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# OPINION

**Requester:** Messrs. Ferd Lewis and Stephen Tsai, The Honolulu Advertiser
**Agency:** University of Hawaii, Athletics Department
**Date:** May 9, 2006
**Subject:** Drug and Substance Screening Records (RFA 05-42)

## REQUEST FOR OPINION

Requesters seeks an opinion on whether, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"), the Athletics Department, University of Hawaii-Manoa (the "University") is entitled to withhold from disclosure certain records relating to the University's Drug Education, Counseling and Testing Program (the "Program"), by which the University tests student athletes for illegal or banned substance abuse, imposes discipline and provides counseling.

This opinion is based solely upon the facts presented in Requesters' letter to the Office of Information Practices ("OIP") dated November 2, 2005, and the University's letter to OIP dated February 15, 2006, unless otherwise indicated.

## QUESTIONS PRESENTED

1. Whether the University may withhold from disclosure the number of student-athletes who have had positive test results for illegal or banned substances to protect the individual privacy interests of those student-athletes.

2. Whether the University may withhold from disclosure the breakdown of sanctions imposed against student-athletes who tested positive for illegal or banned substances to protect the individual privacy interests of those student-athletes.

## BRIEF ANSWERS

1. No. The disclosure of the number of positive tests cannot reasonably lead to the disclosure of the identity of a specific student-athlete. Therefore, the student-athletes who have tested positive have no significant privacy interest in the number of positive test results, and the University thus cannot withhold the number of positive test results under the "privacy" exception to the UIPA.

2. Yes. The breakdown of the sanctions issued by the University against student-athletes who tested positive could reasonably lead to the disclosure of the identity of a student-athlete. Because the public interest in disclosure of this information does not outweigh the student-athlete's privacy interest, the University may withhold the breakdown of sanctions issued for positive test results under the "privacy" exception to the UIPA.[1]

## STATEMENT OF REASONS FOR OPINION

### A. FACTS

By letter dated March 31, 2005, Requesters made a UIPA request to the University for, among other things, records relating to the University's substance abuse testing of student-athletes. More specifically, the request sought access to:

> A copy of the report on UH's drug and substance screening for coaches and athletes (ie. the number of tests administered for steroids, banned substances and drugs for the 2002, 2003 and 2004 school years; the number of confirmed positive tests and a break down of the actions taken). Also, the amount spent by UH. Please note we are not asking for the names of athletes involved only an accounting of numbers.

The University responded by advising Requesters that "[the] information is still being gathered, and will be provided to the extent that disclosure does not violate any privacy interests." On January 18, 2006, the University denied the request as to the number of confirmed positive tests and the actions taken by the University with respect to those student-athletes who tested positive.[2]

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[1] This conclusion is based upon the specific factual circumstances reported by the University. A different conclusion may result under different factual circumstances where the breakdown of the sanctions would not readily lead to the identification of a student-athlete who had a positive test result.

[2] Where extenuating circumstances are present, an agency may acknowledge its receipt of the request within 10 business days. Haw. Admin. R. § 2-71-13(c) (1999).

In support of its denial, the University argues that disclosure of the withheld information would allow Requesters to determine the identity of the individual student-athletes who tested positive for a banned substance, thereby violating the student-athletes' right to privacy and the federal Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) ("FERPA"). Therefore, the University asserts that the information may be withheld from disclosure pursuant to sections 92F-13(1) and (4).

## B. DISCUSSION

As explained below, application of either of the two sections of the UIPA cited by the University as a basis for withholding the requested information raises the same ultimate issue: whether the identity of the student-athlete can be determined from the requested records. For this reason, OIP will jointly address the University's claimed bases for its denial of the request.

The University first asserts that access to the requested information may be denied under the "privacy" exception of the UIPA, which is set forth at section 92F-13(1). Where an individual has a privacy interest in the record or information being sought, an agency may withhold access to that record or information in that record unless the public interest in disclosure of the record or information outweighs the individual's personal privacy interest. Haw. Rev. Stat. § 92F-14(a) (Supp. 2005); see also Haw. Rev. Stat. § 92F-13(1) (1993). The public interest in disclosure is "that which sheds light on the workings of government." OIP Op. Ltr. No. 04-07 at 7.

The University makes a compelling argument that the public interest in disclosure does not outweigh the personal privacy interest of a student who has had a confirmed positive test.[3] The University makes the following assertions: "[T]he fact of testing positive is clearly information of a phase of a student-athlete's life that he or she would not want exposed to the public eye. Disclosure of such

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However, an agency must then provide the requisite written notice to the requester within 20 business days from the date on which the agency received the request. Id. In this case, thus, the University should have provided written notice to Requesters of its intent to deny access to the requested records on or around April 28, 2005. Haw. Admin. R. § 2-71-14 (1999).

[3] The University also asserts that the Program is a voluntary program, not required by the NCAA or law, and that student-athletes are promised confidentiality. An agency, however, cannot restrict access to records or information that would otherwise be public by statute. See State of Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ. of Haw. Chapter, 83 Haw. 378, 404-07, 927 P.2d 386, 413-15 (1996).

information could affect the student-athlete's school and social standing, as well as his or her potential future employment, and since the positive testing cannot be considered to be a violation of law, such personal information is not and should not be of legitimate concern to the general public."

OIP recognizes that the legitimate public interest in knowing how the University administers the Program, which tests student-athletes for banned substances and counsels and disciplines those student-athletes with positive test results; however, OIP agrees that, absent extraordinary circumstances, the public interest in disclosure does not outweigh a student-athlete's significant privacy interest in information about his or her substance abuse test results. The UIPA specifically recognizes that an individual has a significant privacy interest in information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation. Haw. Rev. Stat. § 92F-14(b)(1) (Supp. 2005).

