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March 25, 2004

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Mr. Craig Gima
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VIA FACSIMILE (808) 536-8993
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Re: Evaluation and Expectations of University of Hawaii President

Dear Messrs. Gima and Kerr:

This is in response to your requests to the Office of Information Practices ("OIP") for an opinion regarding the University of Hawaii's ("UH") denial of your respective requests for the above-referenced records.

ISSUE PRESENTED

Whether the Board of Regents' evaluation of UH President Evan Dobelle dated October 26, 2003 ("Evaluation") and the Expectations and Performance Guidelines 2003-2004 prepared by the Board of Regents relating to President Dobelle ("Expectations") are public under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS")("UIPA").

BRIEF ANSWER

Yes. President Dobelle has a significant privacy interest in the Evaluation and the Expectations. His privacy interest, however, is diminished by the fact that he is a public figure by virtue of his position as UH President. When balanced against the public interest in knowing how the Board of Regents is performing its duties, including the employment of the UH president, as well as in knowing how President Dobelle is performing his job, we find that the public interest is greater and, therefore, conclude that disclosure of the Evaluation and the Expectations would not be a clearly unwarranted invasion of personal privacy under section 92F-13(1), HRS.

FACTS

In October 2003, the Board of Regents finalized its most recent annual evaluation of President Dobelle, a process that began in or before July and resulted in the preparation of the Evaluation and the Expectations. According to the Board of Regents' policy, the evaluation process is intended to provide a mechanism through which the Board of Regents is afforded an annual opportunity to discuss the developments of the previous year with the President and to reflect upon the expectations for the future. As noted in the Evaluation, this policy "reiterates that the Board [of Regents] is responsible for the effective management of the University" and "reaffirm[s] the Board [of Regents'] accountability towards institutional governance."

In a letter to Patricia Lee, Chair of the Board of Regents, dated December 3, 2003, Mr. Gima requested access to the Evaluation and the Expectations. Chair Lee, by letter dated December 15, 2003, denied Mr. Gima's request, citing President Dobelle's privacy interest.[1] Aside from the statement that "President Dobelle has a significant privacy interest" in the Evaluation and the Expectations, Chair Lee's letter contained no mention or

[1] We note that Chair Lee's letter cited section 92F-14(b)(8), HRS, as the statutory basis for denying Mr. Gima's record request. Section 92F-14(b)(8), HRS, identifies information contained in a personal evaluation as an example of the type of information in which a person has a significant privacy interest. As discussed herein, the exceptions to disclosure are found in section 92F-13, HRS, not section 92F-14, HRS. In denying Mr. Gima's request based upon President Dobelle's privacy interest, UH should have cited section 92F-13(1), HRS, as the statutory basis for its denial. In responding to future record requests under the UIPA, we remind UH that, if a request is denied, it must cite one or more of the exceptions to disclosure set forth in section 92F-13, HRS.

discussion about how, in UH's opinion, President Dobelle's privacy interest in the Evaluation and the Expectations outweighed the public's right to know. See Haw. Rev. Stat. § 92F-14(a) (Supp. 2003).

Mr. Kerr's record request to Chair Lee of December 13, 2003, also sought access to the Evaluation and the Expectations. Mr. Kerr's request was denied in a letter from David Iha, the Executive Administrator and Secretary of the Board of Regents, dated December 26, 2003, which again recited President Dobelle's privacy interest as the basis for withholding the requested records.[2]

After receipt of Mr. Gima's request for assistance in obtaining the requested records, we asked UH to advise us of the basis for its denial of Mr. Gima's request and requested copies of the Evaluation and the Expectations for our *in camera* review. UH provided us with a copy of the Evaluation and the Expectations on January 23, 2004.[3] UH, however, did not provide any further explanation regarding its denial of Mr. Gima's record request. More specifically, UH did not articulate any basis for its apparent belief that the public interest in the Evaluation and the Expectations was outweighed by President Dobelle's privacy interest.[4]

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[2] Mr. Kerr's record request of December 13, 2003, also sought access to any correspondence within UH and between UH, its General Counsel, and OIP pertaining to disclosure of the Evaluation. This request was denied in a letter from Mr. Iha dated December 26, 2003, which stated that there is no correspondence among the Regents, or between the Regents and UH Administration or OIP, and that any correspondence between the Regents and the General Counsel is protected under the attorney-client privilege. We confirmed in a telephone conversation with Mr. Kerr on January 26, 2004, that this opinion need not address his request for the correspondence.

