

August 7, 2003

Mr. Frank O. Perkins
Assistant Vice President
For Research and Graduate Education
Office of the Senior Vice President
For Research and Dean of the Graduate Division
University of Hawaii
2444 Dole Street, Bachman Hall
Honolulu, Hawaii 96822

Re: UH Animal Care Advisory Committee

Dear Mr. Perkins:

This letter is in response to a request to the Office of Information Practices ("OIP") from Rockne Freitas, former Vice President for University Relations for the University of Hawaii ("UH").

ISSUES PRESENTED

I. Whether records of the UH Animal Care Advisory Committee ("ACAC") are subject to the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

II. If ACAC minutes are subject to the UIPA, whether the exceptions to disclosure permit UH to withhold certain information or material contained therein from disclosure.

BRIEF ANSWERS

I. Yes. UH is a government agency subject to the UIPA. Any records pertaining to the ACAC maintained by UH are subject to the UIPA. In addition, for the reasons set forth below, the OIP finds that the ACAC is an agency subject to the UIPA, and therefore, the records maintained by the ACAC must be disclosed unless exempted by statute.

II. Yes. If the ACAC is required to comply with the "Sunshine Law,"¹ including the keeping of minutes, sections 92-9 and 92F-12, Hawaii Revised Statutes ("HRS"), require that the ACAC's minutes be available to the public. Section 92F-12, HRS, would not authorize UH or the ACAC to withhold from disclosure any part of the minutes of public meetings. Whether the ACAC is subject to the Sunshine Law, however, has yet to be addressed by the OIP or the courts of the State of Hawaii. Until that issue is determined, past minutes of the ACAC meetings should be available to the public, subject to the exceptions to disclosure in section 92F-13, HRS.

FACTS

Research facilities² which conduct animal research and receive federal funding are subject to the federal Animal Welfare Act, 7 U.S.C. 2131 *et. seq.*, and its regulations as adopted by the U.S. Department of Agriculture³. Research facilities must register with the federal Secretary of Agriculture and must comply with the standards promulgated by the Secretary for the handling, care, and treatment of animals and the justification for and use of animals in experiments. 7 U.S.C. §§ 2136, 2143(a) (2003). In addition, an institutional animal care and use committee ("IACUC") must be created, whose members are appointed by the chief executive officer of the research facility. 7 U.S.C. 2143(b)(1) (2002); 9 C.F.R. § 2.31 (2003).

IACUCs are required to inspect all animal research facilities and to review all practices involving pain to animals and the conditions of the

¹ See Part I of chapter 92, Hawaii Revised Statutes.

² A "research facility" means:

any school (except an elementary or secondary school), institution, organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports live animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments . . .

7 U.S.C. § 2132(e) (2003).

³ See 9 C.F.R. § 2.31 *et. seq.* (2003).

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animals semiannually. 7 U.S.C. 2143(b)(3) (2003); 9 C.F.R. § 2.31(c) (2003). IACUCs then must file a report at the research facility for inspection by the Animal and Plant Health Inspection Service (“APHIS”) and any federal agency providing funds. 7 U.S.C. 2143(b)(4)(A), (B) (2003); 9 C.F.R. § 2.31(c)(3) (2003). In addition, IACUCs must maintain certain records which are subject to the disclosure requirements of 9 C.F.R. § 2.35 (2003). Research facilities that do not comply with the Animal Welfare Act can have their funding suspended or revoked.⁴

Mr. Freitas’ letter to the OIP advised that UH receives federal funds for research and that, as a result, it is subject to a variety of federal laws and regulations. These funds are provided in the form of contracts, grants, and cooperative agreements. Mr. Freitas advised that federal laws apply to all of UH’s animals obtained or used for research purposes. UH formed the ACAC to comply with federal laws requiring an IACUC. The ACAC reviews research proposals that involve the use of animals to ensure they are in accordance with federal laws.

Mr. Freitas advised that federal regulations require that minutes be kept of ACAC meetings. These minutes must include records of attendance, activities of the committee, and committee deliberations. The OIP was provided with copies of minutes of February 4, 1993 and April 15, 1993 meetings for *in camera* review.

Ms. Cathy Goeggel, President of Animal Rights Hawaii, has sought access to ACAC records for many years. Ms. Goeggel’s specific requests are for: (1) a current list of members of the ACAC at UH Manoa, and (2) copies of minutes of ACAC meetings from 1993 to present. Requesters of government records have the option of filing a circuit court action to compel disclosure of records by an agency, and Ms. Goeggel has been informed of this right.

