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The Office of Information Practices (OIP) is authorized to issue decisions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to section 92F-42, HRS, and chapter 2-73, Hawaii Administrative Rules (HAR).

**OPINION**

**Requester:** Anonymous  
**Agency:** University of Hawaii  
**Date:** May 18, 2023  
**Subject:** Names of Student Members Serving on Admissions Committee for William S. Richardson School of Law  
(U APPEAL 20-19, U APPEAL 22-24, & U APPEAL 23-05)

OIP is consolidating these three appeals as permitted by section 2-73-15(g), HAR, which authorizes consolidation of appeals that have similar issues or facts, or when the parties are similarly situated.

**REQUEST FOR OPINION**

Requester seeks a decision as to whether the University of Hawaii (UH) properly denied access to student names in response to Requester's three requests for records that indicate the names of student and faculty members serving on the William S. Richardson School of Law (Law School) Admissions Committee (Admissions Committee) for four different academic years under the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA).

Unless otherwise indicated, this decision is based solely upon the facts presented in:

U APPEAL 20-19: an email from Requester to OIP dated September 18, 2019, with attachments; a letter on behalf of UH from the UH Office of the Vice President for Legal Affairs and University General Counsel (UH-GC) to OIP dated October 24, 2019, with exhibits; a letter from UH-GC to OIP dated November 15, 2019; an email

2019, with exhibits; a letter from UH-GC to OIP dated November 15, 2019; an email from UH-GC to OIP dated December 22, 2019, with an attachment; an email from OIP to the U.S. Department of Education (U.S. DOE), Family Policy Office, dated December 30, 2019; notes of a telephone conversation between OIP Staff Attorney Mimi Horiuchi and U.S. DOE employee Bernard Cieplak on December 31, 2019; a letter from OIP to Requester and UH dated January 8, 2020; a letter from UH to OIP dated January 10, 2020; and an email from Requester to OIP dated January 14, 2022.

U APPEAL 22-24: an email from UH to Requester dated February 18, 2022, with an attachment; an email from Requester to OIP dated February 24, 2022; and a letter from UH-GC to OIP dated March 15, 2022, with exhibits.

U APPEAL 23-05: an email from Requester to OIP dated August 5, 2022, with an attachment; a letter from UH-GC to OIP dated August 29, 2022, with exhibits; an email from the U.S. DOE Student Privacy Policy Office to OIP dated September 20, 2022; and an email from UH-GC to OIP dated April 27, 2023, with attached thread.

### **QUESTION PRESENTED**

Whether UH properly denied access under the UIPA to the names of student members of the Admissions Committee.<sup>1</sup>

### **BRIEF ANSWER**

Yes. OIP Opinion Letter Number 89-9 (Opinion 89-9) held that student names may not be withheld under the UIPA's privacy or frustration exceptions at section 92F-13(1) and (3), HRS, and its conclusion regarding the applicability of those exceptions will not be reconsidered in this opinion. However, section 92F-4, HRS, which was enacted after Opinion 89-9 was issued, allows agencies to waive compliance with the UIPA when doing so is necessary to avoid losing federal funding or other services, and based on that change in the law OIP reconsiders herein its ultimate conclusion in Opinion 89-9 that student names may not be withheld. UH is an agency that receives funding under the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. section 1232g, and rules promulgated thereunder. FERPA provides that funds shall not be made available to an educational institution that has a policy or practice of permitting the release of education records without written consent. 20 U.S.C. § 1232g(b)(1). Based on advice from the U.S. DOE, OIP finds the names of student members are part of their education records under FERPA, and, for the reasons explained herein, UH

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<sup>1</sup> When referring herein to the student members of the Admissions Committee, OIP uses term "student members" and refers to their names as "student names."

may deny access to the student names under section 92F-4, HRS, in order to prevent jeopardizing its federal funding under FERPA.

## **FACTS**

### **I. OIP Opinion Letter Number 89-9 (Opinion 89-9)**

Prior to Opinion 89-9, the Law School had a policy of not disclosing the names of persons serving on the Admissions Committee. At the time of that opinion, three Admissions Committee members were faculty members, two were students elected by the student body, and one was an Assistant Dean. The Law School sought to keep all Admissions Committee member names confidential to: (1) avoid the public perception that personal influence is determinative in the admissions process; and (2) preclude any attempts to unfairly influence the process.

