
**Assessment of the Joint Statement of
Understanding between the Governor of Hawai'i
and the Chairman of the National Science Board**

January, 25 2008

OIG 08-6-001



National Science Foundation
Office of Inspector General

Background

A visitation team of seven Board members traveled to Hawaii in June 2007, to visit NSF-funded research sites and to “interact with the [scientific] community in an informal way.” While still making preparations for the trip, the Board Office (NSBO) had communication with the Hawaii Governor’s Office (HGO) regarding a press conference involving the Governor and the Board members and the possibility of the Governor and the Board Chairman signing some sort of statement that was as yet undefined. On the weekend prior to the trip, the HGO provided the NSBO with a draft “Memorandum of Understanding,” which they proposed for joint signature. Over the next few days, NSBO staff and HGO staff negotiated on the language and made significant changes to this document and on the day of the scheduled press conference with the Governor, Tuesday, June 5, 2007, came to agreement on a Joint Statement of Understanding (JSU), which was subsequently signed by the Board Chairman and the Governor of Hawaii.¹ The Board Chairman indicated that his intent was simply to join in a ceremonial statement of mutual support for STEM education and that there was no intent to create a binding commitment on the part of NSF to support Hawaii STEM programs outside of the normal competitive award process.

Subsequent to the signing of this document, the HGO issued a press release regarding the JSU and several Hawaii newspapers reported on the press conference and JSU. These public releases were brought to the attention of the Office of Management, which in turn brought them to the attention of Dr. Arden Bement, Director, National Science Foundation and Chairman, National Science Board Executive Committee. Subsequently, Dr. Bement sent an email to the Board membership, expressing multiple concerns over the signing of the JSU.

Request for OIG Review

Due to the concerns raised by NSF’s Director and input from other Board members, Dr. Steven Beering, Chairman, National Science Board, requested our office to conduct an assessment of the circumstances surrounding the JSU. The scope of our assessment was to determine whether policies, procedures, and guidance are in place to govern the circumstances surrounding the JSU and whether those policies, procedures, and guidance were followed. We conducted this assessment as a nonaudit service. As such, it is not subject to Government Auditing Standards.

¹ The stated purpose of the signed JSU is to jointly recognize the importance of:

- “1) Initiatives and programs supporting STEM Education aspects of the *Hawai’i Innovation Initiative*, including the Hawai’i Innovation Council.
- 2) Initiatives and programs supporting the Board’s *National Action Plan for 21st Century STEM Education*, including the National Council on STEM Education.
- 3) Encouraging vertical and horizontal coordination of STEM Education Programs through all levels of education in Hawai’i, and throughout our Nation.
- 4) Encouraging research, education, and workforce development in science and technology-related businesses in Hawai’i and throughout our Nation.”

During our assessment we identified three categories of policies, procedures, and guidance that may be applicable to the circumstances surrounding the JSU. Those are: 1) Conflict of Interest and Ethics Rules, 2) The Government in the Sunshine Act, and 3) Internal Board Practices.

Conflict of Interest and Ethics Rules

Government employees are subject to various conflict of interest and ethics laws and regulations. As “special government employee[s],” Board members are likewise subject to certain of these laws and regulations. These rules are designed to ensure that government employees act with impartiality and integrity both in fact and in appearance.

NSF has implemented these rules as they relate to Board members in a document titled *A Summary of Basic Conflict-of-Interest and Ethics Rules for Members of the National Science Board* (Board Ethics Rules or Rules). This document defines disqualifying relationships under which a Board member must excuse himself from all deliberations. Importantly, the Board Ethics Rules also state that when in doubt, a Board member is to “consult an ethics counselor in the Office of General Counsel.” The Rules go on to describe that relationships may result in conflicts of interest, “or the appearance of conflicts” and that permission must be obtained before participating in “particular matter[s]” involving “specific parties . . . when you determine that a reasonable person with knowledge of the relevant facts would question your impartiality.” Specifically, Board members must obtain permission if there is a covered relationship, as defined by the Board Ethics Rules, with a party to a matter. The Rules delineate seven ways in which a covered relationship can arise. Such a relationship can generally be characterized as one in which the potential for influence exists such as a family member or employer. In addition, on an annual basis, Board members and NSBO staff receive training on conflict of interest and ethics rules.

