



DAVID Y. IGE  
GOVERNOR

**STATE OF HAWAII**  
**OFFICE OF INFORMATION PRACTICES**

CHERYL KAKAZU PARK  
DIRECTOR

NO. 1 CAPITOL DISTRICT BUILDING  
250 SOUTH HOTEL STREET, SUITE 107  
HONOLULU, HAWAII 96813  
Telephone: (808) 586-1400 FAX: (808) 586-1412  
E-MAIL: oip@hawaii.gov  
www.oip.hawaii.gov

January 8, 2020

VIA EMAIL

Anonymous Requester

Mr. Derek T. Mayeshiro  
Associate General Counsel  
University of Hawaii

Re: Appeal from Denial of Access to General Records (U APPEAL 20-19)

Dear Anonymous Requester and Mr. Mayeshiro:

The Office of Information Practices (OIP) opened an appeal regarding the University of Hawaii's (UH) response to an anonymous requester's (Appellant) request for records made under Part II of the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA). Specifically, Appellant requested access to "a record that indicates the names of all the individuals, both students and faculty, serving on the [William S.] Richardson School of Law [Law School] Admissions Committee [Admissions Committee] for the 2019-2020 school year."

This appeal file 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. A copy of H.R. 104 is attached with this letter.

In this appeal, Appellant asked to appeal UH's response to Appellant's record request, which indicated that UH was withholding the names of the students serving on the Admissions Committee in accordance with sections 92F-4 (UIPA compliance waived to extent necessary to protect eligibility for federal funding), 92F-13(1) (privacy exception), and 92F-13(4) (records protected by federal law), HRS, and 34 CFR section 99.31 (conditions under which prior consent not required to disclose information).

UH provided its written response dated October 24, 2019, and in reply to OIP's requests for additional information, UH provided supplemental written responses dated November 15, 2019 and December 22, 2019 (received by OIP on December 23, 2019). UH asserts that the identity of the

student Admissions Committee member<sup>1</sup> is protected from disclosure by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA) and the UIPA's "privacy" exception. OIP is now providing informal, unenforceable guidance through this letter.

### **I. Government Records with Names of Admissions Committee Members Are Not Protected by UIPA's Privacy Exception**

UH asserts that the identities of the student members on the Admissions Committee may be withheld under the UIPA's "privacy" exception, section 92F-13(1), HRS.

In 1989, the Law School requested an OIP advisory opinion concerning public accessibility to the names of persons serving on the Admissions Committee under the UIPA, the new open records law that took effect on July 1, 1989. At that time, the Law School had a policy of not disclosing the names.<sup>2</sup> OIP Op. Ltr. No. 89-9 at 2. In finding that the disclosure of records with the names of the student members would not constitute a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), HRS, OIP reasoned:

To the extent that the names of the student members of the Admissions Committee . . . are widely known within the Law School, it is difficult to find any significant privacy interest in the confidentiality of their names. That the student members of the Admissions Committee are elected by their peers in contested elections further suggests that no significant privacy interest is implicated by the disclosure of their names.

OIP Op. Ltr. No. 89-9 at 5.<sup>3</sup>

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<sup>1</sup> It is not clear whether there are one or two student Admissions Committee members currently. According to UH, the Law School Government organization, which is part of the Student Bar Association (SBA), holds elections for the selection of two Admission Committee representatives in the Spring semester; however, UH at times refers to a single student member in its responses to OIP.

<sup>2</sup> OIP has found that an agency "cannot restrict access to records or information that would otherwise be public by statute." OIP Op. No. 06-03 at 3 n. 3 (discussing promises of confidentiality given to UH student-athletes who participate in a voluntary drug testing program), citing State of Haw. Org. of Police Officers v. Society of Prof'l Journalists Univ. of Haw. Chapter, 83 Haw. 378, 927 P.2d 386 (1996) (holding that collective bargaining agreements do not preempt statutory rights and responsibilities under the UIPA); see also OIP Op. Ltr. No. 90-39, citing OIP Op. Ltr. Nos. 89-10, 90-2 (concluding that an agency may not validly enter into a confidentiality agreement that would circumvent the disclosure requirements of the UIPA). Accordingly, OIP is inclined to find that the Law School may not adopt a policy that makes the identities of the student members on the Admissions Committee confidential, and the UIPA, not the Law School's or UH's policy, determines whether records with the names of the Admissions Committee student members may be withheld, subject to FERPA's requirements.

