UNIVERSITY OF HAWAI'I SYSTEM LEGISLATIVE TESTIMONY

HB 2583 – RELATING TO GOVERNMENT OPERATIONS

Testimony Presented Before the
House Committee on Higher Education

January 29, 2008

by

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Chair Chang, Vice Chair Bertram and Members of the Committee:

The University of Hawai‘i opposes sections 1 and 2 of HB 2583 because they would abandon the long-established and carefully-crafted balance struck by Hawai‘i’s Uniform Information Practices Act and impose unprecedented and unworkable public disclosure obligations on the University (and the University alone). These sections are also inconsistent with the University’s Constitutional autonomy in its internal affairs and with the principle of equal protection of the laws.

The University takes no position on section 3 of the bill, which would require the University to include head athletic coaches in its annual report to the Legislature of executive, managerial, and faculty salaries.

Section 1: Deliberative Process

Section 1 of the bill would amend section 92-5, Hawai‘i Revised Statutes, to provide that the Board of Regents may not “withhold” recommendations, draft documents, proposals, suggestions, and other predecisional materials that comprise part of the deliberative process by which the Board of Regents formulates decisions and policies.

It appears that the purpose of this language is to require the University to publicly disclose such materials upon request. If so, the amendment would appear in the wrong chapter of the HRS. As drafted, the amendment is placed in chapter 92, the Sunshine Law, in the section that permits executive sessions to be held in certain limited circumstances. However, it is chapter 92F, the Uniform Information Practices Act, that requires public records to be made available, and section 92F-13 that sets forth the exceptions to public disclosure. This drafting flaw makes section 1 confusing, ambiguous, and unworkable.

Furthermore, the existing public disclosure exception for predecisional materials created during an agency’s deliberative process[1] is appropriate and necessary to enable agencies, including the University, to perform their missions. The Office of Information Practices has explained that:

> We believe that under the UIPA, the disclosure of inter-agency and intra-agency memoranda that are predecisional and deliberative would frustrate agency decision-making functions, such as the resolution of issues and the formulation of policies. As is well-recognized in the FOIA [federal Freedom of Information Act] legislative history and case law, the candid and free exchange of ideas within and among agencies is essential to decision-making and is less likely to occur when all memoranda for this purpose are subject to public disclosure. Specifically, an exception for disclosure prevents frustration of agency decision-making because:

[1] The deliberative process exception is based on section 92F-13(3), HRS, which protects “government records that, by their nature, must be confidential in order for the government to avoid the frustration of a legitimate government function.”

> [I]t serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

OIP Op. Ltr. No. 90-8 (internal quotation in original; citations omitted); see also Op. Ltr. Nos. 91-24, 91-16, 90-11. The Office of Information Practices has also explained that the exception is necessary to protect the quality of agency decisions:

> In discussing the purpose of this privilege [under the federal FOIA], the Supreme Court has emphasized the importance of protecting predecisional, deliberative material:
>
> > Manifestly, the ultimate purpose of this long recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decision maker on the subject of the decision prior to the time the decision is made.
>
> In short, the privilege rests upon the belief that "were agencies forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer."

OIP Op. Ltr. 90-11 (internal quotations in original; citations omitted).

The University's current practices regarding public disclosure of "action memoranda" submitted to the Board of Regents are summarized in the attached memorandum from Presley Pang, the Interim Executive Administrator and Secretary of the Board. These practices fully comply with the Sunshine Law and the Uniform Information Practices Act and are intended to maximize the public's opportunity to review and comment on proposed board actions while still preserving the board's ability to keep confidential certain materials that will be considered in executive session. Thus, the balance struck by current law and the University's practices is reasonable and appropriate and should not be set aside by this bill.

Section 1 is also fundamentally flawed in that it fails to place any express limits on the types of communications that would be denied the deliberative process exception. While it appears to be aimed at materials that are actually provided to the Board of Regents for consideration and decisionmaking, it is not expressly limited to such materials. As Office of Information Practices opinions make clear, the deliberative process exception extends to communications at all levels of an agency, because decisions made by an agency's governing body rely on the preliminary work of the agency's staff. Because the Board of Regents is the

University's ultimate decisionmaking body, its deliberative process could be interpreted to include the entire University's deliberative process. Therefore, denying the deliberative process exception to the Board of Regents without expressly limiting the denial to materials actually provided to the Board of Regents for consideration and decisionmaking could have the effect of denying the exception to the entire University. Such an outcome could severely impair the University's internal functioning and decisionmaking process.

Finally, section 1 of HB 2583 is fundamentally flawed because it would single out the University to deny it an appropriate and necessary public disclosure exception that currently applies to every agency of State government (as well as federal agencies under the Freedom of Information Act and the agencies of other states under their public disclosure laws). Singling out the University in this manner is contrary to the principle of equal protection of the laws and the University's Constitutional autonomy in its internal affairs (discussed in more detail below).

In summary, section 1 is fundamentally flawed in both conception and drafting, is poor public policy, and violates the State Constitution.

