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Re: Head Football Coach June Jones' Contract

Dear Ms. Tsujimura:

This letter is in response to a request by the University of Hawaii ("UH") to the Office of Information Practices ("OIP") for an opinion on whether its contract¹ with Head Football Coach June S. Jones III should be made available to the public.² A member of the public and members of the

¹ The contract, which is the subject of this letter, is Coach Jones' first contract with UH. The media has reported that Coach Jones and UH have agreed to a new contract but that the document has yet to be signed by Coach Jones. While we have not reviewed the form of the new contract, we believe that, absent extraordinary circumstances, disclosure of the new contract, once executed, should be in accordance with this opinion.

² The original request from UH also sought guidance as to whether it should disclose the specific amount of Coach Jones' salary. That issue, however, is moot, as UH, apparently with Coach Jones' consent, previously disclosed the specific amount of Coach Jones' annual salary. Accordingly, that issue is not addressed by this letter.

media also have requested that this office address whether UH may properly withhold access to Coach Jones' contract. This letter is copied to those requestors and is intended to provide them with a general understanding of this office's position regarding Coach Jones' contract.

We also are providing UH with a second letter, specifically addressing certain paragraphs of Coach Jones' contract. We are doing so because, after considerable effort, we found it impossible to adequately discuss certain paragraphs of the contract without disclosing the contents of those paragraphs. While our opinion may be that all of those paragraphs should be public, it is not this office's practice to make disclosure of another agency's records either by providing the records themselves to the requestor or through details contained in our written opinions. Disclosure must be through the agency maintaining the records, not from this office. See Haw. Rev. Stat. § 92F-15.5(b) (1993).

ISSUE PRESENTED

Whether the contract between UH and Coach Jones must be publicly disclosed.

BRIEF ANSWER

Yes. Certain information about the contract has been disclosed by UH and Coach Jones and has been reported by the media. We believe that there is no reasonable basis to withhold those portions of the contract containing information that has previously been made public. We also find that, because of the public nature of his position and the fact that he is one of the, if not the, highest paid State employees, Coach Jones' privacy interests relating to the contract are outweighed by the public's right to know. Lastly, based upon the information provided to us by UH, we cannot conclude that disclosure of the contract will frustrate a legitimate government function, i.e., UH's ability to maintain morale in the athletic department or to negotiate contracts with its coaches.

FACTS

UH and Coach Jones entered into an Employment Agreement ("contract") on or about December 31, 1998. The contract was subsequently approved by the UH Board of Regents on January 22, 1999. According to UH, Coach Jones is a member of the Hawaii Government Employees Association, bargaining unit 08, Administrative, Professional and Technical

employees of UH. The contract is a document consisting of ten pages and contains the terms of Coach Jones' employment, including his annual salary as well as various other monetary and non-monetary compensation. UH and Coach Jones advised this office that, at around the time the contract was executed, former Athletic Director Hugh Yoshida orally promised Coach Jones that the contract and its terms would be confidential.

We understand that, some time after the contract was executed, UH disclosed, with Coach Jones' consent, the specific amount of Coach Jones' annual salary.³ UH also disclosed the date of Coach Jones' hire and the fact that the contract was for a period of five years. Since the execution of the contract, other terms of the contract have been reported by various media sources. More specifically, the media reported that, under the contract, Coach Jones receives a housing allowance of \$40,000 per year.⁴ The media has also reported that the contract provides Coach Jones with \$70,000 per year in income from television and radio contracts⁵ and guarantees Coach Jones, if he is fired, \$320,000 per year for the remaining term of the contract.⁶ Recently, Leigh Steinberg, Coach Jones' agent, confirmed that Coach Jones earns \$320,000 in salary and housing allowance.⁷

Apparently, very soon after the contract was executed, UH began receiving requests for access to the document.⁸ By letter dated February 1, 1999, UH requested an opinion from this office as to whether it could release the details of Coach Jones' compensation package, including the portion of

³ UH initially had disclosed a salary range for Coach Jones' salary, relying upon OIP Op. Ltr. No. 91-31 (Dec. 30, 1991). To the extent that Opinion Letter Number 91-31 implies that the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), prohibits the disclosure of the specific salary of union-member employees, that portion of the Opinion is overruled.

