

SB 1384

Testimony

Measure Title: RELATING TO THE UNIVERSITY OF HAWAII.

Report Title: University of Hawaii; Board of Regents; General Counsel; Attorney General

Description: Amends section 304A-1005, HRS, to: (1) Limit the board of regents to appointing only one university general counsel; (2) Require the board of regents to have direct oversight over the university counsel and prohibit the board of regents from delegating this responsibility to the president of the university; (3) Require the university general counsel to report directly to the board of regents; and (4) Allow the board of regents to contract with independent attorneys solely in cases where the university general counsel and attorney general each acknowledge a lack of sufficient expertise. Requires contracted attorneys to consult with and work in conjunction with the attorney general.

Companion: [HB1073](#)

Package: None

Current Referral: HRE/JDL, WAM

Introducer(s): KIM, IHARA, NISHIHARA, SLOM, WAKAI, Baker, Espero, Gabbard, Ige, Kahele, Keith-Agaran, Kidani, Kouchi, Ruderman, L. Thielen



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Testimony Presented Before the
Senate Committees on Higher Education and Judiciary and Labor
Tuesday, February 12 at 2:45

by
Linda K. Johnsrud
Executive Vice President for Academic Affairs/Provost, University of Hawai'i

SB 1384 – RELATING TO THE UNIVERSITY OF HAWAII

Chairs Taniguchi and Hee, Vice Chairs Kahele and Shimabukuro, and members of the committees:

The University of Hawai'i respectfully opposes SB 1384, which would limit the Board of Regents to appointing a single attorney to represent the Regents and provide legal service to the University; require that the attorney report exclusively to the Board of Regents; and permit the Board of Regents to retain outside counsel only in situations in which both the University General Counsel and the Attorney General acknowledge a lack of sufficient expertise, and provided that the outside attorney consults and works in conjunction with the Attorney General.

The University administration, as well as the Board of Regents, depend on access to legal counsel to deal with the broad range of legal issues that arise in an organization of the University's size and scope. It would not be feasible for a single attorney to handle the entire volume of the University's legal work, particularly with only limited access to outside counsel when needed to provide specialized expertise or additional capacity.¹

Requiring the Office of the Attorney General to perform some or all of the University's legal work, or to select and manage outside counsel on behalf of the University, would also be problematic. The Legislature originally authorized the University to hire its own counsel because it recognized that counsel accountable directly to the University and exclusively focused on its legal matters could more effectively serve the University than the Office of the Attorney General, which has a range of other responsibilities. That continues to be true.

It is also appropriate for the Board of Regents to continue to determine the reporting responsibilities of the General Counsel. The General Counsel and subordinate attorneys perform legal services on a range of matters, including matters delegated to administration in which the Board is not directly involved. The Board of Regents, which is responsible for the internal governance of the University, is in the best position to determine how to provide

¹ It is not completely clear whether the bill is intended to limit the University to employing only one attorney total, or whether it would permit one General Counsel plus additional, subordinate attorneys (which is the current structure).

oversight and accountability for the full range of legal matters performed by the Office of General Counsel.

The attached summary, which was prepared by the Office of General Counsel, provides additional information regarding its operations.

Thank you for the opportunity to testify on this measure.

University of Hawai'i Office of General Counsel (OGC) Overview

OGC's goal is to serve the University's legal needs in rendering quality legal services in a timely manner to support the University in meeting its mission "to provide all qualified people of Hawai'i an equal opportunity for quality college and university education at both graduate and undergraduate levels."

The OGC works on all areas of the law pertaining to state agencies and large companies in general, but also works on specialized areas of law unique to an institution of higher learning to support the core mission for the benefit of the citizens of the State of Hawai'i.

The budget allocation and actual expenses of the OGC has remained relatively constant since FY 2008 despite tremendous growth experienced by the University.

The retention of outside legal counsel to complement the work of the OGC is done only when it is deemed in the best interest of the University or if there is a legal conflict that prevents the OGC from rendering legal services in a particular matter.