<sup>3</sup> Although not affecting the analysis here, OIP notes that the portion of OIP Op. 89-9 that discusses the deliberative process privilege has been materially affected by the Hawaii Supreme Court's decision in Peer News LLC v. City and County of Honolulu, 143 Haw. 472 (2018).

OIP is inclined to find that there is no reason to depart from the conclusion in OIP Opinion Letter No. 89-9 (OIP Op. 89-9) that the names of the Admissions Committee members do not fall within UIPA's privacy exception.

## II. FERPA<sup>4</sup> and HRS § 92F-4

UH is subject to FERPA and the regulations implementing FERPA, 34 CFR Part 99, and noncompliance with FERPA would put UH's federal funding in jeopardy. See OIP Op. Ltr. No. 95-3. Section 92F-4, HRS, states that "[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).

Under FERPA, universities may not have a policy or practice of permitting the disclosure of "education records, or personally identifiable information contained therein" without the written consent of eligible students, subject to exceptions. 2 U.S.C. § 1232g(b)(1), -(b)(2); 34 CFR § 99.30(a). The U.S. Department of Education, Family Policy Compliance Office, which administers FERPA, advised OIP that a record that included the names of students who serve on the Admissions Committee meets the definition of a FERPA "education record," as it is "directly related to a student" and "maintained" by the university. 34 CFR § 99.3. Therefore, OIP is inclined to find that the requested record is an "education record" under FERPA.<sup>5</sup>

As discussed above, since 1989, UH has been aware of OIP's opinion that government records with the names of Admissions Committee members do not fall within any UIPA exception, including the "privacy" exception, and must be made public upon request under the UIPA. OIP is inclined to find that UH could meet the requirements of both the UIPA and FERPA by obtaining, in advance of the elections for Admissions Committee representatives, the student nominees' written consent to the disclosure of their names if they are elected to serve. With respect to the students currently on the Admissions Committee, OIP is inclined to find that UH could obtain their written consent, in order to comply with both the UIPA and FERPA.<sup>6</sup> The U.S. Department of Education, Family Policy Compliance Office also advised that UH could ask for the student's consent.

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<sup>4</sup> UH states that "OIP's analysis" in OIP Op. 89-9 "did not consider FERPA." In 1989, the Law School's reasons for withholding the information, as stated in the opinion, were 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 Op. Ltr. No. 89-9 at 3. At that time, the Law School may not have asserted that FERPA protected the identities of the student members from disclosure. With respect to the issue of unfair influence, OIP found that "admissions professionals 'should not pursue any activity that might compromise or seem to compromise their integrity or that of the admissions process.'" Law School Admissions Council, Statement of Good Admission Practices, 3 (1989). There are alternatives to keeping the identity of Committee members confidential in order to ensure the integrity of the Law School admissions process." OIP Op. Ltr. No. 89-9 at 11.

<sup>5</sup> OIP is inclined to agree that the requested record is not a record of an employee that is excluded from the definition of "education records." 34 CFR § 99.3.

<sup>6</sup> OIP asks that UH provide OIP with copies of the students' written consent forms.

### III. Directory Information

UH states that OIP should consider that a purpose of FERPA is to protect “individuals’ right to privacy.” OIP observes that FERPA itself permits the disclosure of education records without consent when the information has been appropriately designated as “directory information,”<sup>7</sup> and notice and opt-out requirements are met. The U.S. Department of Education has stated:

[b]y its nature, directory information is intended to be publicly shared. Congress included the disclosure of properly designated directory information as an exception to the general consent requirement in FERPA so that schools may make disclosures of the type of information generally not considered harmful or an invasion of privacy, such as information in a school yearbook or directory.

FERPA, 76 Fed. Reg. 75604, 75630 (Dec. 2, 2011).

OIP is inclined to find that the name of a student member on the Admissions Committee is not the type of information that FERPA is meant to protect, but rather would fall within the definition of “directory information.” UH designates as one of its categories of directory information “[p]ast and present participation in officially recognized activities (including positions held and official statistics related to such participation and performance).” UH stated that this category does not include the Admissions Committee, but rather “it refers to Chartered [sic] Student Organizations that are defined in Regents Policy 7.202 and includes official student groups recognized by the University.” However, the UH administrative procedure that designates the categories of directory information does not itself limit the category of “officially recognized activities” to Chartered Student Organizations. Further, an official body, the Law School or UH, appears to have created the Admissions Committee and authorized it to review applications and admit students. Consequently, OIP is inclined to find that participation on the Admissions Committee is an “officially recognized” activity.