⁴ The Animal Welfare Act states:

In any case in which a Federal agency funding a research project determines that conditions of animal care, treatment, or practice in a particular project have not been in compliance with standards promulgated under this Act, despite notification by the Secretary or such Federal agency to the research facility and an opportunity for correction, such agency shall suspend or revoke Federal support for the project . . .

7 U.S.C. 2143(f) (2003).

DISCUSSION

I. ACAC RECORDS ARE SUBJECT TO THE UIPA

The UIPA governs public access to records maintained by government agencies and creates a presumption that those records are public unless a statutory exception to disclosure is applicable. Haw. Rev. Stat. § 92F-11 (1993). In this case, there is no dispute that UH is an “agency,” as the term is defined by the UIPA, and therefore, is subject to the requirements of the statute. See OIP Op. Ltr. No. 89-9 (Nov. 20, 1989) (finding UH to be an “agency” under the UIPA).

Although not specifically raised by UH, a question, however, remains as to whether the ACAC is a committee of and, therefore, part of UH. Courts appear split on the issue. For instance, the Louisiana Court of Appeal found that the records of the Louisiana State University Medical Center IACUC were governed by the federal Freedom of Information Act, not the Louisiana public records law. Dorson v. State of Louisiana, 657 S. 2d 755 (La. App. 4 Cir.) (1995) *cert. denied* 662 So. 2d 472 (1995). The court reasoned:

[t]he IACUC was created by order of the federal government, for the purpose of insuring that federal requirements are met, and is accountable only to federal authorities. No state regulations govern the conduct of IACUC activities. The fact that the entity monitored by the IACUC is a state entity does not change the federal nature of the IACUC.

Id. at 757. Based upon its understanding of the IACUC, the court concluded that the IACUC records were outside of the scope of Louisiana’s public records law because they did not properly come within the State statute’s definition of public records.⁵

Conversely, the Vermont Supreme Court concluded that the University of Vermont’s IACUC was subject to Vermont’s Public Records Act and enjoined the IACUC from violating it. Animal Legal Defense Fund v. Institutional Animal Care and Use Committee, 159 Vt. 133, 135 (1992). In a discussion on whether the IACUC was subject to Vermont’s open meetings law, the court found:

⁵ Under Louisiana law, public records are defined as those generated under the authority of the constitution and laws of Louisiana. Id. at 757.

Although the IACUC must be appointed as a condition of the University's receiving federal funding, it does not follow that the IACUC was established by the federal government rather than by [the University of Vermont]. Congress may attach whatever conditions it deems appropriate to the acceptance of federal funds, but it has no power to compel the acceptance of conditional funding by the University.

The University chose to create the IACUC as a condition of receiving federal funds. The members of the IACUC are appointed by the University's chief executive officer, who is directly answerable to the Board of Trustees, which in turn is entrusted with the entire management and control of the University. Consequently, the IACUC exercises authority delegated to it in significant part by the Board of Trustees. Further, the IACUC files semiannual reports with the Office of the Provost and receives staff support from [the University of Vermont]'s Office of Sponsored Programs. University officials may review the actions of the IACUC and reject research criteria accepted by the committee, and they may replace members of the committee. The IACUC is answerable to, and thus a committee of, [the University of Vermont].

Id. at 138 (citations omitted). The court thereafter discussed application of Vermont's public records law to the IACUC, finding "[b]ecause the IACUC is a committee of the University of Vermont, we conclude that the IACUC is also subject to the mandates of the Public Records Act." Id. at 140.

The OIP finds the reasoning of the Vermont court to be compelling. While it was created in order to receive federal research funds, as required by federal law, the ACAC is a committee established by UH, not the federal government. If UH chose to decline federal funds for animal research, UH could dissolve the ACAC. Moreover, although not addressed by Mr. Freitas or you, the OIP assumes that UH officials appoint the members of the ACAC and, if dissatisfied with their actions, may remove members. Accordingly, as recognized by the Vermont court, the ACAC is accountable to UH and, as such, is a committee of UH for purposes of the UIPA. See also Robinson v. Indiana University et. al., 659 N. E. 2d 153 (1995); American Society for the Prevention of Cruelty to Animals v. Trustees of the State University of New York, et al., 556 N.Y.S. 2d 447 (1990), *reversed* as to public attendance at meetings 568 N.Y.S. 2d 631 (N.Y. App. Div) (1991), *aff'd* 591 N.E. 2d 1169 (1992); Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of

the State University of New York, 92 N.Y.S. 2d 357 (1998); Progressive Animal Welfare Society v. University of Washington, 125 Wn. 2d 243; 884 P.2d 592 (1994); Texas Attorney General Open Records Opinion No. 557 (1990).

