

**Op. Ltr. 91-02 Police Officers' Special Duty Service Pay**

OIP Op. Ltr. No. 05-03 partially overrules this opinion to the extent that it states or implies that the UIPA's privacy exception in section 92F-13(1), HRS, either prohibits public disclosure or mandates confidentiality.

February 25, 1991

MEMORANDUM

TO: The Honorable Michael S. Nakamura  
Chief of Police, City and County of Honolulu

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Police Officers' Special Duty Service Pay

This is in reply to your letter dated January 22, 1991, requesting an advisory opinion from the Office of Information Practices ("OIP") concerning the public's right, if any, under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), to inspect and copy government records which disclose amounts paid to Honolulu Police Department officers by persons outside the department as compensation for "special duty" services.

ISSUE PRESENTED

Whether, under the UIPA, information maintained by the Honolulu Police Department ("HPD") concerning amounts paid to HPD officers by persons outside the HPD as compensation for special duty services, must be made available for inspection and copying.

BRIEF ANSWER

Under the UIPA, the HPD must, upon request by any person, permit the inspection and copying of the salary range of an HPD officer who is a civil service employee, and who is not engaged in an undercover law enforcement capacity. See Haw. Rev. Stat. § 92F-12(a)(14) (Supp. 1990). In contrast, under the UIPA, the exact compensation paid by the County to police officers who are exempt from civil service must be disclosed upon request.

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However, because special duty pay received by HPD officers constitutes "outside income" paid by the person contracting for a special duty officer, and because the UIPA declares that individuals have a significant privacy interest in their finances, income, or financial activities, we conclude that the disclosure of government records concerning amounts received by HPD officers as special duty pay would "constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Supp. 1990).

Specifically, in balancing an HPD officer's significant privacy interest in the officer's special duty pay against the public interest in disclosure of this information under the UIPA's balancing test set forth at section 92F-14(a), Hawaii Revised Statutes, we conclude that the public interest in disclosure of this information does not sufficiently outweigh an HPD officer's privacy interest in the same.

We also conclude that the disclosure of the names of "individuals" who contract for special duty services would be clearly unwarranted. In contrast, the HPD should disclose the names of corporations, agencies, or other entities that contract for special duty service. In addition, after the deletion of the names of any individual police officers, government records concerning payments made by those persons contracting for special duty services must be made available for public inspection and copying.

For example, information concerning the types of special duty to which HPD officers are assigned, the total administrative fees paid to the HPD, the aggregate special duty compensation paid for a particular period, or the amount paid to the top special duty pay recipient, would all be public under the UIPA.<sup>ff</sup> □FACTSff,HPD pol  
entitled "special duty." The term "special duty" means:

[T]he performance of a service for a person, organization, or governmental entity, other than the Honolulu police department, by an officer of the Honolulu police department acting in a police capacity, in return for which the officer receives a direct or indirect payment or compensation of some kind.

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Section 5-52.1, Revised Ordinances of Honolulu (Supp. 1987)  
("ROH").

A person or organization desiring the services of a special duty officer must pay the HPD an administrative fee of seven dollars for one police officer, plus one dollar for each additional officer. See ROH § 5-52.3 (Supp. 1987).

Common examples of "special duty" service include traffic control at construction sites, security at public athletic events and concerts, traffic control associated with road repairs, and security at commercial establishments, such as bars, restaurants, and stores. "Special duty" also occasionally involves rendering services to government agencies, such as the University of Hawaii during registration week. Because "special duty" involves a police officer "acting in a police capacity," officers performing such duty do so in their HPD uniforms, and among other police powers, special duty officers may exercise the power of arrest.

According to the HPD, a person or organization desiring special duty services makes a request to the HPD special duty clerk, who logs the request into the special duty database. HPD officers interested in special duty assignments may review a listing of special duty assignment requests, and sign-up for special duty assignment.

