

Honolulu, Hawaii

NOV 19 2012

RE: Oversight,
Accountability, and
Transparency of the
Operational and
Financial Management
of the University of
Hawaii System

Honorable Shan S. Tsutsui
President of the Senate
Twenty-Seventh State Legislature
State of Hawaii

Sir:

Your Special Committee on Accountability - 02, begs leave to report as follows:

The purpose and intent of this report is to set forth the findings and recommendations of the Special Committee on Accountability - 02 regarding the oversight, accountability, and transparency of the operational and financial management of the University of Hawaii System, including but not limited to the University of Hawaii's Athletic Department.

I. Background on the Special Committee on Accountability - 02 and Informational Briefings

On August 29, 2012, pursuant to Senate Rule 20,¹ the Senate President appointed a Senate Special Committee on Accountability

¹ Senate Rule 20 states:

The President may appoint a Special Committee on Accountability which shall conduct informational briefings on matters referred to it by Senate Leadership or investigative matters referred to it by single house or concurrent resolutions. The committee shall be composed of not more than five members, unless otherwise ordered by the Senate, and include a member or members of the minority party. The President shall appoint the committee's vice-chair, who may change from time to time, to represent the standing committee having primary jurisdiction over the subject



(Committee) to conduct an informational briefing or briefings, as may be necessary, to review the oversight, accountability, and transparency of the operational and financial management of the University of Hawaii System, including but not limited to the University of Hawaii's Athletic Department.

The following members were appointed to your Committee:

Senator Donna Mercado Kim, Chair;
Senator Jill Tokuda, Vice-Chair;
Senator Ronald Kouchi;
Senator Les Ihara; and
Senator Sam Slom

Other members of the Senate were invited to attend your Committee's informational briefings.

Your Committee invited the following persons to provide testimony:

Eric K. Martinson, University of Hawaii Board of Regents,
Chair
Carl A. Carlson, Jr., University of Hawaii Board of Regents,
Vice-Chair;
James H.Q. Lee, University of Hawaii Board of Regents, Vice-
Chair;
Coralie Chun Matayoshi, University Board of Regents, Member;
M.R.C. Greenwood, University of Hawaii, President;
Tom Apple, University of Hawaii at Manoa, Chancellor;
Virginia Hinshaw,² University of Hawaii at Manoa, Former
Chancellor;
James Donovan, University of Hawaii at Manoa, Director of
External Affairs and Community Relations (Former
Athletic Director);
Richard Sheriff, University of Hawaii at Manoa, Manager of
the Stan Sheriff Center;
Dennis W. Chong Kee, Cades Schutte LLLP (Cades)

matter referred to the special committee. All requirements of standing committees shall apply to the committee.

² Ms. Hinshaw was unable to attend the Committee's informational briefings but did provide answers to the Committee's questions electronically. A copy of Ms. Hinshaw's response is available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 3, 2012).



Calvert G. Chipchase,³ Cades
Robert Katz, Torkildson, Katz, Moore, Hetherington & Harris
(Torkildson Firm)
Bob Peyton,⁴ Bob Peyton Entertainment, an Entertainment
Corporation and BPE Productions, Inc.

In addition, your Committee requested that the Board of Regents (BOR), University of Hawaii (University), and its attorneys provide your Committee with certain information and documents.⁵

Your Committee held informational briefings on September 24, 2012, and October 2, 2012. No oral public testimony was permitted; however written testimony was accepted by your Committee.⁶ Your Committee received testimony from numerous members of University's faculty, staff, and students, as well as members of the community.

Your Committee's informational briefings were recorded and broadcast live by Olelo. Those recordings will serve as the official record of the informational briefings.⁷

During the informational briefings, your Committee focused on two areas of concern:

- (1) The failed Stevie Wonder Concert⁸ and its aftermath, including the reassignment of Donovan from Athletic

³ Mr. Chipchase did not participate in the informational briefings.

⁴ Mr. Peyton expressed his interest in speaking with the Committee but was unable to attend the Committee's information briefings due to hospitalization.

⁵ Copies of all the documents turned over to the Committee are available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 3, 2012).

⁶ Copies of the written testimony submitted to the Committee are available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 3, 2012).

⁷ Recordings of the informational briefings are available online at http://olelo.granicus.com/ViewPublisher.php?view_id=13 (last visited on October 25, 2012), SCA02 Briefing 9/24/12 and SCA02 Briefing 10/2/12.

⁸ Refer to the Report of Factfinders Regarding the Stevie Wonder Benefit Concert dated August 21, 2012, from Dennis W. Chong Kee and Calvert G. Chipchase to James H.Q. Lee, Vice-Chair of the University of Hawaii Board of Regents, and M.R.C. Greenwood, President of the University of Hawaii System (Factfinders Report). A redacted version of the Factfinder Report and its Attachments are available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 4, 2012).



Director to his current position as Director of External Affairs and Community Relations; and

- (2) Oversight and transparency of the University's fiscal and operational administration, including the role of the BOR.

While your Committee recognizes that the University has general autonomy over its internal affairs, the Legislature has the exclusive jurisdiction to identify laws of statewide concern, which would presumably apply to the University, and the Senate has advice and consent authority and responsibility for the Governor's appointments to the Board of Regents of the University.⁹ Your Committee is deeply concerned that the failed Stevie Wonder Concert and its aftermath have caused tremendous public backlash against the University and have tarnished the University's reputation within the State and at the national level. Your Committee Chair had hoped that the BOR would address these issues and concerns openly on its own; however, due to the BOR's failure to do so, the public outcry for answers and accountability from the University, and direct appeals to Senators for a fair and objective analysis of the University's operations and policies, your Committee finds that informational briefings were a necessary effort to restore public trust and confidence in the University by establishing greater transparency and accountability.

II. Discussion and Findings

In conducting its informational briefings and reviewing the materials provided by the University, your Committee found a number of common themes, concerns, and recurring problems within the University.

A. University Administration, Personnel, and the Failed Stevie Wonder Benefit Concert

1. Loss of Initial \$200,000 Deposit

a. Facilities Use Agreement

In March 2012, Rich Sheriff (Sheriff) was approached by local promoter Bob Peyton (Peyton), head of Bob Peyton Entertainment, and Entertainment Corporation and BPE Productions, Inc., about the

⁹ See Article X, Section 6, Hawaii State Constitution.



possibility of holding a concert at the Stan Sheriff Center (Center).¹⁰

After some negotiation, the University entered into a Facilities Use Agreement to hold a Stevie Wonder Concert (Concert) at the Center.¹¹ The Concert was to be a fundraising benefit for the University's Athletic Department.¹²

b. Pre-Sale of Tickets

Tickets for the Concert were to be pre-sold beginning on June 23, 2012,¹³ and the revenue collected from the pre-sold tickets, an amount of \$225,000, was to be used to confirm Stevie Wonder for the Concert.¹⁴

To protect the University, the Facilities Use Agreement required cancellation insurance and that the University be named as an additional insured.¹⁵ Proof of insurance was supposed to be provided to the University before the pre-sale of tickets commenced.¹⁶ Insurance that would have met the requirements of the Facilities Use Agreement was never obtained.¹⁷

For reasons that remain unclear, the University started pre-selling tickets to the Concert even though proper cancellation

¹⁰ See Factfinders Report at 16.

