation of Individually Identifiable Information Will Prevent a Likelihood of Actual Identification

In previous advisory opinion letters, based upon federal court decisions under FOIA's Exemption 6, we opined the UIPA's clearly unwarranted invasion of personal privacy exception generally does not apply to information pertaining to an individual whose identity cannot be determined after the segregation of identifying information from the record. See OIP Opinion Letter No. 94-8 at 10-11 (May 12, 1994). In determining whether information is individually identifiable, the test employed is whether the information would "result in a likelihood of actual identification." Id.

In Dep't of the Air Force v. Rose, 425 U.S. 352 (1976), a FOIA requester sought access to summaries of honor and ethics hearings at the United States Air Force Academy, involving cadets suspected of violating the academy's honor code. The Court held that the court of appeals properly ordered the agency to produce the case summaries for an in camera inspection by the district court to determine whether the summaries could be redacted of identifying information. The Court observed that "what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar, as fellow cadets or Academy staff, with other aspects of his career at the Academy." Id. at 380.

The Court further reasoned:

> We nevertheless conclude that consideration of the policies underlying the Freedom of Information Act, to open public business to public view when no "clearly unwarranted" invasion of privacy will result, requires affirmance of the holding of the Court of Appeals, 495 F.2d at 267, that although "no one can guarantee that all those who are 'in the know' will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty" it sufficed to protect privacy at this stage in these proceedings by enjoining the District Court, Id. at 268, that if in its opinion deletion of personal references and other identifying information "is not sufficient to safeguard privacy, then the summaries should not be disclosed to [respondents]." We hold, therefore, in agreement with the Court of Appeals, "that the in camera procedure [ordered] will further the statutory goal of

> Exemption Six: a workable compromise between individual rights 'and preservation of public rights to Government information.'" Id. at 269.
>
> To be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe. But redaction is a familiar technique in other contexts and exemptions to disclosure under the Act were intended to be practical workable concepts.

Rose, 425 U.S. 381-382.[3]

Similarly, in Citizens for Envtl. Quality v. United States Dep't of Agriculture, 602 F. Supp. 534 (D.D.C. 1984), a FOIA requester sought the results of medical tests performed upon Forest Service employees in connection with herbicide spraying in an Idaho National Forest. The government offered affidavits stating the circumstances surrounding the herbicide testing were publicly known, and that the identities of the employees tested could readily be deduced. The court noted that likelihood of actual identification was the applicable test, and that the likelihood of actual identification must be "more palpable than [a] mere possibility." Citizens, 602 F. Supp. 538, quoting Dep't of the Air Force v. Rose, 425 U.S. 352, 262 (1976).

The court held that the government had failed to meet its burden of proof by the submission of non-conclusory affidavits that created a triable issue of fact:

> USDA's affidavits, alleging what was "commonly known" about the USDA employees engaged in herbicide application and the resulting "speculation" surrounding the identity of the employee tested, are either too conclusory to create a triable issue of fact for this court to decide or allege only speculation and possibilities which the Supreme Court and the Court of Appeals for the D.C. Circuit have held to be insufficient

[3]In a footnote to its decision, the Court noted that Exemption 6 was "directed at threats to privacy more palpable than mere possibilities." Rose, 425 U.S. at 381 n.19.

> to invoke Exemption 6 as a matter of law. [Citations omitted.] Plaintiff, on the other hand, has come forth with affidavits asserting from the personal knowledge of the affiants, who were residents of the Avery, Idaho area and deeply interested in the USDA's herbicide application program, that they could not identify the subject of the tests from available information and that they know of no one who could.

Citizens, 602 F. Supp. at 529.

A determination whether the segregation of identifying information in the Committee's report is sufficient to prevent a likelihood of actual identification is a difficult one. Based upon our careful in camera examination of the Committee's report, we do not believe that the segregation of the faculty member's name, college, college courses taught, and other information in the Committee Report would be sufficient to prevent the likelihood of actual identification based upon information known outside the agency, when viewed from the vantage point of the University community, in addition to that of the public.

It is our understanding the name of the faculty member against whom the sexual harassment complaints were filed is generally known within the University community, and the faculty member's department. Additionally, we understand that the faculty member's name is known to several student witnesses who testified before the University's sexual harassment investigating panel, by the University's Student Advocate, by the complaining students and their associates, and by students in the course taught by the faculty member. Indeed, the name of the faculty member is known to the person who requested a copy of the Committee's report under the UIPA. See Exhibit "A." Under these circumstances, we do not believe that the segregation of identifying information in the Committee's report would be sufficient to prevent the likelihood of actual identification, and that disclosure of the report in a segregated form would result in a likelihood of actual identification "more palpable than a mere possibility."

Accordingly, we conclude that the facts presented in this opinion present the highly unusual circumstance that the segregation of the faculty member's name and other individually identifiable information will not be sufficient to safeguard the faculty member's privacy interest in the information set forth in the report.

However, we believe that disclosure of section 8 of the report, entitled "Recommendations," would not constitute a clearly unwarranted invasion of the faculty member's personal privacy, since the recommendations set forth therein do not pertain to the faculty member, but instead pertain to perceived problems with the University's Policy and Procedure. This section of the Committee's report does not reveal any identifiable information about the faculty member, but contains the Committee's recommendations for improving the University's Policy and Procedure. Accordingly, we recommend that this section of the report be segregated, and be made available for inspection and copying upon request.

For similar reasons, we do not believe that the disclosure of section 4 of the Committee's report would constitute a clearly unwarranted invasion of the faculty member's privacy. This section of the report merely contains a discussion and analysis of the definition of "sexual harassment," and does not reveal any information pertaining to the faculty member, or the allegations of misconduct that were filed against the faculty member under the University's Policy and Procedure.

CONCLUSION

For the reasons set forth above, it is our opinion that under sections 92F-14(b)(4) and 92F-13(1), Hawaii Revised Statutes, the Committee's Report may be withheld from public inspection and copying, except for sections 4 and 8 of the report, to prevent a clearly unwarranted invasion of the faculty member's personal privacy. Since sections 4 and 8 of the Committee's report do not reveal any information about the faculty member, we recommend that these portions of the Committee's report be segregated, and be made available for public inspection and copying upon request.

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

Very truly yours,

Hugh R. Jones
Staff Attorney

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