

October 29, 2001

Nelson Sakamoto  
Director of Human Resources  
The Research Corporation of the University of Hawaii  
Human Resource Department  
2530 Dole Street  
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Honolulu, Hawaii 96822

Re: Disclosure of Sexual Harassment Complaint Investigation Records

Dear Mr. Sakamoto:

This is in response to your letter of May 5, 1999, and a letter of July 6, 1999, from the subject of a sexual harassment complaint ("Subject") to the Office of Information Practices ("OIP"), for an opinion on the above-referenced matter.

#### **ISSUE PRESENTED**

Whether the Research Corporation of the University of Hawaii's ("RCUH") investigation report for a closed case of alleged sexual harassment must be disclosed to the Subject of the complaint.

#### **BRIEF ANSWER**

Yes, except for information that may be withheld from disclosure under section 92F-22(2), Hawaii Revised Statutes. Among other things, this section allows agencies to withhold records or information the disclosure of which would reveal the identity of a source who furnished information under an express or implied promise of confidentiality.

The RCUH provided the OIP with three documents for review: (1) the Closing Report, (2) a final determination letter to the complaining party, and (3) a final determination letter to the Subject. Identities of witnesses named in the Closing Report may be withheld for those witnesses who received verbal assertions of confidentiality that were made at the time of the interviews, and/or written assertions of confidentiality within the RCUH Sexual Harassment Policies and Procedures. The OIP believes these assertions qualify as "express or implied promise[s] of confidentiality" under section 92F-22(2), Hawaii Revised Statutes.

Normally, section 92F-22(2), Hawaii Revised Statutes, protects only witness names, and not the information provided by that source. However, in this instance, because a small group of people who worked closely together was involved, disclosure of the information provided by a witness would likely lead to the identity of that witness. Therefore, redaction of the witness statements, and other information that would allow identification of witnesses in other sections of the Closing Report, is warranted in order to protect their identities. The OIP notes that this type of redaction could cause the RCUH to withhold most of the Closing Report in this instance.

There were two final determination letters issued by the RCUH, both dated May 4, 1999; one to the Subject, and one to the complaining party ("Complainant"). The Subject presumably has a copy of the letter addressed to him, so it is not addressed here. The letter to the Complainant is very similar to the one sent to the Subject, and the OIP does not believe that any exemptions to disclosure in section 92F-22, Hawaii Revised Statutes, exempt the Complainant's letter from disclosure to the Subject.

### FACTS

The RCUH administers research projects for the University of Hawaii. During one project, an Equal Employment Opportunity complaint was filed against the Subject alleging sexual harassment. After an investigation by the RCUH, in a formal letter of determination to the Subject dated May 4, 1999, you stated that the RCUH's investigation resulted in a finding that there was no evidence to support a breach of the RCUH Sexual Harassment policy or EEO policy, and that the case was closed.

The Subject asked the RCUH for a copy of the investigative records pertaining to the sexual harassment claim filed against him. The RCUH provided the OIP with copies of the Closing Report, and two formal letters of determination (one to the Subject and one to the Complainant), for *in camera* review as to whether the documents should be disclosed.

The Closing Report, written by you, contains a chronology of events, a summary of statements made by each witness who was interviewed, a review of the information and evidence collected, and the RCUH's findings and recommendations. The Closing Report noted that persons who were interviewed were advised by you that it was a "very confidential investigation that should not be discussed with anyone. . . . [E]ach person was told to comply with my request for confidentiality."

One summary of a discussion with a witness specifically states that that witness was told the “investigation would be considered confidential.”

The RCUH sought guidance from the OIP in a letter dated May 5, 1999. This letter advised that RCUH’s fact-finding investigation failed to reveal evidence to support the claims against the Subject. As such, no disciplinary actions were taken against the Subject, and both parties were informed of the RCUH’s findings in separate formal letters of determination dated May 4, 1999. These formal letters of determination summarized findings of the investigation. The OIP assumes that the Subject received the formal letter of determination addressed to him, and that letter will not be discussed here. The formal letter of determination addressed to the Complainant is very similar to the one sent to the Subject.