¹¹ Id. at 2.

¹² Id. at 2. Your Committee questions how much the University's Athletic Department would have really benefited from the Concert since the University was reducing the rental fees it would collect for the use of the Center. Under the hybrid agreement proposed by Sheriff, the rental fee would be reduced to seventy-five percent of the net revenues or ten percent of the gross revenues, whichever was greater. What the Athletic Department would actually have made from the Concert depended highly on ticket sales. See Attachment 43 to the Factfinders Report, available at

<http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 15, 2012), Factfinders Report-Attachments (9-24-12), University-831-839.

¹³ See Timeline of Events, available at

<http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last viewed on October 25, 2012), Briefing Materials (9-24-12).

¹⁴ See Factfinders Report at 2, 22, 24. Your Committee received testimony at the informational briefings that the initial deposit was for \$225,000; however Peyton agreed to borrow and put up a binder in the amount of \$50,000 (\$25,000 for the initial deposit and \$25,000 for the subsequent deposit of \$200,000).

¹⁵ Id. at 25.

¹⁶ Id. at 25.

¹⁷ Id. at 37.



insurance had not been procured.¹⁸ Nobody at the University seemed to have questioned the decision to go forward with ticket sales even though no insurance was in place.¹⁹

c. Wiring of the Deposit

Once the required amount was reached through the pre-sale of tickets, the University was to pay the deposit to Peyton. As testified to at the informational briefings, at the request of Peyton, the payee of the deposit was later changed to Epic Talent, LLC (Epic), the alleged booking agent with which Peyton had been working.²⁰ In order to meet the deadline to pay the deposit and upon pressure from Peyton, a decision was made to make the deposit via wire transfer to Epic.²¹

A Requisition Form for \$200,000, Wire Transfer Form, Authorization for Payment Form, and proforma invoice were all filled out by various University personnel.²² The wire transfer request caught the attention of an employee of the Disbursing Office because it was for a prepayment of a large amount of money by wire transfer. In the employee's eight years in the Disbursing Office, he had not seen a University department make that large of a payment to secure a performer or use a wire transfer to secure a performer.²³ However, on June 26, 2012, the wire transfer for the deposit went out.²⁴

d. Cancellation of the Concert

On July 9 and 10, 2012, the University was contacted by representatives of Creative Artists Agency (CAA), who identified themselves as exclusive agents of Stevie Wonder.²⁵ CAA informed the University that Epic had no authority to book concerts for Stevie Wonder and that Stevie Wonder was not available for the Concert.²⁶

¹⁸ Id. at 4.

¹⁹ Id. at 28.

²⁰ Id. at 27.

²¹ Id. at 29.

²² Id. at 30.

²³ Id. at 31.

²⁴ Id. at 32.

²⁵ Id. at 5. Your Committee notes that while CAA represented that it was the exclusive agent for Stevie Wonder, other information and statements in the Factfinders Report appear to contradict this. See, e.g., id. at 38.

²⁶ Id. at 5.



On July 10, 2012, the University cancelled the concert and began refunding purchases of approximately 6,000 tickets.²⁷

e. Lack of Oversight, Due Diligence, and Communication

Your Committee finds that the lack of oversight and communication among members of the University's Athletic Department, Office of General Counsel, and Disbursing Office contributed to the failure of the Stevie Wonder Benefit Concert and the loss of \$200,000 in deposit money.

In reviewing the Factfinders Report and its attachments, and during the course of questioning testifiers, your Committee is concerned about the lack of due diligence by the University prior to entering into the Facilities Use Agreement, prior to the pre-sale of tickets, and prior to the wiring of the deposit.

As demonstrated in the Factfinders report and testimony to your Committee, the University staff that was involved with the Concert all seemed to believe that it was someone else's responsibility to conduct due diligence and to make sure the University was protected.

While Donovan, who is responsible for the oversight of the Athletic Department, approved going forward with the Concert and had a chance to review the Facilities Use Agreement, he failed to provide any other oversight and left Sheriff to "handle it".²⁸ Sheriff relayed to your Committee that he was merely the communicator between the University and Peyton and left everything else up to his supervisors. Sheriff's direct supervisors did not provide any oversight.²⁹ Nobody at the University conducted any due diligence to determine whether Epic was an authorized agent for Stevie Wonder.³⁰ Nobody took responsibility for allowing the pre-sale of tickets to go forward despite the fact that proper insurance was not in place.³¹

It appears to your Committee that so long as the Office of General Counsel had looked at the Facilities Use Agreement, many

²⁷ Id. at 39.

²⁸ Id. at 3, 5, 18.

²⁹ Id. at 5.

³⁰ Id. at 4.

³¹ Id. at 50.



testifiers believed no further due diligence was needed.³² Furthermore, there may have been confusion or misrepresentation regarding the extent of the Office of General Counsel's involvement in the process of organizing the Concert, which may have led some to believe no further due diligence was necessary.³³ Associate General Counsel Ryan Akamine believed his role was only to suggest terms and make sure the wording of the Facilities Use Agreement was legal and not to check whether the promoter and booking agent were legitimate.³⁴

Staff in the Disbursing Office relied on others, believing they were only responsible for disbursing the funds if there was proper paperwork and the money was available.³⁵ As raised during the informational briefings, certain fiscal policies, like the two-day waiting period for wire transfers, were waived. No one made an effort to ensure that the money was being wired to an escrow account with appropriate escrow instructions, so the deposit was ultimately wired to a third party with whom the University did not have a contract.³⁶ Nobody ensured the terms of the Facilities Use Agreement were being followed.³⁷

President Greenwood and Howard Todo, Vice President of Budget and Finance and Chief Financial Officer, first learned about the Concert at different points in time. Upon becoming aware of the Concert, neither one of them followed up on the specifics pertaining to the Concert because they merely hoped that the Concert would take place and that it would be successful.³⁸ President Greenwood testified to your Committee that at a meeting on July 2, 2012, she asked Todo to investigate the Concert situation further; however in his testimony to the Factfinders, Todo disputes that he received such a request from President Greenwood at that time.³⁹ Todo testified to the Factfinders that it was not until his attendance at a meeting on July 10, 2012, that he first learned of the Concert problems. Subsequently, President Greenwood asked Todo to track the \$200,000 to see

³² Id. at 25, 56.

³³ Id. at 27.

³⁴ Id. at 3-4.

³⁵ Id. at 30-31, 55.

³⁶ Id. at 4, 32, 56.

³⁷ Id. at 47.

³⁸ See Attachment 30 to the Factfinders Report, available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 15, 2012), Factfinders Report-Attachments (9-24-12), University-513-21.

