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To: House Committee on Judiciary

From: Paul T. Tsukiyama, Director

Date: Thursday, February 21, 2008, 2:45 p.m.
State Capitol, Conference Room 325

Re: Testimony on H.B. No. 2583, H.D. 2
Relating to Government Operations.

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices ("OIP") strongly opposes section 3 of the bill and offers comments regarding sections 2 and 4 of the bill. OIP administers Hawaii's public records law, the Uniform Information Practices Act (Modified) ("UIPA"), in chapter 92F, Hawaii Revised Statutes, and Hawaii's open meetings law, also known as the Sunshine Law, in part I of chapter 92, HRS.

Section 2 of this bill seeks to amend section 89C-4, HRS, to require the Board of Regents (the "Board") to disclose in an open meeting for purposes of public comment proposed compensation or change in compensation for UH administrative positions filled by excluded employees under chapter 89C, HRS. Section 3 of the bill also seeks to amend section 92-5, HRS, to add similar language to an exception to the open meetings requirement under the Sunshine Law, which allows a board to meet in an executive (closed) meeting to consider, among other things, an employee's hire or evaluation in order to protect the employee's privacy interest. Haw. Rev. Stat. § 92-5(a)(2) (Supp. 2006). Section 4 of this bill proposes to amend chapter 304A, HRS, to require

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the Board to disclose six days before its meeting the compensation offered to certain newly hired personnel, or changes in compensation offered to certain existing personnel, to be discussed at the meeting.

First, OIP strongly opposes, as it uniformly does, amendment of the Sunshine Law to include provisions related to a specific board. The Sunshine Law was intended to provide provisions of general applicability, and the proposed language is inconsistent with that intent and with the rest of the chapter's provisions. Moreover, if section 89C-4 is amended, amendment to the Sunshine Law is **unnecessary** to effectuate the intent of this bill. **Accordingly, OIP strongly objects to, and recommends deleting, the proposed amendment to section 92-5(a)(2).**

Second, OIP offers the following comment. The Sunshine Law protects an individual's privacy by allowing a board to discuss information related to the hire or evaluation of an officer or employee, including proposed compensation, in an executive meeting, unless the individual requests an open meeting. Haw. Rev. Stat. § 92-5(a)(2) (Supp. 2006). This bill would expressly overrule this Sunshine Law exception for the excluded UH employees, resulting in disparate treatment of those employees from other similarly excluded administrative employees whose privacy with respect to proposed compensation would generally be protected both under the Sunshine Law and under the UIPA.

Third, OIP believes the proposed language creates some ambiguity as to whether the intent is that the Board only "disclose" proposed compensation for an excluded employee in an open meeting or that the Board actually "consider" the proposed compensation in an open meeting.

Thank you for the opportunity to testify.



House of Representatives
Committee on Judiciary
February 21, 2008
2:45 p.m.

H.B. 2583, H.D. 2 Relating Government Operations

The University of Hawaii Professional Assembly (UHPA) has advocated for the disclosure of the salaries proposed for excluded administrators at the University of Hawaii prior to formal action by the Board of Regents.

UHPA recommends that H.D.2 move forward as drafted. H.D. 2 is an improvement on H.D. 1 because it deletes language regarding the deliberative process privilege. UHPA believes the public deserves a right to meaningful comment but UHPA doesn't seek to undermine the ordinary process of managerial deliberation. The previous language was intrusive and not necessary to achieve the objectives of the bill.

During the course of this legislative session, the UH administration and UHPA have exchanged appropriate views on this matter. The nature of the discussion was professional but no specific agreement or stipulation was made between the parties. UHPA believes that H.D. 2 is friendlier to the expressed interests of UH.

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UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

HB 2583 HD 2 – RELATING TO GOVERNMENT OPERATIONS

Testimony Presented Before the
House Committee on Judiciary

February 21, 2008

by

Darolyn Lendio
Vice President for Legal Affairs and University General Counsel
University of Hawaii System

Chair Waters, Vice Chair Oshiro, and Members of the Committee:

The University of Hawaii'i opposes HB 2583 HD 2 because it would abandon the long-established and carefully-crafted balance struck by Hawaii'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.

HB 2583 HD 2 would amend sections 89C-4, 92-5, 304A-1001, and 304A-1004, Hawaii'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), Hawaii'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 Hawaii'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

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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. HB 2583 HD 2 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 would apparently 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 direct authority that the Board has delegated. 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 exclusive 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 2 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 2 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

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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 2 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.

In conclusion, existing law strikes an appropriate balance between public disclosure and agencies' need to keep certain limited matters confidential. HB 2583 HD 2 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 2 be held.

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