OIP was asked whether records containing the names of the Admissions Committee members were public under the UIPA. OIP first found that, to the extent the names of the student members of the Admissions Committee and of the Assistant Dean were widely known within the Law School, “it is difficult to find any significant privacy interest in the confidentiality of their names.” OIP concluded that disclosure of the student names, Assistant Dean name, and faculty names would not constitute a clearly unwarranted invasion of personal privacy under section 92F-13(1), HRS.

OIP also concluded that disclosure of Admissions Committee members’ names would not result in the frustration of a legitimate government function under section 92F-13(3), HRS. OIP thus concluded that the names of all members of the Admissions Committee were public under the UIPA.

### **II. The Three Record Requests and Ensuing Appeals**

UH’s letter to OIP dated November 15, 2019, explained that student members of the Admissions Committee are chosen each Spring when the Student

Bar Association holds elections. The names of the two winners are revealed to the law students through a confidential listserv.<sup>2</sup>

In an email to UH dated July 19, 2019, Requester made a request for “a record that indicates the names of all the individuals, both students and faculty, serving on the Richardson School of Law Admissions Committee for the 2019-2020 school year.” After requester sent several follow-up emails, UH responded with a Notice to Requester (NTR 1) dated September 5, 2019. The NTR 1 granted access to the names of the faculty members on the Admissions Committee but denied access to the names of student members. The NTR 1 listed sections 92F-4 and 92F-13(1) and (4), HRS, and 34 C.F.R. 99-31<sup>3</sup> as its legal justification for withholding the student names. Among other things, NTR 1 explained that a “list of names of students serving on the Richardson School of Law Admission Committee is not disclosable without prior consent of the student.” Requester asked UH to reconsider its position on the applicability of FERPA, and UH denied this request in an email dated September 10, 2019. Requester appealed UH’s denial and U APPEAL 20-19 was opened.

U APPEAL 20-19 was randomly assigned to OIP’s experimental alternative appeal resolution track pursuant to House Resolution (H.R.) 104, Regular Session of 2019, in which the Hawaii House of Representatives requested that OIP conduct an alternative appeal resolution pilot program and prepare “short, informal, unenforceable guidance” for files assigned to the alternative appeal resolution track within two weeks of receiving the agency’s final response. Accordingly, after UH responded to U APPEAL 20-19, OIP sent a letter with its inclinations to the parties dated January 8, 2020. OIP’s inclinations were to be used by the parties as informal guidance and were not binding. UH timely indicated that it did not wish to accept the informal guidance as resolving this appeal, and OIP now resolves U APPEAL 20-19 and the consolidated cases through issuance of this opinion. Based on advice OIP received from the U.S. DOE after OIP sent its inclinations to the parties, the conclusions in this opinion differ from the inclinations.

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<sup>2</sup> A listserv is a type of mailing list software that manages a database of mailing list subscribed members and automatically routes each mail to all members. It includes email list management features that provide automated management of typical tasks such as allowing users to subscribe and unsubscribe to the list or send a single email to all members. Techopedia, Technology Dictionary, <https://www.techopedia.com/definition/1683/listserv#:~:text=LISTSERV%20is%20a%20software%20program,members%20of%20its%20mailing%20list>, (definition of listserv) (last visited May 9, 2023).

<sup>3</sup> 34 C.F.R. part 99 is a set of federal regulations promulgated under FERPA, 20 U.S.C. § 1232g. 34 C.F.R. section 99.31 specifies when prior consent is not required for an educational institution to disclose personally identifiable information.

Requester made a second request to UH dated January 15, 2022, for access to “a record that indicates the names of all the individuals, both students and faculty, serving on the Richardson School of Law Admissions Committee for the 2020-2021 and 2021-2022 school years.” UH denied access to the student names in a Notice to Requester (NTR 2) dated February 18, 2022, citing section “92F-4 34,” HRS, “C.F.R. 99-31,”<sup>4</sup> and section 92F-13(1) and (4), HRS. NTR 2 explained, among other things, that the student committee member “sits on the committee in his/her capacity as student and is not employed for his/her Position [sic] on the committee.” Requester appealed UH’s denial and U APPEAL 22-24 was opened.