³⁹ Id.



whether it could be recovered, which was also after representatives of CAA contacted the University about the unauthorized Concert.⁴⁰

It appears to your Committee that while each department played a part in trying to help make the Concert happen, the key players within the various departments were not communicating with each other to stop the transaction when certain components were not in place, such as the insurance, and they were relying on others to ensure that all the bases were covered, particularly the legitimacy of the payee.

Ultimately, your Committee finds that those persons in the highest authority over their respective portions of the University failed to perform their oversight duties. For example, Donovan, as Athletic Director, failed to ensure that those working under him conducted the necessary due diligence before entering into the Facilities Agreement and before going forward with the pre-sale of tickets. Hinshaw, who was the Manoa Chancellor at the time, failed to provide oversight over the Athletic Department despite the uniqueness of the Concert. President Greenwood, who is responsible for the entire University System, failed to ensure that checks and balances were in place to ensure the Manoa administration's oversight system was adequate and working. Lastly, the BOR failed to provide sufficient oversight and governance control over the University System.

Despite President Greenwood's claims to your Committee that the University was the victim of a "sophisticated" scam, your Committee believes that there were many opportunities for the University to take a step back and to stop the Concert prior to wiring the \$200,000 deposit. Regardless of the fact that federal authorities have issued an indictment against two defendants in the scam,⁴¹ your Committee believes that proper oversight, due diligence, and communication among University administration and personnel would have presented an adequate number of opportunities to prevent the loss of the \$200,000 deposit. This does not appear to be a "sophisticated" scam. This appears to be a case where any reasonable person doing due diligence could have discovered that it was highly questionable as to whether Epic was a legitimate

⁴⁰ Id.

⁴¹ Kakesako, Gregg K. "Federal grand jury indicts 2 men in Wonder blunder case." *Star Advertiser*. November 8, 2012, available at <http://www.staradvertiser.com/news/breaking/177910681.html?id=177910681> (last visited on November 8, 2012).



booking agent for Stevie Wonder.⁴² Ultimately, the University's failure to conduct due diligence on this business transaction placed the University in a vulnerable position to be scammed.

2. The Aftermath

a. Press Conference and Fact Finding

On July 11, 2012, one day after the Concert was canceled, the University held a press conference and announced that Donovan and Sheriff were put on paid administrative leave while the University conducted an investigation into the failed Concert.⁴³

The University hired Cades to conduct a fact finding investigation of the Concert.⁴⁴ However, Cades used attorneys, rather than licensed investigators, who took statements but did not challenge or otherwise qualify the statements and did not even take statements from President Greenwood or General Counsel Darolyn Lendio.

b. Negotiation and Settlement

On July 16, 2012, Donovan's attorney contacted the University and demanded that Donovan be reinstated as Athletic Director or Donovan would take appropriate legal action.⁴⁵ The University then engaged former Attorney General Mark Bennett, currently with the

⁴² At the October 2, 2012, information briefing Senator Slow reported to the Committee that he had travelled to Florida to investigate Epic. See also, Zimmerman, Malia and Dooley, Jim. "On the Trail of the University of Hawaii's Missing \$200,000 . . . in Florida." *Hawaii Reporter*. September 26, 2012, available at <http://www.hawaiireporter.com/following-the-trail-of-the-university-of-hawaiis-missing-200000-to-north-carolina/123> (last visited on October 16, 2012).

⁴³ A copy of the July 11, 2012, letter from Chancellor Tom Apple to James Donovan is available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 4, 2012), Briefing Materials (9-24-12), University-3137-38.

⁴⁴ See Cades Contract, available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 4, 2012), Briefing Materials (9-24-12), University-3118-36.

⁴⁵ A copy of the July 16, 2012, letter from Donovan's attorney David Simmons to President M.R.C. Greenwood and Chancellor Tom Apple is available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 4, 2012), Briefing Materials (9-24-12).



law firm Starn O'Toole Marcus & Fisher, for an amount of up to \$75,000, to negotiate with Donovan.⁴⁶

On August 12, 2012, the University announced that Sheriff and Donovan had been cleared of any wrongdoing, that Sheriff would be reinstated, and that Donovan would be reassigned to a newly created marketing and branding position within the Office of the Chancellor with a salary of \$211,000 per year for three years, despite the fact that the title and job description for this position had not yet been fully developed.⁴⁷ At the time, Donovan had approximately eight months left on his contract as Athletic Director.

At the September 24, 2012, informational briefing, when questioned about the removal of Donovan as Athletic Director and the creation of Donovan's new position, President Greenwood testified several times that she received political pressure to keep Donovan as Athletic Director. President Greenwood testified that she was advised by the Governor, who had received input from the Senate President and Speaker of the House of Representatives, that she should keep Donovan as the Athletic Director; however she did not believe that keeping Donovan as the Athletic Director was in the best interest of the University.⁴⁸

⁴⁶ See documents bate stamped University-3330 through 3347, turned over as part of the University's Response to Senator Kim's Sept. 26 Information and Document Request, available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?conun=SCA02> (last visited on October 10, 2012).

⁴⁷ A copy of the Memorandum and Agreement between Donovan and the University (Memorandum and Agreement) is available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?conun=SCA02> (last visited on October 10, 2012), Briefing Materials (9-24-12).

⁴⁸ On September 24, 2012, the Governor issued the following statement in response to President Greenwood's testimony:

I stated very clearly to President Greenwood that my sole concern was for fairness and even-handedness. I based this concern as the Governor as well as an alumnus and supporter of the University of Hawai'i. I also stressed that any and all decisions made in the wake of the concert failure ensure that all responsible parties be held to account.

The Governor's statement is available at <http://hawaii.gov/gov/newsroom/press-releases/governor-statement-on-senate-hearing> (last visited on November 7, 2012). While the Committee makes no finding on President Greenwood's claim that she was under political pressure to keep Donovan as Athletic Director, your Committee believes that any perceived political pressure does not excuse or



c. Fiscal Implications of the Failed Concert

According to testimony presented at the informational briefings, since Donovan's reassignment, the University has begun the process of hiring a search firm for the price of up to \$90,000 to conduct the search for a new Athletic Director.

In addition, in response to the failed Concert, the BOR has hired KMH, LLP (KMH), for \$50,000 to conduct a review of the University's operational and financial processes.

Your Committee finds that the failure of the Stevie Wonder Concert will likely cost the University and the taxpayers an estimated \$1.1 million at a minimum.⁴⁹ The costs incurred by the University include the loss of the initial \$200,000 deposit, costs related to the ticket sales, cost of the Factfinders Report, costs for attorneys to represent the University, payment of Donovan's attorney's fees, Donovan's new salary of \$211,000 per year for three years, cost of a search firm to assist with the hiring of a new Athletic Director, and the costs incurred by the BOR's hiring of KMH to conduct an external audit.⁵⁰ Your Committee is also concerned about the BOR and the University administration's penchant for hiring outside legal counsel and others in the aftermath of the failed Concert, in particular, whether the costs of these services are necessary and sufficiently justified.

