The Office of Information Practices (OIP) is authorized to issue decisions and advisory opinions under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (the UIPA) pursuant to HRS § 92F-42, and chapter 2-73, Hawaii Administrative Rules (HAR). This is a memorandum opinion and will not be relied upon as precedent by OIP in the issuance of its opinions.

MEMORANDUM OPINION

Requester: Honorable Donna Mercado Kim, President
Hawaii State Senate
Agency: University of Hawaii
Date: March 28, 2013
Subject: UH Fact Finders’ Report

Requester seeks an opinion on whether redactions made by the University of Hawaii (UH) to the Fact Finders’ Report (Report) produced for UH regarding a canceled concert deal were proper under Part II of the UIPA.

Unless otherwise indicated, this advisory opinion is based solely upon the facts presented in Senator Donna Mercado Kim’s letter dated September 21, 2012; the redacted and unredacted versions of the Report and its attachments that Senator Kim provided for review, e-mail correspondence from Senator Les Ihara dated September 26, 2012; a letter sent on behalf of the UH from Robert S. Katz, Esq., and Jeffery S. Harris, Esq., dated October 10, 2012; and telephone discussions with Senator Kim’s staff to clarify the opinion request.

Opinion

The Report should have been publicly disclosed, with the sole exceptions of (1) the name of an individual making a personal loan, mentioned at page 8 of the Report
and in Attachment 44, and (2) a description of the medical condition the concert promoter suffered from, mentioned at paragraph 78 of the Report. Before the Committee provides the correctly redacted Report to record requester Hawaii News Now, OIP recommends that the Committee return the Report to UH so that UH can redo the redaction as provided for herein.

**Statement of Reasons for Opinion**

UH contracted with the Honolulu law firm of Cades Schutte to investigate and report on the events leading up to the cancellation of a planned benefit concert for UH athletics which was to feature a well known performer. UH publicly disclosed a redacted copy of the Report and its attachments, having contracted with the Honolulu law firm of Torkildson, Katz, Moore, Hetherington & Harris to do the redaction. Subsequently, UH provided unredacted copies of the Report and its attachments to the Hawaii Senate Special Committee on Accountability (Committee), which was separately investigating the same matter.

Hawaii News Now then requested a copy of the unredacted Report and attachments from the Committee. Because UH objected to disclosure of the unredacted Report and attachments, the Committee denied the request, but asked OIP for this opinion as to whether UH's redactions were proper and whether the Committee could in fact disclose the unredacted Report and attachments to Hawaii News Now.1

**I. Preliminary Issues**

**A. Interagency Sharing**

UH provided the Committee with both a redacted (for public disclosure) and unredacted version of the Report and attachments. This opinion request is from the Committee regarding whether it could properly disclose the unredacted version of the records provided to it by UH in response to a UIPA request. Section 92F-19, HRS, allows interagency sharing of otherwise confidential information in specific circumstances, one of which is sharing with a Senate committee, and provides that

1 Senator Kim also asked whether UH's response to the Committee was timely, and whether it should have publicly disclosed the redacted attachments at the same time it released the redacted Report. Based on the written record, the response to the Committee does appear to have been within ten business days of the Committee's written request, which would make it timely under the UIPA's administrative rules. See Hawaii Administrative Rules (HAR) § 2-71-13. As to whether UH should have publicly released the redacted attachments along with the redacted Report, it is not clear from the facts available to OIP whether UH was in receipt of a UIPA request for the attachments. If a member of the public had requested the Report together with the attachments, then UH should have disclosed the redacted Report and attachments together. However, in the absence of such a request, UH would not have had an independent duty under the UIPA to publicly release the attachments.
the receiving agency shall be subject to the same restrictions on disclosure as the originating agency. HRS § 92F-19(a)(6) & -(b) (2012). The question thus is whether UH, as the originating agency, was in fact justified under the UIPA in withholding the information it redacted. If UH's redactions were not justified, then since no restrictions on disclosure applied to UH, there is no basis for the Senate committee, as the receiving agency, to also withhold the information. However, as a practical matter, given the size of the records involved and the public interest in this issue, the Senate committee may prefer to ask UH to produce a correctly redacted version based on this opinion.