Requester made a third request to UH dated July 16, 2022, for a copy of a “record that indicates the names of all the individuals, both students and faculty, serving on the Richardson School of Law Admissions Committee for the 2022-2023 school year.” UH denied access to the student names in a Notice to Requester dated August 5, 2022, citing section “92F-4 34,” HRS, “C.F.R. 99-31,”<sup>5</sup> and section 92F-13(1) and (4), HRS, and for the same reasons as set forth in NTR 2. Requester appealed UH’s denial and U APPEAL 23-5 was opened.

## DISCUSSION

### **I. UH’s Response Amounts to a Request for Reconsideration of Opinion 89-9**

In Opinion 89-9, OIP found that the names of Admissions Committee members were public because the UIPA’s exceptions to disclosure at section 92F-13(1) and (3), HRS, did not apply to allow withholding of the names. OIP is treating statements in UH’s letter to OIP dated October 24, 2019, for U APPEAL 20-19 as a request for reconsideration of Opinion 89-9. UH’s letter noted that Opinion 89-9 did not consider the application of FERPA, and argued that the subsequent enactment of section 92F-4, HRS, affects the decision in Opinion 89-9.

Section 2-73-19, HAR, sets forth the standards for reconsideration of an OIP decision:

§ 2-73-19 Reconsideration. (a) The director has the discretion, on the director’s own initiative or upon request by a party, to reconsider any decision made under this chapter.

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<sup>4</sup> OIP presumes UH meant to cite section 92F-4, HRS, and 34 C.F.R. section 99.31.

<sup>5</sup> Again, OIP presumes UH meant to cite section 92F-4, HRS, and 34 C.F.R. section 99.31.

(b) A party must make a request for reconsideration within ten days after the director issues a final decision as provided in section 2-73-17.

(c) At the sole discretion of the director, a precedent set by a prior published OIP decision may be reconsidered, on the director's own initiative or upon request, at any time. Reconsideration of a prior published OIP decision's precedential value does not alter that decision's binding effect on the parties involved in the specific dispute at issue in that decision.

(d) Reconsideration of either a final decision or of a precedent shall be based upon one or more of the following:

- (1) A change in the law;
- (2) A change in the facts; or
- (3) Other compelling circumstances.

(e) Any request for reconsideration of a decision shall be made in writing. OIP may require the party seeking reconsideration to provide a written statement setting out the basis for the request for reconsideration. The other parties will be given notice of any request for reconsideration received and granted, a copy of the request, and any written statement filed. OIP shall allow the other parties to submit a counterstatement and shall fix the time for filing of the counterstatement and any response thereto.

#### HAR § 2-73-19.

UH was a party to Opinion 89-9, which was issued prior to the promulgation of chapter 2-73, HAR. However, OIP's Director has the discretion to reconsider an OIP precedent upon request at any time. HAR § 2-73-19(c). Based on a change in the law and on compelling circumstances, OIP's Director grants UH's reconsideration request in part, as explained below.

UH has not alleged a change in facts since Opinion 89-9 was issued that would warrant a reconsideration of Opinion 89-9, so reconsideration is not granted on this ground.

In these consolidated appeals, UH again argued that the UIPA's privacy exception at section 92F-13(1), HRS, protects student names from disclosure. OIP does not reconsider its conclusion in Opinion 89-9 that the UIPA's privacy and frustration exceptions do not allow UH to withhold names of any members of the Admissions Committee. However, UH also argued that a subsequent amendment to the UIPA after the issuance of Opinion 89-9 allows UH to withhold the student names despite the conclusion therein. Section 92F-4, HRS, which was enacted in 1992, states that "[w]here compliance with any provision of [the UIPA] 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.” Reconsideration is partially granted based on a change in the law to discuss the applicability of section 92F-4, HRS, to disclosure of student names.

