



LINDA LINGLE
GOVERNOR

JAMES R. AIONA, JR.
LIEUTENANT GOVERNOR

STATE OF HAWAII
OFFICE OF THE LIEUTENANT GOVERNOR
OFFICE OF INFORMATION PRACTICES

PAUL T. TSUKIYAMA
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: oiip@hawaii.gov
www.hawaii.gov/oiip

The Office of Information Practices (OIP) is authorized to issue this advisory opinion under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (UIPA) pursuant to section 92F-42, HRS.

MEMORANDUM OPINION

Requester: David Lonborg, Associate General Counsel
Office of the University General Counsel
Agency: University of Hawaii
Date: April 9, 2010
Subject: Grade Distribution Data (U RFO-G 10-1)

Request for Opinion

Requester seeks an opinion on whether the University of Hawaii (UH) must disclose information regarding grade distributions for specific university classes identified by course number and instructor name in response to a request made under part II of the UIPA. Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in your letter dated July 17, 2009, and attached materials.

Opinion

UH must disclose data requested to the extent that it is public, but need not compile the data in the form requested if not readily retrievable in that form. In accordance with Family Educational Rights and Privacy Act (FERPA) guidelines, data may be withheld to the extent that it would allow identification of students in connection with their educational records with reasonable certainty. Information that would allow identification of an instructor to a particular set of grades should generally be disclosed.

Statement of Reasons for Opinion

UH has received a request from Pick-A-Prof, a commercial entity (Requester), for data showing grade distributions and student completion and drop numbers in all courses offered by the university, identified by course name, number and instructor. This information is apparently marketed to students to, among other things, allow them to choose classes based upon the grading practices of the class instructors. The request asked UH to “prepare and provide FERPA-compliant compilations or summaries of information contained in the University’s Banner student records database.”

Redaction of Data Required

“Given the magnitude of the data extraction and scrubbing process” that UH would need to complete in order to provide the information as requested, UH asks whether such data is “‘readily retrievable in the form requested’ within the meaning of HRS § 92F-11(c). UH also asks whether withholding information that would allow the identification of instructors to their grading practices is proper to protect the privacy interests of the instructors. UH has expressed the belief of many faculty members that disclosure of information showing faculty grading would “‘materially impact the conditions of the academic work, and potentially, the employment’ of faculty members” because it may lead students to gravitate towards perceived “easier” graders to the detriment of the students’ educational experience and the faculty members’ employment, which relies in part upon course enrollment. Many faculty members apparently believe that exposing them “to inappropriate student pressure to change their grading practices for reasons unrelated to their professional judgments regarding the quality of individual students’ work in relation to course objectives and expectations” violates their privacy interests.¹

Requester asked UH to provide a report that included the following data:

1. Course Abbreviation
2. Course Number
3. Section Number and/or Instructor Name
4. Number of Students Completing Course
5. Number of A’s assigned
6. Number of B’s assigned
7. Number of C’s assigned

¹ UH has also related faculty concerns that Requester “does not appear to exercise appropriate care regarding the accuracy of information on its website and may simply provide incorrect information to students.” However, the use to and care with which information properly derived under a UIPA request is put are irrelevant for purposes of the disclosure analysis. See OIP Op. Ltr. No. 90-35 (purpose of UIPA request generally irrelevant).

8. Number of D's assigned
9. Number of F's assigned
10. Number of Students that Dropped

OIP understands that UH does not maintain such a report. The UIPA does not require an agency to prepare a compilation or summary of its records in response to a request, unless the information is readily retrievable in the form requested. HRS § 92F-11(c). Thus, UH need not compile or summarize its records into a report of the information requested if it would require extensive efforts to do so. See OIP Op. Ltr. No. 90-35.

UH is, however, required to provide all responsive, disclosable data in its database, even if unsorted. See HRS § 92F-1 (“Government record’ means information maintained by an agency in written, auditory, visual, electronic, or other physical form.”). HRS § 92F-11(c) does not provide a basis for withholding information where redaction of existing public records requires extensive efforts. Instead, it addresses the separate issue of whether an agency must, upon request, compile or summarize information from existing records into a new record where the creation of that new record would require more than a minimal level of effort. See generally State of Hawaii Org. of Police Officers v. Soc’y of Prof’l Journalists, 83 Haw. 378, 394-96 (1996) (SHOPO) (no exception to UIPA for requests an agency deems too burdensome); cf. Osborn v. Bd. of Regents of the Univ. of Wisconsin Sys., 647 N.W.2d 158, 174-77 (Wis. 2002) (court rejected University’s argument that burdensomeness of redaction to protect personally identifiable information in essence required University to create new record, which was not required under the open records law).

