

# UNIVERSITY OF HAWAI'I

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Board of Regents

January 28, 2008

To: Darolyn Lendio  
Vice President for Legal Affairs and  
University General Counsel

From: Presley Pang  
Interim Executive Administrator and  
Secretary of the Board of Regents

Subject: Board of Regents Practice Regarding Release of Action  
Memoranda to the Public

The Board of Regents provides copies of the memoranda submitted to the Board for action, with certain exceptions described below, to anyone who requests copies, as soon as the notice and agenda of the meeting of the Board are filed for posting with the Lieutenant Governor's Office. The notice and the agenda are published at least six days prior to the meeting as required by the Sunshine Law. Thus, these action memoranda are available six days prior to the meeting for pick up at the Board Office. At the meeting, copies of the action memoranda may also be obtained at a side table set up for the Board Office staff.

The Board also provides two opportunities for the public to comment on any agenda item: once at the beginning of the meeting (as a convenience for those who wish to testify and leave); and secondly when the agenda item is specifically taken up for deliberation. In addition, the Board accepts written testimony on any agenda item.

The exceptions to publicly releasing the action memoranda at the time the notice and agenda of a meeting are posted apply to action memoranda or documents that will be discussed in executive session. These matters include personnel matters where the privacy rights of individuals are implicated, or legal matters whether the Board needs to consult with the University attorneys on the Board's powers, duties, immunities, and liabilities. Please note that such documents may also be privileged from disclosure not only by the deliberative process privilege recognized by HRS § 92F 13(3)(concerning frustration of legitimate government function) but by other well-recognized exceptions in the Open Records Law. HRS § 92F-13(1) and (2).

The Board of Regents also follows the practice that once the purposes of the deliberative process privilege are no longer served, and no other privilege applies to the documents—such as confidential attorney work product—the action memorandum is released to the public.

Chair Sonson, Vice Chair Nakasone, and Members of the Committee:

The University of Hawai'i opposes HB 2583 HD 1 because it would abandon the long-established and carefully-crafted balance struck by Hawai'i's Uniform Information Practices Act and impose unprecedented and unworkable public disclosure obligations on the University (and the University alone). These sections are also inconsistent with the University's Constitutional autonomy in its internal affairs and with the principle of equal protection of the laws.

#### Predecisional Disclosure of Proposed Compensation

HB 2583 HD 1 would amend sections 89C-4, 92-5, 304A-1001, and 304A-1004, Hawai'i Revised Statutes, to create new public disclosure obligations applicable only to the University. Under these amendments, the University would be required to disclose "proposed compensation or any change in compensation" for certain administrative positions for public comment at an open meeting of the Board of Regents.

Excluded employees' compensation is already public information under current law (section 92F-12(a)(14), Hawai'i Revised Statutes). The University makes salary information available to the public as required. The University does not make public information about contract proposals that are still under negotiation, salary changes that are being considered within the administration or recommended to the Board of Regents, and similar predecisional materials created as part of the University's deliberative process before a final decision has been made. Current law protects such predecisional materials from disclosure because disclosure would frustrate legitimate government functions and is therefore not required under section 92F-13(3), HRS.

The current law reflects a long-established and carefully-crafted balance established by Hawai'i's Uniform Information Practices Act, HRS chapter 92F. The existing public disclosure exception for predecisional materials created during an agency's deliberative process is appropriate and necessary to enable agencies, including the University, to perform their missions. The Office of Information Practices has repeatedly explained that the exception is necessary to protect agencies' internal communications and the quality of their decisions. See OIP Op. Ltr. Nos. 91-24, 91-16, 90-11, 90-8 (discussed in more detail below). HB 2583 HD 1 conflicts with the careful balance established by the existing statute and is ambiguous and problematic in that it does so by amending other chapters of the law.

The bill is also ambiguous and could create significant administrative issues in that it could be construed to require the Board of Regents to alter its current policies for hiring and compensating excluded employees. The bill would require disclosure of proposed compensation in an open meeting of the Board of Regents, but under current Board of Regents policies hiring authority for most excluded positions has been delegated to the President or other University executives. Currently, only 17 of the approximately 250 executive positions system-wide require Board of Regents approval for hiring. Thus, it appears that the bill could be construed to require the Board of Regents to hold meetings it is not currently required to hold and to exercise directly authority that the Board has currently chosen to delegate. If so, it would add delays and

administrative complexities to the hiring of lower-level executive employees and unnecessarily require the Board of Regents to handle hiring decisions that can more efficiently be made at a lower level.

That flaw, in turn, highlights a more fundamental problem with the bill: it is contrary to the Hawai'i Constitution. Article X, Section 6 of the State Constitution provides, in part, as follows:

There shall be a board of regents of the University of Hawai'i, the members of which shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. ... The board shall have the power to formulate policy, and to exercise control over the university through its executive officer, the president of the university, who shall be appointed by the board. **The board shall also have excusive jurisdiction over the internal structure, management, and operation of the university.** This section shall not limit the power of the legislature to enact laws of statewide concern. The legislature shall have exclusive jurisdiction to identify laws of statewide concern. [Emphasis added.]