[3] UH initially was unwilling to provide us with a copy of the Evaluation and the Expectations for our *in camera* review because President Dobelle apparently had threatened to sue UH if the documents were released. Section 92F-42(5), HRS, however, expressly authorizes OIP to examine the records maintained by an agency for the purpose of determining whether an agency's response to a record request complied with the statute. We do not interpret section 92F-42(5), HRS, as allowing an agency to refuse our request for a copy of a record for the purposes of our review of an agency's action. It is our policy to return or destroy any record provided to us by an agency for use in our review. Even in those situations where we determine that disclosure is appropriate, the record must be disclosed by the agency maintaining the record and not by OIP.

[4] We note that UH has not asserted that disclosure of the requested records would be an unwarranted invasion of the Regents' privacy interests. Accordingly, because that issue was not raised by UH, we have not considered whether the Regents' privacy interests would allow UH to withhold the requested records.

Because disclosure of the Evaluation and the Expectations possibly could significantly impact future evaluations of the President, we provided UH with a further opportunity to inform us of any negative consequences that disclosure of the documents may have on the Board of Regents' ability to perform its job. In other words, we asked UH to advise us if there was any basis for UH to withhold the requested records under section 92F-13(3), HRS, because disclosure would frustrate a legitimate government function. UH responded by letter dated March 22, 2004, stating that, because we had reviewed an unrelated issue involving the executive meeting during which President Dobelle's evaluation was considered, it was the Board of Regents' position that we had been given sufficient information regarding how disclosure of the records would frustrate UH's ability to conduct future evaluations of the President.[5]

We also solicited input from President Dobelle as to his position regarding your record requests. In response, President Dobelle provided us with a letter dated February 13, 2004, enclosing a document entitled "Summary of Sunshine Laws and Privacy of President Dobelle's Evaluation." In the Summary, President Dobelle asserted that he had a significant privacy interest in the Evaluation[6] and discussed two opinions, one by the Supreme Court of Montana and the other by the Superior Court of New Jersey, in which the courts held that an evaluation was not subject to public disclosure. We, however, note that President Dobelle's Statement did not contain any discussion as to the specific manner in which disclosure of the records would be an unwarranted invasion of his privacy.

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[5] Contrary to UH's apparent belief, the information that we previously considered, including the minutes of the executive meeting that were provided to us for our *in camera* review, does not provide any insight or other discussion that we can reasonably interpret to be an argument supporting UH's withholding of the Evaluation and the Expectations under the frustration exception, section 92F-13(3), HRS. We simply have no information regarding whether any function of UH or the Board of Regents would be frustrated by disclosure of the records. Because UH, in essence, has declined to provide us with any information as to whether it believes that the Evaluation and the Expectations can be withheld under section 92F-13(3), HRS, we have not considered the issue. To do so would be pure speculation on our part, something that we believe would be inconsistent with and contrary to the agency's burden of proof to justify non-disclosure of a requested record. Haw. Rev. Stat. § 92F-15(c) (1993).

[6] Although President Dobelle discussed only the Evaluation, we have considered his arguments equally applicable to the Expectations.

We understand that the Board of Regents has begun preliminary discussions on the next evaluation of President Dobelle and is reported to have set forth a new process that may include making a summary of the next evaluation available to the public.[7] President Dobelle is reported to be in favor of opening the next evaluation process to public inspection.[8] However, neither the Board of Regents' reported consideration of creating a summary of future evaluations nor President Dobelle's reported inclination to make future evaluations public is relevant to or has been considered in our analysis of the issues raised by your requests.