We do not believe that an actual conflict of interest exists with respect to the JSU. First, the JSU does not appear to have been entered into with a specific party with whom the Board members have a covered relationship as that term is defined within the conflicts rules. Second, even if the JSU can be construed as creating a covered relationship, under the Board Ethics Rules, with the Governor of Hawaii, there does not appear to currently be a particular matter, under the Board Ethics Rules, before the Board for which a conflict would arise.

Nevertheless, we do believe the circumstances were sufficient for the Board Chairman and the NSBO staff involved to question whether a reasonable person with knowledge of the relevant facts might question their impartiality. First, the idea of the Board Chairman signing a JSU with a state governor is unprecedented. [REDACTED]

█ Finally, the binding nature of the original document, which was prepared by the HGO, should have alerted those involved that the governor may have expected more from the agreement than was possible. Subsequently, the HGO issued a press release that improperly used the substance of the original document, thereby overstating and misrepresenting the actual document signed. Since that time, the Board Office has communicated with the HGO in an attempt to clarify the overstatements and misrepresentations. In response, the HGO apologized for any errors in the announcement, characterizing them as unintentional. After additional communication with the Board Office, the HGO removed the press release from its website.

In our opinion, the circumstances were sufficient to raise a concern in the mind of the Board Chairman and the NSBO staff members involved. Such concerns should have then prompted those involved to seek the advice of the Designated Agency Ethics Official within NSF's Office of General Counsel, who provides the Board guidance on such issues.

We recommend that the Board Chairman request the Designated Agency Ethics Official to formally review the signing of the JSU in light of the ethics rules. Further, we recommend that the Board Chairman seek guidance to remedy the current situation through clarifying with the HGO the Board Chairman's true intent in signing the JSU. The Board Chairman should also be willing to provide similar statements to other state governors upon their request, to avoid any appearance of preferential treatment.

The Government in the Sunshine Act

The Government in the Sunshine Act (Sunshine Act or Act) provides for public access to the government's decision making process. As a collegial body, the NSB is subject to the Act's open meeting requirements and has recently created a Sunshine Act policy manual to help guide the Board in meeting the procedural and substantive requirements of the Act. In particular, the Sunshine Act requires that all meetings, unless they meet one of 10 narrow exemptions, be open to the public and that the Board provide advance public notice of those meetings and, among other things, their content.

We do not believe the provisions of the Sunshine Act apply to the press conference and JSU signing ceremony. To invoke these provisions, there must first be a meeting. A meeting of the Board occurs when there is a quorum of the Board membership (or a Board committee) and there is authorization to exercise formally delegated authority. In this instance, a meeting did not occur in Hawaii for two reasons. First, there was not a quorum of the full Board, the Executive Committee, or any other Committee with authority to take this action. Second, we cannot determine whether the Board Chairman or other members of the visitation team had authorization from either the full Board or the Executive Committee to sign the JSU. While the visitation team did receive a recommendation from the Executive Committee to take the trip to Hawaii, that trip was for the purpose of "informal" interactions with the community. It is not clear

whether the Executive Committee, at the time of recommending the trip, contemplated the Board Chairman engaging in the signing of a document with the state's Governor.

The Board is a collegial body of 24 members as well as the NSF Director that derives its authority from the NSF Act of 1950. The NSF Act spells out the authority of the Board and also delineates some explicit authority of the Board Chairman. That authority is primarily administrative in nature and includes specific tasks such as appointing staff and setting the date for the Board's annual meeting. Our review of the Board's policies, procedures, and guidance identified no formal delegation to or other written documentation of additional authority of the Board Chairman for handling other business on behalf of the Board.

In this situation, the Board Chairman took what he deemed to be a ceremonial action that had no binding effect on the Board or the government. That he did so in his official capacity as Chairman of the National Science Board did not, at the time, raise any concern on the part of those involved as it seemed to be in line with recent practices of the Board Chairman and the Board Office's understanding of the authority vested in the Chairman himself. However, subsequently, this action raised concerns on the part of numerous Board members over whether the Chairman indeed does have this authority and whether that authority was exercised properly.

The signing of the JSU occurred in a rushed manner over the course of just a few days, perhaps without receiving proper consideration and review. This consideration and review could have come from two different sources. First, a thorough legal review performed by independent counsel may have surfaced these authority concerns to the appropriate level, in addition to raising the conflict of interest concerns described previously. While the Board Executive Officer did have his staff [REDACTED] review the JSU, that review was conducted for the purpose of determining whether the Board as a whole had authority to take such an action, and not whether it was proper for the Board Chairman to act alone in signing the JSU. The Board is currently authorized to hire and/or retain the services of independent counsel. However, it has not yet moved to avail itself of such services. We believe that if the Board had ready access to and had consulted independent legal counsel, it may have prevented questions that have been raised.