Because there are no extraordinary circumstances here that would tip the balance in favor of disclosure, it is OIP's opinion that the University may withhold the identities of the individual student-athletes with positive test results pursuant to section 92F-13(1). This includes records or portions thereof containing the student-athletes' names or other information from which they can reasonably be identified.

The University also asserts that FERPA protects the requested records and cites section 92F-13(4) as the UIPA exception supporting its denial of access to the records. That section, however, 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 of a record in violation of its provisions may cause the University to lose or be denied certain federal funding. Assuming this interpretation is correct and that disclosure of the identities of, the student-athletes would violate FERPA, the UIPA would allow the University to withhold the records or information that would identify those student-athletes under section 92F-4. That section waives an agency's compliance with any provision of the UIPA to the extent necessary to protect eligibility for federal funding, services or other assistance. See Haw. Rev. Stat. § 92F-4 (1993).

Because the request received for the records specifically excluded the names of the student-athletes, the issue is whether the requested records would reasonably allow the Requester or other members of the public to determine the identity of an individual student-athlete who has tested positive for a banned substance. If the records or information contained therein could not reasonably lead to the identification of an individual student-athlete, disclosure of the record or information would not constitute a clearly unwarranted invasion of the student-

athlete's personal privacy and, therefore, cannot be withheld under section 92F-13(1).[4]

The University asserts that disclosure of the information in question would lead to the identification of individual student-athletes who have tested positive for an illegal or banned substance. The University explains that the public could identify those student-athletes by using information about the Program contained in the Student-Athlete Handbook (the "Handbook") and available through the University's website. Specifically, the University points to the information contained in the Handbook setting forth the specific consequences for student-athletes who test positive:

- The first positive test the student-athlete may be withheld from all intercollegiate athletics competition and/or practice if their continued participation may represent a health and safety risk to the student-athlete and/or others as determined by medical evaluation and substance abuse assessment.

- The second positive test requires a medical evaluation and a 30 day suspension from all intercollegiate athletics participation.

- The third positive test requires a medical evaluation and a one year suspension from all intercollegiate athletics participation.

2004-05 Student-Athlete Handbook at 40-41.

### 1. The Number Of Positive Test Results

With respect to the number of positive tests, OIP cannot conclude that Requesters or other members of the public could reasonably determine the identity of those student-athletes who tested positive for illegal or banned substances simply because the sanctions are public. It is OIP's opinion that the number of positive test results alone provides insufficient information from which someone could individually identify student-athletes who tested positive. Given the several levels of sanctions set forth in the Handbook, the University's argument that the total number of positive tests can be cross-referenced against those sanctions to

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[4] The University also asserts that, because the student-athletes were promised confidentiality, disclosure of the information "would destroy the [Program], and the loss of the program would result in UHAD and UH losing a valuable tool in the education of our young adults." OIP interprets the University's argument to be that the records may be withheld to "avoid the frustration of a legitimate government function" under section 92F-13(3). The University's frustration argument, however, is inapplicable to "de-identified" records relating to the positive test results and, therefore, need not be addressed by this opinion.

identify the student-athletes is, at best, highly speculative. Accordingly, OIP determines that disclosure of the total number of confirmed positive tests must be disclosed to Requesters.

### 2. Breakdown Of Sanctions

With respect to the "break down of the actions taken," the University argues that disclosure of that specific information would allow Requesters to easily determine the identity of the student-athletes by cross-referencing the breakdown of sanctions with information that is already publicly available. For example, if 10 student-athletes tested positive for illegal or banned substances a second time, those student-athletes would, among other things, be suspended from participating in their respective sport for 30 days. According to the University, if Requesters or other members of the public knew there were 10 such student-athletes, they could potentially identify the 10 student-athletes by observing the 30 day suspensions of student-athletes.

Given the relatively small number of student-athletes who are suspended and the even smaller number who are suspended for exactly 30 days, OIP agrees that disclosure of the information could reasonably allow Requesters or others to identify the specific student-athletes with positive tests at each level or, in the alternative, could stigmatize all student-athletes who received such suspensions. For example, under the example stated above, if the 10 student-athletes suspended from athletic participation for 30 days were the only 10 suspended for 30 days during the applicable time period, it would be evident that the suspended student-athletes all had had second positive tests. If there were a total of 15 such suspensions (five for other reasons) and it was publicly known that 10 of those were the result of second positive tests, then all 15 suspended student-athletes would be stigmatized because statistically, each such student-athlete would be twice as likely to have been suspended for drug use as for another reason. In OIP's opinion, that stigma would be a clearly unwarranted invasion of the privacy of the student-athletes who tested positive as well as those who received 30 day suspensions for other reasons.[5]

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[5] This opinion should be read as allowing the University to withhold, for instance, the specific number of student-athletes who were suspended from participating in their respective sports for 30 days; however, this opinion is not intended to be read to allow the University to withhold other information about the various types and levels of consequences for positive tests without again showing that such information would allow identification of the student-athletes. For example, the University cannot withhold the name of a class that student-athletes are required to pass as a result of a positive test because the number of other students participating in the class for other reasons makes identification tenuous.

## CONCLUSION

It is OIP's determination that the University must disclose the total number of positive tests for illegal or banned substances. Pursuant to section 92F-13(1), however, the University may withhold the breakdown of actions taken as a result of confirmed positive tests

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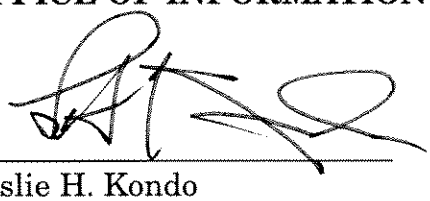

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