Op. Ltr. 10-02 Form of Record; Limitations on Employer Actions (APPEAL 07-27)

Please note that opinions discussing the deliberative process privilege have been materially affected by the Hawaii Supreme Court's majority opinion in Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (Dec. 21, 2018).

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The Office of Information Practices (OIP) is authorized to issue this advisory opinion under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS.

ADVISORY OPINION

Requester: Dr. John Wendell
Agency: University of Hawaii
Date: August 16, 2010
Subject: Form of Record; Limitations on Employer Actions (APPEAL 07-27)

Requester asks whether the University of Hawaii (UH) properly denied Requester's request for all UH faculty names and e-mail addresses (faculty e-mail list) in electronic form under part II of the UIPA, and whether statements made by UH concerning his use of the record it disclosed violate the UIPA.

Unless otherwise indicated, this determination is based solely upon the facts presented in Requester's letter to UH dated April 4, 2007; UH's letter to Requester dated April 10, 2007; Requester's e-mail correspondence with OIP on April 19 and May 30, 2007 and attachments; and UH's letter to OIP dated April 30, 2007 and e-mail correspondence on June 8, 2007.

QUESTION(S) PRESENTED

1. Whether UH is required to provide Requester with a faculty e-mail list in an electronic form.

2. Whether UH may, as Requester's employer, restrict Requester's use of information he obtained under the UIPA.

BRIEF ANSWER(S)

1. UH is not required to compile the faculty e-mail list if it is not "readily retrievable." UH need not provide access to information in electronic form if information in that form is protected under a UIPA exception to disclosure and cannot be segregated.

2. Yes. UH is not prohibited from limiting its employees' use of information obtained under a UIPA request because the UIPA does not provide an affirmative right to use such information without repercussion. Thus, UH's notice to Requester that its internal policy prohibited use of its electronic mail system by its employees in the manner intended by Requester did not violate the UIPA.

FACTS

Requester sent a request to UH for "the university e-mail address for every person classified as faculty in the University of Hawaii System[,]" which he stated he preferred to receive in electronic form. UH responded by sending Requester a hard copy of the University of Hawaii 2006-2007 Faculty and Staff System Directory, which it stated was its most current directory containing the information Requester was seeking, and by directing Requester to its website for the most recently updated e-mail address information. UH informed Requester that it "does not maintain a specific electronic file composed only of faculty e-mail addresses" and therefore the directory provided was the existing UH record most responsive to his request. UH also stated that the UH "system's e-mail broadcast facility utilizes a specialized database format that includes other information about the list members in addition to their e-mail addresses."

At the time the directory was provided, UH understood that Requester intended to use the directory to e-mail surveys to all UH faculty members system-wide. UH's response to Requester thus contained a statement that the directory was being provided in response to his UIPA request, but that UH did not, by providing the directory, authorize its use in the intended manner, which would violate UH Executive Policy E-2.210. That policy governs the use and management of the University's information technology (IT) resources, and is directed at, and places restrictions on the use of IT resources by, all faculty, staff and students. Specifically, UH stated the following:

> This directory is provided to you solely because you are entitled to it under the UIPA. Providing the directory does not constitute authorization for your contemplated use of information contained in it, which we understand to involve e-mailing a survey to all faculty members system-wide. Such a mass e-mail would violate Executive Policy E-2.210, which requires all users of University information systems to respect the rights of others and specifically states that "[u]sers may not engage in the transmission of unsolicited bulk e-mail ('spamming'), regardless of how

important it may seem to the sender." Executive Policy E-2.210 provides that violations may lead to enforcement action, including denial of access."

DISCUSSION

I. Creation or Compilation of Record Requested/Format of Record

An agency must compile information in response to a UIPA request if it is "readily retrievable." Section 92F-11(c), HRS, states that,"[u]nless the information is readily retrievable in the form in which it is requested, an agency shall not be required to prepare a compilation or summary of its records." Thus, even if an agency does not maintain a specific list of information requested, the agency would be required to compile such a list if it is readily retrievable given the agency's programming capabilities. See OIP Op. Ltr. No. 90-35 at 9-10 (given that the Commission on Water Resource Management, using existing programming capabilities, had routinely retrieved an electronic mailing list of persons filing a Declaration of Water Use for its own use, OIP concluded that such information is "readily retrievable"). Whether information is "readily retrievable" presents a question of fact that must be determined on a case-by-case basis. Id.

UH did not state in its response that a faculty e-mail list is not readily retrievable from any of its electronic records or databases in which the requested information is stored,[1] but instead stated that it did not maintain a specific electronic list of only faculty e-mail addresses and therefore provided the printed directory as the existing UH record most responsive to his request. If such a list is readily retrievable, then UH must compile such a list whether or not it actually existed in that form at the time of the request.[2] See OIP Op. Ltr. No. 90-35. If it is not, UH should inform the Requester so and cite to section 92F-11(c), HRS. Haw. Admin. R. ¶2-71-14(b)(2).

A separate question is raised as to the requested physical form of the record.[3] An agency must generally provide access to a government record in the physical

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[1] This would include its database utilized for its communications systems as well as any other electronic databases, files or documents that may contain the contact information requested, such as those used for its website or to create the published directory.

