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October 19, 2012

The Honorable Donna Mercado Kim  
Senate Vice President  
Chair, Senate Special Committee on Accountability  
State Capitol, Room 210  
Honolulu, Hawai'i 96813

Dear Senator Kim:

This responds to your October 12, 2012 request for advice as to whether the University of Hawai'i Board of Regents' "confidentiality covenant" agreement is legal and enforceable against members of its Operational and Financial Controls Improvement Advisory Task Group (Task Group), who were required to sign and abide by the confidentiality terms as a condition to membership in the Task Group.

As explained below, we believe that such an agreement, while not per se void, is overly broad and may be against public policy because it inhibits the disclosure of information that would not otherwise be protected. As to the disclosure of non-protected information which is already governed by existing statutes, the confidentiality covenant agreement is not likely enforceable against members of the Task Group or as a defense to third-party requests for information.

The Task Group

Recognizing that: (a) the Stevie Wonder Concert investigative report showed a failure of management in the Athletic Department and raises issues about financial controls; (2) the Board expects and supports the public's demand for accountability; and (3) the University needs to evaluate its oversight procedures and practices, the Board approved the formation of an Advisory Task Group. See Memorandum from Eric Martinson, Chair to the Board of Regents dated September 4, 2012. The Task Group consists of nine members, five regents and four non-regents.

Following the aftermath of the Stevie Wonder Concert issue the University Administration was tasked with reporting back to the Board of Regents with specific plans to improve its procedures, controls, and oversight practices. To facilitate the Board's oversight of

the plan, the Task Group was formed to guide the scope of the evaluation and monitor activities and progress related to the evaluation and review of the merits and efficacy of the proposed plan for improvement. The Task Group reports to the Board's Committee on University Audits.

#### The Confidentiality Covenant

As a condition to being selected as a member of the Task Group and as consideration for selection as a member, each member was required to sign a document titled "Confidentiality Covenant." The Confidentiality Covenant requires each member to:

1. Keep Task Group Work confidential. I will keep all Task Group Work confidential and I will not, in any form or manner, directly or indirectly, divulge, disclose, release, or communicate any information I receive in connection with the Task Group Work.
2. Designated public and media contact. Board of Regents' Chair Eric Martinson has been designated as the public and media contact for the Task Group and I will not make any disclosures relating to the Task Group Work, and I will direct all such requests for disclosure and any other inquiries or questions to Regents' Chair Martinson.
3. Removal from Advisory Task Group. I may be removed from the Task Group if I breach any of the confidentiality obligations described in this Confidentiality Covenant. I understand that even if removed, the confidentiality obligations contained in the Confidentiality Covenant and the penalties, as may be appropriate, for any breach or violation shall still apply.
4. Penalties for violations. I further understand that any breach of the confidentiality obligations described in this Confidentiality Covenant may result in civil and criminal penalties pursuant to and consistent with applicable law, including, without limitation, Hawaii Revised Statutes Chapter 92F. I acknowledge and understand that if I breach or violate this Confidentiality Covenant, the University of Hawai'i will be obligated to defend me against any claims, actions, or proceedings arising there from only to the extent consistent with applicable laws, University policies and procedures, and the relevant collective bargaining or other labor related agreements.

Thus, the confidentiality covenant is broad and all-encompassing; it requires the Task Group members to keep **all** "work, deliberations, and records of the Task Group" confidential without regard to whether some, or any portion of the information, documents, correspondence or records it obtains or reviews may constitute public records or contain waiver provisions or may otherwise be subject to public disclosure. This appears to be overly broad.

In Hawai'i, there is a strong and well recognized public policy in favor of transparency of government and the prevention of corruption. Hawaii Revised Statutes ("HRS") chapters 92 and

92F.<sup>1</sup> Chapters 92 and 92F apply to actions taken by the Board of Regents and the Task Group, since they are part of the University of Hawaii, which is a public agency. In HRS section 92-1, our Legislature declared that:

In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental process to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy - the discussions, deliberations, decisions, and action of governmental agencies - shall be conducted as openly as possible. To implement this policy the legislature declares that:

- (1) It is the intent of this part to protect the people's right to know;
- (2) The provisions requiring open meetings shall be liberally construed; and
- (3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

HRS section 92F-2 of the Uniform Information Practices Act (Modified) similarly provides that:

In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy – the discussions, deliberations, decisions, and the action of government agencies – shall be conducted as openly as possible.

