

May 26, 1993

Dr. Doris Ching
Vice President for Student Affairs
University of Hawaii
2444 Dole Street
Bachman Hall
Honolulu, Hawaii 96822

Dear Dr. Ching:

Re: Campus Security/Law Enforcement Records

Your letter to the Office of Information Practices ("OIP") dated May 11, 1993 concerning the above-referenced matter has been assigned to me for a reply.

In your letter, you note that section 1555 of the Higher Education Amendments of 1992, amends the federal Family and Educational Rights and Privacy Act ("FERPA") to exempt from the definition of "education records" (which as a condition of federal funding are subject to certain disclosure restrictions):

[R]ecords maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.

20 U.S.C. § 1232g(a)(4)(B)(ii) (1992).

You also note that the University of Hawaii ("University") does retain individuals responsible for campus security, and that these individuals create and maintain various records relating to criminal activity and disturbances occurring on University campuses. Accordingly, you requested advice from the OIP concerning the conditions under which such information may be released to other parties, including the general public, under the Uniform Information Practices Act (Modified), chapter 92F,

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Hawaii Revised Statutes ("UIPA").

As with courts, and state attorneys general, the OIP generally does not provide opinions based upon hypothetical or unknown facts. Because the disclosure of government records under the UIPA depends upon the informational content of the records, and not the name of the file in which they are contained, the OIP cannot, in this letter, provide you with definitive advice concerning the disclosure of every campus security record under all possible circumstances.

Should the University receive a UIPA request for particular records, and should it have questions concerning the disclosure of those records, we recommend that you contact the OIP at that time, since the OIP will be in a better position to examine the records at issue, and provide definitive advice based upon known facts.

Nevertheless, the OIP can provide the University with some general guidance concerning the questions set forth in your letter, that we hope will be of assistance and resolve many of your questions. First, except as provided in section 92F-13, Hawaii Revised Statutes, all government records must be made available for public inspection and copying upon request by any person. Given the recent amendment to FERPA, section 92F-4, Hawaii Revised Statutes, would not authorize the University to withhold access to records created by its security unit.¹

We have issued several opinion letters concerning records or information that have been compiled by an agency for law enforcement purposes. Copies of these opinion letters are enclosed for your information. Under the UIPA, agencies are not required to disclose "[g]overnment records which must remain confidential in order to avoid the frustration of a legitimate government function." Haw. Rev. Stat. ~~§ 3(2F)~~, Hawaii Revised Statutes. The legislative history of this exception indicates that it applies to certain "[r]ecords or information compiled for law enforcement purposes." S. Stand. Comm. Rep. No.

¹Section 92F-4, Hawaii Revised Statutes, provides that "[w]here compliance with any provision of this chapter would cause an agency to lose or be denied federal funding, services, or other assistance from the federal government, compliance with that provision shall be waived."

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2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

In determining whether a record compiled for law enforcement purposes must remain confidential in order to avoid the frustration of a legitimate government function, the OIP has consulted Exemption 7 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(7) (1988) ("FOIA") for guidance. Under FOIA's Exemption 7, agencies are not required to disclose:

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

Based upon federal court decisions, we have opined that in pending or ongoing civil or criminal law enforcement investigations, an agency is generally not required to disclose investigative reports and materials, or witnesses statements.

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See OIP Op. Ltr. No. 91-9 (July 7, 1991).

However, we have also opined that the UIPA's frustration of a legitimate government function exception generally does not protect information already in the possession of the target of a law enforcement investigation, such as a notice of violation or similar records, since the disclosure of this information is not likely to interfere with a prospective law enforcement proceeding. See OIP Op. Ltr. No. 90-36 (Dec. 17, 1990); OIP Op. Ltr. No. 91-27 (Dec. 13, 1991).

Similarly, the county police departments frequently disclose, upon request, general information concerning crimes or incidents to which they have responded, including the location and nature of the incident, number of persons injured, if any, type of injuries sustained, number and type of weapons seized, etc. We believe that University security personnel should make similar general information available upon request.

We have also opined that an arrest log, or police blotter information maintained by the county police departments, which includes the names of individuals who have been arrested, the date and nature of the offense, is not protected from disclosure under the UIPA. See OIP Op. Ltr. No. 91-3 (March 22, 1991). To the extent that campus security officers have the power to make an arrest, we believe that police blotter information created and maintained by this unit would be publicly available under the UIPA.

In contrast, the OIP has opined that individuals have a significant privacy interest in the fact that they are merely suspected of criminal activity, and that unless the disclosure of their identity is necessary to prosecute the violation or to continue the investigation (for example to apprehend the suspect) the names of suspects should be withheld until such time as they have been arrested or charged with an offense. See OIP Op. Ltr. No. 92-19 (Oct. 7, 1992).

With regard to requests made by other State or county agencies, or by a federal agency, for records created and maintained by the University's campus security unit, section 92F-19, Hawaii Revised Statutes, governs the circumstances under which records may be disclosed to such organizations. This year, the Legislature passed legislation submitted by the OIP, which if approved by the Governor, will clarify and amend section 92F-19,

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Hawaii Revised Statutes. A copy of H.B. No. 1594, C.D.1 is enclosed for your information. Among other things, this bill clarifies the circumstances under which an agency may disclose government records to other agencies for the purpose of a civil or criminal investigation.

The OIP has not yet issued an opinion concerning the public's right to inspect investigative reports and materials in closed law enforcement investigations, or in cases where an enforcement proceeding is no longer prospective. In the near future, the OIP will be examining this question, and determining the extent to which the investigative reports, names of witnesses, and other information must be publicly accessible under the UIPA. We shall provide you with a copy of this opinion letter when it is finalized.

In the interim, should the University receive a request under the UIPA for information created by its security unit, and should the general guidance supplied in this letter not resolve questions or concerns that the University may have, please contact the OIP by telephone for additional guidance.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
Enclosures (10)
(OIP Op. Ltr. Nos. 89-12, 89-17,
90-18, 90-36, 91-4, 91-9, 91-32,
92-19, and 92-23; H.B. No. 1594, C.D.1)

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