MEMORANDUM

TO: Robert Cooney
Chair, Senate Executive Committee

FROM: Gary K. Ostrander
Vice Chancellor for Research and Graduate Education

SUBJECT: REVIEW OF NEW EXECUTIVE POLICY E5.229 WHISTLEBLOWER AND RETALIATION POLICY FOR ALLEGATIONS OF RESEARCH AND SCHOLARLY MISCONDUCT

We would like to submit a new executive policy, E5.229 Whistleblower and Retaliation Policy for Allegations of Research and Scholarly Misconduct, for review by the Mānoa Faculty Senate Executive Committee. We are recommending that the attached document be incorporated in the executive policies of the University of Hawai‘i, and are moving forward with the consultation process by seeking comments from the appropriate entities before submitting the final policy to the President.

A response from the Committee by Spring 2012 would be appreciated. Thank you for your attention to this matter.

c: Virginia S. Hinshaw, Chancellor, UH-Mānoa
   C.Y. Hu, Interim Assistant Vice Chancellor for Research (Compliance)
E5.229 Whistleblower and Retaliation Policy for Allegations of Research and Scholarly Misconduct

I. INTRODUCTION

As a public institution, the University of Hawai‘i (herein referred to as the University) has a responsibility to conduct its affairs ethically and in compliance with all laws and regulations. This responsibility extends to all faculty, staff, and students of the University, who are expected to conduct themselves in an ethical and legal manner. Furthermore, to maintain the quality, productivity, and funding for research at a major university, the highest research integrity standards must be supported. Accordingly, the University strongly believes in the importance of protecting whistleblowers who make good faith allegations of research or scholarly misconduct from interference and retaliation, and will undertake diligent efforts to protect the positions and reputations of those persons who make good faith allegations. As such, this policy provides both procedures and protection for all University employees and constituents who may make a good faith disclosure of suspected misconduct in research or scholarship in violation of Executive Policy E5.211. The University will take prompt and appropriate action to prevent, to correct, and if necessary, to discipline behavior that violates this policy (up to and including dismissal from the University).

This policy is also in accordance with the retaliation prohibitions in Executive Policy E1.202 (revision pending approval) entitled "Nondiscrimination, Anti-harassment, and Affirmative Action Policy.

II. SCOPE & PURPOSE

This policy is related to the existing Hawai‘i Employment Practices Law, Hawai‘i Revised Statutes (HRS) § 378-62, and supplements the University Executive Policy E5.211 – Policy for Responding to Allegations of Research and Scholarly Misconduct. This policy serves to protect complainants or informants from interference in making a protected disclosure or retaliation for having made a protected disclosure.

The purposes of this policy are to:

A. Comply with the HRS § 378-62, Office of Research Integrity (ORI) Whistleblowers Guidelines, and the Federal Whistleblower Bill of rights;

B. Provide procedures for the reporting and investigation of disclosures of improper research or scholarly conduct on the part of the University or any of its employees;
C. Protect any University employee or constituent who has made or attempts to make a
good faith disclosure of suspected research or scholarly misconduct from any form of
retaliation, threat of retaliation, or any form of adverse action from a University
member.

D. Provide procedures for processing whistleblower retaliation complaints.

More inclusively this policy serves to:

- encourage an atmosphere that allows individuals to disclose research or scholarly
  misconduct under Executive Policy E5.211,
- protect individuals from retaliation by adverse academic or employment action taken
  as a result of having disclosed allegations of wrongful conduct,
- provide individuals who believe they have been retaliated against with a process to
  seek assistance and support.

III. DEFINITIONS

A. Adverse Action – any action taken by the University or its members which negatively
affects the terms or conditions of the whistleblower status at the University, including
but not limited to his or her employment, academic matriculation, awarding of degree,
or institutional relationship established by grant, contract or cooperative agreement.

B. Allegation – any disclosure of scientific research or scholarly misconduct as defined by
Executive Policy E5.211 to the Research Integrity Officer, or other Institutional official
such as an Ethics Committee member, or Departmental Chairs or Deans.

C. Complainant – a person who makes an allegation of scientific research or scholarly
misconduct and agrees to be interviewed in an Inquiry or Investigation under
Executive Policy E5.211.