Your Committee is concerned about the fiscal impact the Concert and its aftermath will have on the University. While some may argue that in the grand scheme of things, \$1.1 million is a small amount of funds for an institution as large as the University, much of these costs could have been avoided had the University done its due diligence and protected the interests of the University in setting up the Concert or appropriately used all of its internal resources that were available, such as the staff

mitigate the University's actions, including the actions of President Greenwood, in the way it handled the aftermath of the failed Concert.

⁴⁹ A detailed breakdown of the costs used by your Committee to reach the estimated total is available at

<http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 4, 2012), Senate Committee Running Total Cost. Your Committee had requested that the University provide an estimate total of costs; however the University failed to fully respond to this request and when it did respond on October 2, 2012, its response was incomplete and failed to take into account several significant costs.

⁵⁰ Id.



of the Office of General Counsel and the University's internal auditors. The costs the University has incurred as a result of the failed Concert affect the University's budget and may negatively impact the University's ability to provide its students with the classes they need to graduate in a timely manner - a goal the University has focused on with its Hawaii Graduation Initiative and "15 to Finish" campaign.

B. Oversight and Transparency

Your Committee is also greatly concerned about the BOR and the University administration's lack of transparency and openness in the aftermath of the failed Concert.

1. Open Meetings and Sunshine Law Concerns

Through the informational briefings, your Committee finds that at times, the BOR appears to have conducted its meetings with a lack of transparency, including the way it handled the aftermath of the failed Concert. For example, during the informational briefings your Committee learned that there was discussion at the July 19, 2012, BOR meeting about the Factfinders Report; however there is nothing on the July 19, 2012, BOR agenda that would provide proper public notice that this issue would be discussed.⁵¹ The agenda makes absolutely no reference to the Concert or any related subject matter.

At the August 22, 2012, BOR meeting, the BOR met for seven hours in Executive Session. Testimony at the informational briefings suggests that the majority of the discussion related to whether the Factfinders Report should be made public. While some of the discussion by the BOR may have been appropriate for an Executive Session, your Committee maintains that much of the discussion could have been held in public yet the BOR did not conduct any discussion relating to the Concert or its aftermath in a public forum.

Your Committee is also concerned about testimony that the BOR Chair, Vice-Chairs, President, and Chancellor Apple have had discussions outside of properly noticed public meetings that do not fall within the permissible interactions set forth in section

⁵¹ The BOR Meeting Agendas and Minutes are available at <http://www.hawaii.edu/offices/bor/archive/index.php> (last visited on October 5, 2012).



92-2.5, Hawaii Revised Statutes (HRS). The BOR Chair and Vice-Chairs have testified to your Committee that they sought advice from the Office of Information Practices (OIP) and believed these communications with the President to be permissible; however, as discussed during the October 2, 2012, informational briefing, your Committee has received informal advice from OIP that such conversations are not permissible under Hawaii's Sunshine Law.⁵² Therefore, your Committee finds that members of the BOR may have engaged in conversations, meetings, or both, outside of properly noticed public meetings in violation of Hawaii's Sunshine Law.

Your Committee also finds that the BOR may have taken official action outside a properly noticed public meeting when the former BOR Chair unilaterally transferred authority to President Greenwood to represent the University in the Mountain West Conference. At the informational briefings, your Committee Chair questioned the BOR Chair and Vice-Chairs on how the decision was made to transfer authority from the University of Hawaii at Manoa Chancellor to President Greenwood as the University's representative in the Mountain West Conference. After looking through the BOR's agendas and minutes for the past two years, your Committee Chair could not find any official action taken by the BOR to transfer this authority. Instead, it appears that former BOR Chair Howard Karr unilaterally made the decision to transfer authority to President Greenwood rather than place this decision on the agenda for public discussion and decision making.⁵³ Your Committee is concerned that such unilateral action may contradict the spirit and intent of Hawaii's Sunshine Law.⁵⁴ It is your Committee's hope that such important decision making is not kept from public discourse through unilateral action by the BOR's leadership.

⁵² OIP did acknowledge that the BOR may have been acting in good faith but also may have confused two different possible courses of action or otherwise misremembered OIP's advice.

⁵³ See documents bate stamped University-2801 through 2802, turned over as part of the University's Response to Senator Kim's Sept. 26 Information and Document Request available at

<http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 9, 2012). Your Committee has also requested that the BOR provide the Committee with the specific BOR policy that would allow the former BOR Chair to take unilateral action outside of a properly noticed public meeting.

⁵⁴ Your Committee is also concerned that the National Collegiate Athletic Association (NCAA) requires that the Chancellor of the University of Hawaii at Manoa and not the President of the University of Hawaii System to represent the University of Hawaii at Manoa in the Mountain West Conference.



2. Open Records Concerns

In addition, your Committee finds that the University administration may have improperly redacted documents for your Committee's review in violation of Hawaii's Open Records Law.

First, your Committee is concerned about the blanket redaction of the Factfinders Report. At the September 24, 2012, informational briefing, counsel for the University testified that a blanket redaction was done to the Factfinders Report. Counsel also admitted that certain names that should not have been redacted were inadvertently redacted. As raised during the October 2, 2012, informational briefing, your Committee received an informal opinion from OIP that blanket redactions violate Chapter 92F, HRS, Hawaii's Open Records Law. Your Committee has requested that OIP go through the Factfinders Report to make a determination if the University properly redacted the document in compliance with the Open Records Law.⁵⁵

Second, your Committee is concerned that the University has provided your Committee with redacted public documents when it appears that these documents should not have been redacted at all. Your Committee requested the University to provide your Committee with copies of all employee buyout and severance packages for the last twelve years. In response to this request, the University turned over documents that were redacted.⁵⁶ As discussed during the October 2, 2012, informational briefing, several of these documents were public documents and this fact was clearly stated within the context of the documents. As your Committee stated at the October 2, 2012, informational briefing, OIP had provided general advice that several of these documents were public documents that should not have been redacted. At the October 2, 2012, informational briefing, the University, through its legal counsel, could not provide sufficient justification to your Committee as to why these public documents had been redacted.

⁵⁵ The University provided the Committee with unredacted copies of the Factfinders Report but specifically requested that the Committee not publically release them. The Committee has chosen to honor this request until it receives an opinion from OIP despite Jeffrey Harris' (Torkildson Firm) statement to your Committee on October 2, 2012: "if you disagree with us about the redactions, release them, don't argue with me about our redactions."

⁵⁶ Copies of these documents are available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 4, 2012), Buyouts-Severance Packages.



C. Accountability

Your Committee finds that greater accountability is needed to address not only the failure of the Concert but how the University handled the aftermath of the failed Concert.

1. Inadequate Communication with Stakeholders

Your Committee is especially concerned about how the University administration handled the placement of Donovan and Sheriff on administrative leave during the fact finding investigation by Cades. As raised during the informational briefings, your Committee has serious questions as to whether it was proper for the University to make a public announcement and disregard the privacy interests of Donovan and Sheriff, especially in light of the fact that this likely contributed to the settlement agreement between the University and Donovan. The University also failed to give your Committee a justifiable reason why others who were involved with the Concert were not similarly placed on leave while the investigation was taking place.