⁴ The Honolulu Advertiser ("The Advertiser"), Thursday, July 3, 2003.

⁵ The Advertiser, Saturday, January 23, 1999.

⁶ The Advertiser, Saturday, January 23, 1999.

⁷ The Advertiser, Tuesday, August 5, 2003.

⁸ Prior to the contract being executed, Sandy Oshiro of the Honolulu Advertiser had requested an opinion regarding the proposed amount of Coach Jones' salary. This opinion does not address whether a government agency is required to disclose records, such as the contract, which require formal approval and have yet to receive such approval. Moreover, as the issue is moot, we are closing Ms. Oshiro's request. We also decline Ms. Oshiro's request to issue the opinion for future reference because we believe that the answer may depend on the specific circumstances of each contract and require a case-by-case analysis.

Coach Jones' compensation paid by private sources.⁹ Because of UH's present position, we note that, at that time of its request to this office, UH indicated that it had no objection to disclosing Coach Jones' contract. Specifically, UH wrote, "[w]hile we do not object to making [Coach Jones'] compensation package public, we do want to insure that we are in compliance with State law."

Following UH's request to this office, Beverly Keever requested our assistance relating to her request to UH for access to Coach Jones' contract. At that time, Ms. Keever apparently had not received any type of response to her record request. In a letter dated August 21, 2001 to UH, we asked that UH respond to Ms. Keever's request as required by the Hawaii Administrative Rules. We also indicated that it would be appropriate for UH to provide Ms. Keever with a copy of Coach Jones' contract, redacting those portions of the contract that UH felt should be withheld. After Ms. Keever informed us that she had still not received any response, we wrote to UH on March 5, 2002, asking that a segregated copy of the contract be provided to Ms. Keever.¹⁰ We also requested that an unredacted copy of the contract be provided to us for our review. UH subsequently advised us that, notwithstanding the fact that it had provided Ms. Keever with the specific amount of Coach Jones' salary, the contract was not segregable.

DISCUSSION

Under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("HRS") ("UIPA"), records maintained by a government agency are open to public inspection unless disclosure is restricted by law. Haw. Rev. Stat. § 92F-11 (1993). There is no dispute that UH is an agency and the contract is a government record maintained by UH, disclosure of which is subject to the statute. The UIPA provides five exceptions to disclosure, two of which are raised by UH.

I. INFORMATION PREVIOUSLY DISCLOSED

Before discussing the statutory exceptions to disclosure, we first consider whether there is any basis to withhold the portions of the contract

⁹ We note that UH has provided us with no information on this issue. Because a recent request seeks records containing this information as well as similar records relating to Coach Jones' new contract, we will address the issue relating to the private contributions in a subsequent opinion.

¹⁰ During and after a meeting with UH officials on July 16, 2003, we again advised UH to disclose the contract, redacting those provisions which it felt could be withheld under the statute.

containing information that was previously released by UH or reported by the media. According to UH, it has disclosed Coach Jones' annual salary, the date of his hire, and the length of his contract.¹¹ In addition, as noted above, Coach Jones' agent, Mr. Steinberg, has confirmed the amount that Coach Jones earns in salary and housing allowance. Prior to Mr. Steinberg's statement, the media also reported the amount of Coach Jones' housing allowance, guaranteed income from radio and television, and severance package.

There clearly is no basis to withhold information that UH previously released. In our opinion, any argument to the contrary would be frivolous. Once UH voluntarily disclosed the information, whether to one member of the public or to the media, it cannot later claim that the same information is somehow protected from disclosure. An agency certainly is not permitted to discriminate by disclosing records to some and withholding the same records from others. Stated another way, by its voluntary disclosure of the information, UH waived any argument that the same information is protected from future disclosure.