D. Deciding Official – the Senior Academic or Research Institutional Official appointed by
the University President, whose duties are defined in Executive Policy E5.211. This
individual makes final determinations on allegations of research misconduct,
retaliation complaints, and any institutional administrative action based on research
misconduct and retaliation complaint decisions.

E. Good faith allegation – an allegation of research or scholarly misconduct made with a
belief in the truth of the allegation. The whistleblower (complainant or informant) has
a reasonable basis that the information indicates research or scholarly misconduct. An
allegation is not in good faith if it falsely reports retaliation or is made with reckless
disregard for or willful ignorance of facts that would disprove the allegation.
F. **Informant** – person who wishes to remain anonymous, and informs the University (e.g., through the Ethics Committee, the Research Integrity Officer, or a Institutional official) of the possibility of research or scholarly misconduct.

G. **Interference** – direct or indirect use of authority or influence to obstruct an individual’s right to make a protected disclosure.

H. **Protected disclosure** – a good faith communication about actual or suspected wrongful conduct carried out by a University member based on a reasonable belief that the conduct has both occurred and is wrongful under Executive Policy E5.211.

I. **Research Integrity Officer** – appointed by the Deciding Official or his/her designee. The Research Integrity Officer is responsible for: (1) assessing allegations of research misconduct to determine if they fall within the definition of research or scholarly misconduct, as covered by Executive Policy E5.211 and whether they warrant an Inquiry on the basis of the allegation being sufficiently credible and specific so that potential evidence of misconduct may be identified; (2) overseeing inquiries, investigations, and retaliation complaints; and 3) providing staff support to Review Panels.

J. **Retaliation** – any adverse action or credible threat of an adverse action taken by the University or University member, in response to a whistleblower’s good faith allegation of misconduct. It does not include a decision to investigate whether an allegation of misconduct has been made in good faith.

K. **University Member** – a person employed by, affiliated with, under a contract or agreement, or under the control of the University. University members include but are not limited to administrative, teaching and support staff, researchers, clinicians, technicians, fellows, students, and contractors and their employees.

L. **Whistleblower** – an individual who makes an allegation or demonstrates intent to make an allegation (or what is perceived to be an allegation) against a University member involved in scientific or scholarly research. (Also referred to as Complainant or Informant.)

IV. **POLICY GUIDELINES**

These guidelines set forth the University’s approach for handling whistleblower retaliation complaints. Individuals who follow University procedures in making a good faith report have a conditional privilege and are protected from retaliatory academic or employment action including discharge, reassignment, demotion, suspension, harassment, or other acts of discrimination. In cases where allegations involve PHS funds, the Office of Research Integrity’s Whistleblower’s Policy and protections will apply in addition to this policy. Specifically, the University must undertake “diligent efforts to protect the positions and
reputations of those persons who, in good faith, make allegations."

A. Confidentiality
Disclosures made by a complainant or informant are considered to be strictly confidential by the University. The identity of a whistleblower who agrees to be a complainant will remain confidential, consistent with the need to know in order to conduct an adequate Inquiry and Investigation as defined by Executive Policy E5.211. The University regards confidentiality as fundamentally critical for both whistleblowers and respondents. Both parties shall abide by confidentiality guidelines stated in E5.211. Knowledge of informant identity should be limited to the Institutional official, Research Integrity Officer, Ethics Committee chairperson, or Ethics Committee member to whom the protected disclosure is made. As such, informant identity will not be part of the need to know process for conducting Inquiries and Investigations under E5.211 and retaliation complaint investigations as described below.

Consistent with PHS regulations and ORI policy, the University believes that whistleblowers possess a conditional privilege of protection to disclose, in good faith, to Institutional officials, the Research Integrity Officer, the Ethics Committee Chairperson, or EC member allegations of research or scholarly misconduct as defined by E5.211. This privilege does not extend to a whistleblower’s violation of confidentiality protections for a respondent as noted in this policy and E5.211, disclosure made to a person or persons not reasonably believed to be necessary to accomplish the purpose of the privilege, and intentional public allegation of misconduct, such as disclosure to the media.