B. Method of Redaction

UH's redactions were done by “whiting out” the redacted material so that redactions were not always readily apparent. OIP has opined that an agency should redact in a way that makes it clear where material has been redacted, which means blacking out rather than whiting out redactions on paper copies. See HAR § 2-71-17(b) (“agency shall segregate information from a requested record in such a way so that it is reasonably apparent that information has been removed from the record”). When UH re-redacts the Report and attachments in a manner consistent with the UIPA, therefore, it should black out the information being redacted, or otherwise ensure that it is apparent where information has been redacted. OIP notes also that there are some inconsistencies between the attachments and the Report itself as to what was redacted, which obviously lessen any arguments by UH in support of the redactions.

II. Substance of Redactions

Redactions were of names of individuals, organizations, units of government and government programs, and in two instances, of information related to an individual’s physical condition. The UIPA requires that all government records are open to the public except as provided in section 92F-13, HRS. HRS § 92F-11 (2012). Under the UIPA, UH “has the burden of proof to establish justification for non-disclosure.” HRS § 92F-15(c) (2012). UH claimed the “privacy” and “frustration” exceptions in section 92F-13, HRS, as the basis for the redactions.

A. Frustration Exception

The UIPA allows agencies to withhold information contained in “[g]overnment records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.” HRS §92F-13(3) (2012). UH claimed that this UIPA exception was the basis for many of its redactions, but in its response to this opinion request, it failed to articulate any argument as to why disclosure of the names in question would frustrate a legitimate government function.
function.\textsuperscript{2} OIP notes that the possibility of interference with a currently ongoing investigation does generally provide a basis to withhold preliminary reports and other records from an investigation file while it is still ongoing. \textit{See}, \textit{e.g.}, OIP Op. Ltr. No. 91-9.

However, even assuming that UH’s Report would still be considered part of an ongoing investigation, even though UH’s own investigation had been completed, because the Report was provided to a law enforcement agency pursuing its own separate investigation, UH would necessarily have waived any argument that disclosure of the Report would frustrate its ability to pursue the investigation due to its disclosure of the substance of the Report’s findings. The alleged interference with an investigation that could result from premature disclosure of investigation records would be a valid reason to withhold access if the people being investigated would thereby be tipped off as to what the investigator had learned. In this case, however, the people being investigated would have already been tipped off as to what the investigator had learned about their roles in the affair because UH had publicly disclosed the report with redactions only of names of the people involved and those people already knew that they were involved in the investigation. Having already released the results of its investigation, UH has no basis to argue that public disclosure of the names of people who know they were being investigated would further frustrate any law enforcement investigation. OIP therefore finds that the UIPA’s frustration exception did not support UH’s redactions of names in the Report.

\textbf{B. Privacy Exception}

The UIPA allows agencies to withhold information contained in “[g]overnment records which if disclosed, would constitute a clearly unwarranted invasion of personal privacy.” HRS §92F-13(1). UH also asserted that the UIPA’s privacy exception justified all its redactions, whether of names of individuals, names of organizations, or categories of unnamed persons or organizations.

\textbf{1. Organizations}

UH redacted the names of numerous business entities, units of government, government facilities or programs, and other groups or entities, citing the UIPA’s privacy exception as a basis for doing so. However, only natural persons have cognizable privacy interests under the UIPA’s privacy exception. HRS §§ 92F-3 and 92F-13(1); see OIP Op. Ltr. Nos. 89-5; 99-3 at 8 n.3. Businesses, government, and nonprofit entities and other groups do not have a privacy interest. Because none of

\textsuperscript{2} UH has not argued that the Report constituted attorney work product, and OIP notes that any privilege attaching to the Report would in any case have been waived by the public disclosure of the substance of the report.
the organizations, facilities and programs redacted have a privacy interest, there was no basis to redact any of their names under the privacy exception to disclosure.