With respect to the information reported by the media, although not raised in UH's written response on this matter, we understand that there may be an issue as to whether statements in the press, without official confirmation, likewise serve to waive an agency's right to withhold the information. In this case, we need not resolve the issue because the information was confirmed by Coach Jones' agent. We have no difficulty concluding that, as Coach Jones' agent, Mr. Steinberg's confirmation of the amount that Coach Jones earns and the breakdown of that amount was equivalent to Coach Jones disclosing those figures. The bell, therefore, has "rung" with respect to those terms, and the bell cannot be "unring" by denying access to those same terms. In other words, withholding the information previously made public serves no legitimate purpose because UH cannot force the public to forget or pretend to forget that information. Accordingly, as with the information disclosed by UH, we find no basis for UH to withhold the portions of the contract containing the terms that have been reported by the media and confirmed by Mr. Steinberg.

¹¹ We do not intend to imply that UH has not disclosed any other information regarding the contract. UH listed the recited items as examples of information it had publicly disclosed. We do not necessarily understand the examples cited by UH to be exhaustive.

II. THE PRIVACY EXCEPTION

The first exception to disclosure invoked by UH and which we apply to the information not already in the public domain is the "privacy exception." Under the UIPA, records may be withheld if disclosure of those records would be an unwarranted invasion of a person's privacy. Specifically, the statute states:

§92F-13 Government records; exceptions to general rule. This part shall not require disclosure of:

(1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;

...

Haw. Rev. Stat. § 92F-13(1) (1993). The statute further provides that, where the public interest in disclosure outweighs an individual's privacy interest, disclosure is warranted. Haw. Rev. Stat. § 92F-14(a) (Supp. 2002). We have interpreted section 92F-14(a), HRS, to require a balancing of the public interest and an individual's privacy interest. See OIP Op. Ltr. No. 03-08 (April 8, 2003).

With respect to the contract, UH contends that Coach Jones has a significant privacy interest in the terms of his employment, citing section 92F-14(b)(4), HRS. While we are uncertain whether the contract falls within the types of documents described by section 92F-14(b)(4), HRS, we agree that Coach Jones has a significant privacy interest in the terms contained in the contract. The issue, therefore, is whether the public interest in the contract outweighs Coach Jones' privacy interest.

Coach Jones expressed his reasons for wanting the contract to be withheld. He also advised us that former Athletic Director Yoshida had promised him, at around the time the contract was executed, that the contract and its contents would be confidential. We certainly respect Coach Jones' privacy interest and understand his motivation for wanting the contract to be withheld. We also acknowledge Coach Jones' expectation that the contract would be confidential based upon former Athletic Director Yoshida's promise.

First, while Coach Jones may have relied upon former Athletic Director Yoshida's promise of confidentiality, we must find that former Athletic Director Yoshida had no authority to waive State law. See OIP Op. Ltr. No. 93-22 (Nov. 4, 1993). His promise of confidentiality, therefore, is not a factor in our consideration of the issue.

Second, in our opinion, Coach Jones' reasons for wanting the contract to be confidential and his expectations of privacy must be considered in light of the statute's purpose. In numerous other opinions, we have recited the statute's purpose of protecting the public's interest by "[o]pening up the government processes to public scrutiny and participation[.]" Haw. Rev. Stat. § 92F-2 (1993). With that purpose in mind, we believe that the public interest in disclosure of the contract outweighs Coach Jones' privacy interest. Whether or not by choice, Coach Jones is one of the most prominent people in the State. He is also one of the highest paid State employees. Numerous media reports have indicated that, upon the signing of his new contract, Coach Jones will become the highest paid State employee. Given these facts, the public clearly has an interest – one which we find to be quite significant – in knowing the terms of Coach Jones' contract. Accordingly, in balancing these two interests, we do not believe that section 92F-13(1), HRS, permits UH to withhold Coach Jones' contract.¹²

III. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION EXCEPTION

Section 92F-13(3), HRS, is the second exception to disclosure which is applicable to this opinion. This section allows an agency to withhold a record "in order for the government to avoid the frustration of a legitimate government function[.]" Haw. Rev. Stat. § 92F-13(3).

In the original request to us, UH did not assert section 92F-13(3), HRS, as a basis for withholding disclosure of the contract. In fact, in the original request, UH indicated that it had no objection to disclosing Coach Jones' compensation package. At that time, UH questioned whether, because section 92F-12(a)(14), HRS, specifically required disclosure of Coach Jones' salary range, it was prohibited from disclosing the other components of Coach

¹² At least one other jurisdiction has similarly decided that a coach's privacy interest does not preclude disclosure of his contract. See, e.g., Ark. Op. Atty. Gen. No. 89-003 (January 10, 1989).