The burden placed on agencies in responding to time consuming requests is addressed to some extent by OIP’s administrative rules that authorize fees that may be charged for redaction of records. SHOPO, 83 Haw. at 396; HAR §2-71-19. We note that UH should first inform the Requester that a report will not be provided and provide the Requester with a good faith estimate of the search, review and segregation fees that will be charged to the Requester to fulfill the request in order to allow the Requester to abandon the request if desired. HAR §2-71-14.

In making its argument, UH has disputed the Requester’s proposed method for de-identifying the requested information, including the suggested minimum cell size. FERPA places the responsibility on UH to protect student data in light of other information that may be available. 73 Fed. Reg. 74835 (2008). Thus, UH may redact information that would allow identification of students with their protected educational records in accordance with FERPA standards adopted in 2008, including the “reasonable certainty” standard,² and accompanying guidelines.³ See

² The regulations attempt to balance the need for disclosure for accountability and other purposes while preserving privacy protections. See U.S. Dept. of Ed. Section-By-

HRS § 92F-4 (compliance with UIPA waived to the extent necessary to protect eligibility for federal funding); OIP Op. Ltr. No. 95-3; see also HRS §§ 92F-13(1) (privacy exception) and -13(3) (frustration exception).

Data Revealing Instructors' Grading Practices

OIP concludes that the privacy exception under the UIPA does not allow UH to withhold information that would link a specific instructor to a set of grades. UH has advanced the faculty members' argument that making their grading practices public would be akin to disclosing information pertaining to their job performance where no suggestion has been made that their grading practices are inappropriate or improper. The faculty members believe that this exposure would violate their privacy interests in that it would expose them to inappropriate reputational and other consequences.

OIP believes that an instructor's grading practice is clearly public because it reflects a core job function of an instructor and relates to the operation of the university. OIP does not find that the potential exposure to student pressure on grading practices gives rise to a significant privacy interest in the performance of that core function.⁴ Indeed, to the extent that any significant variation in grading practices exist between faculty teaching the same or similar level course material, it would

Section Analysis of Regulations (DOE Analysis) at 11 (Dec. 2008) (analyzing new regulation adopted at 34 CFR § 99.31(b) (De-identification of information)); 73 Fed. Reg. 74834 (citing to 73 FR 15584-15585). To do so, the regulations incorporate the "reasonable certainty" standard, and "recognize that the risk of avoiding the disclosure of [personally identifiable information] cannot be completely eliminated and is always a matter of analyzing and balancing risk so that the risk of disclosure is very low." DOE Analysis at 11; 73 Fed. Reg. 74840.

³ 73 Fed. Reg. 78435 ("determining whether a particular set of methods for de-identifying data and limiting disclosure risk is adequate cannot be made without examining the underlying data sets, other data that have been released, publicly available directories, and other data that are linked or linkable to the information in question."); see id. (providing examples and recommending reference to examples and disclosure methods described in the NPRM at 15584 and the Federal Committee on Statistical Methodology's Statistical Policy Working Paper 22, www.fcsm.gov/working-papers/wp22.html).

⁴ Student pressure on an instructor's grading practices and its potential effects on faculty tenure or the quality of the students' education may more accurately be an argument under the "frustration" exception. HRS § 92F-13(3). For the same reasons stated above, OIP believes that UH may guard against this frustration by means entirely within UH's control. For example, UH may appropriately protect faculty from the negative effects of legitimate grading differences on faculty tenure and promotion by the adoption and application of standards for grading classes within the same course levels. Further, faculty and student education quality may be protected by use of course requirements to ensure enrollment in classes deemed important to the student's education.

seem incumbent upon UH to correct grading practices of specific faculty members that result in grading inequity among students. Similarly, to the extent that awareness of the grades typically given causes students to “avoid courses that would be important and valuable to their educations,” it would seem incumbent upon UH to ensure that students take those important and valuable courses by, for instance, requiring them to be taken to obtain the related degree.

Further, we cannot find that the fact that disclosure of grading practices could indirectly reflect upon an instructor’s job performance by forming the basis for an allegation of misconduct makes it, in the absence of any question of employee misconduct, employee personnel file type information that is generally protected under § 92F-13(1). Cf. OIP Op. Ltr. No. 99-1. The fact that a consequential use may exist that could indirectly affect or lead to a characterization of an instructor’s job performance does not give rise to a significant privacy interest for the instructor in grades given as part of the day-to-day responsibilities of that position. OIP thus concludes that § 92F-13(1) would not justify the withholding of data that would identify an instructor in connection with his or her grade distribution.

OFFICE OF INFORMATION PRACTICES


Cathy L. Takase
Acting Director