December 31, 1990

MEMORANDUM

TO: The Honorable Albert J. Simone, Ph.D
President, University of Hawaii

FROM: Kathleen A. Callaghan, Director

SUBJECT: Corollary Issues Regarding OIP Opinion Letter No. 90-12 (Feb. 26, 1990) Pertaining to Sexual Harassment Charges

Your memorandum dated March 5, 1990, requesting a clarification of the above-referenced advisory opinion, has been forwarded to the Office of Information Practices ("OIP") by Attorney General Warren Price, III, in accordance with established protocol, to respond to the corollary issues posed in your memorandum that were not raised by the facts presented in OIP Opinion Letter No. 90-12 (Feb. 26, 1990).

ISSUES PRESENTED

I. Whether the names of faculty members who have been charged with sexual harassment by students should be disclosed when the formal charge is pending, or is dismissed for lack of merit or sufficient evidence.

II. Whether, under the facts presented, the University of Hawaii-Manoa ("UH") violated the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), by disclosing to the student-complainant the disciplinary action taken against the faculty member who allegedly sexually harassed the complainant.

III. Whether, under the UIPA, a government agency may enter into an agreement, pursuant to which the agency promises to designate

government records as "confidential" when they are not otherwise protected from disclosure by the UIPA.

IV. Whether government agencies and "employee organizations" may, through collective bargaining, enter into agreements which prohibit or restrict an agency's disclosure of government records which must be made available for public inspection and copying under the UIPA.

V. Whether the UIPA requires the disclosure of government records which are protected from disclosure by state or federal statutes.

VI. Whether a finding by the U.S. Department of Education, Office for Civil Rights, that the UH sexual harassment complaint procedure is flawed would materially affect the conclusions reached in OIP Opinion Letter No. 90-12 concerning the UH's sexual harassment complaint procedure.

VII. Whether OIP Opinion Letter No. 90-12 concerning the disclosure of formal charges of sexual harassment by students against UH faculty members applies to other UH campuses.

BRIEF ANSWERS

I. Yes. The UIPA provides that agency employees do not have a significant privacy interest in "information relating to the status of any formal charges against [them] and disciplinary action taken." Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1989) (emphasis added). This conclusion is supported by authorities interpreting substantially similar provisions of other state open records laws. Had the Legislature intended that only those "formal charges" that are meritorious be disclosed, it could have done so in unequivocal language. Further, based upon federal court decisions interpreting the law enforcement exception of the federal Freedom of Information Act, in our opinion the disclosure of certain information set forth below regarding "formal charges" will not interfere with a potential or continuing law enforcement investigation, at least, where as here, the respondent is notified of the charges. Lastly, in our opinion the disclosure of certain information regarding a formal charge of sexual harassment filed against a faculty member in accordance with the UH's procedure does not result in a violation of the faculty member's constitutional right to due process.

II. No. Because the information disclosed to the student-complainant is classified as "public" information, the University correctly disclosed to the student the disciplinary action imposed upon the faculty member.

III. No. An agency may not, after the effective date of the UIPA, enter into an agreement with a "person," which prohibits or restricts the agency's disclosure of government records which are not protected from disclosure by a UIPA exception to public access. Such a contractual provision would be unenforceable as a matter of public policy.

IV. No. Although section 89-18, Hawaii Revised Statutes, provides that chapter 89, Hawaii Revised Statutes, "Collective Bargaining in Public Employment," takes precedence over all conflicting statutes concerning the chapter's subject matter, we conclude that a government agency and an employee organization may not, through collective bargaining, enter into agreements that prohibit the disclosure of government records which must be disclosed under the UIPA. To conclude otherwise would result in an absurd construction of section 89-19, Hawaii Revised Statutes, and would defeat a uniform and comprehensive legislative scheme governing public access to government records.

V. No. Under the UIPA, an agency is not required to disclose government records which are protected from disclosure by state or federal law. See Haw. Rev. Stat. § 92F-13(4) (Supp. 1989).

VI. No. A finding by the federal government that the UH's sexual harassment complaint procedure is flawed would not materially affect the conclusions set forth in OIP Opinion Letter No. 90-12 (Feb. 26, 1990).