II. TREATMENT OF RECORDS AND INFORMATION

A. Minutes of ACAC Meetings

Generally, under the UIPA, an agency is required to make minutes of public meetings available to the public. More specifically, the statute states in relevant part:

§ 92F-12 Disclosure required. (a) Any other law to the contrary notwithstanding, each agency shall make available for public inspection and duplication during regular business hours:

...

(7) Minutes of all agency meetings required by law to be public[.]

Haw. Rev. Stat. § 92F-12(a)(7) (Supp. 2002). In numerous prior Opinions, the OIP has interpreted section 92F-12, HRS, as requiring public disclosure of the types of records listed therein, without the benefit of the exceptions to disclosure in section 92F-13, HRS. See, e.g., OIP Opinion Ltrs. No. 02-04 (June 26, 2002); No. 01-02 (Apr. 12, 2001); No. 97-7 (July 18, 1997), No. 92-10 (Aug. 1, 1992); No. 91-10 (July 19, 1991).

Based upon Mr. Freitas' letter, however, it is the OIP's understanding that the ACAC's meetings have been and continue to be closed to the public and that the minutes of the meetings are not available to the public.⁶ The OIP also understands that the ACAC's minutes were prepared based upon the assumption that they were confidential and that certain information has been included in the minutes that, if the ACAC had been complying with the Sunshine Law, may have been withheld as the subject of an executive meeting.

⁶ The OIP has not been asked to opine whether the ACAC meetings are subject to the "Sunshine Law" at part I of chapter 92, HRS. The OIP notes, however, that for boards who are subject to the Sunshine Law, their meeting minutes are public records under the Sunshine Law and must be available to the public within 30 days after the meeting. Haw. Rev. Stat. § 92-9 (1993). The OIP further notes that the Sunshine Law permits certain matters to be discussed and decided in executive meetings closed to the public. Haw. Rev. Stat. § 92-4 (1993); Haw. Rev. Stat. § 92-5 (Supp. 2002). In those circumstances, the minutes may be withheld until such time as their disclosure would not defeat the purpose of the executive meeting. Haw. Rev. Stat. § 92-9(b) (1993).

Since it is undetermined whether the ACAC must comply with the Sunshine Law, the OIP concludes that the past minutes of the ACAC are not subject to section 92F-12(a)(7), HRS.⁷ To find otherwise would be unfair to the ACAC and UH because certain portions of past meeting minutes may include information that the ACAC would have been entitled to discuss in an executive meeting had the ACAC been determined to be subject to the Sunshine Law. For the purposes of this opinion, it is the OIP's conclusion, after balancing the statutory intent and the equities, that, in determining whether the ACAC meeting minutes should be disclosed to the public, UH and the ACAC may consider the exceptions to disclosure set forth in section 92F-13, HRS.⁸ The relevant exceptions are discussed below as they apply to the meeting minutes and Ms. Goeggel's request for a list of the ACAC members.

B. Exceptions to Disclosure

The UIPA operates on the presumption that government records are public. Haw. Rev. Stat. § 92F-11(a) (1993). This presumption of openness is subject to five exceptions to disclosure, three of which are pertinent to the issues raised by Mr. Freitas.⁹ The burden to justify nondisclosure of records

⁷ While the issue remains unresolved, the OIP recommends that the ACAC be aware of the Sunshine Law's requirements in the event it is ultimately decided that the ACAC is subject to the Sunshine Law. Should the ACAC begin at this time to conduct its meetings in accordance with the requirements of the Sunshine Law, it would be appropriate to meet in executive session in accordance with section 92-5, HRS. Such a practice by the ACAC would protect its executive meeting minutes from disclosure for so long as necessary. See Haw. Rev. Stat. § 92-9 (1993). The minutes relating to the public portions of meetings, however, should be considered to be public record and made available in their entirety. Id.

⁸ The OIP emphasizes that this conclusion is intended to be limited to the facts reviewed in this instance only. Boards, committees, and other bodies whose status as a "Sunshine" board are undecided or unresolved should not view this Opinion as authority to withhold minutes that should be public. As it is the intent of both the UIPA and the Sunshine Law to open up governmental processes to public scrutiny, such a reading of this Opinion would be inconsistent with the statutes' intent. Haw. Rev. Stat. §§ 92-1, 92F-2 (1993).