Second, an established Board process that addresses the authority of the Chairman to act in these types of situations occurring outside of the normal Board meetings could also have prevented these questions. When the Chairman's authority is not clear, such a process may have required at least an email to all Board members to obtain their input prior to the signing of the JSU. This communication may have surfaced the conflict of interest concerns as well as any authority concerns.

Consequently, we recommend that the Board develop, implement, and communicate to all members a process for how it conducts on-the-spot business outside of its regularly scheduled meetings, including a definition of the roles and responsibilities of the Board Chairman and, if necessary, formal delegation of authority. In addition, the Board should reconsider its decision to employ its own independent counsel.

Internal Board Practices

Finally, our review of the Board's internal practices found no other formal policies, procedures or guidance that might have guided the Board in handling the situation surrounding the signing of the JSU. For example, unlike the National Science Foundation, the Board does not have its own policy for how to respond to contacts with the media, or contacts with state and local governments.

We recommend that the Board develop a protocol for how it will address relations with the media and state and local governments, as well as any other similar entities. In addition, the Board should consider how best to employ NSF resources that are available to it in handling media and public relations issues.

Board Response to Draft Report

In response to a draft of this report, the Board agreed with our analysis and our recommendations. In addition, the Board has taken steps to implement all of our recommendations and we now consider these to be completed. The Board's full verbatim response is attached to this report.

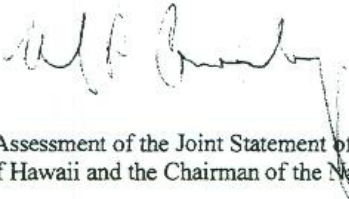
Appendix: NSB Response to Draft Report

National Science Board

December 14, 2007

MEMORANDUM

TO: Dr. Christine Boesz
Inspector General, NSF

FROM: Dr. Michael P. Crosby 
Executive Director

SUBJECT: Response to Draft OIG Assessment of the Joint Statement of Understanding between the Governor of Hawaii and the Chairman of the National Science Board

Thank you for the opportunity to review and respond to the draft Office of Inspector General (OIG) Assessment of the Joint Statement of Understanding between the Governor of Hawaii and the Chairman of the National Science Board (Board). Dr. Steven Beering (Chairman of the Board) and Dr. Dan Arvizu (Chairman of the Board's Audit and Oversight [A&O] Committee) have asked me to provide you with this response.

We fully concur with your analysis confirming that the June 5, 2007 press conference involving seven Board Members and the Governor of Hawaii did not involve any actual conflict of interest or any violations of the Government in the Sunshine Act.

Nevertheless, the Board and its staff always work to improve our processes and we appreciate your recommendations regarding external Board activities and the role of the Board Chairman. In this vein, we believe all of your recommendations have been or are in the process of being addressed. For example, at its October 2007 meeting the full Board approved a statement that affirmed the practice of allowing the Chairman to speak for the Board on established Board policies, positions, and programs. We believe this statement formally clarifies the authority of the Board Chairman to communicate established Board policies, positions, and programs outside of Board Meetings.

The Board Office has also communicated again with the Hawaii Governor's Office (HGO) in order to clarify the intent of the JSU and further request correction of the HGO website press release regarding the JSU. In addition, the Board Office has requested that the Designated Agency Ethics Official both review the signing of the JSU to confirm that no violation of the conflict of interest rules occurred, and formally certify the Board Office Attorney Advisor as the Board Office Conflicts Officer. In addition, the Board Office intends to use external support services in the future for special event information and outreach. These types of resources to supplement Board staff capabilities may have been useful to the Board not only in preparing for its trip to Hawaii, but also in working with the HGO over the signing of the JSU.

We suggest that several statements in your draft could be modified to enhance the clarity of your findings and recommendations. For example, the report characterizes the signed document as an "agreement" and not the statement jointly recognizing the importance of science, engineering,

National Science Foundation

4201 Wilson Boulevard • Arlington, Virginia 22230 • (703) 292-7000 • <http://www.nsf.gov/nsb> • e-mail: NSBoffice@nsf.gov

and mathematics education that it is. Board Office Staff are available to meet with your staff to discuss other points of possible clarification, if you believe it would be helpful.

Attachment

cc: D. Arvizu
S. Beering
D. Cureton
✓ K. Cutforth
R. Moy
K. Scott