Section 2: Public Disclosure of Proposed Compensation Ranges

Section 2 of HB 2583, which would require the Board of Regents to publicly disclose "the range of proposed compensation to be offered to persons under consideration for executive positions and head athletic coaching positions" at least six days before any open meeting, is also fundamentally flawed in that it violates the University's Constitutional autonomy in its internal affairs, would impair the University's ability to effectively negotiate contracts with prospective hires, and would violate the deliberative process exception from public disclosure (discussed above).

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 excusive 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.]

Public disclosure of agency records and the appropriate balance between public disclosure and agencies' need for confidentiality in their predecisional deliberative process is clearly a matter of statewide concern. The Legislature has appropriately addressed that concern by enacting the Sunshine Law and the Uniform Information Practices Act, which contain appropriate exceptions from public discussion and public disclosure to allow agencies to function effectively and appropriately. Section 2 of this bill would set aside the rules established

by these general laws and create a special rule, applicable only to the University, requiring public disclosure of predecisional materials—specifically, compensation ranges—provided to the Board of Regents in connection with its consideration of prospective hires for executive and head coaching positions. Hiring and compensation decisions clearly fall within the "internal structure, management, and operation" of the University. By requiring the University, alone among the State's agencies, to publicize aspects of its contract negotiations with prospective hires, section 2 of the bill would violate the Board of Regents' exclusive jurisdiction over the internal structure, management, and operation of the University. Thus, section 2 would violate the State Constitution.

Section 2 also conflicts with existing public disclosure law and is fundamentally flawed as a matter of public policy. As discussed in detail above, current law exempts predecisional materials created as part of an agency's deliberative process from public disclosure because disclosure of such material would frustrate legitimate government functions. Information provided to the Board of Regents regarding possible compensation ranges for prospective hires clearly falls within this exception. The Board of Regents uses such materials to assist in its deliberations prior to a decision as to whether to approve authority to extend an offer to a prospective employee. Even after the Board of Regents approves the terms of an offer to a prospective employee, the matter remains predecisional because terms of the contract are still being negotiated; the extension of an offer does not necessarily mean that the prospective employee will agree to accept the offer on the terms approved by the Board of Regents. As soon as a contract is finalized, its terms are generally available for public disclosure under existing law, so the exemption is applicable only as long as needed to protect the negotiating and decisionmaking process.

Moreover, the 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.

Finally, section 2 is somewhat vague as to which prospective employees would be effected. The measure requires public disclosure of proposed salaries at least six business days "before any related open meeting convened for purposes of public comment." Presumably this language is intended to apply only to prospective hires whose contracts must be approved by the Board of Regents and to require disclosure prior to the meetings at which the Regents will be asked to provide that approval, but that is not entirely clear. Under current Board of Regents policies, authority over most executive and head coaching hires is delegated to the President or Chancellors. Only 17 of the approximately 250 executive positions system-wide require Board

of Regents approval for hiring, and head coaching contracts require Board of Regents approval only for salaries that exceed the ranges set forth in Board policy by more than 25%.

Therefore, section 2 of the bill is also fundamentally flawed, contrary to the State Constitution and existing law, and poor public policy.

Summary

Existing law strikes an appropriate balance between public disclosure and agencies' need to keep certain limited matters confidential. Sections 1 and 2 of HB 2583 would upset that well-crafted balance for the University of Hawai‘i (and only the University). The bill is vague and ambiguous, violates the Board of Regents' exclusive jurisdiction over the University's internal affairs under the State Constitution, and could do serious harm to the University's internal functioning and its ability to negotiate contracts with prospective hires.

The University respectfully requests that HB 2583 be amended to delete sections 1 and 2 or held in its entirety.

UNIVERSITY OF HAWAI>I

Board of Regents

January 28, 2008

To: Darolyn Lendio
Vice President for Legal Affairs and
University General Counsel

From: Presley Pang
Interim Executive Administrator and
Secretary of the Board of Regents

Subject: Board of Regents Practice Regarding Release of Action Memoranda to the Public

The Board of Regents provides copies of the memoranda submitted to the Board for action, with certain exceptions described below, to anyone who requests copies, as soon as the notice and agenda of the meeting of the Board are filed for posting with the Lieutenant Governor's Office. The notice and the agenda are published at least six days prior to the meeting as required by the Sunshine Law. Thus, these action memoranda are available six days prior to the meeting for pick up at the Board Office. At the meeting, copies of the action memoranda may also be obtained at a side table set up for the Board Office staff.

The Board also provides two opportunities for the public to comment on any agenda item: once at the beginning of the meeting (as a convenience for those who wish to testify and leave); and secondly when the agenda item is specifically taken up for deliberation. In addition, the Board accepts written testimony on any agenda item.

The exceptions to publicly releasing the action memoranda at the time the notice and agenda of a meeting are posted apply to action memoranda or documents that will be discussed in executive session. These matters include personnel matters where the privacy rights of individuals are implicated, or legal matters whether the Board needs to consult with the University attorneys on the Board's powers, duties, immunities, and liabilities. Please note that such documents may also be privileged from disclosure not only by the deliberative process privilege recognized by HRS § 92F 13(3)(concerning frustration of legitimate government function) but by other well-recognized exceptions in the Open Records Law. HRS § 92F-13(1) and (2).

The Board of Regents also follows the practice that once the purposes of the deliberative process privilege are no longer served, and no other privilege applies to the documents—such as confidential attorney work product—the action memorandum is released to the public.