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February 27, 1995

Thomas W. Gething
Interim Assistant VPAA
Ofc. of the Senior Vice President/
Executive Vice Chancellor
University of Hawaii at Manoa
Backman 105
2444 Dole Street
Honolulu, Hawaii 96822

Dear Mr. Gething:

Re: Disclosure of Records Relating to Cases Brought Under the Academic Grievance Procedures and Student Code of Conduct

This is in reply to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion concerning the above-referenced matter.

ISSUES PRESENTED

I. Whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), records associated with cases brought under the University of Hawaii's ("University") Academic Grievance Procedures and Student Code of Conduct must be made available for public inspection and coping upon request.

II. Whether hearings of the University of Hawaii's Academic Grievance Committee and Student Conduct Committee must be open to attendance by the public.

BRIEF ANSWERS

I. No. The U.S. Secretary of Education has made clear in recent comments and analysis dated January 17, 1995 on changes to

rules implementing the federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), that records directly relating to a student, including student disciplinary records are "education records" subject to FERPA's restrictions on disclosure without the consent of the student, irrespective of whether those proceedings relate to non-academic or criminal misconduct.

As such, we are constrained to conclude that under section 92F-4, Hawaii Revised Statutes, the University of Hawaii is not required by the UIPA to disclose government records directly relating to a student, connected with proceedings or cases brought under the University of Hawaii's Student Code of Conduct or Academic Grievance Procedure.

II. This question involves the application of the State's open meetings law, part I of chapter 92, Hawaii Revised Statutes. The OIP does not have jurisdiction over the open meetings law; this duty is vested with the State Attorney General and the county prosecuting attorneys. Therefore, we are forwarding that portion of your opinion request to the Attorney General for appropriate action.

FACTS

In a letter to the OIP, you requested an opinion concerning whether records associated with cases brought under the University of Hawaii's Academic Grievance Procedures and the Student Conduct Code must be available for inspection and copying under the UIPA. Your letter was prompted by a Georgia court decision, Red & Black Publishing Co. v. Board of Regents, 427 S.E.2d 257 (Ga. 1993), finding that records of a university student "organizational court," which disciplined a student fraternity for a rules violation, did not involve the disclosure of "education records" protected from disclosure under FERPA.

Accordingly, you requested an opinion from the OIP concerning whether records associated with cases brought under the Student Conduct Code and the Academic Grievance Procedure are government records that are open to the inspection of the public under the UIPA. You also requested us to advise you whether hearings of the Student Conduct Committee and the Academic Grievance Committee must be open to attendance by the public.

The University of Hawaii's Student Conduct Code sets forth categories of conduct that are not permitted at the University by students, such as interference with freedom of speech and the right to peaceably assemble; furnishing of false information;

personal misconduct (such as harassment, theft, damage to property); creating disturbances; abuse of controlled substances; violation of residence hall violations; academic dishonesty; and other misconduct. A violation of the Student Code of Conduct may lead to disciplinary sanctions involving a warning, probation, recision of grades or degrees, suspension, or expulsion.

The Academic Grievance Procedure sets forth professional standards of behavior and conduct to which faculty members as teachers and students as learners are expected to adhere. This policy also establishes grievance procedures for the resolution of allegations that a faculty member or student has violated these principles, including hearing procedures.

DISCUSSION

I. INTRODUCTION

Under the UIPA, "[e]xcept as provided in section 92F-13, each agency upon request by any person shall make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1992). Under the UIPA, the term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1992).

II. AGENCY COMPLIANCE WITH UIPA WAIVED TO THE EXTENT THAT COMPLIANCE WOULD RESULT IN THE LOSS OF FEDERAL FUNDING

Section 92F-4, Hawaii Revised Statutes, provides:

> **§92F-4 Funding, services, and other federal assistance.** Where compliance with any provision of this chapter would cause the agency to lose or to 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 (Supp. 1992).