Jones' compensation package.¹³ Only recently did UH claim that disclosure would frustrate its ability to perform a legitimate government function. We note that, in responding to future record requests, UH is required to cite the specific authority under which it is denying the request. Haw. Admin. R. § 2-71-14(b)(2).

Subsequent to our meeting with UH officials, we expressly requested that UH provide us with specific information to support its frustration argument. In response, UH wrote that disclosure of Coach Jones' contract "could have the impact of frustrating the Athletic Director's ability to maintain a cohesive coaching team and a successful athletic program." More specifically, UH articulated that release of Coach Jones' contract will adversely affect current Athletic Director Herman Fraizer's ability to negotiate future contracts with other coaches and will damage the working relationships of employees in the Athletic Department. While UH's concerns may be justified, UH has provided us with no specific examples of or any concrete information as to how disclosure of the contract will frustrate the Athletic Department's ability to function. We give great deference to an agency's judgment that disclosure would frustrate its ability to perform a legitimate government function; however, such general, ambiguous assertions of harm as provided by UH are of little help. We would be remiss in our statutory duties if we simply accepted UH's statement that disclosure will frustrate a legitimate government function without any factual basis to support UH's assertion.

In this case, given the publicity surrounding Coach Jones' hiring and the new contract, absent any specific facts from UH, we simply have no information from which to conclude that disclosure of the contract will affect the Athletic Department in any manner. In our opinion, UH's assertion, without any supporting basis, that disclosure will hurt Athletic Director Fraizer's ability to negotiate future contracts with other coaches is speculative and an overstatement. As we see it, many of the monetary terms of the contract have been reported. It is reasonable to assume that other coaches, both presently employed and potential employees, are familiar with those terms. Disclosure of the contract, therefore, most likely will not be of any further detriment to Athletic Director Fraizer's ability to hire or retain a coach. Moreover, assuming a coach is represented by an agent, even one less

¹³ We do not interpret section 92F-12(a)(14), HRS, as creating, by implication, a confidentiality provision. In other words, we interpret section 92F-12(a)(14), HRS, as requiring disclosure of the employment-related information listed therein and, as for information not included in section 92F-12(a)(14), we believe that those items are subject to disclosure under section 92F-11, HRS, applying the exceptions to disclosure in section 92F-13, HRS.

skilled than Mr. Steinberg, that agent is likely to be generally familiar with the contracts that similarly qualified coaches at other universities are receiving. That being the case, we cannot conclude that knowledge of the specific terms of Coach Jones' contract will create a disadvantage for Athletic Director Fraizer.

We also have difficulty understanding UH's contention, given that football is the Athletic Department's biggest revenue-generating sport and in light of Coach Jones' coaching credentials. Coaches of other sports who may not have Coach Jones' credentials or whose sports do not generate the same amount of revenue for the Athletic Department cannot reasonably expect to be given the same contract as that given to Coach Jones. In our opinion, it is simply too unrealistic to think that, even if another coach knew all of the terms of Coach Jones' contract, he or she could demand terms similar to the Coach Jones' deal.¹⁴ Accordingly, we do not see why UH believes that disclosure of Coach Jones' contract will impair Athletic Director Fraizer's ability to negotiate other contracts.

Lastly, with respect to UH's statement that disclosure of the contract could cause morale problems within the Athletic Department, we again note that many of the contract's terms have been disclosed. Without any more specific information from UH, we assume therefore that, if there was going to be morale issues because of Coach Jones' contract, those issues have arisen already.

IV. OBLIGATION TO DISCLOSE SEGREGATED RECORD

We feel that it is appropriate to address UH's response to the various requests for access to Coach Jones' contract, especially in light of the pending requests for Coach Jones' new contract.