In its letter of May 5, 1999, the RCUH asked that the OIP advise how much information the RCUH can release to the Subject under the UIPA. The RCUH also stated its concern with the confidentiality of the records; particularly, with the Subject’s intentions, and the RCUH’s potential exposure to adverse impact, such as claims of retaliation by the Complainant or others. The RCUH advised it retains some hand written investigation notes; but does not have any copies of recordings. If necessary, RCUH offered to provide the OIP with copies of these hand-written notes. Finally, the RCUH stated that the Closing Report is considered an official report. It summarizes the RCUH’s findings, investigation, and conclusion.

The Subject, in a letter to the OIP dated July 6, 1999, asked for the OIP’s assistance in obtaining “all files and records pertaining to the case/investigation” against him for sexual harassment.

In a letter dated February 16, 2000, you stated that RCUH believes that its “investigation reports are considered confidential.” That letter also advised that RCUH had informed all parties to the investigation including the Subject that the investigation was “confidential.”

In a letter to the OIP dated March 6, 2000, the RCUH set forth its position that disclosure should be denied in its entirety for two reasons. First, section 92F-22(2), Hawaii Revised Statutes, allows an agency to withhold personal records when disclosure would reveal the identity of a source that furnished information to the agency under an express or implied promise of confidentiality. The RCUH states that its “Sexual Harassment policy, our investigation report, and statement to each individual interviewed required an assurance of confidentiality. Therefore, any allowance to access these confidential records would be inappropriate.”

The RCUH's second basis for withholding was that, because this is a Sexual Harassment case, RCUH is "very concerned with related adverse issues stemming from potential 'retaliation complaints' from the individuals involved in the case." The RCUH cited to Title VII of the Civil Rights Act, which provides protection to individuals filing complaints from the individuals (or agency) they have filed the complaint against. The RCUH asked the OIP "to consider the ramifications of any release of confidential information (i.e., investigation report relating to a Sexual Harassment complaint)."

The RCUH Sexual Harassment Policies and Procedures contain the following language regarding confidentiality:

1. Due to the sensitive nature of complaints of sexual harassment, complaints will be investigated with particular care and will remain confidential to the extent possible. The purpose of this is to protect the confidentiality of the complainant, to encourage the reporting of incidents of sexual harassment, and to protect the reputation of any person wrongfully accused of sexual harassment.

The RCUH also stated in its March 6, 2000, letter, that disclosure would impair its ability to obtain witness statements in future complaints because individuals will fear what they reveal will become public. Further, in this instance, because the research project under which the allegations of sexual harassment occurred was very small, redaction would not hide the identities of individuals.

In a telephone conversation of July 12, 2001, the OIP asked you for copies of the hand written notes referred to in your May 5, 1999, letter. In contrast to your earlier letter, you then stated that no such notes are maintained by the RCUH that would satisfy the Subject's request. Hand written notes were taken at the time each witness was interviewed. These notes were used to draft the Closing Report, and RCUH no longer maintain these notes. You further stated, in what appears to be a contradiction to the statements made in your earlier letter, that as a general policy, RCUH does not maintain the notes after the final report is written.

## DISCUSSION

### **I. BACKGROUND**

The UIPA requires that when a government agency<sup>1</sup> maintains any accessible personal record<sup>2</sup>, it shall make that record available to the individual to whom it pertains, in a reasonably prompt manner and in reasonably intelligible form. Haw. Rev. Stat. § 92F-21 (1993).

There are five exemptions to this general rule of disclosure. The RCUH has invoked one of these exemptions:

**§ 92F-22 Exemptions and limitations on individual access.** An agency is not required by this part to grant an individual access to personal records, or information in such records:

...

(2) The disclosure of which would reveal the identity of a source who furnished information to the agency under an express or implied promise of confidentiality.

Haw. Rev. Stat. § 92F-22 (1993).

## II. PERSONAL RECORD REQUESTS

In the facts before us, the records at issue contain information about the Subject, the Complainant, and each witness named therein that gave a statement. Thus, we are dealing with a joint personal record. See OIP Op. Ltr. No. 95-19 at

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<sup>1</sup> The OIP determined that RCUH is an “agency” that is subject to the UIPA in the OIP Opinion Letter Number 90-27 (July 19, 1990).