UH further alleged that FERPA, which was not discussed in Opinion 89-9, materially affects the decision reached therein regarding disclosure of names of student members. FERPA was a law in existence at the time Opinion 89-9 was issued, but UH apparently failed to raise FERPA when Opinion 89-9 was pending. An agency generally has a duty to make the legal arguments to it to meet its burden to justify withholding information under the UIPA. See HRS § 92F-15(c) (placing burden of proof on agency to establish justification for nondisclosure) (2012). Although UH failed to timely raise the issue in Opinion 89-9, FERPA is a federal law that affects UH’s receipt of federal funds and other assistance. Therefore, OIP grants UH’s reconsideration request insofar as necessary to consider FERPA as a potential trigger for the applicability of section 92F-4, HRS, on the basis that UH’s potential loss of federal funds and other assistance due to FERPA is a compelling circumstance.

## **II. FERPA**

### **A. FERPA’s General Scheme**

FERPA, set out at 20 U.S.C. section 1232g and in regulations promulgated thereunder at 34 C.F.R. part 99, is a federal law enacted in 1974 that protects the privacy of student education records.<sup>6</sup> FERPA provides that “[n]o funds shall be made available . . . to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization,” subject to several exceptions. 20 U.S.C. § 1232g(b)(1).

FERPA applies to all schools that receive funds under an applicable program<sup>7</sup> of the U.S. DOE. UH is subject to FERPA and the regulations implementing

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<sup>6</sup> FERPA defines “education records” as records that (1) contain information directly related to a student and (2) are maintained by an educational agency or institution. 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3.

<sup>7</sup> An “applicable program” means any program for which the U.S. DOE has administrative responsibility as provided by law or by delegation of authority pursuant to law. 20 U.S.C. § 1221(c).

FERPA, 34 C.F.R. part 99, and OIP has previously found that noncompliance with FERPA would put UH's federal funding in jeopardy. OIP Op. Ltr. No. 95-3.

According to the U.S. DOE website,<sup>8</sup> FERPA gives parents certain rights with respect to their children's education records. These rights transfer to "eligible students," i.e., students who reach the age of 18 or attend a school beyond the high school level.<sup>9</sup> 20 U.S.C. § 1232g(d); 34 C.F.R. § 99.3. Among other things, FERPA provides that eligible students have the right to inspect, review, and correct their education records maintained by the school. 20 U.S.C. § 1232g(a)(1) (A), (B). Generally, schools must have written permission from the eligible student to release any information from a student's education record. 20 U.S.C. § 1232g(a)(5). However, FERPA allows schools to disclose those records, without consent, to certain parties or under certain conditions. 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.31.<sup>10</sup>

## **B. Treatment of Directory Information**

One of the conditions under which a school may disclose student information without consent is for "directory" information such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. 20 U.S.C. § 1232g(a)(5)(A), (B).<sup>11</sup> Schools must tell eligible students about directory information and allow eligible students a reasonable amount of time to request that the school not disclose directory information about them. Id.

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<sup>8</sup> U.S. Department of Education, Family Educational Rights and Privacy Act (FERPA), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last visited May 11, 2023).

<sup>9</sup> FERPA grants rights to parents and eligible students. However, OIP only refers to eligible students herein as by definition the student members of the Admissions Committee are all attending a school beyond the high school level and are thus eligible students.

<sup>10</sup> For example, FERPA allows schools to disclose education records to school officials with legitimate educational interest, to other schools to which a student is transferring; to specified officials for audit or evaluation purposes; in connection with financial aid to a student; and for specified research, health and safety, criminal justice, and similar purposes. 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.31. Other than directory information as discussed herein, none of the listed purposes is potentially applicable in this situation.

<sup>11</sup> The U.S. DOE observed that some state open records laws require disclosure of student directory information because "in most cases, FERPA does not specifically prohibit the disclosure of this information." FERPA, 76 Fed. Reg. 75604, 75630 (Dec. 2, 2011).

Under 34 § C.F.R. 99.37(a), universities are allowed to determine what they consider directory information. UH's directory information, per UH Board of Regents Policy (Regents Policy) section 7.202, does not include names of student members of the Admissions Committee. Directory information at UH includes:

1. Student name
2. Major field of study
3. Class (freshman, sophomore, etc.)
4. Past and present participation in officially recognized activities (including positions held and official statistics related to such participation and performance)<sup>12</sup>
5. Weight and height of members of athletic teams
6. Dates of attendance
7. Previous institutions attended
8. Full or part-time status
9. Degrees conferred and dates
10. Honors and awards.