Specifically, UH should not have redacted the identities of the companies involved either directly or indirectly in the concert deal; assorted booster clubs and sponsors of UH athletic programs (including generic references to unidentified groups, such as “booster clubs,” which were redacted despite the fact that specific groups were not even named); units of government, government facilities, and government programs or systems; groups holding judgments against an individual (particularly given that judgments are in the public record and thus would be considered public in any case); and the several other insurance and entertainment companies referred to in the course of the Report. There is no basis, under the privacy exception or any other exception to the UIPA, for any redaction of the identity of entities, facilities, systems, or programs that are not natural persons.

2. Individuals

Natural persons, or individuals, can have a privacy interest; however, for information about an individual to be withheld under the UIPA’s privacy exception, the individual concerned must have a significant privacy interest in the information that is not outweighed by the public interest in disclosure. HRS §§ 92F-13(1) and 92F-14(a) (2012). There is generally a significant privacy interest in the fact that someone’s name was identified as part of an investigation into a possible violation of criminal law. See HRS § 92F-14(b)(2). The investigation leading to the Report was not a criminal investigation, nor did it look into any alleged employee misconduct. However, the events discussed in the Report were expected to and did lead to a separate criminal investigation, focused apparently outside UH, which ultimately resulted in charges being pressed against at least two of the non-UH parties involved in the concert deal. Although the Report’s focus was on UH’s “management, planning, organization, and administration” of the planned benefit concert rather than on potential violations of criminal law, because of the related criminal investigation it is arguably possible that some individuals named in the Report had a privacy interest comparable to that arising from being named in connection with a criminal investigation.

Even assuming that to be the case, the high public interest here would outweigh that privacy interest. This investigation involved expenditure of a significant sum of public money, in which there is a high public interest, and it sheds light on the conduct of government officials, which is another basis for elevated public interest. See, e.g., OIP Op. Ltrs. No. 94-28 at 6 and 04-07 at 7. Thus, the mere fact that an individual named in the report would be revealed as having been mentioned in the

---

context of an investigation related to a criminal investigation is not sufficient reason to withhold that individual's name on the basis of privacy. For a person's identity to fall within the UIPA's privacy exception, there must be another basis for finding that the individual in question has a significant privacy interest in his or her identity in the context of the report. OIP also notes that much of the information redacted from the report, including names, was already in the public domain, as the incident and subsequent handling of the incident had been widely reported by the news media.

UH redacted the names of every person mentioned in the report, with the exception of most current UH employees. Thus, the names redacted included those of people involved directly or at second hand in the concert deal; people not involved in the deal but connected to the performer; people currently or formerly at or connected to UH; and people referred to by someone else as a business connection or source of information.

Beginning with the people involved in the concert deal, the local concert promoter who came up with the concert idea was also the primary contact for and apparently the primary stakeholder of what OIP will refer to as “Company A,” the company that UH directly contracted with, and he had been long known as a concert promoter; thus, the local concert promoter has no privacy interest in his identity as such. His name, therefore, should not have been redacted. However, paragraph 78 of the report included a description of his medical condition. Medical information carries a significant privacy interest, which is not in this case outweighed by the public interest in disclosure. See HRS § 92F-14(a) & (b)(1). Certain information about his medical condition thus was properly redacted under the UIPA, even after his death, as further detailed below. See OIP Op. Ltr. No. 03-19.

The intended performer is well-known as a performer and there is no basis to find a privacy interest in the fact that he was the performer UH thought it was engaging. OIP further notes that his name had been publicized in UH's statewide announcement of the concert and thus in this case was already widely known in connection to the failed concert, and indeed tickets with his name on them were being pre-sold at the time of its cancellation. There was no privacy basis for redacting his name.

The principals behind what OIP will call “Company B” and “Company C,” the entertainment companies that Company A contracted with to obtain the performer’s services, have both publicly promoted themselves as representing their respective agencies and thus have no privacy interest in being identified as representatives of those agencies. We note also that the subsequent arrest of two of those individuals was widely reported on and is in the public domain. There was no privacy basis for redacting their names.
A person who was introduced by the concert promoter as the person in charge of promotion for Company A events was not, so far as OIP could determine, a principal or even an employee of the business. Nonetheless, OIP cannot find a significant privacy interest in his being identified as the person in charge of promotion for Company A. There was no privacy basis for redacting his name.