DISCUSSION

The UIPA establishes a presumption that all records[9] maintained by government agencies[10] are open to public inspection unless access is restricted or closed by law. Haw. Rev. Stat. § 92F-11(a) (1993). The fact that the Evaluation and the Expectations are government records and that UH is an agency for the purposes of the UIPA are not in dispute.

Among the exceptions to disclosure found in the UIPA, an agency is allowed to withhold "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy[.]" Haw. Rev. Stat. § 92F-13(1) (1993). The Legislature, in enacting section 92F-13(1), HRS, stated that "once a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure. If the privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." Conf. Comm. Rep. No. 112-88, in 1988 House Journal, at 817-18.

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[7] See Beverly Creamer, *Regents to Revise Rating Process*, The Honolulu Advertiser, February 21, 2004, *available at:* www.honoluluadvertiser.com; Craig Gima, *New Evaluation of Dobelle Starts*, The Honolulu Star Bulletin, February 21, 2004, *available at:* www.Starbulletin.com.

[8] Id.

[9] "Government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (1993).

[10] "Agency" means "any unit of government in this State, any county, or any combination of counties; department; institution; board; commission; district; council; bureau; office; governing authority; other instrumentality of state or county government; or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, but does not include the nonadministrative functions of the courts of this State." Haw. Rev. Stat. § 92F-3 (1993).

Section 92F-14(b), HRS, contains examples of types of information in which the Legislature has determined that an individual has a significant privacy interest. As noted above, UH cited section 92F-14(b)(8), HRS, in denying your respective record requests. That section identifies "[i]nformation comprising a personal recommendation or evaluation" as one type of information in which a person has a significant privacy interest. Also relevant to the present matter is section 92F-14(b)(4), HRS, which provides, with certain specific exceptions, none of which are applicable to the present situation, that a person has a significant privacy interest in "[i]nformation in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position[.]"

Section 92F-14(b), HRS, is intended to provide a non-exhaustive list of the types of information that carry significant privacy interests. We have previously found that an employee has a significant privacy interest in personnel-related information even when it is not contained in the employee's personnel file. OIP Op. Ltr. No. 03-18 at 5 (Nov. 12, 2003), citing OIP Op. Ltr. Nos. 98-5 (Nov. 24, 1998) and 97-5 (March 28, 1995). Similarly, based on our review of the Evaluation and the Expectations, we agree with UH and President Dobelle that President Dobelle has a significant privacy interest in the Evaluation and the Expectations. Both documents contain "personnel information" akin to the type of information listed in section 92F-14(b)(4), HRS, and are either an evaluation as identified in section 92F-14(b)(8), HRS, or contain that type of information.

While we believe that he has a significant privacy interest in the information contained in the Evaluation and the Expectations, we also believe that President Dobelle's privacy interest is substantially diminished because he is a public figure by virtue of his position as President of UH.[11] See, e.g., OIP Op. Ltr. No. 03-16 (Aug. 14, 2003). More specifically, it is patently clear that President Dobelle is one of the more prominent members of our community. He is the CEO of the State's only public system of higher education, an entity that enjoys semi-autonomous status, and oversees over 45,000 students on three university campuses and seven community college

[11] Regarding information in which a person has a significant privacy interest, we note that some information may carry a greater privacy interest than other types of information. For example, an individual's privacy interest in information that is "highly personal and intimate" may not be diminished simply because the individual is a public figure. In this case, based upon our review of the Evaluation or the Expectations, we do not believe that either record contains information that can reasonably be considered to be "highly personal or intimate."

campuses and a budget of approximately $660 million. UH also receives millions of dollars in research and other types of grants, employs thousands, from administrators and professors to custodians, and significantly contributes to our State's economy. Moreover, President Dobelle is one of the most highly compensated State employees, earning $442,000 per year and residing at College Hill.

