

UNIVERSITY OF HAWAII SYSTEM

LEGISLATIVE TESTIMONY



SB 2263 – RELATING TO THE UNIVERSITY OF HAWAII

Testimony Presented Before the
Senate Committee on Education

February 1, 2008

by

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Chair Sakamoto, Vice Chair Tokuda, and Members of the Committee:

The University of Hawai‘i opposes SB 2263 because the bill, in its current form, is ambiguous and contrary to existing provisions of the Sunshine Law and Uniform Information Practices Act that provide for open meetings and public disclosure subject to limited, well-established, and appropriate exceptions. The bill may also create administrative problems and inefficiencies for the University and is and contrary to the Board of Regents’ exclusive jurisdiction over the University’s internal structure, management, and operation under the State Constitution.

Sections 1 and 2: Predecisional Disclosure of Proposed Compensation

Sections 1 and 2 of SB 2263 would amend sections 89C-4 and 92-5, 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 changes in changes 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. SB 2263 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 SB 2263: 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. SB 2263 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. If public disclosure of proposed future compensation levels for excluded employees 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 would 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.

Section 3: Disclosure of Board of Regents Expenditures and Budgetary Documents

Section 3 of SB 2263 would amend section 304A-105, HRS, to require “all expenditures and changes thereto” made by the Board of Regents to be disclosed in open meeting for purposes of public comment, and to require that all “expenditure requests, proposals, and any other budgetary documents utilized by the board in an open meeting” be made available to the public at least six days before the meeting.

The University supports the principle of fiscal transparency and strives to make fiscal information available to the public in a timely manner. This section of the bill, however, as drafted is unworkable, it has the unintended consequence of forcing the Board to use stale financial information, and it will bring the fiscal and monetary operations of the University to an immediate halt.

“All expenditures”, “expenditure requests” and “proposals” could be interpreted to mean that each and every transaction the University processes during its normal daily operations, would need to be brought to the Board for public comment at a Board meeting. This would be impracticable and unreasonable, since the University processes hundreds of thousands of purchase orders, requisitions, checks, contracts and other transactions. Not all expenditures of money by the University need to be specifically approved by the Board of Regents. Good management requires that expenditure authority be delegated to University administrators, which include delegation of authority to system officers, to the campus chancellors, and to appropriate fiscal officers within each campus. For example, settling a nuisance lawsuit for a nominal \$1,000 does not need to be brought before the Board for approval. Similarly, entering into a \$25,000 research contract does not need Board approval. When the Board office buys a new desk top computer for its staff, such expenditure is “made by the Board” because it is accounted for in the sub account for the Board Office. But this computer purchase is not presented for approval at a duly noticed public meeting of the Board.

Section 304A-105 is intended to empower the Board to act. The powers enumerated in this section are meant to be high level, comprehensive, authorizing powers: the Board is empowered to appoint officers; the Board is empowered to delegate authority; the Board is empowered to purchase lands; and the Board is empowered to spend money. We interpret this section of Chapter 304A as the “organic” powers of the Board of Regents, somewhat akin to Articles of Incorporations for private corporations. This section is not meant to be the “operations manual” for the University. The policy guidelines, the implementing procedures and the operational details of running the University are set forth in Board Policies, in Executive Policies, and in Administrative Procedures. In keeping with the principles of transparency, all of these internal policies and procedures are posted on public websites.

The statutory drafting problem reflected in this bill is that its “expenditure process” requirements are engrafted onto the Board’s organic powers, thus severely hobbling what should remain as broad gauge empowering authority. We do not believe this bill was intended to require that all expenditures of funds by the University, or changes thereto, must be approved at an open meeting of the Board. The fiscal operations of the University and all its 10 campuses state wide would grind to a halt if this requirement were fully implemented. No entity as large or as complex as the University of Hawaii system could operate if all expenditure or changes to expenditures had to be proposed, discussed, and approved at a public meeting by a governing board of directors.