Matters such as hiring and compensating employees, and the level at which hiring and compensation decisions are made, are part of the "internal structure, management, and operation" of the University. HB 2583 HD 1 invades the Board of Regents' exclusive jurisdiction over the University's internal affairs by amending general statutes that apply to all State agencies to create special rules that apply only to the University. Public disclosure of agency records and the appropriate balance between public disclosure and agencies' need for confidentiality are matters of statewide concern, and the Legislature has appropriately addressed such matters by enacting the Sunshine Law and the Uniform Information Practices Act, including the exceptions from public disclosure set forth therein. While HB 2583 HD 1 asserts that it relates to matters of statewide concern, the fact that it applies only to the University demonstrates otherwise. If public disclosure of proposed future compensation levels for excluded employees truly were a matter of statewide concern, the bill would presumably amend the existing, generally-applicable provisions of the Sunshine Law and Uniform Information Practices Act to require such disclosure of all agencies.

Moreover, public disclosure of proposed compensation could severely hamper the University's ability to negotiate terms (including salary) of employment contracts that are favorable to the University. Allowing proposed compensation to be disclosed for public comment before a contract has been negotiated and executed would give prospective employees the upper hand in bargaining and would damage the University's negotiating position. For example, the Board of Regents might be asked to authorize a contract proposal to a prospective employee at a certain salary but also to authorize the President to increase the salary proposal by up to a specified amount if necessary to successfully negotiate a contract. Revealing to a prospective hire that the Board had granted such authority could severely damage the University's ability to obtain a contract at a salary below the maximum authorized. Such an impairment of the University's bargaining position is fiscally imprudent and would frustrate the legitimate government purposes for which existing law provides protection.

In addition, many applicants for positions that do not currently require Board of Regents approval request confidentiality until an offer has been made and accepted. Requiring all proposed hires and their compensation to go to the Board of Regents would deter these applicants from applying for fear that premature disclosure would affect their current employment. This would detrimentally affect the pool of applicants from which the University is able to hire.

Finally, HB 2583 HD 1 is problematic in that it amends multiple statutory sections without regard to the subject matter of those sections. This “shotgun” approach creates potential ambiguities with respect to both the new requirements that the bill would impose and the existing subject matter of the amended sections.

#### Denial of Deliberative Process Exception

The bill would also amend section 92-5, Hawai‘i Revised Statutes, to provide that the Board of Regents may not “withhold” recommendations, draft documents, proposals, suggestions, and other predecisional materials that comprise part of the deliberative process by which the Board of Regents formulates decisions and policies.

It appears that the purpose of this language is to require the University to publicly disclose such materials upon request. If so, the amendment would appear in the wrong chapter of the HRS. As drafted, the amendment is placed in chapter 92, the Sunshine Law, in the section that permits executive sessions to be held in certain limited circumstances. However, it is chapter 92F, the Uniform Information Practices Act, that requires public records to be made available, and section 92F-13 that sets forth the exceptions to public disclosure. This drafting flaw makes section 4 confusing and ambiguous.

Furthermore, the existing public disclosure exception for predecisional materials created during an agency’s deliberative process<sup>1</sup> is appropriate and necessary to enable agencies, including the University, to perform their missions. The Office of Information Practices has explained that:

We believe that under the UIPA, the disclosure of inter-agency and intra-agency memoranda that are predecisional and deliberative would frustrate agency decision-making functions, such as the resolution of issues and the formulation of policies. As is well-recognized in the FOIA [federal Freedom of Information Act] legislative history and case law, the candid and free exchange of ideas within and among agencies is essential to decision-making and is less likely to occur when all memoranda for this purpose are subject to public disclosure. Specifically, an exception for disclosure prevents frustration of agency decision-making because:

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<sup>1</sup> The deliberative process exception is based on section 92F-13(3), HRS, which protects “government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.”

[I]t serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

OIP Op. Ltr. No. 90-8 (internal quotation in original; citations omitted); see also Op. Ltr. Nos. 91-24, 91-16, 90-11. The Office of Information Practices has also explained that the exception is necessary to protect the quality of agency decisions:

In discussing the purpose of this privilege [under the federal FOIA], the Supreme Court has emphasized the importance of protecting predecisional, deliberative material:

Manifestly, the ultimate purpose of this long recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decision maker on the subject of the decision prior to the time the decision is made.

In short, the privilege rests upon the belief that "were agencies forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer."

OIP Op. Ltr. 90-11 (internal quotations in original; citations omitted).