Since we have found President Dobelle to have a significant privacy interest in the information contained in the requested records, albeit diminished, to determine whether public disclosure of the Evaluation and the Expectations would constitute a clearly unwarranted invasion of President Dobelle's privacy, we must next balance President Dobelle's privacy interest and the public interest in disclosure of the information. Haw. Rev. Stat. § 92F-14(a) (Supp. 2003). In balancing the privacy interest of President Dobelle against the public interest in disclosure, the public interest to be considered is that which sheds light upon the workings of government. See OIP Op. Ltr. No. 98-5 at 18-19 (Nov. 24, 1998). In this case, we believe that the specific public interest in disclosure is to allow the public to scrutinize the work of the Board of Regents, which is ultimately responsible for managing the University system, and to review President Dobelle's job performance.[12]

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[12] We have been forced to make numerous assumptions as to how disclosure of the Evaluation and the Expectations may invade President Dobelle's privacy interest. More specifically, we have assumed that disclosure may affect President Dobelle's reputation or may be embarrassing to President Dobelle. Neither UH nor President Dobelle provided us with any specific explanation or information as to how disclosure of the Evaluation and the Expectations would affect President Dobelle's privacy interest. As mentioned above, UH provided us with no discussion aside from the citation to section 92F-14(b)(8), HRS, to justify withholding the Evaluation and the Expectation based upon the privacy exception. The quotations from the opinions by the Montana and New Jersey courts that are contained in President Dobelle's Summary are equally insufficient to explain how President Dobelle's privacy interest outweighs the public interest in the records.

We note that the statute expressly provides that "[t]he agency has the burden of proof to establish justification for non-disclosure." Haw. Rev. Stat. § 92F-15(c) (1993). While, in rendering this opinion, we have, to the best of our abilities, made assumptions as to President Dobelle's privacy interest in the requested records, at least one jurisdiction has disregarded bare allegations that disclosure would constitute a clearly unwarranted invasion of a person's privacy without an explanation as to the specific manner in which the person's privacy interest would be affected. See, e.g., Ridenour v. Board of Education, 314 N.W.2d 760, 764 (Mich. Ct. App. 1981). As a reminder to all government agencies, when a record request is denied, the agency denying the request must be able to provide us with specific information that supports the agency's statutory basis for denying the request.

A number of other jurisdictions have considered whether an evaluation of a government employee's job performance is subject to public disclosure, some specifically in the context of a state university or college president's evaluation. See, e.g., Municipality of Anchorage v. Anchorage Daily News, 794 P.2d 584 (Alaska 1990) (head librarian evaluation); Ridenour v. Board of Education, 314 N.W.2d 760 (Mich. Ct. App. 1981) (community college president and school superintendent evaluations); Spokane Research & Defense Fund v. City of Spokane, 994 P.2d 267 (Wash. Ct. App. 2000) (evaluation of city manager); Courier-Journal and Louisville Times Co. v. Board of Education, 1994 Ky. App. LEXIS 33 (1994) (evaluation of school superintendent); 2001 Att'y. Gen. Texas ORL 1514 (2001) (college president evaluation); 00-ORD-46 (Ky. Att'y Gen. 2000) (university president evaluation); Missoulian v. Board of Regents, 675 P. 2d 962, (Mont. 1984) (evaluations of university presidents); Trenton Times Corp. v. Board of Education, 351 A.2d 30 (N.J. Super. Ct. App. Div. 1976) (superintendent of public schools evaluation); 39 Op. Atty Gen. Ore. 480 (1979) (evaluation of community college president). Based upon our research, however, it appears that there is no consensus on the issue.

For instance, in Municipality of Anchorage v. Anchorage Daily News, 794 P.2d 584 (Alaska 1990), the Supreme Court of Alaska considered whether the Anchorage Library Advisory Board's evaluation of the Head Librarian was exempt from public disclosure under the Alaska Public Records Act. To determine whether disclosure was required, the court instructed that "a balance must be struck between the public interest in disclosure on the one hand, and the privacy and reputational interests of the affected individuals together with the government's interest in confidentiality, on the other." Id. at 590. The court, noting that the Head Librarian "was in charge of the public library facilities, 120 public employees, and $7.2 million annually in public monies[,]" held that evaluation must be disclosed. Id. at 591. In balancing the public's right to monitor the Head Librarian's job performance against his privacy interest, the court observed:

> public officials are properly subject to public scrutiny in the performance of their duties. Moreover, in the instant case the superior court expressly found that the performance evaluation did not in any way deal with the personal, intimate, or

> otherwise private life of [the Head Librarian]. This finding is not clearly erroneous. Under these circumstances the balance of competing interests falls on the side of the public's interest in free access to public documents.