After an HPD officer has completed a special duty assignment, the person or organization requesting the assignment either pays the officer in cash, or forwards payment to the HPD, made payable to the officer performing the special duty services. If special duty services are performed for a government agency, the agency likewise remits payment to the HPD made payable to the special duty officer. According to the HPD, in 1990, officers employed by the HPD received over three million dollars as compensation for special duty services. In addition, according to the HPD, all officers performing special duty are subject to civil service laws.

The HPD maintains a computer database from which it is able to print out a listing of the amounts paid to identified HPD officers as compensation for special duty. The HPD requests the OIP's advice regarding whether information concerning the amounts earned by HPD officers performing special duty, must be made available for inspection and copying under the UIPA.

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DISCUSSION

The UIPA, the State's new open records law, sets forth the general rule that "[a]ll government records are open to inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1990). Thus, except as provided by section 92F-13, Hawaii Revised Statutes, each agency must "make government records available for inspection and copying during regular business hours." Haw. Rev. Stat. § 92F-11(b) (Supp. 1990). In addition to the UIPA's general rule that all government records are public unless protected by a statutory exception to access, the UIPA sets forth a list of government records, or categories of records, that must be made available for inspection and copying "[a]ny provision to the contrary notwithstanding." Haw. Rev. Stat. § 92F-12(a) (Supp. 1990).

With regard to information relating to present or former officers or employees of an agency, section 92F-12(a), Hawaii Revised Statutes, provides in pertinent part:

**§92F-12 Disclosure required.** (a) Any provision to the contrary notwithstanding each agency shall make available for inspection and duplication during regular business hours:

. . . .

- (4) The name, compensation (but only the salary range for employees covered by chapters 76, 77, 297 or 304) . . . of present or former officers or employees of an agency . . . except that this provision shall not apply to information regarding present or former employees involved in an undercover capacity in a law enforcement agency; . . . .

Haw. Rev. Stat. § 92F-12(a)(14) (Supp. 1990).

Thus, under the UIPA, the exact compensation of present or former agency employees who are not covered by chapters 76, 77, 297 or 304, Hawaii Revised Statutes, must be made available for inspection and copying during regular business hours. On the contrary, only the salary range of agency employees who are

covered by civil service laws (chapter 76 and 77, Hawaii Revised Statutes), including HPD officers, must be made available for inspection and copying under the UIPA.

Because a person contracting for a special duty officer pays the officer directly, and because such payments do not constitute the officer's "regular pay," the issue presented is whether an HPD officer's "outside income" which is received through a program administered by the HPD, must be made available for inspection and copying under the UIPA.

Section 92F-13(1), Hawaii Revised Statutes, provides that an agency is not required by the UIPA to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Under the UIPA, the "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. § 92F-14(a) (Supp. 1990).

Under this balancing test, "if a privacy interest is not `significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw S.J. 689, 690 (1988) ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure").

In subsection (b) of section 92F-14, Hawaii Revised Statutes, the Legislature set forth examples of information in which an individual has a "significant privacy interest." This subsection provides in pertinent part:

(b) The following are examples of information in which the individual has a significant privacy interest:

. . . .

- (6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness; . . . .

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Haw. Rev. Stat. § 92F-14(b)(6) (Supp. 1990) (emphases added).

Thus, under the UIPA, HPD officers in the civil service have a significant privacy interest in their "compensation," except for information identifying their salary range. However, in accordance with the UIPA's balancing test set forth at section 92F-14(a), Hawaii Revised Statutes, if the public interest in disclosure of an HPD officer's outside income outweighs such officer's significant privacy interest in the same, its disclosure would not constitute a clearly unwarranted invasion of personal privacy. Haw. Rev. Stat. §§ 92F-2 and 92F-14(a) (Supp. 1990).

In previous OIP advisory opinions, we concluded that the "public interest" to be considered under the UIPA's balancing test is the public interest in the disclosure of "[o]fficial information that sheds light on an agency's performance of its statutory purpose," see OIP Op. Ltr. No. 90-7 (Feb. 9, 1990), and in information which sheds light upon the conduct of government officials, see OIP Op. Ltr. No. 90-17 (April 24, 1990). Two of the basic policies served by the UIPA are to "[p]romote the public interest in disclosure" and to "[e]nhance governmental accountability through a general policy of access to government records." See Haw. Rev. Stat. § 92F-2 (Supp. 1990).