VII. To the extent that other UH campuses have sexual harassment policies and complaint procedures similar to the one at issue, OIP Opinion Letter No. 90-12 (Feb. 26, 1990) on this subject applies equally to other UH campuses.

FACTS

The OIP received a letter dated October 9, 1989, from Deputy Attorney General Ruth I. Tsujimura, requesting an advisory opinion regarding whether the UH may disclose the identity of a

particular faculty member against whom disciplinary action was taken, and the disciplinary action taken, based upon a written complaint filed by a student under the UH's Sexual Harassment Policy and Complaint Procedure.

In response to this request, the OIP issued OIP Opinion Letter No. 90-12 (Feb. 26, 1990). In that advisory opinion, we concluded that under section 92F-14(b)(4), Hawaii Revised Statutes, present or former agency employees do not have a significant privacy interest in "information relating to the status of any formal charges against [them] and disciplinary action taken." Furthermore, after applying a cardinal rule of statutory construction that words used in a statute are to be understood in their "general or popular use or meaning," we concluded in our previous advisory opinion that:

> [A] "formal charge" is one that is made pursuant to, and in accordance with, an established agency misconduct procedure under which allegations of misconduct may be lodged against an agency employee. In our opinion, however, the existence of a written complaint against an agency employee, does not by definition, constitute a "formal charge." Thus, in applying section 92F-14(b), Hawaii Revised Statutes, it is necessary to review each agency's policies and procedures to determine in a given case whether a "formal charge" has been made.

OIP Op. Ltr. 90-12 at 7 (Feb. 26, 1990) (emphasis added).

We also advised that under section 92F-14(b)(4), Hawaii Revised Statutes, an agency must disclose the following information:

1) The fact that a "formal charge" or complaint has been filed;

2) The name of the agency employee against whom the complaint has been lodged;

3) The "status" of the complaint as pending (for example, "under investigation") or concluded (for example, dismissed);

4) The disciplinary action taken in response to the formal charge, if any; and

5) Any other information about the agency employee which is designated as "public" under section 92F-12(a)(14), Hawaii Revised Statutes.

Following the issuance of OIP Opinion Letter No. 90-12 (Feb. 26, 1990), you posed several questions that were not raised by the facts of the UH's original request for an advisory opinion from the OIP. This opinion shall address those corollary issues.

DISCUSSION

I. WHETHER THE NAMES OF FACULTY MEMBERS SHOULD BE DISCLOSED WHEN THE FORMAL CHARGE IS STILL PENDING OR DISMISSED DUE TO LACK OF MERIT.

A. Privacy Concerns.

The UH understandably expresses concern that the disclosure of the fact that a formal charge has been made, when such a charge is under investigation or where the charge is dismissed, could constitute a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes, or could "obstruct [the University's] ability to conduct an impartial investigation." However, as to possible privacy concerns, the Legislature has specifically declared that public employees do not have a significant privacy interest in "information relating to the status of any formal charges," not just those that are found to be meritorious after investigation. Haw. Rev. Stat. § 92F-14(a), (b)(4) (Supp. 1989) (emphases added).

In OIP Opinion Letter No. 90-12, we noted that provisions of the public records laws of Minnesota and Indiana, like Hawaii's, also classify as "public" data, the status of either "any complaints or charges" or "any formal charge" against the employee, irrespective of whether the charges result in disciplinary action. See OIP Op. Ltr. No. 90-12 at 6-7 (Feb. 26, 1990). Had the Hawaii Legislature intended to protect from disclosure information relating to the status of formal charges against public employees where the charges have been dismissed, or do not result in disciplinary action, it could have done so

quite easily. Instead, however, the Legislature used the language "any formal charges." It is therefore apparent that the words "any formal charges" as used in section 92F-14(b)(4), Hawaii Revised Statutes, not only require the disclosure of the existence of formal charges that result in a finding of fault or cause, but also require the disclosure of the existence of those formal charges that are pending or that have been dismissed, provided that the subject employee has been given notice of the charges (as discussed below).