Id. (Footnotes omitted).

Similarly, the Court of Appeals of Michigan held that the performance evaluations of the president of a community college and the superintendent of the school district were public under Michigan's Freedom of Information Act. Ridenour v. Board of Education, 314 N.W.2d 760 (Mich. Ct. App. 1981). In reaching its conclusion, the court rejected the Board of Education's argument that disclosure of the performance evaluations was an intrusion of the president's and superintendent's privacy that outweighed the public's right to know. Id. at 764. The court reasoned:

> [s]uch a perspective overlooks the public interest in the area of government. People have a strong interest in public education. Because a large portion of the tax dollar goes for the support of the schools, the taxpayer is increasingly holding the boards and administrators accountable for these moneys. Further, the public continues to have an increasing interest in the educational process and expects this public body to be accountable for its actions.

Id. The court also noted that the Board of Education had not articulated any specific matter of a private nature but had offered the bare allegation that the disclosure would constitute a clearly unwarranted invasion of the president's and superintendent's privacy. Id.

In contrast to the above opinions, the Supreme Court of Montana has held that the evaluations of the presidents of several Montana state universities were protected from public disclosure. Missoulian v. Board of Regents, 675 P. 2d 962, (Mont. 1984). The Missoulian, a Montana newspaper, challenged the closure of certain Board of Regents' meetings at which the presidents of six university system units were evaluated and sought disclosure of the documents considered by the Board as part of the evaluations. The court first held that evaluations were matters of individual

privacy protected by the Montana Constitution,[13] finding that the presidents' privacy interests were not diminished because of their positions and suggesting that, because of the sensitive nature of the presidential function, there was more reason to allow evaluations of the presidents to be conducted in confidence. Id. at 969-70. The court's conclusion that the presidents had a constitutional right of privacy in the evaluations appears to be akin to our determination that President Dobelle has a significant privacy interest in the information in the Evaluation and the Expectations.[14]

After finding that the presidents had constitutionally protected privacy interests in the evaluations, the court next considered whether the public's right to examine documents and to observe the deliberations of public bodies as set forth in another section of the Montana Constitution[15] as well as in Montana's Open Meeting Act[16] allowed the Board to withhold access to the

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13 The Montana Constitution, in relevant part, provides:

> *Right of Privacy.* The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Mont. Const. art. II, § 10. The UIPA was expressly intended to implement, in part, the right of privacy found in article I, section 6 of the Hawaii Constitution. State of Hawaii Organization of Police Officers v. Society of Professional Journalists-University of Hawaii Chapter, 83 Haw. 378, 397-98, 927 P.2d 386, 405-06 (1996); Painting Industry of Hawaii Market Recovery Fund v. Alm, 69 Haw. 449, 452, 746 P.2d 79. 81 (1987).

14 Both the finding by the Missoulian court that the Constitutional right of privacy protected the evaluations and our finding that President Dobelle has a significant privacy interest in the Evaluation and the Expectations require a balancing of the privacy interest and the public's interest.

15 Article II, section 9 of the Montana Constitution provides:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government or its subdivisions, except in cases which the demand of individual privacy clearly exceeds the merits of public disclosure.

Emphasis added.

16 Montana's Open Meetings Act incorporates language similar to that found in the Montana Constitution. Specifically, the Open Meetings Act in effect at the time of the opinion provided:

> (1) All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds shall be open to the public.

records considered in the evaluation process and to conduct the evaluations in meetings closed to the public. Id. at 970. Although the Missoulian court's analysis related only to whether the evaluations could be conducted in a meeting closed to the public, an issue that is not presented by your requests, the court's discussion about balancing the competing interests "to determine whether the demands of individual privacy clearly exceed the merits of public disclosure" is relevant and instructive. Id. at 971.