In addition, your Committee seriously questions why the BOR did not play a more active role in communicating with the public after acknowledging the cancellation of the Concert. The active role could have entailed assisting with providing satisfactory answers or explanations for the failed Concert and taking a more serious and timely look at the way the University's administration handled the aftermath of the failed Concert.

2. Corrective Actions

At the informational briefings, the President expressed that the University was still looking into the Concert and assured your Committee that although no one had been terminated by the University, there would be consequences. The President also testified that the unusual autonomy and authority granted to the Athletics Department was withdrawn. The President also testified that the job description of the Center's Manager was rewritten to lessen the Manager's power in order to avoid any similar mishaps in the future.

Your Committee also recognizes the BOR Chair's testimony that the Concert, as well as its aftermath, will be addressed by the BOR as part of the President, Chancellor, and General Counsel's personnel evaluations.



While your Committee appreciates these efforts, it is your Committee's hope that the BOR and the University's administration will hold appropriate departments and personnel within the University more accountable for their respective actions to ensure that an incident like the failed Concert never happens again.

D. Operational Management

1. Failure to Follow BOR Policies

Your Committee finds that the BOR failed to follow its own policies when it did not approve the Memorandum and Agreement (Agreement) ⁵⁷ between Donovan and the University prior to its execution.

During the informational briefings, your Committee raised the concern that the Agreement between Donovan and the University, whereby Donovan was reassigned from Athletic Director to a new position within the Chancellor's Office, did not follow BOR Policies Section 8-1 because the BOR did not approve the Agreement.⁵⁸ Several members of the BOR testified that they were

⁵⁷ A copy of the Memorandum and Agreement between Donovan and the University (Memorandum and Agreement) is available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 10, 2012), Briefing Materials (9-24-12).

⁵⁸ Section 8-1 of BOR Policies provides in relevant part:

a. General:

Except as otherwise provided herein, the President is authorized to approve, sign, and execute contracts and settlements of claims in accordance with law and Board policy. . . . Should it be determined, in consultation with the Board, that a contract or settlement is anticipated to have a significant impact on policies, programs, or operations; or result in potential institutional liability the prior approval of the Board shall be required regardless of amount and source of funding. The President may delegate authority for the approval, acceptance, signing, and execution of contracts and settlements to other University officials.

* * *

d. Settlement Agreements:

All settlement agreements recommended by the University's General Counsel involving payments of \$500,000 or less, or involving



advised by the Office of General Counsel⁵⁹ that it was not a settlement agreement that required BOR approval. However, your Committee received a letter from the Department of the Attorney General finding that the Agreement was in fact a settlement agreement "because it is an arms length agreement that was negotiated through legal counsel and resolved a legal dispute" and required the BOR's approval because it also met other criteria specified in Section 8-1 of the BOR Policies.⁶⁰ The opinion concludes:

Thus, Mr. Donovan waived and released his claims against the University in exchange for both the payment of his attorney's fees and his reassignment to a new position and the salary he is to be paid. He did not waive his claims against the University in exchange for the payment of his attorney's fees alone and the amount the University is to pay under the settlement agreement is both the \$30,000 for Mr. Donovan's attorney's fees and his annual salary of \$211,200 for 3 years. As a result, as a settlement agreement exceeding \$500,000, the Jim Donovan settlement agreement required the approval of the BOR according to the BOR's policies.⁶¹

workers' compensation claims in any amount and which do not contravene Board policy and do not have a significant impact on policies, programs or operations, shall be approved by the President or the President's designee. Agreements which are anticipated to require changes in Board policies and/or have significant impact on policy, programs, or operations and/or where the Board is named as a party to a suit, shall require the prior approval of the Board regardless of amount. All settlement agreements exceeding \$500,000, except for settlement of workers' compensation claims, shall require the approval of the Board. This requirement may not be circumvented by subdivision of the total amount of the settlement claim. All settlements requiring Board approval shall include a signature line for the Board. (emphasis added)

⁵⁹ Your Committee is concerned about the fact that the Office of General Counsel provided the BOR with advice and counsel regarding the Agreement when the University represented to the Committee that the reason the Turkildson Firm and Bennett were hired to deal with matters relating to the Concert and its aftermath was because the Office of General Counsel had a conflict of interest based on its involvement with the Concert.

⁶⁰ See Letter dated October 1, 2012, addressed to The Honorable Donna Mercado Kim from Russell A. Suzuki, First Deputy Attorney General. This letter is available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 4, 2012), Briefing Materials (10-2-12).

⁶¹ Id.



The failure of the BOR to approve the Agreement with Donovan was not the only time it appears that the BOR has failed to follow its own policies. Testimony during the October 2, 2012, informational briefing also showed that the BOR did not follow its own policies when it approved the paid professional improvement leave request of former Chancellor Hinshaw. As discussed at the briefing, Chancellor Hinshaw was granted up to ten months of professional improvement leave.⁶² However, under BOR policy she was not entitled to any such leave because she had not been serving the University for a period of at least six years.⁶³ In addition, even if Hinshaw was entitled to any professional improvement leave, she would not have been entitled to the ten months granted by the BOR because BOR policy provides that such leave be paid for one month for every year of service.⁶⁴ This would have required Hinshaw to have worked for the University for at least ten years. For whatever reason, the BOR made an exception to its policies and allowed Hinshaw to take professional improvement leave, as well as granting her a tenured position while still paying her at the Chancellor level.

At the October 2, 2012, informational briefing your Committee received testimony that the BOR was told by President Greenwood that if it did not approve the request for Chancellor Hinshaw's paid professional improvement leave, there might be a lawsuit. In addition, according to testimony presented at the October 2, 2012, informational briefing, at least one Regent questioned the BOR

⁶² See Letter dated January 11, 2012, from M.R.C. Greenwood, President, to Eric K. Martinson, Chairperson, Board of Regents, turned over as part of the University's Response to Senator Kim's Sept. 26 Information and Document Request available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 17, 2012), University-3162-3165.

⁶³ BOR Policies Section 9-12, Part IV.D states, in relevant part:

Leave may be granted for periods up to twelve (12) months at full pay or twelve (12) months at half pay after six (6) years of full-time continuous service, including creditable service in other Board classifications with total months earned at the rate of one (1) month for each year, up to twelve (12) years of service. Leaves of shorter duration may be granted at the rate of one (1) month of leave for each year of executive or managerial service, after six (6) years of full-time continuous service up to twelve (12) years, including creditable service in other Board of Regents classifications. The total short duration leave taken with pay should not exceed that provided for regular professional improvement leave.

⁶⁴ Id.



policy requiring the BOR to approve a higher pay level for those granted professional improvement leave.

The BOR made yet another exception to its policies when it approved a five-year contract for Chancellor Apple. During the October 2, 2012, informational briefing, your Committee received testimony that Chancellor Apple's five-year contract was an exception to BOR policy, which allows for initial appointments of three years.⁶⁵ Your Committee also received testimony that at least one member of the BOR felt she had no choice but to approve Chancellor Apple's five-year contract, which provided for automatic tenure and a salary of about \$102,000 more than that of the previous Chancellor. Since the President had selected and negotiated a package deal with Chancellor Apple, at least one member of the BOR felt that the BOR could not change the terms of the package but could only accept or reject the package. The BOR appears to have accepted President Greenwood's decision to select and negotiate with Chancellor Apple without requesting information on or considering any of the other candidates.

