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To: House Committee on Judiciary

From: Paul T. Tsukiyama, Director

Date: Friday, March 28, 2008, 2:00 p.m.
State Capitol, Conference Room 325

Re: Testimony on S.B. No. 2263, SD 2
Relating to the University of Hawaii.

Thank you for the opportunity to submit testimony on this bill. The Office of Information Practices ("OIP") opposes 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 to amend section 89C-4, HRS, to require the Board of Regents 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. The bill, as proposed, additionally seeks to amend the Sunshine Law to add almost identical language to the open meetings exception for consideration of, 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. 2007).

OIP opposes, as it uniformly does, any amendment of the Sunshine Law to include provisions related to a specific board. The statute was specifically intended and is structured to provide general rules of application. Provisions specific to various boards should be placed in the statutes that govern that board or the process that will be affected, such as chapter 89C does here. The redundant

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wording placing the same requirement for disclosure in the Sunshine Law is inconsistent with the rest of the statute's provisions and unnecessary. If section 89C-4 is amended as proposed, that section would control. **Accordingly, OIP strongly objects to and recommends deleting the proposed amendment to section 92-5(a)(2).**

OIP notes that this bill will result in different treatment of a limited class of excluded UH employees from similarly excluded administrative employees in other agencies, whose privacy interests in proposed compensation would generally be protected under the Sunshine Law.

Thank you for the opportunity to testify.



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Testimony Presented Before the
House Committee on Judiciary
March 28, 2008 at 2:00 pm

by

Darolyn Lendio

Vice President for Legal Affairs and University General Counsel, University of Hawai'i

SB 2263 SD 2 – RELATING TO THE UNIVERSITY OF HAWAII

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

The University of Hawai'i opposes SB 2263 SD 2. The bill is 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. By establishing new public disclosure obligations applicable only to the University, the bill would create administrative problems and inefficiencies for the University and improperly restrict the Board of Regents' exclusive jurisdiction over the University's internal structure, management, and operation under the State Constitution. The bill would also invade the privacy and violate the equal protection rights of affected University employees by subjecting affected employees to greater public scrutiny without a rational basis.

Predecisional Disclosure of Proposed Compensation

SB 2263 SD 2 would amend sections 89C-4 and 92-5, Hawai'i Revised Statutes, to create new public disclosure obligations for certain University compensation decisions. Under these amendments, the University would be required to disclose "proposed compensation or changes in changes in compensation" for executive/managerial positions filled by excluded employees in an open meeting of the Board of Regents for public comment. The University opposes the amendments for a number of reasons.

First, the proposed disclosure mandates would make the University's employment decisions slower and more cumbersome. 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. SB 2263 SD 2 would apparently require the Board of Regents to exercise direct authority over all hiring and compensation decisions involving excluded administrative employees. This

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would add unnecessary delays and inefficiencies to relatively routine employment decisions. It would also make it more difficult for the University to hire desirable employees, as many prospective employees request that their applications be handled confidentially until an offer is made and accepted so that their pre-existing employment will not be adversely affected.

Second, the substantive provisions of the bill are inconsistent with its findings and purpose. Section 1 of the bill contains findings stating that the Legislature is concerned that “salaries of university faculty and administrators have dramatically increased” and that “approximately four hundred and seventy-three faculty and administrators are currently paid salaries that exceed the salary of the governor of Hawaii, which makes the matter one of statewide importance and concern.” However, the public disclosure obligations created by the bill are inconsistent with the stated concerns. The bill requires predecisional disclosure of proposed compensation for “executive/managerial positions...filled by excluded employees.” There are currently approximately 250 executive positions for excluded employees in the University of Hawaii’s system (some of which are vacant). Of those positions, 95 currently receive salaries in excess of the Governor’s. The majority of excluded executive employees do not receive salaries greater than the Governor’s but would still be covered by the new public disclosure mandate. Meanwhile, 354 faculty members and 12 administrative, professional, and technical (“APT”) employees (including coaches) receive salaries in excess of the Governor’s and are within the bill’s stated area of concern, but are not covered by the bill’s requirement for predecisional disclosure of proposed compensation.¹ Thus, the bill does not effectively address its stated concerns.

Third, the treatment of excluded executive employees under the bill invades their privacy and violates their right to equal protection under the laws. Currently, prospective employees of the University are subject to the same rules as applicants to other State agencies. Under University policies and procedures, applicants for most positions can ask for and receive confidentiality in the hiring process until an employment decision is made.² Proposed changes in excluded executive employees’ compensation and the reasons for such changes are also confidential until a final decision is made. Since changes in current employees’ compensation are generally performance-based, predecisional confidentiality protects employees’ privacy and the University’s interest in providing candid feedback without subjecting employees to possible public embarrassment. The bill singles out excluded executive employees of the University for this unique and unfavorable statutory treatment even though the classification created by the bill is inconsistent with its stated purposes. Therefore, the

¹ Faculty members and APT employees are covered by the Unit 7 and Unit 8 collective bargaining agreements, respectively. These employees’ terms and conditions of employment are subject to the collective bargaining process, and subjecting their compensation to additional public disclosure mandates would raise contractual and other issues.