The insurance broker who was handling the proposed insurance for the event, and who is now deceased after an unrelated motorcycle accident, had and has no privacy interest in the fact that he was an insurance broker and acted as such, so there was no privacy basis for redacting his name.

Moving to the names of people currently or formerly at or connected to UH, a reference to unnamed “season ticket holders” was, to begin with, not even identifiable as referring to particular individuals because they were unnamed. Further, even assuming the season ticket holders could be identified by cross-referencing a list of all UH season ticket holders, they have no privacy interest in being identified as season ticket holders or as people who would be offered the opportunity to buy concert tickets. There was no privacy basis for redacting this reference to unnamed persons.

The names of former UH employees, including a former Manoa Chancellor, former head of UH disbursing, and former athletic director at UH, were redacted, although ineffectively in that their job descriptions were left in and could readily lead to their actual identification. The fact that a person was formerly a government employee is public by law, without exception. HRS § 92F-12(a)(14) (2012). Thus, the privacy exception could not be applied to those former employees, and there was no basis for redacting their names. In Report paragraph 112, UH also redacted the name of what appears to be a current UH employee. The identity of present as well as former government employees is public by law, so there was no basis for redacting her name. Id.

UH redacted the name of the president of the nonprofit that acts as a UH athletic fundraiser, who is also an employee of the nonprofit that acts as a general UH fundraiser. While these organizations, as nonprofits, are not government agencies themselves, they are closely intertwined with UH. We see no basis for finding a significant privacy interest in a person’s identity as an employee of or president of a nonprofit formed for the purpose of UH fundraising. The name should not have been redacted.

UH also redacted references to unnamed “Booster Club Presidents.” These individuals are not even identified and it is not apparent that they would be readily identifiable. See, e.g., OIP Op. Ltr. Nos. 99-2 at 9 & 03-18 at 10-11 (both opinions noting that “[w]hat constitutes identifying information must be determined not only from the standpoint of the public, but also from that of persons familiar with the circumstances involved”). Further, even if they were actually named in the report,
there is no privacy interest in the fact that a person is a UH booster club president. There was no privacy basis for redacting these references.

With respect to the names of persons mentioned in passing, either as having been referred to by someone involved in the deal as a business connection or by someone involved in the deal or connected to UH as a source of information, UH also redacted a reference to a category of unnamed persons, in this case "sound and lighting people." This reference in no way identifies any individual and for that reason alone there was no basis to redact it, but even if the sound and lighting people in question were actually named they would not have a significant privacy interest in being identified as such. There was no privacy basis for this redaction.

UH redacted the name of a British promoter whom the concert promoter had worked with and who was mentioned in the Report as having introduced the concert promoter to one of the entertainment company principals he contracted with for the concert deal. There is no reason to find that the British promoter had a privacy interest in his identity as a promoter, and indeed he appears to have an online presence and some reputation as a promoter. His name should not have been redacted.

UH redacted the name of an attorney working in the entertainment field, who one of the subcontractor principals had said was the entertainer Prince's attorney and that she had worked with him. Even apart from the fact that the attorney in question does seem to be publicly known as an entertainment attorney and entertainment professional, he has no privacy interest in the fact that someone referred to him as Prince's attorney and claimed to have worked with him. Similarly, the name of a former president of Motown Records, who the same subcontractor principal also claimed to be working with and who was also apparently part of the performer's management, does not have a privacy interest in being identified as such. Their names should not have been redacted.

UH redacted the name of the Events and Services Manager at the Neil Blaisdell Center, an employee of the City and County of Honolulu. The fact that he is a City employee is public under section 92F-12(a)(14), HRS, in any case, and he has no privacy interest in the fact that he talked to someone as part of his job. His name should not have been redacted.