In considering whether the university presidents' privacy interest clearly exceeded the public's constitutional and statutory right to know, the court found, notwithstanding the Missoulian's argument that public disclosure of the evaluations would "foster[] public confidence in public institutions, maintain[] the accountability of public officials, assur[e] public access to information to allow evaluation of public expenditures, and prevent[] the secret conduct of government and usurping of the people's sovereignty[,]" that the Missoulian had "failed to show how any of these public interests would be furthered by public disclosure or hindered by confidentiality[.]" Id. at 972. Because the Missoulian did not establish any relation between the evaluations and the objectives of the right to know provision, the court held that "the demands of individual privacy of the university presidents and other university personnel in confidential job performance evaluation sessions of the Board of Regents clearly exceed the merits of public disclosure." Id. at 973.[17]

Similarly, in Trenton Times Corp. v. Board of Education, 351 A.2d 30 (N.J. Super. Ct. App. Div. 1976), one of the cases quoted in President Dobelle's Summary and cited by the Missoulian court, the New Jersey

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> (2) Provided, however, the presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, shall be open.

Mont. Code Ann. § 2-3-203 (emphasis added).

[17] The Evaluation and the Expectations do not name individuals who may have been interviewed as part of the Board of Regents' evaluation process. However, certain upper level UH employees were mentioned by job title only, and a few individuals were mentioned by name, but the OIP does not believe the information about them implicates enough of a privacy interest to warrant discussion in this opinion.

Superior Court held that an evaluation relating to the job performance of the superintendent of the public schools of the City of Trenton did not need to be disclosed. The court's opinion, however, was based upon a finding that, under New Jersey law, the evaluation was not a public document or, if it was, that its disclosure was prohibited by two Executive Orders which specifically identified the types of information in personnel files that could be disclosed, none of which included the information in the evaluation. Id. at 32.

As you may be able to discern from our discussion of the cases and by the fact that there is a split of authority on the issue, we believe that the competing privacy interest of President Dobelle and the public's right to know are very closely balanced.[18] In the end, however, we are persuaded that the public interest in knowing how the Board of Regents is performing its duties (part of which includes the employment of the UH president) as well as the public interest in knowing how President Dobelle is performing his job, when balanced against President Dobelle's diminished privacy interest, tips the scale in favor of disclosure. Moreover, although the factors

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[18] The Report of the Governor's Committee on Public Records and Privacy (1987) ("Governor's Committee Report") recognized the tension between the public's right to know and the privacy interests of government employees:

> The Committee heard a good deal of testimony on the subject of records relating to government employees. As was often stated, these are public officials being compensated with public dollars. There is, therefore, a strong interest in ensuring that this money is well spent. There is also a need to reduce any potential for corruption and most importantly to allow for a meaningful review of actions and polices. Most government employees recognize that the "rules of the game" are different for public sector workers and as one of the Committee members noted, there is less expectation of privacy for those who work in government. [citation omitted].
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> At the same time, it is important to focus on the areas of major concern . . . while individuals who accept public employment must also expect a greater degree of scrutiny, they do not by accepting public employment surrender all of their rights to privacy. And while the public wants accountable government, the public is not well served by a situation in which government service becomes so onerous that qualified individuals will not apply.
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> The major issue which was raised concerns **the personnel records of public employees.**

Vol. I Governor's Committee Report 106 (1987) (emphasis in original).

that we consider under the UIPA are slightly different from those considered by many of the courts which have held that an evaluation is public, we believe that the result reached in those cases, i.e., that the public interest in the evaluation of an upper level public employee outweighs the employee's privacy interest, is the appropriate result under the UIPA.

As expressed above, we believe that President Dobelle's privacy interest in the Evaluation and the Expectations is diminished.[19] While we have considered that the disclosure of the Evaluation and the Expectations may affect President Dobelle's reputation and may be embarrassing to President Dobelle, neither record contains information that we would consider to be "highly personal and intimate" from President Dobelle's perspective. Rather, the Evaluation and the Expectations relate to President Dobelle's performance of his duties as UH President.