### **C. Advice From the U.S. DOE**

Notes of a telephone conversation on December 31, 2019, between a former OIP Staff Attorney and the U.S. DOE, which administers FERPA, show that the U.S. DOE informed OIP that a record with the names of students who are members of the Admissions Committee is “part of the student’s ‘education record[,]” that UH decides what is “directory information” and whether it is protected by FERPA, and that the U.S. DOE “stands by” UH’s belief that it is protected information.

Interpretation of FERPA’s provisions is outside of OIP’s jurisdiction as set forth in sections 92-1.5 and 92F-42, HRS, except insofar as such interpretation may be necessary to determine whether those provisions justify an agency in

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<sup>12</sup> According to UH, this refers to Chartered Student Organizations as defined in Regents Policy 7.202. As such, it does not include student membership on the Admissions Committee. OIP’s inclinations stated that OIP was inclined to find that participation on the Admissions Committee is an “officially recognized” activity, and that if a student member of the Admissions Committee has not submitted an opt-out form, then OIP was inclined to find that the UIPA requires disclosure of the name of the student member as no UIPA exception to disclosure applies. However, as explained in section II. C, the U.S. DOE advised OIP that to the contrary, it interprets FERPA’s requirements together with UH’s determination of what constitutes directory information to prohibit UH from disclosing the student’s name without consent.

withholding records under the UIPA.<sup>13</sup> Further, in determining whether section 92F-4, HRS, justifies an agency's withholding of records, the key question is how the relevant federal agency interprets applicable federal law and whether it might deem a disclosure under the UIPA sufficient reason to deny funding or other services. Thus, OIP consulted again with the U.S. DOE to confirm OIP's understanding of the U.S. DOE's interpretation of FERPA's requirements in the prior telephone conversation. The U.S. DOE provided emailed advice on September 20, 2022, stating, in relevant part:

The U.S. Department of Education's Student Privacy Policy Office (SPPO or Office) maintains the Help Desk FERPA email box to provide school officials, parents, students, and others with brief, informal responses to routine questions about FERPA. . . .

In your inquiry, you asked: "I work with Hawaii's local FOIA law, chapter 92F, Hawaii Revised Statutes, which presumes government records are public unless an exception to disclosure applies. Our local State university law school received a record request for the names of members of its admissions committee. The committee includes one member who is a current law student. The university's position is that FERPA requires it to withhold the student name as an education record, and asserted it could lose federal funding if it discloses the name. Are you aware of an interpretation of FOIA that addresses this question? . . ."

[W]hile we are not interpreting your State's open records law, most States have exemptions, either general or specific to FERPA, that would essentially mean that education records protected by FERPA maintained by a school are not subject to the State's law. We do not know what your State's law says in this regard. However, even if the law did not have an exemption for records protected by FERPA, an educational agency or institution (or State department of education) could not disclose personally identifiable information from students' education records in response to an open records request. In general, nothing in FERPA would prohibit a school from disclosing information pursuant to an open records request, as long as all personally identifiable information from students' education records has been removed. Based on the information you have provided, it appears that

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<sup>13</sup> OIP could also be required to interpret FERPA in an appeal under the Sunshine Law, part I of chapter 92, HRS, if a board argued that FERPA justified an action otherwise in violation of that part.

the university would be prohibited by FERPA from disclosing the student's name without his or her consent.

Based on that email exchange, OIP finds that the U.S. DOE is likely to deem UH's disclosure of a student member's name a violation of FERPA by UH.

### **III. Section 92F-4, HRS, Waives Compliance with the UIPA to the Extent Necessary for UH to Avoid Losing Federal Aid**

In 1994, the Legislature enacted a new section in the UIPA that provides “[w]here 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.” HRS § 92F-4 (2012).