⁹ The UIPA does not require disclosure of the following:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- ...
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;
- (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and

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or information is on the agency maintaining the records. Haw. Rev. Stat. § 92F-15(c) (1993). Upon receipt of a request to inspect or copy records pertaining to the ACAC, the ACAC or UH should, on a case-by-case inquiry, determine whether an exception in section 92F-13, HRS, protects the records or information from public disclosure. The ACAC and UH may consult with the OIP or make seek advice of their own attorney on disclosability.

The OIP initially is compelled to note that, because of the very general nature of Mr. Freitas' concerns, without reference to specific records, the OIP's comments which follow are to be considered general advice. While, generally, the types of information described by Mr. Freitas fall within the ambit of section 92F-13, HRS, there are instances where those records should be made available to the public. Because of the very general descriptions of the type of information contained in the minutes, the OIP is not opining that, in every instance, it would be appropriate to withhold the minutes in part or in their entirety. Moreover, the OIP emphasizes that section 92F-13, HRS, should not be used as a blanket exception to withhold records or information. Each request for records must still be reviewed on a case-by-case inquiry and the information contained in the record must be reviewed to determine whether disclosure would, for instance, truly frustrate a legitimate government function.

Addressing, more specifically, the issues raised by Mr. Freitas, the OIP first notes his concerns regarding disclosure of: (1) ACAC minutes insofar as they contain detailed discussions and deliberations which, if disclosed, would have a chilling effect on ACAC members and on the research faculty as a whole who may become reluctant to submit protocols for review, and (2) minutes that include the ACAC's decisions and predecisional discussions involving qualifications of individuals and existing or potential deficiencies in proposed research procedures. Generally speaking, section 92F-13(3), HRS, which protects information the disclosure of which would cause the frustration of a legitimate government function, applies to these two types of information. The "frustration" exception includes a deliberative process privilege, or DPP. Under the theory of DPP, an agency may withhold information that is both predecisional and deliberative. See OIP Op. Ltr. No. 00-01 (Apr. 12, 2000).

Mr. Freitas also raised concerns about disclosure of: (1) protocols that are sometimes reviewed involving research not preformed at or sponsored by UH, and (2) minutes that may contain information that could violate researchers' or outside sponsors' interests in existing or future intellectual property rights. Again, generally speaking, the "frustration" exception protects such information where appropriate. The Legislative history of the

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“frustration” exception shows it was meant to protect information consisting of confidential business information and trade secrets. See OIP. Op. Ltr. No. 02-07 (Aug. 27, 2002).

Regarding Mr. Freitas’ concern that certain research proposals may contain information that the UH has a legal obligation to keep confidential, section 92F-13(4), protects information that is required by State or federal law to be confidential from public disclosure.

Mr. Freitas also noted that minutes contain references to individuals (researchers, assistants, and others) who may not be aware their names are in the minutes. Section 92F-13(1), HRS, protects information which, if disclosed, would be a clearly unwarranted invasion of personal privacy. In applying this exception, UH and the ACAC must balance the public interest in disclosure of records or information against any privacy interests therein. See Haw. Rev. Stat. § 92F-14(a) (Supp. 2002); see also OIP. Op. Ltr. No. 03-04 at 4-6 (Apr. 8, 2003) for discussion on the “privacy” exception.

In addition, Mr. Freitas noted that some protocols may involve use of drugs or drug-testing trials performed by agreement with private companies with whom the UH may have confidentiality agreements, and which may involve proprietary matters. While proprietary matters are generally protected by section 92F-13(3), HRS, the OIP cautions against confidentiality agreements. Any confidentiality agreement found to be in conflict with the UIPA or any other law is not enforceable. In other words, if a record is required to be disclosed, it must be disclosed, notwithstanding the existence of a confidentiality agreement between UH and a third-party.

Finally, Ms. Goeggel has requested the names of the ACAC members. You invoked, on behalf of UH, section 92F-13(3), HRS, as its reason for nondisclosure of names of ACAC members, stating that, because of the potential for controversy involved with the use of animals for research, members serving on committees like the ACAC have been subjected to unsolicited attention, pressure, and threats on occasion. Thus, disclosure of their names would jeopardize UH’s ability to recruit persons to serve on the ACAC, and failure to maintain an IACUC would jeopardize UH’s research activities.