² For some senior positions, the University as a matter of policy discloses the names of finalists and seeks input from the University community.

classification lacks a rational basis and violates affected employees' right to equal protection.

Fourth, the University agrees with the Office of Information Practices ("OIP") that the current language of the bill is ambiguous as to its intent and effect. As OIP pointed out in its testimony to Senate committees considering this bill, if the intent of the legislation is to require that no compensation shall be paid to excluded executives at the University, and no change to that compensation can be effected, unless or until the Board of Regents acts on the compensation at a public meeting held pursuant to Chapter 92 ("Sunshine Law"), the word "disclosed" should be replaced by "considered" and other clarifying language should be inserted. As stated above, the University also agrees with OIP that the bill would cause excluded executive employees of the University to be treated differently than similarly-situated employees in other agencies whose privacy would generally be protected. The University concurs with OIP's fundamental assessment that the Sunshine Law is a law of statewide concern and that it is inappropriate to amend the generally-applicable provisions of the Sunshine Law with special provision applicable only to a specific State agency.

Fifth, these flaws, in turn, point to another fundamental problem with SB 2263 SD 2: it violates the University's autonomy under the State 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 SD 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. While public disclosure of agency records and the appropriate balance between public disclosure and agencies' need for confidentiality are clearly matters of statewide concern, the Legislature has appropriately addressed such matters by enacting general laws—the Sunshine Law and the Uniform Information Practices Act—that incorporate appropriate, generally-applicable exceptions from public disclosure. The findings section of SB 2263 SD 2 asserts that it relates to matters of statewide concern, but the fact that it applies only to the University demonstrates otherwise. If

public disclosure of proposed future compensation levels for excluded executive 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, not adopt special rules that apply to University employees but not to similarly-situated employees of other agencies.

Sixth, SB 2263 SD 2 is unnecessary and inappropriate because existing law creates a careful and appropriate balance between the public's right to know and agencies' need to keep certain matters confidential. This balance is incorporated into Hawaii's Uniform Information Practices Act, HRS chapter 92F, which includes an exception from the general rule of public disclosure to protect predecisional materials created during an agency's deliberative process. The Office of Information Practices has repeatedly explained that the exception is appropriate and necessary to enable agencies, including the University, to perform their missions and to protect their internal communications and the quality of their decisions. See OIP Op. Ltr. Nos. 91-24, 91-16, 90-11, 90-8. SB 2263 SD 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. Once a compensation decision is made, executive employees' compensation is public information under current law (section 92F-12(a)(14), Hawaii Revised Statutes), and the University makes salary information available to the public as required.

Seventh, 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.

For all of these reasons, the University opposes the provisions of SB 2263 SD 2 requiring predecisional disclosure of certain University employees' proposed compensation or changes in compensation.

Disclosure of Board of Regents Expenditure and Budgetary Documents

SB 2263 SD 2 would also amend section 304A-105, HRS, to require "all documents regarding 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

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“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, could have the unintended consequence of forcing the Board to use stale financial information, and could bring the fiscal and monetary operations of the University to an immediate halt.

“All documents regarding expenditures...made by the board” 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. All general powers of the University are exercised “under the direction of the board of regents” pursuant to section 304A-103, HRS, so “expenditures...made by the board” could be construed to include all expenditures of the University. Requiring the Board of Regents to review and approve all documents relating to University expenditures 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. The University interprets 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. The University does 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.

It appears that the Senate Committee on Education attempted to address this drafting problem by amending the original version of SB 2263 to refer to “documents regarding expenditures” rather than simply “expenditures.” However, this change did not solve the problem. Because all University expenditures could be construed as made by the Board of Regents, documents relating to all University expenditures would at least arguably be covered by the current language of the bill, even if such documents are never presented to or reviewed by the Board of Regents. If the intent of the bill is simply to require public disclosure of financial information that is actually provided to the Board of Regents, the requirement for public disclosure of “all documents regarding expenditures and change thereto” should be deleted in its entirety, since the bill also incorporates a specific requirement for public disclosure of “expenditure requests, proposals, and any other budgetary document utilized by the board at an open meeting.”

However, 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 also problematic in its current form. 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.

It appears that the intent of this proposed requirement is to prevent the Board from acting on, discussing, or taking into consideration any document that was not released 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. In their current form, the provisions of SB 2263 SD 2 requiring disclosure of expenditure and budgetary documents threaten to cripple the financial management of the University.

Conclusion

For the foregoing reasons, the University opposes SB 2263 SD 2 and asks that it not be advanced.