B. Process for Filing a Complaint
A protected disclosure may be filed with the any Institutional official, the Research Integrity Officer, Ethics Committee Chairperson or member. Regardless of where the disclosure is made, the complaint will be forwarded to the Research Integrity Officer, who is charged with reviewing all allegations of scientific or scholarly misconduct, conflicts of interest, and responsible conduct of research. Individuals are encouraged to make their disclosure report in writing so that all issues and facts surrounding the complaint are clearly communicated.

Retaliation complaints submitted to the Research Integrity Officer should include all details relevant to the allegation, including the date and nature of the retaliation, the name of the individual(s) involved, and the names of any witness(s) or individual(s) who may have direct knowledge of the retaliatory acts. Upon receipt of a complaint, the Research Integrity Officer shall follow the procedures described below.

C. Process for Review of the Complaint
A protected disclosure of potential scientific research or scholarly misconduct will be evaluated following the standards that apply as outlined in Executive Policy E5.211. After a disclosure has been received, the Research Integrity Officer and Chair of the Ethics Committee will conduct a preliminary assessment of the allegation to determine
if an inquiry is warranted. After complaints are disclosed, whistleblowers are advised to continue to perform assigned duties.

Steps that may be taken as interim measures, when situations warrant, to protect complainants or informants during preliminary assessments, inquiries and investigations may include:

1. Temporary relocation;
2. Reassignment, or temporary shift to another supervisor;
3. Changing graduate advisors (students);
4. Alternative work/research schedule.

D. Protection from Retaliation
The University will not tolerate: 1) retaliatory actions against any employee or constituent for making a good faith allegation of misconduct, or 2) direct or indirect use or attempted use of official authority, or influence of an employee’s position or office for the purpose of interfering with the rights of another employee or constituent who wishes to make a protected disclosure.

E. Making a False Claim
Making a false complaint, or one not in good faith, is considered to be a serious ethical violation and will be treated accordingly. The institution has the burden of proving by a preponderance of the evidence that the allegation of scientific misconduct was not made in good faith, and whether or not a whistleblower abuses his or her conditional privilege will be a matter of fact specific inquiry.

V. Procedures for Processing Whistleblower Retaliation Complaints

A. Responsible Official
The Research Integrity Officer is the designated responsible official for implementing the University’s whistleblower policy and procedures. The Research Integrity Officer also serves as a liaison between the University and the Public Health Service’s Office of Research Integrity. The Research Integrity Officer shall be free of any real or apparent conflicts of interest in any particular case. If a real or apparent conflict of interest exists the Deciding Official shall appoint a substitute responsible official who has no conflict of interest.

B. Notice of Institutional Policy
The University shall provide to all its members notice of its whistleblower policy and procedures. The notice shall include the requirement set forth below regarding a whistleblower's deadline for filing a retaliation complaint. The policy and procedures shall be either disseminated or be publicized and made readily available to all institutional members.

C. Filing Complaints
1. A whistleblower who wishes to receive the procedural protections described by this policy shall file his or her retaliation complaint within 180 days from the date the whistleblower became aware of the alleged adverse action. The University shall review and resolve all whistleblower retaliation complaints and should do so within 180 days after receipt of the complaint. In cases where allegations involve PHS funds, if acknowledgement of the complaint is not received within ten (10) working days, the whistleblower should file the retaliation complaint directly with Office of Research Integrity at the following address:

   Office of Research Integrity  
   Division of Investigative Oversight  
   1101 Wootton Parkway, Suite 750  
   Rockville, MD 20852  
   Telephone: (240) 443-8800  
   Fax: (301) 594-0043

The Office of Research Integrity will forward such complaints to the Research Integrity Officer for appropriate action.

2. The retaliation complaint must include a description of the asserted adverse action, or threat thereof, against the whistleblower, by the institution or its members in response to the allegation made in accordance with E5.211. If the retaliation complaint is incomplete, the Research Integrity Officer shall describe to the whistleblower what additional information is needed in order to meet the minimum requirements of a complaint under this Part.