[2] If a list is readily retrievable, UH may first confirm that Requester still wants the list given UH's belief that it was no longer sought by Requester.

[3] We note the distinction between a record that is requested in any electronic form so that it can be transmitted by e-mail, and records that are requested in the original electronic form in which the record was created and is physically maintained, such as a word document, an excel spreadsheet, or an electronic list from a database, addressed

form requested by the public as long as an agency maintains the information in that form, and unless doing so might significantly risk damage, loss, or destruction of the original record. See OIP Op. Ltr. No. 90-35 at 10-14. However, the agency may deny access in the form requested if an exception to disclosure applies. Id. For example, it may be appropriate for an agency to deny access to a record in electronic Word format if the record is one that contains embedded data consisting of information that may be withheld under the "frustration" exception to disclosure, such as internal back and forth comments between agency employees that are protected by the deliberative process privilege. See Haw. Rev. Stat. § 92F-13(3); OIP Op. Ltr. No. 90-8.

UH appears to have denied access to electronic information in its databases on the basis that it cannot segregate information in which faculty members and staff have a significant privacy interest. An agency may deny access to its electronic database where the agency cannot segregate information that may properly be withheld under a UIPA exception to disclosure. See OIP Op. Ltr. No. 05-06; OIP Op. Ltr. No. 90-35. If the requested information cannot be provided in an electronic format from any of UH's electronic records or databases for this reason,[4] UH should deny access by citing to section 92F-13(1), HRS, as the basis for its withholding. In that event, UH's disclosure of its printed directory with reference to its website[5] for updated information in response to Requester's request would not violate the UIPA.

II. Executive Policy Restriction on Use of UH E-mail System

Requester has complained about UH's reference to Executive Policy E-2.210 because he believes that UH cannot, in its response to a UIPA request, refer in any way to his intended use of the information. OIP finds that UH's statement regarding Executive Policy E-2.210 does not conflict with any right created by the UIPA or any underlying public policy, and therefore does not violate the UIPA.

The purpose for which information obtained under a UIPA request is used is generally irrelevant for purposes of responding to the request. OIP Op. Ltr. No. 90-35 at 14-15 (agency must treat commercial and non-commercial requesters equally).

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above. Cf. Haw. Admin. R. ¶2-71-18(c) (agency shall make reasonable effort to transmit copy of record in the manner sought by requester).

[4] Requester likely wanted access to UH's electronic e-mail address book, but he might also have been satisfied with the transmission in another electronic form that would allow the data to be readily manipulated to create an electronic address book.

[5] Although an agency may refer a requester to the agency website to access records, we note that a requester may still request that the agency provide a copy, but must then pay for any lawful fees charged. Haw. Rev. Stat. § 92F-11 (except as provided in section 92F-13, agency has an affirmative duty to provide access); Haw. Admin. R. §2-71-19.

UH did not, however, take Requester's intended use of the requested information into consideration in making its disclosure. Rather, UH provided the record it believed to be responsive to Requester's request independent of this intended use.

However, UH knew that Requester was a UH employee and it understood that he intended to use the information to e-mail UH faculty system-wide. It thus informed Requester, in conjunction with its disclosure, that such mass mailings on UH's information systems would violate Executive Policy E-2.210, and that UH was not, by disclosing the record, waiving that policy's application to Requester. Given this factual background, it is clear that UH's implicit notice of adverse employment consequences for Requester's potential use of the information was based on Requester's status as a UH employee, rather than Requester's status as a record requester. The specific question raised for OIP, therefore, is whether an employer may directly or indirectly restrict an employee's use of information obtained through a UIPA request.

Although the UIPA does not allow an agency to condition disclosure of public records on a requester's proposed use of those records, it also does not contain provisions creating an affirmative right to use information through a UIPA request: It is silent as to whether an employer, government or private, may limit its employees' use of information so obtained, and does not explicitly set forth a public policy against such a restriction. OIP declines to read such a policy into the UIPA, and thus concludes that the UIPA does not bar an employer (governmental or private) from placing limits or conditions on its employees' use of information obtained through a UIPA request or enforcing its restrictions. See OIP Op. Ltr. No. 04-10 (county charter provisions that purport to limit an individual officer's or employee's ability to appear and testify as a member of the public do not violate the Sunshine Law, which does not provide individuals with an affirmative right of freedom of speech); see generally Shero v. Grand Savings Bank, 176 P.3d 1204 (Okla. 2008) (court found that Oklahoma Open Records Act did not contain public policy that would give rise to a claim for employer liability for employee's discharge for refusing to drop a lawsuit brought against a third party under the Act, where the Act was "silent as to any limitations on the actions of an employer" or "any public policy against conditioning continued employment on the abandonment of claims pursuant to the Act"). Accordingly, UH did not violate the UIPA by reminding Requester of Executive Policy E-2.210 and the possible consequence to Requester should he use the e-mail directory information provided in response to his UIPA request in violation of that policy.

OFFICE OF INFORMATION PRACTICES

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