Supporting this conclusion is a Minnesota Attorney General opinion dated November 4, 1987, interpreting similar provisions of the Minnesota Government Data Practices Act. In that opinion, the Minnesota Attorney General concluded that section 13.43(2), Minnesota Statutes, required the disclosure of "the nature of any specific complaints or charges" against a public employee after such charges are presented to the employee, both before and during the course of any proceeding. Further, this opinion concluded that the status of such charges must be disclosed even when the employee voluntarily agrees to discipline before a final administrative decision.

Further support for our conclusion is found in the case of Johnson v. Dirkswager, 315 N.W.2d 215 (Minn. 1988). In Dirkswager, the Minnesota Supreme Court held that provisions of the Minnesota Government Data Practices Act, which are similar to section 92F-14(b)(4), Hawaii Revised Statutes, precluded a defamation claim by a wrongfully discharged public employee against the Minnesota Commissioner of Public Welfare. Specifically, in Dirkswager, the Commissioner of Public Welfare had disclosed to members of the press that an agency employee had been discharged for "sexual improprieties," by orally disclosing a termination letter sent to the employee. After a public hearing in which the fired employee contested these charges, the employee was cleared of all charges and reinstated to his job.

Thereafter, the employee brought a defamation suit against the State of Minnesota. A jury returned a verdict for the employee, but on appeal, the Minnesota Supreme Court held that the charge of sexual impropriety, even if false, was "public data" under Minnesota law and, therefore, the state was absolutely privileged, because "one who is required to publish defamatory matter is absolutely privileged to publish it." Dirkswager, 435 N.W.2d at 223. More specifically, the court,

noting that Minnesota law classifies as public data "the status of any complaints or charges against the employee, whether or not the complaints or charges resulted in disciplinary action," concluded that the charges contained in the employee's termination letter "clearly . . . would have been public." Id. at 222 n.9; see also Frier v. Independent School Dist. No. 197, 356 N.W.2d 724, 730 (Minn. App. 1984) ("[T]he public has an absolute right of access to knowledge about alleged misconduct by a teacher").

B. Interference with a Civil or Criminal Law Enforcement Investigation.

Your letter also raises concerns about the impact of disclosing the status of a formal charge in a continuing investigation. However, while the disclosure of the existence of a formal charge against an agency employee may subject the investigatory process in these situations to greater scrutiny than existed previously, the courts have held that this in and of itself does not preclude the release of certain information.

As we noted in OIP Opinion Letter Nos. 89-17 (Dec. 27, 1989) and 90-36 (Dec. 17, 1990), federal courts applying the federal Freedom of Information Act have held that the disclosure of information in agency records could not reasonably be expected to interfere with law enforcement investigations when the target of an investigation is in possession of the information in question. See, e.g., Goldschmidt v. United States Department of Agriculture, 557 F. Supp. 274 (D.D.C. 1983); Wright v. OSHA, 822 F.2d 642, 646 (7th Cir. 1987). The rationale for this position is that FOIA's exemption concerning the disclosure of law enforcement records was enacted to prevent the target of an enforcement proceeding from utilizing FOIA to obtain premature access to evidence that may be used by the government in such a proceeding. Similarly, criminal law enforcement agencies frequently disclose the fact that an arrest and/or charge has been made, without impairing their ability to conduct an investigation relating to that arrest and/or charge. It should be kept in mind that just because the status of a "formal charge" may be a public record, that certainly does not mean that the actual investigatory materials and evidence become public records. Said information is generally protected from disclosure by other sections of the UIPA.

In light of the above, we must conclude that section 92F-14(b)(4), Hawaii Revised Statutes, requires the disclosure of the existence of a "formal charge," whether or not that charge has been dismissed or is under investigation. If the charge has been dismissed, the UH should provide the requester with the reason for the dismissal, for instance, "charge dismissed for lack of merit," "insufficient evidence," or "no probable cause." The fact that the disclosure of certain information regarding a formal charge may in some way inhibit an investigation is not cause to prohibit public access to the status of the formal charge under Hawaii law.

C. Due Process Concerns.

Your letter also expresses concern that the disclosure of information regarding formal charges of sexual harassment against faculty members may deprive a faculty member of "due process," by causing reputational injury to the employee before a finding has been made that the charge is supported by a sufficient quantum of proof.