The Texas Attorney General found that names of IACUC members were not protected from public disclosure because there is no constitutional right protecting identities of individuals performing services for the

government and because names of government employees are public. See Texas Attorney General Open Records Opinion No. 557 (1990). While the Texas Attorney General appears to have focused on the IACUC members' privacy and not a frustration argument, the OIP agrees with the conclusion. Even if the ACAC members are non-UH or non-government employees, the OIP does not believe that the potential for controversy warrants withholding the names of ACAC members on the basis that disclosure would frustrate a legitimate government function. The OIP does not believe that it necessarily follows that UH will be unable to retain qualified individuals to serve on the ACAC because of the vague threat of unwanted public attention. The OIP further notes that it is unaware of any government board or commission with the authority to keep the names of its members from the public. The OIP therefore opines that names of ACAC members are public under the UIPA.

C. Applicable Federal Laws

The ACAC should note that the Animal Welfare Act requires members of an IACUC to treat certain records and information generated or received as confidential.¹⁰ Also, IACUCs must maintain certain records¹¹ which are subject to federal disclosure requirements:

All records shall be available for inspection and copying by authorized APHIS or funding Federal agency representatives at reasonable times. APHIS inspectors will maintain the confidentiality of the information and will not remove the materials from the research facilities' premises unless there has been an alleged violation, they are needed to investigate a possible violation, or for other enforcement purposes. Release of

¹⁰ § 2157. Penalty for release of trade secrets

(a) Release of confidential information prohibited. It shall be unlawful for any member of an Institutional Animal Committee to release any confidential information of the research facility including any information that concerns or relates to—

- (1) the trade secrets, processes, operations, style of work, or apparatus; or
- (2) the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures, of the research facility.

(b) Wrongful use of confidential information prohibited. It shall be unlawful for any member of such Committee—

- (1) to use or attempt to use to his advantages; or
- (2) to reveal to any other person,

any information which is entitled to protection as confidential information under subsection (a). . . .

7 U.S.C. 2157 (2003).

¹¹ See 9 C.F.R. § 2.35 (2003).

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any such materials, including reports, summaries, and photographs that contain trade secrets or commercial or financial information that is privileged or confidential will be governed by applicable sections of the Freedom of Information Act.

9 C.F.R. § 2.35 (2003).¹² The ACAC should consult with its own attorney on compliance with federal laws.

III. FEDERAL FUNDING AT RISK

Mr. Freitas advised the UH is receiving federal funding. The UIPA contains the following provision regarding federal funding:

§ 92F-4 Funding, services, and other federal assistance. Where compliance with any provision of this chapter would cause an agency to lose or be denied funding, services, or other assistance from the federal government, compliance with that provision shall be waived but only to the extent necessary to protect eligibility for federal funding, services, or other assistance.

Haw. Rev. Stat. § 92F-4 (1993). In order for the UH to invoke this waiver, it must show that it receives federal funding or other assistance, and that this funding or assistance would be jeopardized by disclosure of ACAC records and minutes. Further, the UH should keep in mind that this is not a blanket exception to disclosure, it only allows noncompliance with the UIPA “to the extent necessary to protect eligibility” for federal assistance. The OIP has not been provided with sufficient evidence to opinion whether section 92F-4, HRS, applies to the minutes or other records relating to the ACAC.

CONCLUSION

UH and ACAC are “agencies” subject to the UIPA. As such, ACAC records are subject to the UIPA’s disclosure requirements. Because it has not been determined whether the ACAC is subject to the Sunshine Law, ACAC

¹² Research facilities are not required to disclose publicly or to the IACUC during its inspection, trade secrets or commercial or financial information which is privileged or confidential. 7 U.S.C. § 2143 (a) (2003). Other jurisdictions have discussed this “trade secrets” exception to disclosure. For example, the court in *S.E.T.A. UNC-CH, Inc. v. William D. Huffines, M.D.*, 101 N.C. App. 292 (1991) *further proceedings at* 420 S.E. 2d 674 (1992), rejected the defendant’s trade secrets argument, finding that the following is public under State law: what type and how many animals are to be used; whether surgery will be performed; type of anesthesia used; pre and postoperative procedures; how animal pain and discomfort will be minimized; type of euthanasia, if any; and general descriptions of projects (as more detailed descriptions are public under FOIA). *Id.* at 296-697. The court also noted that such cases must be examined on a case by case inquiry. *Id.* at 298.

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minutes may be segregated in accordance with section 92F-13, HRS. Names of ACAC members are public.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

CMD: ankd

cc: Cathy Goeggel, Animal Rights Hawaii