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November 12, 2004

Ms. Cathy Goeggel
President, Animal Rights Hawaii
P.O. Box 10845
Honolulu, Hawaii 96816

David Cameron Duffy, Ph. D.
Professor of Botany and Unit Leader
Pacific Cooperative Studies Unit
3190 Maile Way, St. John 410
Honolulu, Hawaii 96822-2279

Re: University of Hawaii Institutional Animal Care & Use Committee

Dear Ms. Goeggel and Dr. Duffy:

This letter responds to your requests for an opinion by the Office of Information Practices (the "OIP") as to whether the University of Hawaii Institutional Animal Care & Use Committee (the "UH IACUC") is subject to part I of chapter 92, Hawaii Revised Statutes ("HRS"), governing public agency meetings (commonly referred to as the "Sunshine Law"). Specifically, we have construed your request to present the following issue:

ISSUE PRESENTED

Whether the UH IACUC must conduct its meetings in compliance with the provisions of the Sunshine Law and, therefore, allow the public to attend.

BRIEF ANSWER

No. It is our opinion that the Sunshine Law does not apply to an agency, board, commission, authority, or committee created by or pursuant to federal law. We find the UH IACUC to be created pursuant to federal law and therefore not subject to the provisions of the Sunshine Law.

DISCUSSION

Based upon correspondence received from the University of Hawaii (the "University") and our independent research, it is our understanding that, although established by and maintained with the sanction of the University, the UH IACUC derives its official existence and official functions and duties from federal law. Federal law mandates that each research facility that uses or intends to use live animals in research, tests or experiments establish an Institutional Animal Care and Use Committee (IACUC) to oversee compliance with the standards promulgated by the federal government under, among other laws, the Animal Welfare Act (7 U.S.C. § 2131 et seq.) (the "Act").[1] Federal law also dictates the general composition of the committee; authorizes appointment of the members by the chief executive officer of the facility; delineates the committee's authority, functions and responsibilities; and directs the general procedures to be followed by the committee.[2]

The UH IACUC was thus created pursuant to,[3] and is governed by, federal law. We are aware of no similar state law directing the establishment and the functions and duties of the UH IACUC. Accordingly, we believe that the UH IACUC must be considered to be an entity created pursuant to federal law rather than state law.

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[1] See 7 U.S.C. §§ 2141, 2143 (2004); 9 CFR 2.31 (2004). See also Health Research Extension Act of 1985, Public Law 99-158, "Animals In Research" (November 20, 1985).

[2] The functions and responsibilities of the committee include the continual review of the research facility's program for humane care and use of animals, the biannual inspection of the animal facilities; the preparation of reports of its evaluations of such program and facilities; the review and investigation of concerns resulting from complaints; the making of recommendations to the research facility; the review and approval of significant changes regarding the use and care of animals; the review and approval of all proposed activities involving animals according to the standards promulgated pursuant to the Act; and the suspension of activities that deviate from the proposed activity approved. See 7 U.S.C. § 2131 et seq.; 9 CFR 2.31; Public Law 99-158.

[3] The members of the UH IACUC are appointed by the Office of the Chancellor.

The question of whether the Sunshine Law governs the meetings of a board created by federal law has not yet been addressed in Hawaii case law. The OIP has, however, previously opined in informal opinions that boards resulting from federal law do not meet the definition of "board" under the Sunshine Law and, therefore, are not subject to its provisions.[4] As set forth below, the scope of the Sunshine Law has been consistently deemed to encompass boards created by or pursuant to the laws of the State or its political subdivisions. Such a construction is consistent with the language of the statute read as a consistent whole and with the legislative history to the Sunshine Law.

The Sunshine Law provides that "[e]very meeting of all **boards** shall be open to the public" except as otherwise provided in the constitution or in sections 92-4 and 92-5 of the Sunshine Law. Haw. Rev. Stat. §92-3 (1993) (emphasis added). The Sunshine Law defines "board" as follows:

> (1) "Board" means any agency, board, commission, authority, or **committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order**, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions.

Haw. Rev. Stat. §92-2(1) (1993) (emphasis added). In analyzing whether an entity falls under this definition, we have previously sought guidance from the Hawaii Supreme Court memorandum opinion in Green Sand Cmty. Ass'n v. Hayward, Civ. No. 93-3259 (Haw. 1996) (mem.).[5] The Court there noted that "[t]he definition of "board" in section 92-2(1), HRS, contains five distinct elements. A "board" is: (1) an agency, board, commission, authority, or committee of the State or its political subdivisions; (2) which is created by constitution, statute, rule, or executive order;

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[4] For example, we have opined that the Technical Advisory Committee established by the Department of Transportation, Airports Division, as required by federal statute in order to become eligible under a federal funding program, is not subject to the Sunshine Law because no state or county law authorized its creation. OIP Informal Op. Ltr. to Aviation Nuisance and Sound Abatement Committee Community Representative, dated June 28, 2004. We have also opined that the Big Island Resource Conservation and Development Council ("Big Island RCDC"), authorized pursuant to the federal Resource Conservation and Development Program and designated by local government authorities, does not fall under the Sunshine Law definition of "board" because it resulted from federal action and was accountable only to the United States Department of Agriculture. OIP Informal Op. Ltr. to Big Island RCDC, dated July 14, 2004.