UH argued that FERPA allows it to withhold the names of students on the Admissions Committee notwithstanding the UIPA, because FERPA requires the federal government to withhold money from any state agency having a policy or practice of releasing education records without consent, except under limited circumstances. 20 USC § 1232g(b)(1). In other words, UH argued that section 92F-4, HRS, now provides an exception to UH's compliance with UIPA to avoid jeopardizing its federal funding due to FERPA.

As stated earlier, OIP does not reconsider its conclusion in Opinion 89-9 that the UIPA's privacy and frustration exceptions do not allow UH to withhold names of any members of the Admissions Committee. However, the ultimate conclusion therein that UH must disclose student names is materially affected by the subsequent enactment of section 92F-4, HRS, coupled with the clear advice from the U.S. DOE that it believes UH's disclosure of the student member names would be contrary to FERPA's requirements. OIP therefore is constrained to opine that, while the student names do not fall under the exceptions to disclosure in section 92F-13(1) or (3), HRS (as explained in Opinion 89-9), UH may nonetheless withhold the student names under section 92F-4, HRS, to the extent necessary to protect its eligibility for federal funding or other assistance. Because the U.S. DOE interprets FERPA to prohibit disclosure of the student names as members of the Admissions

Committee,<sup>14</sup> and noncompliance with FERPA would put UH's federal funding from the U.S. DOE in jeopardy, OIP now concludes for the requests at issue in all three appeals that UH is not required to disclose the student names based on section 92F-4, HRS.<sup>15</sup>

#### **IV. UH's Other UIPA Arguments**

##### **A. FERPA Is Not a Confidentiality Statute so Section 92F-13(4), HRS, Does Not Allow UH To Withhold Student Names**

Section 92F-13(4), HRS, allows agencies to withhold "[g]overnment records which, pursuant to . . . federal law . . . are protected from disclosure[.]" UH asserted that section 92F-13(4), HRS, allows it to withhold student names based on the provisions in FERPA. OIP has previously declined to construe FERPA as a confidentiality statute, stating that this exception

applies only where a statute or court order requires that the record be withheld. OIP does not construe FERPA to make educational records confidential by law. Rather, under FERPA, it appears that disclosure

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<sup>14</sup> OIP's inclinations noted OIP was not convinced that disclosure of the student names, which are already known within the Law School, would cause the UH to lose federal funding under FERPA. Indeed, there may be a factual question as to whether the U.S. DOE would take the extreme action of denying federal funding to UH based solely on UH's disclosure of the student names at issue. However, OIP does not interpret section 92F-4, HRS, to require UH to establish that the U.S. DOE has a definite intent to deny federal funding to UH based solely on the disclosures in question. The evidence that the U.S. DOE would consider such disclosures to be contrary to FERPA, together with FERPA's provisions clearly requiring the U.S. DOE to deny funding to an educational institution that has a policy or practice of disclosing information contrary to FERPA, is sufficient to satisfy the requirements of section 92F-4, HRS.

<sup>15</sup> OIP's inclinations stated that UH could meet the requirements of both the UIPA and FERPA by obtaining the student nominees' written consent to the disclosure of their names if they are elected in advance of the elections for Admissions Committee representatives. For students currently on the Admissions Committee, OIP suggested that UH could obtain their written consent in order to comply with both the UIPA and FERPA. While this approach would indeed have been a way to resolve the dispute in compliance with both the UIPA and FERPA, OIP notes that the UIPA does not require UH to ask individuals to consent to disclosure of their names or other information and students are not required to provide such consent under either the UIPA or FERPA.

of a record in violation of its provisions may cause the University to lose or be denied certain federal funding.

OIP Op. No. 06-03 at 4. In that opinion, OIP went on to conclude that the UIPA would allow UH to withhold the records or information under section 92F-4, HRS, as OIP has concluded is also the case here. *Id.* Therefore, consistent with precedent, OIP concludes that section 92F-13(4), HRS, does not apply to the student names at issue here because FERPA is not a confidentiality statute.