D. Responding to Complaints

1. Upon receipt of a whistleblower retaliation complaint, the Research Integrity Officer shall notify the whistleblower (or informant intermediary) of receipt within ten (10) working days. The notice shall also inform the whistleblower of the process the University proposes to follow in resolving the retaliation complaint and the necessary actions by the whistleblower required under that process.

2. The whistleblower may raise any concerns about the proposed process with the Research Integrity Officer and the University may modify the process in response to the whistleblower’s concerns.

3. The whistleblower has five working days from the date of receipt of the initial notification in Part 1 above to:

   a. Accept the proposed process, although the whistleblower may also submit documentation for the official record about any concerns he or she may have about the proposed process; or
b. Not accept the proposed process. If the whistleblower rejects the proposed process, he or she may appeal to the Deciding Official.

4. In matters involving PHS funds, the University shall notify The Office of Research Integrity of any whistleblower retaliation complaint it receives within ten (10) working days after receipt of the complaint.

E. Interim Protections
1. At any time before the merits of a whistleblower retaliation complaint have been fully resolved, the whistleblower may submit a written request to the Research Integrity Officer to take interim actions to protect the whistleblower against an existing adverse action or credible threat of an adverse action by the institution or member.

2. Based on the available evidence, the Research Integrity Officer shall make a determination of whether to provide interim protections and shall advise the whistleblower of his or her decision in writing. Documentation underlying the decision whether to provide interim protections shall become part of the record of the complaint. When the whistleblower retaliation complaint is fully resolved, any temporary measure taken to protect the whistleblower shall be discontinued or replaced with permanent remedies.

F. Institutional Investigation
1. Based on the available evidence, the Research Integrity Officer shall make a determination if the retaliation complaint is credible and specific relevant to an adverse action and protected disclosure concerning misconduct as defined by E5.211.

2. Upon determination by the Research Integrity Officer that the complaint is credible and specific, the University shall conduct an institutional investigation of the whistleblower retaliation complaint according to these procedures and implement appropriate administrative remedies consistent with the investigation's finding and institutional decision.

3. An investigation of whistleblower retaliation shall be timely, objective, thorough, and competent. The investigation should be conducted by a panel of at least three (3) individuals appointed by the Research Integrity Officer. The members of the investigation panel, who may be from outside the institution, shall have no personal or professional relationship or other conflict of interest with the whistleblower or the alleged individual retaliator(s), and shall be qualified to conduct a thorough and competent investigation.

4. The investigation shall include the collection and examination of all relevant evidence, including interviews with the whistleblower (if a complainant), the alleged retaliator(s), and any other individual who can provide relevant and material information regarding the claimed retaliation.
5. The University shall fully cooperate with the investigation and use all available administrative means to secure testimony, documents, and other materials relevant to supporting the investigation.

6. The confidentiality of all participants in the investigation shall be maintained to the maximum extent possible throughout the investigation.

7. The Research Integrity Officer and Panel members shall evaluate and respond objectively to any concerns raised by the whistleblower prior to resolution of the complaint about the process, including concerns regarding conflicts of interest on the part of institutional officials or specific panel member involved in implementing these procedures.

8. The conclusions of the investigation shall be documented in a written report submitted to the Deciding Official and made available to the whistleblower. The report shall include findings of fact, a list of witnesses interviewed, an analysis of the evidence, and a detailed description of the investigative process.

9. The Deciding Official shall make a final institutional determination as to whether retaliation occurred. This decision shall be based on the report, the record of the investigation, and a preponderance of evidence standard.

10. If there is a determination that retaliation has occurred, the Deciding Official shall determine what remedies are appropriate to satisfy the institution's regulatory obligation to protect whistleblowers. The Deciding Official shall, in consultation with the whistleblower, take measures to protect or restore the whistleblower's position and reputation, including making any public or private statements, as appropriate. In addition, the Deciding Official may provide protection against further retaliation by monitoring or disciplining the retaliator.

11. If PHS funding was involved in scientific misconduct allegation(s), the Research Integrity Officer shall promptly notify the Office of Research Integrity of its conclusions and remedies, if any, and forward the underlying investigation report to ORI.

12. University compliance with these procedures does not bar the whistleblower from seeking redress against the University's decision under items 9 and 10 as otherwise provided by law.