Aside from the fact that charges in civil and criminal proceedings are routinely made before any type of determination of the merits, judicial decisions have generally held that government agencies do not deprive a public employee of due process by the disclosure of stigmatizing information alone. Rather, to succeed on a claim that a public employee was deprived of due process, where only a liberty interest is involved, the employee must prove that: (1) the employee was discharged; (2) defamatory charges were made against the employee in connection with the discharge; (3) the charges were false; (4) the charges were made public; (5) the employee requested a hearing in which to clear the employee's name; and (6) the request was denied. See, e.g., Johnson v. Morris, 903 F.2d 996 (4th Cir. 1990) (where corrections officer merely suspended and not discharged due to stigmatizing charges, no 14th Amendment liberty interest implicated); Wells v. HICO Independent School District, 736 F.2d 243, 256 (5th Cir. 1984) ("stigmatization must be `in or as a result of the discharge process'"); Rosenstein v. City of Dallas Texas, 876 F.2d 392, (5th Cir. 1989); Colaizzi v. Walker, 812 F.2d 304, 307 (7th Cir. 1987) ("interest protected is occupational liberty rather than reputation"); Rodriguez de Quinonez v. Perez, 596 F.2d 486 (1st Cir. 1979); Bennett v. City of Redfield, 446 N.W.2d 467 (Iowa 1989). A "name clearing

hearing" is "not a prerequisite to publication, and the state is not required to tender one prior to disclosing the charges or discharging the employee." See Rosenstein, 876 F.2d at 396.

Indeed, our research reveals that in cases involving the discharge of a public employee which is accompanied by a false and stigmatizing charge, a pre-termination hearing is not constitutionally required. Rather, courts have only required that "the claimant be accorded notice of the charges against him and an opportunity to `support his allegations by argument however brief, and, if need be, by proof, however informal.'" Campbell v. Pierce County Georgia, 741 F.2d 1342, 1345 (11th Cir. 1984), quoting Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16 n.17, 89 S. Ct. 1554, 1564 n.17, 56 L. Ed. 2d 30 (1978); see also, In re Selcraig, 705 F.2d 789 (5th Cir. 1983); Perez, 596 F.2d 486 (1st Cir. 1979).

With respect to the charges against the faculty member which led to the issuance of OIP Opinion Letter No. 90-12, we are informed that no discharge or suspension from employment resulted from the faculty member's alleged wrongful conduct. Thus, the publication of false allegations which result in a reputational injury cannot, in and of itself, give rise to a claim that the employee was denied constitutional due process.

We appreciate your concerns over the impact of OIP Opinion Letter No. 90-12. However, we suggest that the root of the problem is the statutory language of section 92F-14(b)(4), Hawaii Revised Statutes, not the OIP's advisory opinion. We agree with the Attorney General that legislative clarification of section 92F-14(b)(4), Hawaii Revised Statutes, is desirable, and the OIP intends to submit proposed legislation during the next legislative session that would clarify those types of "charges" against agency employees about which information must be disclosed, and the stage or time in the process that such disclosures must occur.

II. WHETHER THE UNIVERSITY WAS CORRECT IN DISCLOSING INFORMATION TO THE COMPLAINANT ABOUT THE DISCIPLINARY ACTION TAKEN AGAINST A FACULTY MEMBER AS A RESULT OF THE STUDENT'S COMPLAINT.

Another issue presented for consideration is whether, under the facts presented, the University violated the UIPA by

disclosing to the student-complainant the disciplinary action taken against the faculty member who allegedly sexually harassed the complainant.

The complainant has requested the University to disclose, in writing, the nature of the disciplinary action taken against the faculty member in order to verify that such action indeed had been taken. The complainant alleges that she was informed by the respondent's union agent that the faculty member received the "lightest possible sanction." The University investigated this allegation and believes "that such an incident took place." Since the complainant already knew the name of the respondent, the nature of the allegations, and the disposition of the complaint, the University decided to verbally disclose to the complainant the sanctions imposed upon the faculty member. However, the University declined to confirm this information in writing pending clarification of OIP Opinion Letter No. 90-12.

For the reasons already set forth above, we believe that the University was correct in its decision to disclose to the complainant the disciplinary action taken against the subject faculty member, and the same may be confirmed in writing. Since any member of the public would be entitled to know the employee's name and the disciplinary action taken under the facts presented, so too would the complainant be entitled to such information.