On the other side of the balance, because UH is a significant presence in the State -- serving over 45,000 students on 10 campuses, employing thousands, overseeing a budget of hundreds of millions of dollars and contributing millions of dollars to the State economy -- we believe that there is a strong public interest in knowing how the Board of Regents, the body tasked with overseeing UH, is performing its duties. One of those duties includes overseeing President Dobelle, who is one of the most highly compensated State employees and the person responsible for UH's day-to-day operations. The Evaluation and the Expectations provide insight as to how the Board of Regents believes President Dobelle is performing his duties and, clearly, are records that would allow the public to scrutinize the performance of the Board of Regents. See Haw. Rev. Stat. § 92F-2 (1993).

We also believe that there is a strong public interest in knowing how President Dobelle is performing his duties as UH President. As noted above, because UH operates semi-independently from the executive branch and is such a significant presence in the State, the public interest is substantial, and through the disclosure of the records, the public is able to more fully consider President Dobelle's job performance.

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[19] We believe that President Dobelle has much less of a privacy interest in the Expectations; however, given our conclusion, we do not find it necessary to discuss the Expectations separately from the Evaluation.

We find that the comments of the Court of Appeals of Washington in holding that disclosure of an evaluation of the Spokane City Manager was appropriate under Washington's public records statute to be compelling and consistent with our reasoning:

> Evaluations of public employees ordinarily are not subject to public disclosure. In the normal course, both the supervisor and the employee reasonably expect those evaluations to remain confidential. The disclosure of that information would be offensive to a reasonable person and of small public concern.
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> * * *
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> The position of Spokane City Manager is not like that of other public employees. The Spokane City Manager is the City's chief executive officer, its leader and a public figure. The performance of the City Manager's job is a legitimate subject of public interest and public debate. A person in the position of Spokane City Manager cannot reasonably expect that evaluations of the performance of his or her public duties will not be subject to public disclosure. Additionally, each year the Spokane City Council evaluates the job performance of the City Manager. In part, the purpose of that evaluation is to determine whether the employment of the City Manager should continue. Because the City Council used this information in making its determination to retain the City Manager, there is a legitimate public interest in the information.

Spokane Research & Defense Fund v. City of Spokane, 994 P.2d 267, 270 (Wash. Ct. App. 2000).

We also find Missoulian and Trenton Times to be distinguishable and, therefore, unpersuasive in light of our statutory scheme.[20] First, with respect

[20] The Attorney General of the State of Oregon has also opined that a community college president's personnel evaluation was exempt from public inspection based upon an Oregon statute that specifically exempted "[f]aculty records relating to matters such as ... personal and academic evaluations" from public inspection. 39 Op. Atty Gen. Ore. 480 (1979). Because of our different statutory scheme, we do not believe that the Oregon Attorney General's opinion is helpful in our determination of the present issue.

to Trenton Times, in contrast to New Jersey law, the Evaluation and the Expectations are, without dispute, government records under the UIPA. Moreover, contrary to the Executive Orders relied upon by the New Jersey court, the UIPA does not contain any provision that allows disclosure of only certain, specified information contained in personnel files. Rather, under the UIPA, the record and any corresponding privacy interest therein must be considered on a case-by-case basis.

Second, with respect to the Montana court's opinion, while we agree that President Dobelle has a significant privacy interest in the Evaluation and the Expectations, unlike the Missoulian court, we do not believe that, under the UIPA, a requestor must specifically show how the public interest in disclosure would be furthered by the disclosure of the Evaluation and the Expectations or how the public interest would be hindered by allowing UH to withhold the records. Missoulian, 675 P. 2d at 972. We interpret the UIPA simply to require a balancing of the privacy interest and the public's right to know. We further believe that the public interest in disclosure of the Evaluation and the Expectations is self-evident, i.e., that disclosure will enable the public to examine the Board of Regents' oversight of President Dobelle to determine, among other things, whether the Board of Regents is properly discharging its duties with respect to UH, as well as to examine President Dobelle's job performance. Moreover, under the UIPA, there is a presumption that the record is public and the agency seeking to withhold the record has the burden of establishing that an exception to disclosure is applicable. Haw. Rev. Stat. §§ 92F-11(a), 92F-15(c) (1993). Accordingly, in contrast to the Missoulian court's interpretation of Montana law, we do not believe that the UIPA requires the requestor to make any showing as to how the public interest in disclosure would be furthered by disclosure of the requested record.