The addition of section 92F-4, Hawaii Revised Statutes, to the UIPA resulted from Act 118, Session Laws of Hawaii 1992. The legislative history of Act 118 convincingly demonstrates that it

was added to prevent State and county government agencies from losing federal funding where compliance with the UIPA would run afoul of federal statutory or regulatory restrictions concerning the dissemination of information, including restrictions imposed by FERPA:

> [Y]our Committee notes that Chapter 92F, HRS, must also be amended to protect public agencies from being denied federal funding, services, or other assistance when complying with the Uniform Information Practices Act (UIPA).
>
> For example, educational institutions that receive federal funding may not disclose student education records under the federal Family Educational Rights and Privacy Act (FERPA) unless authorized by other provisions of federal law or by regulations adopted by the U.S. Secretary of Education. Compliance with the UIPA may seriously jeopardize federal funding for the University of Hawaii if this waiver is not provided. Moreover, other State agencies such as the Department of Health and the Department of Education may also be affected.

H. Stand. Comm. Rep. No. 1725-82, 16th Leg., 1992 Reg. Sess. Haw. H.J. 1564 (1992); see also, S. Stand. Comm. Rep. No. 2014, 16th Leg., 1992 Reg. Sess., Haw. S.J. 963 (1992).

FERPA generally conditions federal funding to educational institutions upon compliance with restrictions on the disclosure of "education records" without the consent of a student. In 1992, the U.S. Congress amended FERPA to exclude from the definition of the term "education record" records maintained by law enforcement units of an educational agency or institution. See section 1555 of the Higher Education Amendments of 1992, P.L. 102-325, codified at 20 U.S.C. § 1232g(a)(4)(B)(ii).

The Secretary of Education is authorized by FERPA to adopt regulations to implement FERPA. In January 1995, the Secretary of Education issued new regulations under FERPA, defining the term "law enforcement unit" as used in FERPA, and defining "disciplinary action or proceeding" in existing FERPA regulations. See Family Educational Rights and Privacy; Final

Rule, 60 Fed. Reg. 3464 (January 17, 1995) (to be codified at 34 C.F.R. part 99).

In the analysis of and comment on the rule changes, the Secretary of Education observed that a substantial minority of comments received by the U.S. Department of Education on the proposed regulations were from those believing that: (1) disciplinary records relating to criminal and other non-academic misconduct should not be treated as "education records" subject to FERPA's restrictions on disclosure, and (2) postsecondary institutions have used FERPA to evade efforts by the public to gain access to information about crime on campuses. The Secretary of Education specifically noted that the Department of Education's proposed rules were perceived by some commentators as "an effort to circumvent the recent State court ruling, Red & Black Publishing Co. v. Board of Regents, 427 S.E.2d 257, 261 (Ga. 1993)."

Nevertheless, the Secretary of Education made clear that all student disciplinary records, including those relating to non-academic or criminal misconduct by a student are "education records" subject to FERPA's restrictions on disclosure:

> *Discussion*: The Secretary has carefully analyzed the statutory and regulatory authority to address these concerns. Based on the broad definition of "education records," which includes those records, files, documents, and other materials that contain information directly related to a student, except those that are specifically excluded by statute, all disciplinary records, including those related to non-academic or criminal misconduct by students, are "education records" subject to FERPA. It is noted that *Red & Black Publishing Co. v. Board of Regents* concerned records of a student "organization court" which disciplined a student organization (fraternity) for a rules violation and did not concern disciplinary action against an individual student. More recently, another State court ruled that FERPA prevented a university from releasing to the media personally identifiable information from student disciplinary records without consent. *Shreveport Professional Chapter of the*

> *Society of Professional Journalists v. Louisiana State University in Shreveport*, Case No. 393,332 First Judicial District Court, Caddo Parish, LA (March 4, 1994). Although the Secretary is equally concerned with the problem of crime on campus, it is clear that only Congress has the authority to change the statutory provisions of FERPA to permit disclosure of disciplinary records without prior consent.
>
> Nevertheless, because crime on our Nation's college campuses has escalated since 1974 when FERPA was enacted, the Secretary has notified Congress of the need to address this important issue. The Congress may find that public access to disciplinary records concerning criminal and other non-academic misconduct is an appropriate response to the problem of maintaining safe college campuses, and the Secretary has offered to work with Congress in writing an appropriate amendment to FERPA.

Family Educational Rights and Privacy; Final Rule, 60 Fed. Reg. 3464, 3465 (1995) (italics in original, emphases added).