III. "CONFIDENTIALITY AGREEMENTS."

The next issue raised is whether, under the UIPA, a government agency may enter into an agreement, pursuant to which the agency promises to designate government records as "confidential," when the records are not otherwise protected from disclosure by the UIPA.

In OIP Opinion Letter Nos. 89-10 (Dec. 12, 1989) and 90-2 (Jan. 18, 1990), we concluded that an agency may not validly enter into a confidentiality agreement that would circumvent the disclosure requirements of the UIPA. As pointed out in these OIP advisory opinions, such confidentiality provisions have been declared void to the extent that they circumvent the provisions of the open records laws of other states. Thus, in Anchorage School Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Ala. 1989), the Supreme Court of Alaska declared that a "public agency may not circumvent the statutory disclosure requirements by

agreeing to keep the terms of a settlement agreement confidential . . . . [A] confidentiality provision such as the one in the case at bar is unenforceable because it violates the public records disclosure statute."

Similarly, in KUTV, Inc. v. Utah State Board of Education, 689 P.2d 1357, 1361 (Utah 1984), the court observed, "[i]f this court allowed a promise of confidentiality to end the inquiry, any state official could eliminate the public's rights under the Public and Private Writings Act. This is not an acceptable result." See also Mills v. Doyle, 407 So. 2d 348, 350 (Fla. Dist. Ct. App. 1981) (allowing private collective bargaining agreement to circumvent disclosure mandate of open records statute "would sound the death knell of the [a]ct"); Guard Publishing Co. v. Lane County School Dist. No. 4J, 791 P.2d 854, 858 (Ore. 1990) (an agency cannot exempt records by promising the contributor confidentiality).

The UH, in its request for clarification of OIP Opinion Letter No. 90-12 also notes that before the effective date of the UIPA, it entered into "confidential settlement agreements" with certain faculty members formally charged with sexual harassment, in return for agreed upon "remedial action." The UH questions whether this would also result in a retroactive application of the UIPA to government records created or maintained before the UIPA's effective date, such that the names of faculty members formally charged with sexual harassment and disciplinary action taken in accordance with the UH's procedure must now be disclosed, notwithstanding past express promises of confidentiality.

As to the application of the UIPA to government records compiled before the Act's effective date, July 1, 1989, we observe that "[n]o law has any retrospective operation unless otherwise expressed or obviously intended." Haw. Rev. Stat. § 1-3 (1985). Further, it has been frequently stated that even where expressed or obviously intended, a statute cannot have a retroactive application where such application would interfere with, impair, or divest existing rights. See, e.g., National Wildlife Federation v. Marsh, 747 F.2d 616 (11th Cir. 1984).

At least two authorities have concluded that the application of public records statutes to records compiled before the effective date of such laws does not result in the application of

a statute in a retrospective manner. In State ex rel. Beacon Journal Publishing Co. v. University of Akron, 415 N.E.2d 310 (Ohio 1980), the Supreme Court of Ohio held that the disclosure of police investigatory records, which had not been previously subject to public inspection before the adoption of a new public records law, would not result in a retroactive operation of amendments to the state's public records law which only protected such records under narrowly tailored exceptions to access. On this question, the court reasoned:

> In examining [the statute], we initially note that it speaks in terms of "all public records" and makes no distinction for those records compiled prior to its effective date. More importantly, however, is the simple fact that Beacon Journal is not seeking to apply the statute in a retrospective manner, but is instead seeking present access to the records. Concededly, the creation of the records took place prior to the legislative amendment at issue, but this is not the conduct regulated by the statute. [The statute] deals with the availability of public records, not with the recordation function of governmental units. The date the records were made is not relevant under the statute. Since the statute merely deals with record disclosure, not record keeping, only a prospective duty is imposed upon those maintaining public records.

State, etc., v. University of Akron, 415 N.E.2d at 313 (emphases added).