We also reviewed a number of other opinions in which the court concluded that an evaluation should be withheld from public disclosure; however, those cases involved lower-level employees, not an employee in a position akin to that held by President Dobelle. See, e.g., Dawson v. Daly, 845 P.2d 995 (Wash. 1993) (deputy prosecutor); Bacon v. Washington Department of Corrections, 2002 Wash. App. LEXIS 1878 (2002) (correctional unit supervisor); Trahan v. Larivee, 365 So.2d 294 (La. App. 1978) (deputy directors). In our opinion, as discussed herein, it is because of his position as UH President that the question exists as to whether President Dobelle's evaluation must be disclosed. If the issue related to a rank-and-file employee, it is very likely that we would concur with those opinions cited above and conclude that the evaluation may be withheld.

We make clear that this opinion is limited to the Evaluation and the Expectations. We do not imply by this opinion that the evaluation of a rank-and-file employee or any other State employee is public. Such determination must be made on a case-by-case basis. We also do not imply by this opinion that all records relating to President Dobelle's evaluation are public. For instance, as part of the evaluation process, we understand that President Dobelle prepared a self-evaluation. While you have not requested that document, and accordingly, we have not considered whether disclosure of it is required, we anticipate that UH may be able to withhold the self-evaluation because disclosure of it may discourage President Dobelle from making a candid self-evaluation, thereby frustrating the Board of Regents' evaluation process. Moreover, the self-evaluation arguably may also be part of the deliberative process involved in rendering the Evaluation and the Expectations which, if true, may allow UH to withhold the records under section 92F-13(3), HRS.

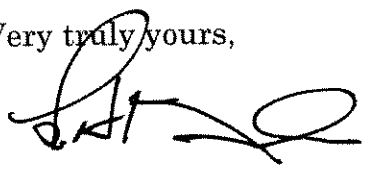
We expect, as reflected by the lack of consensus in the opinions discussed above, that our conclusion will not be without dispute. We acknowledge that the issue regarding the public's right to access the Evaluation and the Expectations is not clear-cut. We also recognize that, once the Evaluation and the Expectations are disclosed, any damage to President Dobelle's privacy interest that may arguably result cannot be subsequently repaired. Because of that concern, i.e., that the bell cannot be unrung, by copy of this letter to UH, we suggest that UH withhold the Evaluation and the Expectations from you for a period not to exceed five business days from the date of this letter to allow President Dobelle an opportunity to challenge our opinion, if he so chooses, in court. Given that President Dobelle has been aware of this issue regarding the Evaluation and the Expectations for a number of months and the fact that we would be rendering an opinion as to whether the records were public, we believe that five business days is a reasonable and fair balance between allowing President Dobelle the opportunity to protect any privacy interest that he believes may be impacted by the disclosure of the records and providing public access to the records without any further delay.

CONCLUSION

The Evaluation and the Expectations are public. While President Dobelle has a significant privacy interest in those records, his privacy interest is diminished by, among other things, the fact that he is a high

ranking State employee who is responsible for managing the State's public university and community college system. In balancing the public interest in knowing how the Board of Regents is performing its duties, which include overseeing President Dobelle, and in knowing how President Dobelle is performing his job against President Dobelle's privacy interest, as required by section 92F-14(a), HRS, we find the public interest to be greater. Accordingly, UH cannot withhold the Evaluation and the Expectations, as disclosure would not be a clearly unwarranted invasion of personal privacy under section 92F-13(1), HRS.

Very truly yours,



Leslie H. Kondo
Carlotta Dias

LHK/CMD:ankd/cy

cc: The Honorable Patricia Lee, Chair, Board of Regents, University of Hawaii (via facsimile no. 547-5880)
The Honorable Evan S. Dobelle, President, University of Hawaii (via facsimile no. 956-5286)
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David Iha, Executive Administrator and Secretary, Board of Regents (via facsimile no. 956-5156)
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