We also do not think the bill's requirement that any budget document used by the Board at an open meeting must be available to the public at least six days before the meeting is workable. Strictly read, this provision would require the Board to retroactively fulfill a requirement (disclosing the document) only if a future condition is satisfied (using the document at a public meeting). Up to the time of the actual deliberation, the Board may or may not decide to take up a budget matter, or defer the matter. However, under the language of the bill, that decision made at the public hearing would trigger a requirement that ought to have been retroactively implemented six days prior to the hearing.

We think the intent of this proposed requirement is to prevent the Board from acting on, or discussing or taking into consideration a document that was not release to the public six days earlier. So interpreted, this proposed requirement forces the Board to act on stale information and ignore current fiscal information, if it chooses to act at all. This is not good management.

What might work would be language, suitably placed—and clearly not in the organic powers of the Board set forth in Section 105—requiring that to the extent the Board utilizes or refers to written documents at an open session of a Chapter 92 public meeting (as distinct from an executive session) of the Board, such documents must be made contemporaneously available to the public, either by distributing hard copies, or making a visual projection of the document, or some other means, for the purpose of allowing the public to better follow the Board's deliberation. Further, if a document exists and is in the Board's possession at the time the Board gives notice of a Chapter 92 meeting, and if the Board anticipates that it will openly discuss or refer to that document during the public session of that Chapter 92 meeting, the Board must make that document available to the public at the time it gives notice of the meeting.

This would be a workable, sensible requirement that strikes an appropriate balance between fiscal transparency, public accountability, good management, and operational feasibility. **It is also the current practice of the Board.**

The University believes that existing law and University practices in compliance therewith are sufficient and that broad new language like that in section 3 is unnecessary, infeasible in some circumstances, and counterproductive. The comments set forth above with respect to sections 1 and 2 of the bill are also applicable to section 3.

Summary

Existing law strikes an appropriate balance between public disclosure and agencies' need to keep certain limited matters confidential. SB 2263 would upset that well-crafted balance for the University of Hawai'i, and only the University. The bill would create unnecessary ambiguities in the law and potential administrative difficulties and inefficiencies for the University. It also invades the Board of Regents' exclusive jurisdiction over the University's internal affairs under the Hawai'i Constitution.

The University respectfully requests that SB 2263 be held.

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To: House Committee on Education

From: Paul T. Tsukiyama, Director

Date: Friday, February 1, 2008, 2:30 p.m.
State Capitol, Conference Room 225

Re: Testimony on S.B. No. 2263
Relating to the University of Hawaii.

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices ("OIP") has no position on the substance of the bill, but does oppose the amendment to part I of chapter 92, HRS (the "Sunshine Law") because it is inconsistent with that law and is unnecessary to effectuate the bill's purpose.

This bill seeks at section 1, page 1, lines 8 to 11, 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. The bill also seeks at section 2, page 2, lines 8 to 12, 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).

First, OIP reads the proposed language to require only the announcement or written disclosure of the proposed compensation in an open meeting, not the entire

discussion and consideration of that matter. If the Committee's intent is that the Board have its entire consideration of the proposed compensation for an excluded employee in an open meeting, OIP believes that the language of the bill should make that clear, by substituting the word "considered" for the word "disclosed" at p. 1, line 11. OIP notes, however, that consideration of the entire matter in an open meeting would result in different treatment of a limited class of excluded UH employees from similarly excluded administrative employees in other agencies whose privacy would generally be protected. Further, OIP notes that the bill requires disclosure of the proposed salary or proposed salary change "in open meeting" which may not allow the public sufficient notice for the preparation of testimony. If desired, the Committee may want to provide that the Board include the proposed compensation amount in its meeting notice filed under the Sunshine Law, if the proposed amount is known at the time the notice is filed.