<sup>2</sup> The UIPA defines “personal record” as “any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual’s education, financial, medical, or employment history, or items that contain or make reference to the individual’s name, identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.” Haw. Rev. Stat. § 92F-3 (1993).

9-10 (Aug. 1, 1995) (because a complaint filed against a police officer contains personal information about both the officer and the complainant, it is a joint personal record).

In the OIP Opinion Letter Number 94-27, the OIP reviewed the fact-finding report generated as a result of an investigation of a sexual harassment allegation by a student against a faculty member. An investigating panel interviewed witnesses, conducted a hearing, and produced a twenty-seven page fact-finding report. The OIP Opinion Letter Number 94-27 advised that the report should be disclosed both to the complaining student and to the subject faculty member after a final decision has been made because it is the personal record of both individuals. This Opinion also advised that section 92F-22(2), Hawaii Revised Statutes, would allow the agency to withhold names of witnesses contained in the fact finding report who were promised confidentiality. The facts of the OIP Opinion Letter Number 94-27, however, did not show that there was any evidence that an express or implied promise of confidentiality was made to any individual providing information.

A second opinion letter discussing the application of section 92F-22, Hawaii Revised Statutes, the OIP Opinion Letter Number 95-19, opined that the investigative record maintained by the Maui Police Commission was a joint personal record of the complainant and the respondent, and should be made available to both. This Opinion also noted that while section 92F-22(2), Hawaii Revised Statutes, may protect the identity of a source, it would not protect the information provided by that source. OIP Op. Ltr. No. 95-19 at 10 (Aug. 1, 1995).

The OIP Opinion Letter Number 95-23 also discussed witness identities. In that letter, the OIP opined that the University of Hawaii Committee on Ethics in Research and Scholarly Activities could withhold from the faculty member who was the subject of a complaint, a fifty page complaint by another faculty member alleging scientific misconduct. The University of Hawaii's ("UH") policy provides that statements initiating such procedures shall remain confidential to the extent possible during the initial stages of an inquiry. The OIP opined that the facts showed that section 92F-22, Hawaii Revised Statutes, allowed UH to withhold the complaint because there had been a promise of confidentiality made with good cause in accordance with section 92F-22(2), Hawaii Revised Statutes. The OIP also advised that agencies should not give blanket assurances of confidentiality, but that confidentiality should be based on good cause. OIP Op. Ltr. No. 95-23 at 12 (Sep. 12, 1995). Expanding on OIP Opinion Letter Number 95-19, the OIP Opinion Letter Number 95-23 also stated that while section 92F-22(2), Hawaii Revised Statutes, normally applies only to a person's identity and not to the information provided by that person, there are instances when it would be appropriate to

withhold the entire statement. For example, when the requester of information already knows the identity of an individual who provided information to the agency, the agency may withhold both the identity and the information provided. See OIP Op. Ltr. No. 95-23 at 3 (Sep. 12, 1995).

#### **A. Closing Report**

Based on the OIP's review of the Closing Report, the UIPA, and the opinions cited above, the OIP believes the Subject is entitled, under section 92F-21, Hawaii Revised Statutes, to access the records relating to the complaint filed against him. However, the OIP also believes that, based on your narratives of witness statements in the Closing Report, express and/or implied promises of confidentiality were made verbally and/or in writing to at least some of the witnesses. In keeping with the spirit of the UIPA, the OIP advises that agencies should not make blanket assurances of confidentiality. Investigators should always ensure that any such promises they make are appropriate, because if they are made in violation of the UIPA, witness identities and their statements would be subject to disclosure. That is not to say that promises of confidentiality were not warranted in this case. Accordingly, section 92F-22(2), Hawaii Revised Statutes, allows the RCUH to withhold names of *only* those witnesses who received such promises of confidentiality.

Regarding statements made by witnesses, as is stated above, the UIPA does not specifically protect such statements from disclosure unless that disclosure would reveal the identity of a witness who received a promise of confidentiality. In this case, the evidence shows that the witnesses were in a small, close work environment with the Subject, and redaction of their names would not be sufficient to protect their identities. The evidence also tends to show that the Subject would be able to determine who made which statements that were part of the investigation. Therefore, witness statements may also be redacted, but *only* if: (1) the witness received an express or implied promise of confidentiality, and (2) redaction of the statement is necessary to protect the witness's identity. The OIP understands that such a redaction could be a substantial portion of the Closing Report. It is important therefore to emphasize that only those portions of the report that could actually allow identification of witnesses who were promised confidentiality should be redacted. All other information contained in the report should be disclosed to the Subject.