This office has consistently advised agencies that they must disclose those records or portions thereof for which there is no statutory basis to withhold disclosure. The administrative rules require such disclosure within a specific timeframe. See Haw. Admin. R. §§ 2-71-13 and 2-71-15. As noted above, we twice recommended that UH disclose the contract to Ms. Keever, segregating those terms which UH believed should be withheld. In response,

¹⁴ We readily admit that we have none of the experience that Athletic Director Fraizer has in negotiating contracts with coaches. That precisely is the reason we requested UH to provide us with specific explanation as to how disclosure of the contract would frustrate Athletic Director Fraizer's ability to run his department. However, given UH's response, we have no alternative but to rely upon our assumptions regarding university coaches' contracts.

UH advised us and Ms. Keever that “the contract is not segregable” and stated that it would wait for an opinion from this office before disclosing any of the contract. UH also repeated its assertion that “the contract is not segregable” in responding to a recent request from the Advertiser.

UH’s position that “the contract is not segregable” is simply disingenuous. As discussed earlier in this letter, UH and Coach Jones, through his agent, disclosed a number of the contract’s terms. There is no reasonable basis to support UH’s refusal to disclose the portions of the contract containing those terms. At an absolute minimum, UH could have – and should have – released a copy of the contract containing Coach Jones’ name, the term of the contract, and annual salary. In addition, the contract contains a number of “standard” clauses, all of which could have – and should have – been disclosed.¹⁵

After meeting with UH officials in July, we again recommended that UH disclose a segregated form of the contract. By letter dated August 6, 2003, UH explained its continuing refusal to do so:

the rationale is the (sic) based upon past practice, where most of the information contained in a document is subject to OIP review, the OIP had approved selective release of information culled out of the document. If, for example, in this case, we were to have redacted the information still in question, most of the information in the ten pages would have been redacted. Under these circumstances, past practice was to release that which could be released by culling out the information from the document. If this practice no longer complies with the requirements of the law, please so inform us. We are willing to conform our practice accordingly.

First, this office has never advised agencies that they may satisfy a record request under the UIPA by providing “culled” information from the requested record and withholding the record. Nothing in the statute supports such an interpretation. Second, as noted above, this office twice advised UH to make disclosure of the contract, redacting the paragraphs in question. We

¹⁵ More specifically, the “standard” paragraphs include the introduction paragraph containing Coach Jones’ name, the two “WHEREAS” clauses of the contract, the Special Provisions relating to vacation and Coach Jones’ obligation to comply with UH and NCAA rules, the paragraph subjecting the contract to legislative appropriations, the paragraphs regarding dispute resolution, contract modification and contract integration and the signature page.

Ruth I. Tsujimura, Esq.
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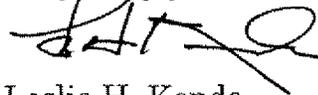
question how UH can continue to sincerely contend that its response in this case was based upon a practice approved by this office. Even if the majority of the contract would have been redacted pending our opinion, UH was required to make the redacted record available.

As you can discern, we are critical of UH's handling of this matter. An agency is not permitted to use this office's backlog of opinion requests to delay disclosing records or portions thereof which the agency cannot reasonably articulate a statutory basis for withholding disclosure. To avoid a similar response relating to Coach Jones' new contract, once that document is executed, we recommend that UH disclose the contract, segregating those provisions that it believes is consistent with this opinion and supported by law. UH should make disclosure of the new contract in the timeframe required by the appropriate administrative rule.

CONCLUSION

We find that there is no reasonable basis to withhold those portions of the contract which have been disclosed by UH or Coach Jones, through his agent. We also find that the public's interest in the contract outweighs Coach Jones' privacy interest and that, based upon the information provided to us by UH, disclosure of the contract will not reasonably frustrate the Athletic Department's ability to operate. For those reasons, the contract, in its entirety, should be disclosed.

Very truly yours,



Leslie H. Kondo
Carlotta M. Dias

LHK/CMD:cy/ankd

cc: Beverly Keever (via facsimile)
Sandra Oshiro, The Honolulu Advertiser (via facsimile)
Ferd Lewis, The Honolulu Advertiser (via facsimile)
Stephen Tsai, The Honolulu Advertiser (via facsimile)
Rob Perez, Honolulu Star Bulletin (via facsimile)