Operational Background

As background, the OGC was created by the Legislature in 1999 as a direct outgrowth of constitutional autonomy for the University. Prior to that, the University relied on the state Department of the Attorney General for legal counsel, just as the other state departments do. The Department of the Attorney General assigned one or two attorneys to the University to handle the University's entire legal services workload.

The growth of the University system with 10 campuses statewide over the past ten years has been significant. This is evidenced by the University's record enrollments for several consecutive years and the increase in the University's workforce (faculty and staff) since the time the OGC was established. The University's growth, combined with issues that are unique to higher education (including such areas as research, academic programs, development, and collegiate athletics), required dedicated legal expertise to facilitate the attainment of the goals and mission of the University. The Legislature determined the creation of the OGC was to be an integral part of the University's capacity to implement its autonomy.

Operationally, the OGC monitors the number of legal matters handled by the office, status of those legal matters, and provides quality legal services to the University in a timely manner. The OGC reports directly to the Board of Regents and the President of the University.

OGC basic facts:

Serves the University (a statewide "corporate body" having an annual operating budget of approximately \$1.4 billion per year, with approximately 8,000 to 10,000 employees statewide and approximately \$4 billion in net assets.)

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Staff: 1 General Counsel/6 Staff Attorneys/3 secretaries/1 secretary-legal assistant/1 legal assistant [1 staff attorney position and 1 secretary position currently vacant]

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Current number of active and open matters: approximately 1,625

Average number of new matters opened per year: approximately 650-750

OGC Operating Budget: approximately \$1.2 million per year (see table below)

Areas of practice:

OGC covers all areas that are faced by one of the largest corporations in the State, but also does specialized work in the area of research, academic freedom, patents, copyright, trademark, licensing, academic ethics and other areas related to higher education - labor and employment issues, workplace injury, research grant applications, contracts, personal injury, sponsorship agreements, real estate development, land use issues, environmental issues, collections, student issues, collegiate athletics issues, financing and bond matters, risk management, equal employment, civil rights, Native Hawaiian issues, ceded lands issues, information technology, distance learning, etc., to name a few.

Annual operating budget and expenditures

The numbers represented below are the OGC's annual budget allocation within the UOH900 appropriation.

Fiscal Year	Salary	Operating	Total
2008	\$1,131,499	\$120,512	\$1,252,011
2009	\$1,170,497	\$111,068	\$1,281,565
2010	\$1,108,357	\$75,984	\$1,184,341
2011	\$1,078,622	\$62,754	\$1,141,376
2012	\$1,088,199	\$75,638	\$1,163,837

FY2013 (Projected budget allocation for this fiscal year)

Salary - \$955,877 (Salary includes projection of currently filled positions to 6/30/2013.)

Operating - \$207,960 (Operating funds include the allotted base budget for one (1) vacant AVP General Counsel position and one (1) current Legal Clerk position.)

Total - \$1,163,837

FY2014 (Projected budget allocation for next fiscal year)

Salary - \$1,184,096 (Salary assumes the filling of one (1) AVP General Counsel position and one (1) Legal Clerk position. Salary also assumes that the temporary salary saving that expires 6/30/2013 is restored as scheduled for HGEA members.)

Operating - \$75,000

Total - \$1,259,096

The numbers represented below are the OGC's actual expenditures for FY2008 – FY2012.

FY	Salary	Operating	Total
2008	\$1,092,193	\$95,803	\$1,187,996
2009	\$1,158,533	\$113,370	\$1,271,903
2010	\$1,110,951	\$44,593	\$1,155,544
2011	\$1,006,062	\$67,422	\$1,073,484
2012	\$1,136,396	\$74,323	\$1,210,719

Retention of outside legal counsel

Outside legal counsel is retained when it is considered in the best interest of the University to do so. The retention of outside legal counsel to perform work for or on behalf of the University is an integral and critical part of handling and managing the University legal services workload, particularly given the high volume of matters that come into the OGC annually (ranges from an average of approximately 650 to 750 new matters per year with a current total of approximately 1,625 active matters) and the limited number of OGC attorneys (7 attorney positions at the present time, which includes one vacancy). Without outside legal counsel, the University and OGC would be hard pressed to maintain their current level of effectiveness and would not be placing themselves in the best position to succeed on behalf of the University or making the best use of its limited resources.