Likewise, in News-Press Publishing Co. v. Kaune, 511 So. 2d 1023 (Fla. Dist. Ct. App. 1987), the court considered whether the application of an open records statute exemption to records compiled before the effective date of the exemption would be an "unwarranted retroactive application" of the newly enacted exemption. In holding that the application of the public records law's new exemption would not be a retroactive application of the law, the court reasoned:

> Under the facts of this case, we conclude that the date of request is the critical date and, therefore, even though we believe section 112.08(7) is remedial and thereby retroactive, we do not have to so

> determine. The request was made on July 2, 1986, and the law became effective July 1, 1986. It would be illogical to base a chapter 119 exemption of a class of public documents on the question of whether the document came into existence prior to or subsequent to the date of exemption for those requests for disclosure made thereafter. It seems to us indisputable that if the legislature determines that "all documents pertaining to subject `A' in personnel files shall be exempt," it intends, unless it specifies otherwise, that on the effective date of the law creating the exemption all such documents are exempt from any request for disclosure made thereafter regardless of when they came into existence or first found their way into the public records.

News-Press, 511 So. 2d at 1026 (emphases added).

Similarly, the UIPA requires the present disclosure of government records compiled before its effective date, unless protected from disclosure under section 92F-13, Hawaii Revised Statutes. Section 92F-11, Hawaii Revised Statutes, provides in pertinent part:

> **§ 92F-11 Affirmative agency disclosure responsibilities.** (a) All government records are open to public inspection unless access is restricted or closed by law.
>
> (b) Except as provided by section 92F-13, each agency upon request by any person shall make government records available for public inspection and copying during regular business hours. [Emphasis added.]

Under the UIPA, "[g]overnment record means information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1989). As with the public records law in the University of Akron case, the UIPA makes no distinction between those government records compiled before or after its effective date. Indeed, section 92F-11(a), Hawaii Revised Statutes, unambiguously provides that "[a]ll government records are subject to public inspection."

Even if the application of the UIPA to records compiled before its effective date would result in a retroactive application of this law, at least one commentator has concluded that "there is no vested right in the confidentiality of records which were compiled prior to enactment of an open records act." 2 N. Singer, Sutherland Statutory Construction § 41.06 (4th ed. rev. 1986) (citing, Texas Ind. Acc. Bd. v. Industrial Foundation, 526 S.W.2d 211 (Tex. Civ. App. 1975)); See also, Texas Ind. Acc. Bd. v. Texas Industrial Foundation, 540 S.W.2d 668, 677 (Tex. 1976).

We conclude that the provisions of the UIPA control access to or the protection of records, regardless of when they were created, provided that they are "maintained" by an agency. This, in our opinion, does not result in the retrospective application of a law. Additionally, no agency may validly enter into confidentiality agreements that circumvent the disclosure requirements of the UIPA. We further believe that no person has a vested right in the confidentiality of government records which were compiled before the effective date of the UIPA. Thus, we conclude that a promise of confidentiality made before the effective date of the UIPA cannot supersede the Act's disclosure mandates.

However, whether these principles, as applied to "confidentiality agreements" that were entered into before the UIPA's effective date, would result in an unconstitutional impairment of contract, must be left to a determination by the Attorney General, not the OIP. Until such a determination is made, we would advise against the disclosure of such confidentiality agreements.

IV. WHETHER THE PROVISIONS OF AN EMPLOYEE ORGANIZATION'S COLLECTIVE BARGAINING AGREEMENT WITH A GOVERNMENT AGENCY SUPERSEDE THE DISCLOSURE MANDATES OF THE UIPA.

The UH's next question is whether the provisions of a collective bargaining agreement, which prohibits the disclosure of disciplinary action taken against an agency employee, supersede the disclosure provisions of the UIPA. Section 89-3, Hawaii Revised Statutes, gives all employees the right to collectively bargain on questions of wages, hours, and other terms and conditions of employment which are subject to

negotiations under chapter 89, Hawaii Revised Statutes. Additionally, section 89-18, Hawaii Revised Statutes, provides:

> **§89-19 Chapter takes precedence, when.** This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive legislation, rules or regulations adopted by the State, a county, or any department or agency thereof, including the departments of personnel services or the civil service commission. [Emphasis added.]