[5] See OIP Op. Ltr. No. 01-01 (recognizing that such memorandum opinion may not be cited as precedent before the Hawaii courts but using it as guidance in analyzing whether the Sunshine Law applied to Vision Teams established by the Mayor of the City & County of Honolulu).

(3) to have supervision, control, jurisdiction or advisory power over specific matters; (4) which is required to conduct meetings; (5) and which is required to take official actions." Id. at 9.[6]

The legislative history to this section makes reasonably clear that the laws referred to in the second element, "created by constitution, statute, rule, or executive order," are those of the State. See S. Stand. Comm. Rep. No. 759-76, Haw. S.J. 1216 (1976) (emphasis added) ("This section has been amended to clarify the definition of "board" "to make it clear that a board covered by the Sunshine Law is one which is created by **the** constitution, statute, rule, or executive order . . . ."). The Sunshine Law, however, explicitly directs at section 92-71, HRS, that its provisions be applied "to all political subdivisions of the State." Haw. Rev. Stat. §92-71 (1993). To read section 92-71, HRS, together with the definition section 92-2(1), HRS, as part of a consistent whole effectively requires that the phrase "of the State or its political subdivisions" contained in the first element of the definition of "board" also be applied to the second element, "created by constitution, statute, rule, or executive order[.]"

And, indeed, consistent with this construction, the Hawaii Supreme Court has implicitly construed the definition of "board" to refer to the laws of the State's political subdivisions, specifically relying on section 92-71, HRS, to extend the definition of "board" to those created pursuant to county laws. Chang v. Planning Comm'n, 64 Haw. 431, 442 & n.12 (1982) (recognizing application of Sunshine Law generally to county planning commission based upon HRS §92-71, which makes the blanket mandate of open meetings under HRS §92-3 applicable to all political subdivisions of the State). Legislative history further supports application of the phrase "of the State or its political subdivisions" to each of the elements defining a "board." See S. Stand. Comm. Rep. No. 759-76, Haw. S.J. 1216 (emphasis added) ("under this amendment [to clarify the definition of "board"] it would be clear that the Sunshine Law would be applicable to any agency, board, commission, authority or committee, **which has official existence with official functions and duties,**

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[6] The Court, in its review of a motion to dismiss for failure to state a claim, found that the lower court could not determine that the Hawaii Space Development Authority (HSDA) and the Space Advisory Committees (SACs), both under the Department of Business, Economic Development, and Tourism (DBEDT), were not, as a matter of law, "boards" subject to the Sunshine Law. The Court noted that under such a motion the facts asserted in a complaint must be taken as true, and those asserted facts showed the HSDA and the SACs to meet all five elements under the definition of "board" being (1) established by a state executive office and therefore committees of the State; (2) created pursuant to authority delegated by the legislature; (3) given "advisory power" over the "specific matters" of space policy and space-related projects; (4) required to conduct meetings; and (5) required to take "official actions" in the form of making official recommendations.

as established pursuant to the constitution, statute, rule, or executive order").

In contrast, no language in any provision of the Sunshine Law nor any reference in its legislative history suggests application of the Sunshine Law to a board that has official existence with official functions and duties pursuant to federal law. A reading of the law as a consistent whole and with its legislative history thus leads to the conclusion that the Sunshine Law applies to entities created and governed by the laws of the State or its political subdivisions. Absent any indication to the contrary, we decline to extend the language "created by constitution, statute, rule, or executive order" to encompass entities created by or pursuant to federal law. It is thus our opinion that federally created entities fall outside the definition of "board" and, therefore, outside the ambit of the Sunshine Law.[7]

As stated above, we find the UH IACUC to be a committee created pursuant to federal law. For this reason, at a minimum,[8] the UH IACUC does not constitute a "board" under the Sunshine Law and, therefore, need not operate in accordance with its provisions.

CONCLUSION

Based upon a reading of the Sunshine Law as a consistent whole and with its legislative history, and absent any indication to the contrary, it is our opinion that the Sunshine Law does not apply to any agency, board, commission, authority, or committee created by or pursuant to federal law. As we find the UH IACUC to be a federally created committee and therefore not subject to the Sunshine Law, the UH IACUC may deny the public access to its meetings.

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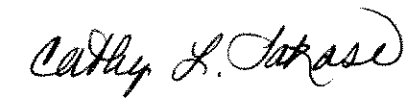
[7] Cf. Am. Soc. For the Prevention of Cruelty to Animals v. Bd. of Trustees of State Univ. of New York, 541 N.Y.S.2d 183 (N.Y. Sup. Ct. 1989) (court found university animal care committee created under Animal Welfare Act not to be a "public body" under its Open Meetings Law, which court found evident excludes federal bodies from statute's ambit because the statute required a "public body" to perform a governmental action for the **state**); Dorson v. State, 657 So. 2d 755 (La. App. 1995) (IACUC members, whose existence and activities are dictated by federal law, deemed as members to be acting as federal functionaries, not as public officials of the state performing state business; therefore, IACUC found not to be a "public body" under Open Meetings Law).

[8] We note without deciding that the UH IACUC may also lack other requisite elements under the definition of "board."

If you have any questions regarding the foregoing, please do not hesitate to call our office.

Very truly yours,



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