There appears to be a pattern in which the BOR waives its own policies, resulting in greater costs for the University. While your Committee recognizes the BOR's authority to create its own policies, your Committee questions why such policies are in place and whether the policies are appropriate when it appears that the BOR either is unfamiliar with its own policies or simply chooses to waive or not follow them on several occasions despite significant fiscal consequences.

2. Roles and Responsibilities

Your Committee finds that there is concern about the perceived roles and responsibilities of the BOR and the President, as well as the seeming lack of clear lines of authority between the BOR and the President.

The BOR is charged with responsibility over the general management and control of Hawaii's only public institution of

⁶⁵ See also, Letter dated May 9, 2012, from M.R.C. Greenwood, President, to Eric K. Martinson, Chairperson, Board of Regents, available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last viewed on October 17, 2012), Briefing Materials (10-2-12); see also, BOR Policies Section 9-12, Part II.C.1.a.



higher learning.⁶⁶ In confirming the individual Regents to the BOR, the Senate expects the BOR to be diligent in its duties and responsibilities and to question the University's administration when necessary to ensure any actions taken are in the best interest of the University and in furtherance of the University's mission. In questioning the President and certain members of the BOR, it became clear to your Committee that there are serious questions concerning the BOR's independence from the President. For example, during the informational briefings, your Committee discovered that the BOR learned about the University's Agreement with Donovan only one day before the University went public with the information.⁶⁷ In addition, your Committee heard testimony that the BOR did not question the Agreement between the University and Donovan. One Regent expressed that she felt that the BOR had no choice but to support the Agreement after the fact or it would be a breach of contract on the University's part. It appears that the University did not seek input or approval from the full BOR before entering into the Agreement.⁶⁸

Your Committee is concerned that the BOR is not given adequate information or time to fully discuss the facts and all available options before voting on important issues. Instead, there appears to be a pattern that BOR decisions are predetermined or made for the BOR ahead of time so that individual Regents have little choice but to go along with the recommendations presented to them.

While your Committee appreciates the efforts of the BOR, it emphasizes that the BOR is the governing body of the University System. The BOR should take an active role in deliberating and making decisions on recommendations made by the University's administration. As part of governing the University System, the BOR should question and hold the University administration accountable when the University's administration takes action that is detrimental to the University. Your Committee is especially concerned about cases where the University administration does not present the BOR with decisions that should be made or approved by

⁶⁶ See attached State of Hawaii University of Hawaii Organization Chart, available online at <http://hawaii.gov/budget/executivesupplementalbudget/supplementalbudget> (last visited on October 26, 2012), DETAILS OF THE OPERATING AND CAPITAL BUDGET - by Department, p. 918.

⁶⁷ Members of the BOR testified that the BOR learned that the University's settlement with Donovan had been executed one day before it was made public.

⁶⁸ The BOR did not take any official action on the settlement agreement.



the BOR or otherwise fails to provide the BOR with sufficient information to make well-informed decisions. The BOR is charged with holding the University's administration accountable; it should not merely approve all of the University administration's recommendations without conducting its own due diligence.

E. Fiscal Management

In conducting informational briefings and reviewing the documents provided by the University, it has become apparent to your Committee that the University must examine its fiscal management procedures to ensure that the expenditures of public funds are justified and done in accordance with procurement law.

1. Cost Control and Procurement Concerns

As discussed earlier, the failed Concert will likely cost the University approximately \$1.1 million dollars at a minimum. First, part of this cost is up to \$90,000 to hire a search firm to assist with the hiring of a new Athletic Director.⁶⁹ Your Committee is concerned about the fact that Chancellor Apple sought an exemption to hire a search firm for \$90,000 before members of the search committee, which ultimately would make a decision on whether or not to hire a search firm, had been named. Your Committee is even more troubled by the fact that Chancellor Apple initially denied that this was the case at the October 2, 2012, informational briefing until presented with executed documentation to the contrary.

Second, your Committee has learned through testimony and through its request for documents from the University that from March 2011 through May 2012, the University has spent over \$2.2 million on outside legal counsel. This does not include the \$1.2 million a year budgeted for the Office of General Counsel or costs for outside legal counsel as a result of the failed Concert. For example, the University contracted with former Attorney General Bennett for up to \$75,000 worth of services to negotiate the University's Agreement with Donovan. The University also

⁶⁹ Your Committee acknowledges testimony that the University is trying to raise the \$90,000 through private donations; however your Committee still finds the \$90,000 to be an additional cost, especially if the University is unable to raise adequate funds through private donations.



contracted with Cades for an amount of \$50,000 for its Factfinders Report.⁷⁰

When your Committee questioned the procurement procedures that were followed in contracting with Cades for the Factfinders Report, President Greenwood testified that the University did not have to follow state procurement laws for this matter because the Cades contract fell within an "expert witness exemption." However, as your Committee noted during the September 24, 2012, informational briefing, the State Procurement Office has advised your Committee that Cades is not considered an expert witness and no exemption would apply.

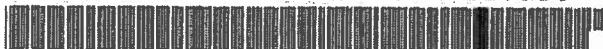
Also extremely concerning to your Committee is the fact that the Torkildson Firm has subcontracted or otherwise consulted with Hoakea Communications, a public relations firm with an existing \$25,000 contract with the Research Corporation of the University of Hawaii (RCUH), to assist the University in dealing with public relations issues stemming from your Committee's informational briefings.⁷¹ It is your Committee's understanding that as part of its scope of duties, Hoakea Communications asked business leaders and others in the community to request that your Committee not hold its informational briefings. Regardless of whether this was considered a subcontract or a consultation, your Committee questions whether it is a proper use of public funds for a public relations firm to be hired to try to stop your Committee from holding informational briefings to seek answers about the failed Concert and examine fiscal and operational issues at the University, especially where the University has its own public relations personnel on staff with a budget of \$1.2 million.⁷² Your Committee has serious questions as to when Hoakea Communications began assisting the University in the aftermath of the Concert and whether it was improperly using its contract with RCUH to engage in a separate scope of work for the University.⁷³ Your Committee's

⁷⁰ See Cades Contract, available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 4, 2012), Briefing Materials (9-24-12), University-3118-36.

⁷¹ Kerr, Keoki, "EXCLUSIVE: To help 43 PR staff, UH hired 2 consultants for \$150,000." *HawaiiNewsNow*. September 27, 2012, available at <http://www.hawaiinewsnow.com/story/19662107/besides-43-public-relations-staff-uh-hired-2-pr-consultants-for-150k?clienttype=printable> (last viewed on October 15, 2012).

⁷² *Id.*

⁷³ Your Committee raises this issue because Hoakea Communications has gone on public record stating that it had helped the University in the aftermath of the



concerns are compounded by the fact that neither the justification nor the cost for subcontracting Hoakea Communications for this matter has been provided to your Committee.