As discussed earlier in this opinion, no contract can circumvent the disclosure requirements of the UIPA. The UH's question, however, is whether, in light of the broad language of section 89-19, Hawaii Revised Statutes, a collective bargaining agreement can prohibit the disclosure of information that is required to be disclosed by the UIPA. We believe that the decision of the Supreme Court of Ohio in State ex rel. Dispatch Printing Co. v. Wells, 481 N.E.2d 632 (Ohio 1985), is instructive regarding this question.

In Dispatch Printing, a newspaper sought access to the personnel records of a municipal police chief, who had been demoted. The personnel records were classified as "public records" under Ohio statutes. The Ohio State Civil Service Commission refused to permit inspection of the former police chief's personnel records, arguing that the provisions of a collective bargaining agreement between the municipality and its police force, which required that such records be confidential, superseded Ohio's public records law. Specifically, the Ohio State Civil Service Commission's preemption argument was premised upon a provision of the Ohio Collective Bargaining Code, which is identical in substance to section 89-19, Hawaii Revised Statutes:

> [C]hapter 4117 of the Revised Code prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in chapter 4117 of the Revised Code or as otherwise specified by the general assembly.

Dispatch Printing 481 N.E.2d at 634. In rejecting the State's contention that the pertinent collective bargaining agreement

preempted the state's public records law, the Ohio Supreme Court reasoned:

> Further, respondents' contention requires an unreasonable construction of R.C. chapter 4117. The wording in the cited portion of [the collective bargaining law] was designed to free public employees from conflicting laws which may act to interfere with the newly established right to collectively bargain. If respondents' construction of this provision were accepted, private citizens would be empowered to alter legal relationships between a government and the public at large via collective bargaining agreements. It is an axiom of judicial interpretation that statutes be construed to avoid unreasonable or absurd consequences.

Id. at 634 (emphasis added).

Likewise, in Cammack v. Waihee, 673 F. Supp. 1524 (D. Hawaii 1987), the Federal District Court for the District of Hawaii rejected an argument that under section 89-19, Hawaii Revised Statutes, the inclusion of a Good Friday holiday into the collective bargaining agreements of public employees preempted the provisions of section 8-1, Hawaii Revised Statutes. In dismissing this assertion, the court reasoned, "the argument that the inclusion of a Good Friday holiday into the collective bargaining agreements of approximately 65% of Hawaii's public employees suspends the effect of a validly enacted statute of the State strains credulity." Cammack, 673 F. Supp. at 1529.

Lastly, in Mills v. Doyle, 407 So. 2d 348 (Fla. Dist. Ct. App. 1981), the court held that the provisions of a teachers union's collective bargaining agreement, which required that the grievance records of municipal teachers be confidential, did not supersede the provisions of Florida's Public Records Act. In reaching this decision, the court noted that a contrary conclusion would permit the evisceration of the state's public records law:

> [T]he trial court was correct in shunting aside the argument that the collective bargaining contract between [the union] and the School Board established the confidentiality of the subject records, for to allow the elimination of public records from the

> mandate of [the records act] by private contract would sound the death knell of the Act.

Mills, 407 So. 2d at 350 (emphasis added).

We find the decision of the Dispatch Printing case and other authorities to be persuasive. To find otherwise would permit a public employee's union, through collective bargaining, to prohibit an agency's disclosure of government records that are "public" under the UIPA. This would defeat a uniform and comprehensive legislative scheme as well as the express public policy of this State that "the formation and conduct of public policy--the discussions, deliberations, decisions and action of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. § 92F-2 (Supp. 1989).

Therefore, we conclude that unless a government record is protected from disclosure by one of the UIPA exceptions set forth at section 92F-13, Hawaii Revised Statutes, the provisions of a collective bargaining agreement cannot prohibit or interfere with an agency's disclosure of such records, notwithstanding the provisions of section 89-19, Hawaii Revised Statutes.

V. WHETHER THE UIPA CONFLICTS WITH STATE OR FEDERAL LAWS.

The UH also requests an opinion concerning whether the UIPA conflicts with state or federal laws, such as Title VII of the Civil Rights Act and Title IX of the Education Amendments.

If such a conflict would arise, the UIPA provides that no agency is required to disclose "government records which, pursuant to state or federal law . . . are protected from disclosure." Haw. Rev. Stat. § 92F-13(4) (Supp. 1989). This office could find no provision of Title IX, or regulations adopted thereunder, 34 C.F.R. Þ 106 (1989), which would prohibit the disclosure of the existence of a formal charge of sexual harassment made by a student against a faculty member and the identity of the respondent.