While FERPA regulations make the disclosure of directory information optional, the U.S. Department of Education observed that “some educational agencies have advised, and administrative experience has shown, that State open records laws have required disclosure of student directory information because, in most cases, FERPA does not specifically prohibit the disclosure of this information.”<sup>8</sup> FERPA, 76 Fed. Reg. 75604, 75630 (Dec. 2, 2011).

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<sup>7</sup> The U.S. Department of Education has explained that the examples of “directory information” listed in the FERPA regulations are not intended to be exhaustive. FERPA, 65 Fed. Reg. 41852, 41855 (July 6, 2000).

<sup>8</sup> The U.S. Department of Education further stated that “[i]t is our understanding that many, if not most, State open records . . . require that public entities, such as . . . universities, disclose information to the public unless the disclosure is specifically prohibited by another State law or by a Federal law such as FERPA. Thus, in practice, while FERPA only requires schools to disclose [personally identifiable information] from education records to parents or eligible students, **State sunshine laws may require the public release of properly designated directory information from which parents and eligible students have not opted out.**” (Emphasis added.)

FERPA provides that a student may request that information designated as directory information not be disclosed to the public by completing a request to opt out of directory information. If a student Admissions Committee member for the “2019-2020 school year” has opted out, OIP requests that UH provide a copy of the opt-out form for OIP’s review in connection with this appeal, within ten business days. If a student member of the Admissions Committee has not submitted an opt-out form, then OIP is inclined to find that the UIPA requires disclosure of the name of the student member, in a government record, as no exception to disclosure applies.

#### IV. Risk of Physical Harm

Finally, in its email to OIP dated December 22, 2019, UH contends that because the requester has not identified him- or herself by name, UH is unable to assess whether “release of the information may create a substantial and demonstrable risk of physical harm to the student committee member under HRS § 92F-14(b)(10).” UH states that because the requester is using “the web services of UIPA.org which appears to post to its publicly available website documents and information received through various UIPA requests,” there is a potential of physical harm to the student member by a denied law school applicant, if the name is disclosed.

The names of the faculty members who serve on the Admissions Committee have already been disclosed to the requester and could also be posted to UIPA.org in the same manner as the student member’s name. UH provided no evidence, however, to show that any of the already disclosed committee members have experienced or been threatened with physical harm. Further, OIP has observed 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. OIP is therefore inclined to find that UH has failed to meet its burden in section 92F-15(c), HRS, that section 92F-14(b)(10), HRS, applies in this instance.

OIP’s inclinations as stated herein are informal guidance and are not binding on the parties to this appeal. By this letter OIP notifies Appellant and UH that if any party does not wish to accept this informal guidance as resolving this appeal, that party is requested to so notify OIP in writing within 20 business days of the date of this letter, and OIP will resolve this appeal according to its general “first-in-first-out” policy, and cases older than yours will be completed first. Depending upon the facts of each appeal, many, but not all, appeals are closed with the issuance of an OIP opinion letter, which could take a year or longer to complete because of OIP’s backlog of cases.

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UH asserts that section 92F-13(4), HRS (providing that agencies are not required to disclose “[g]overnment records which, pursuant to . . . federal law . . . are protected from disclosure”) protects the student members’ identities from disclosure. OIP has previously stated, however, that the exception “applies only where a statute or court order requires that the record be withheld. OIP does not construe FERPA to make educational [sic] records confidential by law. Rather, under FERPA, it appears that disclosure 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. Therefore, OIP is inclined to find that section 92F-13(4), HRS, does not apply because FERPA is not a confidentiality statute. Moreover, OIP is not convinced that the disclosure of the names of the student members of the officially created Admissions Committee, who are already known within the law school, would cause the UH to lose federal funding under FERPA.

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**Unless either party informs OIP in writing within 20 business days from the date of this letter that the party does not want to accept OIP's initial inclinations, this appeal will be dismissed.**

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

If you have any questions concerning this matter, please contact OIP.

Very truly yours,



Mimi Horiuchi  
Staff Attorney

MKH:za  
Enclosure