Your Committee is concerned about the large amounts of money being spent by the University for outside legal and consultant services and hopes the BOR ensures that outside legal counsel and consulting services for which public funds are being spent are justified, effective, and properly procured.

2. Quality of Services Procured

In addition, your Committee questions whether the University received quality services for the \$50,000 fee. As noted above, Cades took statements of individuals but did not check the veracity of these statements or address several instances of conflicting statements. In addition, Cades did not question or request statements from President Greenwood or General Counsel Lendio. Chong-Kee testified that he did not believe that President Greenwood was an appropriate witness even though President Greenwood ultimately has oversight over the University's administration. Your Committee disagrees with the fact finders' judgment that President Greenwood was an inappropriate witness: the omission of statements from key administrators such as President Greenwood and General Counsel Lendio, who supervised those directly involved in the Concert, was a major oversight by Cades. Your Committee questions whether the University could have saved at least \$50,000 by allowing the Honolulu Police Department to take witness statements and conduct an investigation.⁷⁴

Concert for two and a half months prior to the end of September 2012, but that its subcontract with the Torkildson Firm started in August 2012. See id.
⁷⁴ Your Committee notes that during the September 24, 2012, informational briefing, when asked whether the University made a report to the Honolulu Police Department (HPD) after it was learned the \$200,000 deposit was missing, President Greenwood responded, "Absolutely. We talked directly with law enforcement." However, your Committee contacted the HPD, which confirmed that it was never contacted by the University on this matter. HPD stated that had it been contacted, it would have investigated and taken witness statements. In addition, HPD also stated that if there had been an out-of-state nexus, HPD would have contacted the Federal Bureau of Investigation or Secret Service. See Letter dated September 25, 2012, from Chair Donna Mercado Kim to Chief of Police Louis Kealoha, Letter dated September 27, 2012, from Chief of Police Kealoha to Chair Mercado Kim, available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 15, 2012), Briefing Materials (10-2-12).

2013-0139 SPECIAL CR SMA-11.doc



The University has also contracted with the Torkildson Firm in an amount up to \$25,000 to redact documents and respond to your Committee's request for information. Katz testified before your Committee that the amount the University could ultimately be billed by the Torkildson Firm is more than \$25,000. Your Committee is concerned as to whether the University received legal services worth at least \$25,000. Your Committee's understanding is that the Torkildson Firm was hired to assist the University with responding to the Committee based on its knowledge of privacy laws; however it appears that the Torkildson Firm may not have even considered the law. While the Torkildson Firm testified that the University's Human Resources Department, and not the Torkildson Firm, actually redacted the buyout and severance package documents, your Committee questions why the Torkildson Firm, hired as legal counsel to assist the University in responding to the Committee's request for documents, including the buyout and severance package documents, did not correct any erroneous redactions made by the University or advise the University of potential violations of Hawaii's Open Records Law.

Your Committee also questions the Torkildson Firm's quality of representation in responding to the Committee's request for a running total of how much the Concert and its aftermath has cost the University.⁷⁵ The University's answer to your Committee's request was inadequate and not responsive to the question.⁷⁶

⁷⁵ See University's Response to Senator Kim's Sept. 26 Information and Document Request available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 5, 2012). Question 1 of the Sept. 26 Information and Document Request asked for:

A complete breakdown of the running total of costs incurred by the University of Hawaii relating to the failed Stevie Wonder Benefit Concert and other relevant costs. Other relevant costs shall include but not be limited to all costs associated with legal services provided, public relations services, and any other services rendered to assist in the preparation and participation in the September 24th and October 2nd informational briefings of this Committee; provided that cost estimates shall be included where actual billings or detailed expenses are not yet available[.]

⁷⁶ Id. In response to that question, the Torkildson Firm responded that:

The Agreement for Services produced on Sept. 20, 2012, gave an estimate of 'not to exceed \$25,000' for services and provided a procedure for change orders and price adjustments, if and when circumstances justify them.



During the October 2, 2012, informational briefing, when questioned by the Committee about the response, the Torkildson Firm represented that the question was unclear and that they did not understand what the Committee was asking for. Your Committee disagrees with the Torkildson Firm's recharacterization of the question asked by your Committee. On the contrary, your Committee believes that the question was clear and easily understood by a reasonable person and therefore raises the possibility that the Torkildson Firm was instead withholding information from your Committee and the public.⁷⁷

3. Contract Buyouts

Your Committee also finds that the University should re-examine its practice of providing lucrative buyouts for the termination of executive employment contracts.

Your Committee received documents from the University showing that in the past twelve years, it has paid over \$2.5 million to former executives and coaches in contract buyouts.⁷⁸ Some of these buyouts include:

- (1) More than \$1 million to former President Evan Dobbelle;
- (2) \$600,000 to former University Head Football Coach Greg McMackin; and
- (3) \$312,000 to former Athletic Director Herman Frazier.⁷⁹

The University's practice of buying out contracts appears to reward individuals for inadequate performance. Your Committee believes that the University should only consider such buyout provisions under extreme circumstances and that such consideration should first be heavily scrutinized. Your Committee further

⁷⁷ Your Committee notes that this same request was made during the September 24, 2012, informational briefing. At that time, no one from the Torkildson Firm or the University asked for clarification of the request or gave any indication that the request was not understood.

⁷⁸ Copies of these documents are available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 4, 2012), Buyouts-Severance Packages.

⁷⁹ Daysog, Rick. "Senate panel to investigate UH buyout." *HawaiiNewsNow*. September 26, 2012, available at <http://www.hawaiinewsnow.com/story/19640529/senate-panel-to-investigate-uh-buyouts> (last visited October 10, 2012).



believes that the University should not be sending the message that it rewards individuals for failing to achieve the obligations of their contract, failing to meet certain standards, or failing to perform certain jobs satisfactorily.

**F. BOR Operational and Financial Control Improvement
Advisory Task Group**

Your Committee recognizes that the BOR has approved the creation of an Operational and Financial Control Improvement Advisory Task Group (Task Group). According to the BOR, "[t]he purpose and primary function of the . . . Task Group . . . is to oversee, provide input, monitor activities, and guide the scope of an evaluation and improvement initiative specific to the significant operational and financial processes and related internal controls of the University of Hawai'i. . . ." ⁸⁰

Phase One of the Task Group's work will focus on "an assessment and evaluation of the operational and financial processes that resulted in the failed Stevie Wonder transaction." ⁸¹ Phase Two will include a review of the University's "operational and financial processes and controls on a system wide basis" as well as making a determination "if the University's current policies (Board, Executive, and Administrative) require clarification and revision with respect to the assignment of responsibility, delegation of authority, and accountability for duties performed by University personnel." ⁸² A possible Phase Three would look at "comparing higher education operational and financial process 'best practices' to those currently in place at the University." ⁸³

It is your Committee's understanding that the University has engaged the external audit services of KMH to conduct the evaluation. ⁸⁴ Since KMH has previously done work for the University and may do work for the University in the future, your Committee notes potentially conflicting interests for KMH: If

⁸⁰ See documents bate stamped University-3173 through 3179, turned over as part of the University's Response to Senator Kim's Sept. 26 Information and Document Request available at <http://www.capitol.hawaii.gov/specialcommittee.aspx?comm=SCA02> (last visited on October 5, 2012).