It is possible that provisions of Title VII of the Civil Rights Act which, among other things, prohibits employment discrimination based upon gender, may impose restrictions on the disclosure of complaints of sexual harassment by employees of the University against other University employees. However, this

issue was not presented for determination in our earlier opinion, which did not involve allegations of employment discrimination involving sexual harassment. The UH should not disclose government records concerning charges of alleged employment discrimination under Title VII, without seeking specific guidance from the Attorney General concerning the disclosure of those records.

VI. EFFECT OF FLAWED UNIVERSITY PROCEDURE.

In its March 5, 1990 memorandum, the UH noted that a student had filed a complaint with the U.S. Department of Education, Office of Civil Rights ("OCR"), alleging that the UH's sexual harassment complaint procedure was flawed under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 and regulations adopted thereunder, 34 C.F.R. part 106. As a result of the OCR's investigation, it is our understanding that the OCR found that UH's sexual harassment complaint procedure was flawed in that it does not outline the specific steps involved; contains no time frames; does not provide for notice of findings and remedies to both parties; does not provide for remedies or delineate who has the authority and responsibility for imposing remedies; and contains no appeal provisions. The UH questions whether these above findings undermine the conclusions previously reached by the OIP in OIP Opinion Letter No. 90-12.

In our previous advisory opinion on this subject, we concluded that the UH's sexual harassment complaint procedure was sufficiently formal such that the existence of the "formal complaint" made by the student under that procedure was subject to disclosure under section 92F-14(b)(4), Hawaii Revised Statutes. While the findings made by the OCR indicate that the UH sexual harassment complaint procedure may not comport with Title IX and regulations adopted thereunder, notwithstanding these possible flaws, it is still our opinion that a complaint filed by a student against a faculty member in accordance with the express and formal procedural requirements of the current procedure, is a "formal charge" within the meaning of the UIPA. See OIP Op. Ltr. No. 90-12 (Feb. 26, 1990).

VII. WHETHER OPINION LETTER NO. 90-12 APPLIES TO ALL UH CAMPUSES.

Another issue raised by the UH is whether OIP Opinion Letter No. 90-12 (Feb. 26, 1990) applies to formal charges of sexual

harassment made by students against faculty members at other UH campuses. To the extent that other UH campuses have sexual harassment policies and complaint procedures similar to the one present at the Manoa campus, and to the extent that a student lodges a formal complaint as defined by such procedures, we answer in the affirmative.

CONCLUSION

Based upon the foregoing, we conclude that:

I. Under the UIPA, agency employees do not have a significant privacy interest in information relating to the status of any formal charges against them, not just those that are found to be meritorious after investigation. Further, the disclosure of certain information regarding a formal charge of sexual harassment filed against a faculty member in accordance with the UH's procedures does not result in a violation of the faculty member's constitutional right to due process.

II. The UH was correct in disclosing to the student-complainant the disciplinary action imposed upon the faculty member as a result of the written complaint of sexual harassment filed in accordance with the UH's procedure, and the disciplinary action may be confirmed in writing.

III. An agency may not, after the effective date of the UIPA, enter into a "confidentiality agreement" which prohibits or restricts the agency's disclosure of government records which are not protected from disclosure by one of the UIPA's exceptions to access set forth at section 92F-13, Hawaii Revised Statutes.

IV. Notwithstanding the provisions of section 89-19, Hawaii Revised Statutes, a collective bargaining agreement cannot prohibit or interfere with an agency's disclosure of a government record, unless the government record is protected from disclosure by one of the UIPA's exceptions to access.

V. Under the UIPA, a government agency is not required to disclose government records which are protected from disclosure by state or federal law.

VI. A federal government agency's finding that the UH's sexual harassment complaint procedure at issue is flawed would not alter

the OIP's conclusions previously set forth in OIP Opinion Letter No. 90-12.

VII. To the extent that other UH campuses have sexual harassment policies and complaint procedures similar to the one at issue, OIP Opinion Letter No. 90-12 applies equally to other UH campuses.

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