Further, in enacting the UIPA, the Legislature declared that "it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. § 92F-2 (Supp. 1990). Thus, the public interest to be considered in applying the UIPA's balancing test is the public interest in the disclosure of information which sheds light upon an agency's performance of its duties and the conduct of government officials, or which otherwise promotes governmental accountability. On the contrary, however, in previous OIP advisory opinions, we reasoned that this "public interest," in the usual case, is "not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about any agency's own conduct." OIP Op. Ltr. No. 89-16 (Dec. 27, 1989), quoting, U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468, 1481, 103 L. Ed. 2d 774, 796 (1989).

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In our opinion, there is a substantial public interest in information concerning the types of special duty to which HPD officers are assigned. HPD police officers who perform special duty services are "acting in a police capacity" and do so in their HPD uniforms. The disclosure of information concerning the types of special duty services to which HPD officers are or may be properly assigned, or the HPD's policies concerning this program, sheds light upon the conduct of a government agency and its officials.

While public employees and officials cannot reasonably expect the same degree of privacy in their financial affairs as do private citizens, Nakano v. Matayoshi, 68 Haw. 140, 148 (1985), in the absence of other facts or special circumstances which might tip the balance of interests, we conclude that the public interest in the disclosure of amounts paid to each HPD officer as "outside income" for special duty services, does not outweigh a police officer's significant privacy interest in this information as evidenced by sections 92F-12(a)(14) and 92F-14(b)(6), Hawaii Revised Statutes. Accordingly, we conclude that the disclosure of amounts paid to each HPD officer performing special duty services would generally constitute a clearly unwarranted invasion of personal privacy under the UIPA.

We additionally believe that "individuals" who contract for special duty services have a significant privacy interest that is not outweighed by the public interest in disclosure of this fact. Accordingly, the HPD also should generally not disclose the identities of natural persons who contract for special duty services. In contrast, the HPD should disclose the names of corporations, agencies, or other "entities" that contract for special duty service, due to the absence of any privacy interest in this information.

Furthermore, the disclosure of aggregate information concerning the HPD's special duty program, after the deletion of any reasonably segregable information which identifies individual officers, would not constitute a clearly unwarranted invasion of personal privacy under the UIPA. Thus, under the UIPA, such information as the total special duty compensation paid for a particular period, or the total received by the top special duty pay earner, if such information exists, would not be protected by the UIPA's privacy exception. Similarly, information concerning

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amounts paid by government agencies to HPD officers for special duty services, when severed of any individually identifiable information, is also public. See Haw. Rev. Stat. § 92F-12(a)(3) and (10) (Supp. 1990). Likewise, information concerning the special duty administrative fees collected by the HPD is not protected from disclosure by the UIPA's personal privacy exception.

Lastly, we do not conclude as a categorical matter that the disclosure of information concerning a public official's outside financial affairs would always result in a clearly unwarranted invasion of personal privacy under the UIPA. In other factual contexts, we might conclude that a public official's privacy interest in their financial affairs is outweighed by the public interest in disclosure.

#### CONCLUSION

Although under the UIPA, the salary ranges of HPD officers whose employment is subject to chapters 76 or 77, Hawaii Revised Statutes, must be disclosed, we conclude that as a general matter, the disclosure of amounts paid to each and every HPD officer by outside persons for special duty services would constitute a clearly unwarranted invasion of personal privacy. Under the UIPA, HPD officers have a significant privacy interest in information concerning their outside income. This is a privacy interest that, in our opinion, is generally not outweighed by the public interest in disclosure under the UIPA's balancing test.

Hugh R. Jones  
Staff Attorney

HRJ:sc  
cc: Jahan Byrne

APPROVED:

Kathleen A. Callaghan  
Director

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