### **B. UH May Not Withhold Names Under Privacy Exception Based on Risk of Physical Harm**

UH's email to Requester dated September 10, 2019, asked Requester to identify himself or herself by name in future correspondence. Notwithstanding OIP's previous conclusion in Opinion 89-9 that the UIPA's privacy exception did not apply to the student names, UH's response to U APPEAL 20-19 explained it sought Requester's name to assess whether disclosure of the student names "may create a substantial and demonstrable risk of physical harm to the student committee member under" section 92F-14(b)(10), HRS.<sup>16</sup>

UH noted that the Requester's request was received from UIPA.org, which posts records to its public website received in response to record requests submitted through it. UH stated that because Requester is using "the web services of UIPA.org which appeared to post to its publicly available website documents and information received through various UIPA requests," there is a potential of physical harm to student members by a denied law school applicant, if the name is disclosed. UH indicated it was therefore unable to properly assess the risk of harm to a student member by disclosure of their name.

"[T]he UIPA has an 'any person' standard for disclosure of records in response to general government record requests made under part II of the UIPA, so a requester's identity and reason for making a request are usually not relevant to the requester's access rights." OIP Op. Ltr. No. 10-05 at 2. UH would need to establish that public disclosure of the student names created a "substantial and demonstrable risk of physical harm" to the students without reference to the individual member of the public making the request. UH provided no evidence, however, to show that any of the already disclosed faculty committee members have experienced or been

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<sup>16</sup> Under section 92F-14(b)(10), HRS, an individual has a significant privacy interest in "[i]nformation that if disclosed would create a substantial and demonstrable risk of physical harm to an individual." That significant privacy interest would have to be balanced against the public interest in disclosure to determine whether disclosure would be a clearly unwarranted invasion of personal privacy. HRS §§ 92F-13(1), 92F-14(a).

threatened with physical harm, and likewise presented no evidence of threats or other indications that disclosure of the student names would create a substantial and demonstrable risk of physical harm to them. OIP therefore finds that there is no evidence of a significant privacy interest in student names by those students based on risk of physical harm or for any other reason.<sup>17</sup> Consistent with its prior conclusion in Opinion 89-9, OIP concludes again that UH may not withhold the student names based on the UIPA's privacy exception.

### **RIGHT TO BRING SUIT**

Requester is entitled to file a lawsuit for access within two years of a denial of access to government records. HRS §§ 92F-15, 92F-42(1) (2012). An action for access to records is heard on an expedited basis and, if Requester is the prevailing party, Requester is entitled to recover reasonable attorney's fees and costs. HRS §§ 92F-15(d), (f) (2012).

For any lawsuit for access filed under the UIPA, Requester must notify OIP in writing at the time the action is filed. HRS § 92F-15.3 (2012).

This constitutes an appealable decision under section 92F-43, HRS. An agency may appeal an OIP decision by filing a complaint within thirty days of the date of an OIP decision in accordance with section 92F-43, HRS. The agency shall give notice of the complaint to OIP and the person who requested the decision. HRS § 92F-43(b) (2012). OIP and the person who requested the decision are not required to participate, but may intervene in the proceeding. *Id.* The court's review is limited to the record that was before OIP unless the court finds that extraordinary circumstances justify discovery and admission of additional evidence. HRS § 92F-3(c). The court shall uphold an OIP decision unless it concludes the decision was palpably erroneous. *Id.*

A party to this appeal may request reconsideration of this decision within ten business days in accordance with section 2-73-19, HAR. This rule does not allow for extensions of time to file a reconsideration with OIP.

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<sup>17</sup> OIP previously recognized that "law schools elsewhere and the University of Hawaii Medical School make public the names of persons serving upon their admissions committees." OIP Op. Ltr. No. 89-9 at 11. However, UH confirmed that the membership on the medical school admissions committee is not currently made public on any website or publication of the medical school. UH also stated that its medical school admissions committee does not include any student members, and this has been the case for many years, as long as those currently involved can remember.

This letter also serves as notice that OIP is not representing anyone in this appeal. OIP's role herein is as a neutral third party.

**OFFICE OF INFORMATION PRACTICES**

A handwritten signature in black ink, appearing to read "Carlotta Amerino", written over a horizontal line.

Carlotta Amerino  
Staff Attorney

APPROVED:

A handwritten signature in blue ink, appearing to read "Cheryl Kakazu Park", written over a horizontal line.

Cheryl Kakazu Park  
Director