The Task Group was presumably constituted pursuant to HRS section 92-2.5(b) which permits two or more board members, but less than a quorum, to **investigate** a matter relating to the official business of the board. Under this section the scope of the investigation and the scope of each member's authority are to be defined at a board meeting; the resulting findings and recommendations are to be presented to the board at a meeting of the board;<sup>2</sup> and deliberations and decision-making on the matter investigated, if any, occurs only at a duly noticed meeting of

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<sup>1</sup> You may wish to consult with the Office of Information Practices which is the agency charged with administering both chapters.

<sup>2</sup> Under the Board's Task Group protocol, the Task Group is to report to the Board's Committee on University Audits, rather than to the full Board. However, we note that on the Board's October 18, 2012 agenda, the Task Group was to provide a status update to the Board. We understand that the status update was postponed to the Board's next meeting.

the board held subsequent to meeting where the findings and recommendations are presented.<sup>3</sup> Under HRS chapter 92F, the exceptions to the disclosure of government records are limited to:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
- (2) Government records pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable;
- (3) Government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function;
- (4) Government records which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure; and
- (5) Inchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to section 21-4 and the personal files of members of the legislature.

It is a general rule that agreements against public policy are illegal and void. Barger v. Garden Way, Inc., 231 Ga. App. 723, 499 S.E.2d 737 (Ga. App. 1998). A confidentiality agreement “cannot make secret that which is not secret . . .” Lanier Prof'l. Servs., Inc. v. Ricci, 192 F.3d 1, 5 (1<sup>st</sup> Cir. 1999). Here, as set forth above, the confidentiality covenant makes “all Task Group Work confidential.” Certainly not every piece of information the Task Group obtains or prepares is confidential. Further, as noted above, the confidentiality covenant makes no distinction between public information and confidential information. Such an overly broad covenant is contrary to one of the Board’s stated reasons for constituting the Task Group, which is to support the “public’s demand for accountability.” Also, insofar as the Task Group is to report to the Board’s Committee on University Audits, rather than to the full Board at a properly noticed public meeting, we believe that such a provision is contrary to HRS section 92-2.5, which provides that an investigative committee must report to the full board, not to a board committee.

Because there is no right to be a member of the Task Group, the Board can impose reasonable criteria for membership in the Task Group. However, we believe that the Board’s use of the confidentiality covenant in connection with the appointment of a statutorily permitted interaction group appears to thwart the purpose and public policy underlying the Sunshine Law because the confidentiality covenant is overly broad and is not limited to matters excepted under HRS chapters 92 and 92F. We therefore conclude that while this confidentiality covenant may

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<sup>3</sup> Query whether the purpose of the Task Group, which is to “guide the scope of the evaluation, monitor activities and progress related to the evaluation, and review the merits and efficacy of the proposed plans for improvement,” fits entirely within the scope of HRS section 92-2.5(b), which is to “investigate a matter relating to the official business” of a board. We believe that it is only the investigative aspect of the Task Group that is the permitted interaction of board members.

The Honorable Donna Mercado Kim

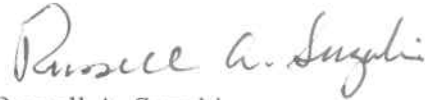
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not be per se illegal, it is likely to be unenforceable under Hawai'i law to the extent that it is overly broad and inconsistent with the public policy of transparency and accountability declared under HRS chapters 92 and 92F.

Should you require additional assistance, please contact us.

Very truly yours,



Russell A. Suzuki  
First Deputy Attorney General

APPROVED:



David M. Louie  
Attorney General