Second, OIP does oppose, as it uniformly does, amendment of the Sunshine Law to include provisions related to a specific board. The Sunshine Law was intended to provide general provisions so the proposed language is inconsistent with the statute's intent and the rest of its provisions. Moreover, amendment to the Sunshine Law is unnecessary if section 89C-4 is amended. **Accordingly, OIP strongly recommends deleting the proposed amendment to section 92-5(a)(2).**

Third, OIP notes that the proposed language to section 304A-105(a)(5), at page 4, lines 10 to 13, contains the same ambiguity as the proposed language to section 89C-4 because it is unclear whether the requirement that expenditures and changes be "disclosed in open meetings" requires only the announcement or written disclosure of the information in an open meeting or that the entire discussion and consideration of the matter occur in an open meeting. OIP also notes that if the

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intent of the proposed language at page 4, lines 13 to 17, is to require UH to make available "all expenditure requests, proposals, and other budgetary documents" to be utilized at an open meeting consistent with the Sunshine Law's timeframe to file notice of that open meeting, the "six day" requirement should be amended to read "six calendar days." Haw. Rev. Stat. § 92-7(b) (Supp. 2006).

Thank you for the opportunity to testify.



The Senate
Committee on Education
February 1, 2008
1:30 p.m.

S.B. No. 2263 Relating to the University of Hawaii

On behalf of the University of Hawaii Professional Assembly, our union representing the 3,300 faculty members of the UH System supports the passage of this bill. The changes proposed in this legislation will allow meaningful public comment on proposed salaries and salary increases for excluded managerial and executive administrators in the UH System. Under the Board of Regent's current interpretation of the Uniform Information Practices Act, the public is caught in a classic "catch-22" where they may not know the salary proposal until after the action is taken, at which time any public comment would have no impact on the decision.

In the last five years, the salaries paid to UH administrators have gone up astronomically. This began with the salary paid to then President Dobelle that was two and half times more than that being paid to President Mortimer. President Dobelle then proceeded to make additional new administrative hires at salary levels that were unprecedented in the history of the University of Hawaii, and also increased the salaries of continuing executive administrators commensurate with these new salaries. Internal Regents' policy tied managerial and executive salary levels to position title descriptions in such studies as those produced by the College and University Personnel Association (CUPA—see www.cupahr.org/surveys/salariesurveyinfo.html.) Even as one could debate the relationship of these titles and salaries to the duties of specific administrative positions in the UH System, executive administrators have been hired, and received special salary increases, beyond the CUPA benchmarks.

These salaries and salary increases continue to be approved by the Regents, and they do appear as action items on the Regents' Meeting Agenda, but there's a catch. Under the "Sunshine Law" (HRS Chapter 92, Part I) the Regents can go into executive session to consider "personal decisions" that specifically deal with hiring, evaluation, dismissal, or discipline. Establishing salaries, however, is not listed. The Regents have determined that when they discuss any administrative salary or recommended salary increase, the provisions allowing an executive session apply. Action on setting the salary is then taken in executive session and never substantively reported on the record. HRS Chapter 92 provides that both the individual salaries of faculty members in bargaining unit 7 and the

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salaries of excluded administrators employed by the University of Hawaii are subject to public disclosure by name. These are the only public employees subject to such personal disclosure of salaries. Still, when the public is informed, through the agenda of the Regents, that an administrative salary will be considered, the amount of the increase or the salary amount is not disclosed. These are the highest paid public employees in the State of Hawaii, yet the public cannot comment on the appropriateness or impact of these salaries on the programs of the University since they are not disclosed. After the Regents have taken action, and approved the salaries, the public can then request disclosure of the salary that was approved, but at that point have no venue to provide testimony to influence the decision.

Considering the importance of these decisions with respect to the University of Hawaii and the State of Hawaii, we do not believe that it is unreasonable for the Regents' agenda to state the amount of salary proposed for an excluded administrator **prior to action by the Regents** to approve the salary. The ultimate decision on setting administrative salaries still rests with the Regents. Generally, the Regents discuss administrative salary requests in the meeting prior to them being scheduled for formal decision-making. It does not seem unreasonable for the Regents to then disclose to the public those salaries on the agenda for the meeting when they will be formally accepted. The decision will still be in executive session.

In the private sector, a different set of standards can be applied to the disclosure of salary data. In the public sector, salaries can be considered separately from hiring decisions and discharge related matters that require strict confidentiality. If this were not the case, the Legislature would not have approved public disclosure of salaries, exclusively, for the faculty and administrators of the University of Hawaii.

Respectfully submitted,


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