UH redacted the names of an agent and the managing partner and agent for the performer at an entertainment agency. They have no privacy interest in the fact that they are entertainment agents or in the fact that they represent the performer, and indeed it appears that they were at some pains to make it publicly clear that they, and not Companies B and C, in fact represent the performer. Similarly, another person mentioned as being the president of another entertainment company likewise has no privacy interest in being identified as such. Their names should not have been redacted.
3. Individual With a Significant Privacy Interest in His Identity

In the case of one person whose name was redacted, though, there was a significant privacy interest at issue. At page 8 and in attachment 44, the Report names (and UH redacted the name of) an individual who loaned $50,000 to the concert promoter as a personal loan, which the concert promoter used as his contribution toward booking the performer. Information about an individual’s finances carries a significant privacy interest. HRS § 92F-14(b)(6). Because the information about the loan is information about the lender’s personal finances, the lender’s identity carries a significant privacy interest. The public interest in knowing the identity of the lender does not outweigh his privacy interest in his personal finances, given that the transaction did not involve public money and it is already publicly known that the concert promoter got the $50,000 that he contributed toward the booking through a personal loan from a friend. Thus, in this sole instance, UH’s redaction of this name was appropriate under the UIPA’s privacy exception.

4. Information about Individuals Other than Identity

In two instances, UH also redacted information about individuals other than their identities. With respect to a UH employee named in the report, UH redacted a statement in report paragraph 167 indicating the reason for his absence from a meeting. The fact that a government employee is out on leave, and the type of leave taken, are public information. E.g., OIP Op. Ltr. No. 90-17. The redacted statement did not include any medical or other information that would give rise to a significant privacy interest. Thus, the redaction was not justified by the UIPA’s privacy exception, and the redacted statement should have been disclosed.

UH also redacted a reference to the concert promoter’s medical condition, as noted above. The original redaction included more than just his medical condition, as a brief description of his physical appearance was also redacted. Because the concert promoter’s name should not have been redacted and he must be identified, as discussed above, it is appropriate for UH to redact the description of his medical condition as quoted from an email dated July 10, 2012, based on the UIPA’s privacy exception, but the preceding sentences regarding his general physical appearance should not have been redacted.

III. Conclusion

Almost none of UH’s redactions to the Report were justified. However, UH could properly redact (1) the name of an individual making a personal loan, mentioned at page 8 of the Report and in Attachment 44, and (2) the specific medical condition the concert promoter suffered from, mentioned at paragraph 78 of the Report.

With respect to the attachments to the Report, UH’s redactions should be consistent with those permitted for the Report itself; i.e., only the name of the individual who
made the personal loan and the specific medical condition the concert promoter suffered from. In the event that an attachment to the Report contains previously redacted information of a different sort from the names and other information discussed in this opinion, and whose disclosure raises privacy concerns not already addressed herein, UH is welcome to contact OIP for guidance regarding that specific information.

Finally, although there may have been a good faith argument as to whether identification of a few individuals mentioned in the Report was proper, OIP notes that for the vast majority of redactions it was clear from the language of the UIPA, from OIP's published opinions, and from court opinions regarding the UIPA that there was no basis for arguing that the UIPA's privacy exception might apply. See, e.g., State of Hawaii Organization of Police Officers v. Society of Professional Journalists --University of Hawaii Chapter, 83 Haw. 378, 927 P.2d 386 (Haw. 1996). For instance, UH redacted references to categories of companies and individuals who were not even named; names of units of government and government facilities; names of former UH employees; and names of numerous companies and other entities that are not natural persons. Perhaps due to its decision to outsource its responsibilities under the UIPA, UH's response to requests for records related to this issue of high public interest appears not to have been supervised by anyone with even a passing familiarity to the actual law governing public record requests, the UIPA. OIP strongly recommends that UH ensure that in the future those responsible for responding to record requests on UH’s behalf, whether UH employees or otherwise, be competent in dealing with the UIPA. In doing so, UH is encouraged to make use of the resources available on OIP’s website, including a 1.5 hour training video and a UIPA handbook.

**Right to Bring Suit**

Requester is entitled to seek assistance from the courts when Requester has been improperly denied access to a government record. HRS § 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 opinion 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 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.

OFFICE OF INFORMATION PRACTICES

Jennifer Z. Brooks
Staff Attorney

APPROVED:

Cheryl Kakazu Park
Director