The Secretary of Education, in the comment and analysis of the rule changes, observed that under the rule amendments adopted the term "law enforcement unit" has been clarified, and that if a law enforcement unit creates a record for law enforcement purposes and provides a copy of that record to a school official for use in a disciplinary proceeding, "that copy is an "education record" subject to FERPA if it is maintained by the dean, principal, or other school official and not the law enforcement unit . . . [t]he original document created and maintained by the law enforcement unit is not an "education record" and does not become an "education record" merely because it was shared with another component of the institution." Id. at 3466 (emphasis added).[1]

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[1]Under the new FERPA regulations, a "law enforcement unit" is defined as follows:

> (a)(1) *Law enforcement unit* means any individual, office, department, division, or other component of an

(continued...)

Based upon the foregoing policy statement of the U.S. Secretary of Education, who has the enforcement jurisdiction over FERPA, we are constrained to conclude that records associated with cases brought under the Student Conduct Code or the Academic Grievance Procedure are "education records" for purposes of FERPA when those records contain information directly related to a student. Accordingly, under section 92F-4, Hawaii Revised Statutes, the University of Hawaii is not required to make those records available for public inspection and copying. However, as explained above, records maintained by a law enforcement unit of the University of Hawaii are not education records, even when those records have been shared with other components of the University for purposes of a disciplinary action or proceeding.

The OIP does not have enforcement jurisdiction over the State's open meetings law, part I of chapter 92, Hawaii Revised Statutes; such authority is vested with the Attorney General and county prosecutors. See Haw. Rev. Stat. § 92-12(a) (1985). Therefore, the OIP does not have the authority to provide you with an opinion concerning the second issue you raised. Accordingly, we are referring that portion of your opinion request to the Attorney General for appropriate action.

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[1](...continued)
educational agency or institution, such as a unit of commissioned police officers or non-commissioned security guards, that is officially authorized or designated by that agency or institution to-

(i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or

(ii) Maintain the physical security and safety of the agency or institution.

(2) A component of an educational agency or institution does not lose its status as a *law enforcement unit* if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.

34 C.F.R. § 99.8(a)(1), (2) (1995).

However, we wish to point out comments and discussion by the Secretary of Education regarding comments received on the proposed rule by those arguing that disciplinary proceedings should be open to the public:

> *Comments*: Some commentators noted that conduct that would constitute a criminal violation should not be kept confidential as part of a campus disciplinary proceeding and that disciplinary hearings should be open to the public. In contrast, a number of school officials stated that to allow disciplinary hearings to be open to the public would substitute those processes for criminal proceedings, which would negate a long-standing separation of an on-campus disciplinary system from the criminal justice system.
>
> *Discussion*: FERPA does not prevent an institution from opening disciplinary proceedings to the public. Rather, FERPA prevents the non-consensual disclosure of education records or personally identifiable information from "education records," unless the disclosure meets one or more of the statutory conditions for non-consensual disclosure. <u>Schools routinely restrict access to disciplinary proceedings to those school officials with a "legitimate educational interest," which is the first condition for non-consensual disclosure under section (b)(1) of the statute, because information from "educational records" is frequently disclosed in a disciplinary hearing</u>.

As discussed above, the Secretary has advised and offered to work with Congress toward an appropriate solution to the concern about campus safety issues in relation to FERPA.

Family Educational Rights and Privacy; Final Rule, 60 Fed. Reg. 3464, 3465 (January 17, 1995) (italics in original, emphasis added).

Enclosed for your information is a copy of the Secretary of Education's summary, analysis, and commentary on amendments to regulations implementing FERPA filed on January 17, 1995.

CONCLUSION

It is the view of the U.S. Secretary of Education that records relating to student disciplinary proceedings that contain information directly related to a student are "education records" that are subject to FERPA's restrictions on disclosure without the consent of the student. As such, the OIP is constrained to conclude that under section 92F-4, Hawaii Revised Statutes, the University of Hawaii is not required to disclose records concerning cases brought under the Student Conduct Code, or the Academic Grievance Procedure, that contain information directly relating to a student. The OIP does not have the legal authority to opine whether hearings of the Student Conduct Committee or Academic Grievance Committee must be open to the attendance by the public.

Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
c: Alberta Hopkins
Acting Dean of Students

Jahan Byrne

Russell Suzuki
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