Finally, if a signed consent is obtained from each witness in accordance with section 92F-12(b)(1), Hawaii Revised Statutes, then the RCUH is allowed to disclose their statements under the UIPA.

## **B. Final Determination Letter to Complainant**

The OIP reviewed the final determination letter addressed to the Complainant. The contents of that letter are very similar to the contents of the final determination letter the Subject received. No statements attributed to witnesses are contained in that letter. The OIP believes that no exemptions to disclosure apply to justify withholding that letter from the Subject. The RCUH should, therefore, make that letter available to the Subject for inspection and copying.

## **III. CIVIL RIGHTS ACT AND FEAR OF RETALIATION**

The RCUH has asserted that disclosure of the investigative records may violate the federal Civil Rights Act because it may entice individuals involved to retaliate.

The Civil Rights Act provides, at Title VII, section 2000e-3 (a) that:

[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

This statute does not appear on its face to require the withholding of the records discussed in this opinion from the Subject. The OIP recommends, however, that the RCUH consult with the Department of the Attorney General on this issue. The OIP's powers and duties are set forth at section 92F-42, Hawaii Revised Statutes, and the OIP does not have jurisdiction to give advice on liability under federal laws.

The OIP does note, however, that agencies are not required to disclose personal records to the person they pertain to when such records are “[r]equired to

be withheld from the individual to whom it pertains by statute or judicial decision or authorized to be so withheld by constitutional or statutory privilege.” Haw. Rev. Stat. § 92F-22(5) (1993). Therefore, if it can be shown that the federal Civil Rights Act *requires* that the requested information not be disclosed to the Subject, the RCUH need not disclose the records, despite the advice set forth in this opinion. Again, the OIP recommends that the RCUH consult with its own attorney regarding the application of the Civil Rights Act.

#### **IV. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION**

The RCUH noted in a letter to the OIP dated March 6, 2000, that disclosure of information provided by witnesses would impair its ability to obtain statements in future complaints because individuals will fear that what they reveal will become public. Had the RCUH received a request under part II of the UIPA, which is entitled “Freedom of Information,” section 92F-13(3), Hawaii Revised Statutes, would have supported this argument. Section 92F-13(3), Hawaii Revised Statutes, provides that government agencies need not disclose information which, if disclosed, would cause the frustration of a legitimate government function. The OIP opined in the past that this exception includes information which, if disclosed, would impede the government’s ability to obtain such information in the future. See OIP Op. Ltr. No 92-23 (Nov. 18, 1992). However, the Subject made a personal record request under part III of the UIPA, and not a freedom of information request under part II of the UIPA. For personal record requests, section 92F-13, Hawaii Revised Statutes, does not apply at all. See Haw. Rev. Stat. §§ 92F-13, 92F-22 (1993). The exemptions for personal record requests are found at section 92F-22, Hawaii Revised Statutes, and there is no exemption therein for “frustration” type situations.

#### **CONCLUSION**

The UIPA requires that personal record requesters be given access to their personal records, subject to the exemptions set forth at section 92F-22, Hawaii Revised Statutes. The OIP does not believe that any of these exemptions apply to the final determination letter addressed to the Complainant.

The Closing Report contains statements made by witnesses who appear to have been given promises of confidentiality. Section 92F-22(2), Hawaii Revised Statutes, allows the identities of witnesses who have been given express or implied promises of confidentiality to be withheld from personal record requesters. In this instance, because all the witnesses worked in a close environment with the Subject, he would be able to determine their identities from the content of their statements.

In such instances, it is warranted to redact the statements insofar as they would reveal the identity of the person who made them.

By copy of this letter, the Subject should be aware that if he disagrees with the OIP's conclusion herein, he has a right to bring a civil lawsuit against the RCUH in the circuit court, any time within two years after the date of receipt of this letter, which is the OIP's final determination as to the Closing Report. See Haw. Rev. Stat. § 92F-27 (1993).

Very truly yours,

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APPROVED:

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