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November 9, 2012

VIA EMAIL:

Senator Donna Mercado Kim  
State Capitol  
415 South Beretania Street  
Honolulu, Hawaii 96813

Re: Task Group Confidentiality Covenant

Dear Senator Kim:

In your letter dated October 12, 2012, you asked the Office of Information Practices (OIP) for guidance as to whether the Sunshine Law, chapter 92, Hawaii Revised Statutes (HRS), would be violated by requiring members of the University of Hawaii Board of Regents' (Regents) Advisory Task Group on Operational and Financial Controls (Task Force) to sign a Confidentiality Covenant (Covenant) regarding their work in that group. Your letter noted that during the Informational Briefing of the Senate Special Committee on Accountability held October 2, 2012, the Regents' Vice-Chair, James H.Q. Lee, testified that the Task Force members were required to sign such a covenant. Because OIP has been asked only for general guidance as to whether such an agreement could be consistent with the Sunshine Law, OIP has not asked the Regents for their position regarding the matter, and will not make factual findings or provide an opinion as to the legal standing of the Task Force itself or the Covenant. If you would like OIP to provide an opinion on those issues, we will open an investigation file upon your request.

The unsigned copy of the Covenant, which you enclosed for OIP's review, requires signatories to keep the "work, deliberations, and records of the Task Group" confidential and to direct all inquiries regarding the Task Force to Eric Martinson, the Regents' Chair<sup>1</sup> (Chair), and warns members that in the event of an unauthorized disclosure they may be removed from the Task

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<sup>1</sup> From the list of Task Force members you enclose, it appears that the Chair is not actually a Task Force member, so it is unclear how he would be able to answer questions regarding the Task Force's ongoing work. However, it is possible that his response as designated contact to any inquiries may simply have been to state that the investigation was pending and that no information would be released until the Task Force made its report.

Force and may be in violation of the law.<sup>2</sup> You also enclosed a memorandum from the Chair to all Regents<sup>3</sup> setting out the proposed scope of authority and membership for the Task Force.

It appears that the Task Force was set up as a permitted interaction group under section 92-2.5(b)(1), HRS. Permitted interactions are circumstances in which the Sunshine Law specifically allows board members to discuss board business outside a meeting, and are exceptions to the law's general rule that such discussions must take place only at a meeting open to the public. OIP discussed the requirements of the specific permitted interaction at issue here in its Opinion Letter Number 06-02, writing at pages 3-4:

The Sunshine Law generally prohibits board members from discussing "board business" [footnote omitted] between themselves outside of a properly noticed meeting. Haw. Rev. Stat. § 92-3 (1993). However, in limited circumstances board members may privately discuss "board business" as a permitted interaction, and such discussions are not considered meetings for the purpose of the Sunshine Law. Haw. Rev. Stat. § 92-2.5(f) (Supp. 2005). The "investigation" permitted interaction, which the Board referred to as the basis for the Committee, allows a group of board members constituting less than a quorum of a board to investigate a matter relating to the board's official business outside of a meeting. Haw. Rev. Stat. § 92-2.5(b)(1) (Supp. 2005). The statute, however, imposes specific procedural requirements that a board must follow in forming the investigative task force and considering the task force's findings and recommendations. *Id.* More specifically, the board members chosen to participate in the investigative task force must be named at a board meeting and the scope of the investigation and each member's authority must be defined at that time. *Id.* The investigative task force must report back at a second meeting, and the board cannot discuss or act on that report until another meeting "held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board." *Id.* The language of the statute, in other words, anticipates that an investigative task force will undertake an investigation of defined and limited scope and will make a single report back to its board, after which the board (at a later meeting) may discuss and act on the issue. Because the permitted interaction allows board members to privately discuss board business, an exception to the usual open meeting requirements, OIP must strictly construe the statutory requirements. Haw. Rev. Stat. § 92-1(3) (1993).

Thus, assuming that the Task Force was indeed created as a permitted interaction group under section 92-2.5(b)(1), HRS, the Sunshine Law would not require that its work be done in open

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<sup>2</sup> The only law specifically referenced in that connection is the Uniform Information Practices Act (Modified), chapter 92F, HRS (UIPA). It is not clear what provision of the UIPA was relied upon as setting out civil and criminal penalties for a disclosure in violation of the Covenant.

<sup>3</sup> The memorandum is dated the day before the meeting at which Regents apparently created the Task Force. However, it is possible that it was actually distributed at the meeting itself, or was filed as an attachment to the agenda for that meeting, rather than being distributed outside a meeting.

meetings, so the members' agreement to keep their discussions private would not be in contradiction to the Sunshine Law's requirements.<sup>4</sup> The Task Force would need to follow statutory requirements for such a group, as described above, which notably include the requirement that "[a]ll resulting findings and recommendations are presented to the board at a meeting of the board." HRS § 92-2.5(b)(1)(B). Although the language of the statute does not specifically state that the report must be made in open session, the Sunshine Law requires that exceptions to the general open meeting requirement be narrowly construed and OIP recognizes that the reporting requirement is the mechanism ensuring public accountability as to board members' discussions of board business that may otherwise take place entirely outside the public eye. Consequently, OIP has generally recommended that even where a permitted interaction group's report deals with an issue that would be suitable for discussion in an executive session,<sup>5</sup> the group should still give a report of its findings and recommendations in open session. Again, though, the Confidentiality Covenant does not appear to contradict the report requirement, in that it does not appear to bar any release of information regarding the group's work at any time, but instead appears only to bar an unauthorized release by an individual member.

In summary, an agreement by members of a permitted interaction group operating under section 92-2.5(b)(1), HRS, to keep information about their work confidential, would not be inconsistent with the Sunshine Law so long as the group still fulfilled all the statutory requirements set forth in that section.

If you have further questions about this issue or the Sunshine Law in general, please do not hesitate to contact OIP.

Very truly yours,



Jennifer Z. Brooks  
Staff Attorney

JZB:cly

cc: Darolyn Lendio, Esq. UH General Counsel (via email)  
UH Board of Regents (via email)

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<sup>4</sup> The confidentiality required by the Covenant, insofar as it applies to records of the Task Force, could conflict with UIPA, which as a state law would preempt a confidentiality agreement. However, the mere existence of the Covenant would not be a violation of the UIPA. A violation of the UIPA would occur only if the Regents relied on the Covenant to withhold Task Force records that the UIPA required to be made public.

<sup>5</sup> The purposes for which a board may hold an executive session are listed in section 92-5, HRS. Although the topic addressed by this permitted interaction group as a whole is not one that clearly falls into one of the listed purposes, it is possible that some part of their investigation falls under one of the purposes, such as the one for personnel issues where an individual's privacy is involved.