The 7 staff attorney positions are a streamlined, concentrated core providing legal services to the University system statewide. It would be impossible for such a small staff to manage the volume of complaints, cases, actions, and matters that come in every year, particularly when many frequently require attorneys with specialized skills in a particular area. The

specific instances in which the University would seek to hire outside legal counsel are as follows:

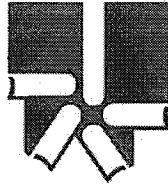
1. Specialized knowledge required. If there is a particular specialized field or area of knowledge that is not adequately covered by or represented on the current staff; or
2. Complex litigation. It is a large, complex litigation case that would require dedication of significant attorney and staff time away from other priority legal matters and occupy an inordinate amount of attorney and staff time to properly supervise and monitor, or
3. Conflict of interest. If there is a legal conflict of interest with the office being able to represent more than one party in the case (for instance, if an employee complains against another employee and UH and UH is the employer).

The process for selection of outside legal counsel involves the steps listed below and is followed as a regular practice consistent with the applicable procurement laws:

1. Request for Qualifications. Annual RFQ (Request for Qualifications) conducted through both advertising and internal industry communication. Names, expressions of interest, statements of qualifications, and resumes received by the University Procurement Office are forwarded to the OGC. One or more committees made up of members of the OGC reviews the submissions and determines whether the attorneys are qualified to perform legal services in the areas for which they applied (e.g., creates an "approved vendor" list).
2. Need for outside counsel. The OGC in consultation with the client (Board of Regents or UH Administration) determines whether outside counsel is needed in a particular case.
3. Screening committee. Three-member internal committee made up of staff attorneys, excluding the University General Counsel, evaluates the listing of qualified attorneys in the relevant field or fields of law. The screening committee ranks the top 3 attorneys as to suitability for a particular case and submits them to the University General Counsel for consideration. The screening committee frequently consults with clients regarding the type of attorney they seek to assist them, particularly if it is a specialized area of law.
4. Selection. The University General Counsel selects from the list submitted by the screening committee. Although the University General Counsel has the prerogative to choose an attorney not ranked first by the screening committee, the University General Counsel almost always selects the top ranked attorney, as recommended by the screening committee. Additionally, if it is discovered after the selection that the first ranked attorney has a legal conflict and is unable to accept

the matter from the University, the University General Counsel may select another attorney from the recommended list submitted by the screening committee.

5. Compensation. Rates and specific attorneys who staff any matter are negotiated by the University General Counsel to obtain the optimum rates and results on behalf of the University. If no agreement can be reached, then the University General Counsel may select the next ranked attorney and commence negotiations toward a contract.



The Senate
Joint Committees on Higher Education
and Judiciary and Labor
Tuesday, February 12, 2013
2:45 p.m.

SB 1384, Relating to the University of Hawaii.

Dear Chairmen Taniguchi and Hee and Committee Members:

The University of Hawaii Professional Assembly (UHPA) has expressed concerns regarding the operations of the University of Hawaii General Counsel and its responsibility in carrying out functions relating to the collective bargaining agreement and its implementation. The experience of UHPA indicates there is not a clear line of authority between the University of Hawaii President and Legal Counsel regarding responsibility for legal matters, such as prohibited practices, and matters regarding the relationship with the exclusive bargaining representative. This has resulted in delegation of authority to resolve legal issues to the campus level with the employment of outside counsel. UHPA has strenuously objected to this delegation and the problems inherent in removing the accountability from both the President and General Counsel acting upon behalf of the Board of Regents in significant matters.

UHPA believes that the funds being expended on the use of outside legal counsel directly impact instructional program by transferring legal costs to the respective campus and instructional department due to arbitrations and Hawaii Labor Relations Board activities. This type of expenditure itself should be suspect and a matter of concern regarding financial accountability for overall legal expenditures authorized by the UH President and General Counsel.

UHPA appreciates the intent of SB 1384 to clarify and seek remediation in the operations of the University of Hawaii General Counsel functions.

Respectively submitted,

A handwritten signature in black ink that reads "Kristeen Hanselman".

Kristeen Hanselman
Associate Executive Director

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY

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