The University's current practices regarding public disclosure of "action memoranda" submitted to the Board of Regents are summarized in the attached memorandum from Presley Pang, the Interim Executive Administrator and Secretary of the Board. These practices fully comply with the Sunshine Law and the Uniform Information Practices Act and are intended to maximize the public's opportunity to review and comment on proposed board actions while still preserving the board's ability to keep confidential certain materials that will be considered in executive session. Thus, the balance struck by current law and the University's practices is reasonable and appropriate and should not be set aside by this bill.

This portion of the bill is also fundamentally flawed in that it fails to place any express limits on the types of communications that would be denied the deliberative process exception. While it appears to be aimed at materials that are actually provided to the Board of Regents for consideration and decisionmaking, it is not expressly limited to such materials. As Office of Information Practices opinions make clear, the deliberative process exception extends to communications at all levels of an agency, because decisions made by an agency's governing

body rely on the preliminary work of the agency's staff. Because the Board of Regents is the University's ultimate decisionmaking body, its deliberative process could be interpreted to include the entire University's deliberative process. Therefore, denying the deliberative process exception to the Board of Regents without expressly limiting the denial to materials actually provided to the Board of Regents for consideration and decisionmaking could have the effect of denying the exception to the entire University. Such an outcome could severely impair the University's internal functioning and decisionmaking process.

This portion of the bill is fundamentally flawed because it would single out the University to deny it an appropriate and necessary public disclosure exception that currently applies to every agency of State government (as well as federal agencies under the Freedom of Information Act and the agencies of other states under their public disclosure laws). Singling out the University in this manner is contrary to the principle of equal protection of the laws and the University's Constitutional autonomy in its internal affairs (discussed in more detail below).

### Summary

Existing law strikes an appropriate balance between public disclosure and agencies' need to keep certain limited matters confidential. HB 2583 HD 1 would upset that well-crafted balance for the University of Hawai'i (and only the University). The bill is vague and ambiguous, violates the Board of Regents' exclusive jurisdiction over the University's internal affairs under the State Constitution, and could do serious harm to the University's internal functioning and its ability to negotiate contracts with prospective hires.

The University respectfully requests that HB 2583 HD 1 be held.



The House  
Committee on Labor  
February 8, 2007  
8:30 a.m.

**H.B. 2583, H.D. 1                      Relating to Government Operations.**

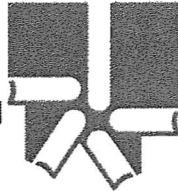
The University of Hawaii Professional Assembly (UHPA) continues to believe that it is in the public interest, not just the interest of our organization, that the statutes should be changed to provide the disclosure of the salaries proposed for excluded administrators at the University of Hawaii prior to formal action by the Board of Regents. This includes the disclosure of salaries even when the Board of Regents has delegated its authority to the President of the University or other administrative levels.

For a second year, UHPA has asked the legislature to make changes in the statutes that would effectuate the principle of disclosure and the UH administration has opposed any changes in these laws. Recently, representatives of UHPA and the UH administration have discussed our differences and we believe that we have clarified the misconceptions of our position as stated by the UH administration. We think we are close to agreement with the UH administration over what changes in statutes would be acceptable. Probably most of the constitutional and statutory disputes will turn out to be insubstantial once the intention of this bill is correctly understood. The short version is that UHPA has been asking for less than UH administration thought. It may be necessary to refine the language slightly but that would be more for clarity than substance.

In Section 2, what is contemplated is not continual or early disclosure of proposed compensation packages, but merely disclosure in time for public comment before the final Regents' vote. In other words, all the negotiations over salary would be over, the tentative package would all be worked out, and it would be time for a final up or down vote by the Regents, which would normally take place in executive session. We do not seek to alter the confidential deliberations of the Regents but rather ask that meaningful public comment be allowed before those deliberations take place.

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If the Regents see a document in an open meeting, the public should see that same document. When such documents exist in advance of the meeting, documents should be provided in advance; otherwise, in the case of last-minute documents, as soon as they are available. We don't think the UH administration has any real objection to this because it conforms to their current revised practice and makes sense under existing open meetings law.

We would propose in Section 3, at 92-5 (b), that the amended language concerning the "deliberative process" be deleted. Actually, the principle of disclosure of excluded administrative personnel compensation could be accomplished without any changes to HRS Chapter 92.

Once it is understood that we are not proposing that the public have access to deep pre-decisional materials, we think much of the opposition to this bill by the UH administration should evaporate. We do not want to do away with legal privileges or intrude into intra-agency deliberation; we just want public comment on high-paid hires, changes in excluded administrative salaries, and open documents in open meetings.

The point still undergoing discussion with the UH administration is how public comment can be achieved on salary decisions delegated down to the Presidential and lower administrative levels, that do not ever come to the Regents. We would propose that any salaries that exceed the salary of the Governor of the State of Hawaii be subject to public comment before any final decision is made by either the Regents or any of their administrative agents approving such salaries.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. N. Musto'.

J. N. Musto, Ph.D.  
Executive Director