⁸¹ Id.

⁸² Id.

⁸³ Id.

⁸⁴ Id.



KMH's assessment reflects negatively on the University or generates findings or recommendations with which the University disagrees, KMH's potential future contracts with the University may be jeopardized. As such, your Committee hopes that KMH can maintain its independence and objectivity during its external evaluation of the University's operational and fiscal practices.

Your Committee also has concerns regarding whether the private sector members of the Task Group may have a conflict of interest since several of these individuals work for accounting firms that have either done work for the University, are currently doing work for the University, or will likely do work for the University in the future.⁸⁵ Your Committee hopes these individuals can maintain their independence while participating in the Task Group's work.

Your Committee is also concerned about testimony that members of the Task Group were required to sign a Confidentiality Covenant requiring that they not disclose certain information or face potential civil and criminal penalties. Your Committee questions whether the Confidentiality Covenant is legal and enforceable⁸⁶ and, regardless of enforceability, whether a consequence of the Confidentiality Covenant will be to discourage Regents from disclosing any information, including information that is not protected by law from disclosure. As such, your Committee Chair requested an opinion from the Attorney General and guidance from OIP on this matter.

The Attorney General found that while the confidentiality covenant "may 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."⁸⁷

Lastly, your Committee looks forward to receiving reports and updates on the findings and outcomes of the Task Group and KMH and hopes that the University will make this evaluation process as open and transparent as possible.

⁸⁵ Id.

⁸⁶ At the October 2, 2012, informational briefing, Vice-Chair Lee testified that he did not know if the Confidentiality Covenant was enforceable.

⁸⁷ See Letter dated October 19, 2012, addressed to The Honorable Donna Mercado Kim from Russell A. Suzuki, First Deputy Attorney General.



III. Recommendations

Based on the discussion and findings above, your Committee recommends that:

- (1) A request be made to the Legislative Auditor to conduct a financial and management audit of the University System to specifically address the issues and concerns raised by your Committee;
- (2) The legislative committees with jurisdiction over the University determine whether the issues raised by your Committee can be addressed through legislation during the 2013 Regular Session and consider adopting such legislation, including but not limited to whether the process by which the members of the BOR are selected should be amended;
- (3) The legislative committees with jurisdiction over procurement consider examining whether the University improperly used procurement exemptions for services related to legal, consulting, and public relations service contracts or agreements, including but not limited to the University's use of the expert witness exemption in contracting Cades to conduct its fact finding investigation of the failed Concert;⁸⁸
- (4) The BOR undertake a thorough review of its policies and procedures to:
 - (A) Provide clarity over the role and responsibilities of the BOR, President, and Chancellors;
 - (B) Ensure clear lines of authority between the BOR, President, and the individual Chancellors;
 - (C) Ensure that the policies and procedures facilitate the University's mission; and

⁸⁸ At the September 24, 2012, information briefing, President Greenwood testified that the University used the expert witness exemption in hiring Cades to conduct its fact finding investigation.



- (D) Determine whether the Office of General Counsel should report directly to the BOR while also providing legal services to the University's administration, rather than reporting to the BOR and the University's administration;
- (5) The BOR report to the Committee on the steps taken to complete recommendation (4) and the outcomes of the BOR's review pursuant to recommendation (4);
- (6) The BOR receive training on its policies and procedures;
- (7) The BOR receive annual training on Chapter 92, HRS, Hawaii's Sunshine Law, and Chapter 92F, Hawaii's Open Records Law, in order to ensure openness and transparency;
- (8) The BOR work with OIP to address all concerns raised by your Committee relating to Chapters 92 and 92F, HRS, and correct any violations, including the re-issuing of all documents requested by your Committee with the appropriate redactions, if any;
- (9) The BOR increase its public discussion of important issues during public meetings, to the extent that those discussions are permitted by law, by encouraging individual Regents to state their positions and explain their votes on agenda items;
- (10) Following a meeting in executive session, the BOR report in open session on its discussions in executive session, to the maximum extent permitted by law;
- (11) The BOR improve the thoroughness and clarity of its meeting minutes;
- (12) As part of providing greater openness and public participation, the BOR explore allowing a public comment process as part of the President's evaluation;
- (13) After the completion of the BOR Task Group's work, the BOR submit potential legislation for consideration to:
- (A) Improve the University's fiscal transparency;



- (B) Hold appropriate departments and personnel within the University more accountable for their respective actions; and
 - (C) Improve and streamline the University's operational management;
- (14) After the completion of the BOR Task Group's work, the BOR consider external monitoring measures such as follow-up auditing by the Legislative Auditor or the hiring of a master to ensure that the recommendations of the Task Group, KMH, the Legislative Auditor, or others, as appropriate, are implemented in a timely and proper manner;
- (15) Each campus of the University make available on its website an annual statement which itemizes how the campus spends the revenues generated from student tuition in carrying out the operations of each campus, including but not limited to costs of instruction, facilities maintenance, payroll for executive personnel, and payroll for non-executive personnel;
- (16) The BOR submit to your Committee a detailed breakdown of the following:
- (A) Cost of staffing the Office of General Counsel for the 2012-2013 fiscal year;
 - (B) Projected cost of staffing the Office of General Counsel for the 2013-2014 fiscal year;
 - (C) Amount the University has spent to procure outside legal counsel for the 2012-2013 fiscal year;
 - (D) Projected cost to the University to procure outside legal counsel for the 2013-2014 fiscal year;
 - (E) Cost of staffing the public relations departments of all campuses of the University System for the 2012-2013 fiscal year;
 - (F) Projected cost of staffing the public relations departments of all campuses of the University System for the 2013-2014 fiscal year;



- (G) Amount the University has spent to procure outside public relations services for the 2012-2013 fiscal year, including any public relations services procured through RCUH; and
- (H) Projected cost to the University to procure outside public relations services for the 2013-2014 fiscal year, including any public relations services to be procured through RCUH;
- (17) The BOR provide your Committee with the guidelines used by the BOR and the University administration for reviewing all outside legal counsel and public relations contracts, including those public relations contracts procured through RCUH, and determining that the deliverables for those contracts are met; and
- (18) The BOR and the University develop and report to the Committee a plan of action to improve the negative image of the University as a result of the failed Concert, its aftermath, and the findings that have resulted from the Committee's informational briefings; provided that no additional public relations expenses are incurred by the University in carrying out this recommendation.

IV. Conclusion

Your Committee believes that the recommendations presented above are a starting point for increasing accountability and transparency over the operational and financial management of the University System, as well as a step toward restoring public trust in Hawaii's only public, taxpayer-supported institution of higher learning.

Respectfully submitted on
behalf of the members of the
Special Committee on
Accountability - 02,


DONNA MERCADO KIM, Chair

