

April 28, 1994

Honorable Kenneth W. Mortimer
President
University of Hawaii
2444 Dole Street
Bachman Hall
Honolulu, Hawaii 96822

Attention: Rockne Freitas
Vice President for University Relations

Dear President Mortimer:

Re: UIPA Request of the UH Observer for Information About
University Employees Suspended or Discharged for
Employment-Related Misconduct

This is in reply to a memorandum dated April 20, 1993 from Rockne Freitas, Vice President for University Relations, requesting that the Office of Information Practices ("OIP") provide you with written guidance in responding to a request by Mr. Jahan Byrne, Editor-in-Chief of the UH Observer, for information about University of Hawaii ("UH") employees who have been suspended or discharged for employment-related misconduct.

FACTS

By letter dated August 26, 1994, and pursuant to the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), the UH Observer requested:

The names and titles of all University of Hawaii employees who, from January 1, 1983 to current, were either suspended or discharged as a result of disciplinary action sustained against them. We would also like to receive information that explains the nature of the employment-related misconduct, the university's summary of the allegations of misconduct, any findings of fact and

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conclusions of law, and the type of disciplinary action taken by the university.

We understand that this request will only result in the release of an employee's name whose disciplinary action has been timely invoked by the university's highest non-judicial grievance adjustment procedure

. . . .

Letter from Jahan Byrne, Editor-In-Chief, UH Observer, to Kenneth Mortimer, President, University of Hawaii, dated August 26, 1994.

Based upon a telephone conversation with Mr. Byrne on April 25, 1994, it is our understanding that he has clarified his request dated August 26, 1994. Specifically, Mr. Byrne amended his request such that he is seeking information concerning members of bargaining units 7 and 8, dating from July 1, 1989, who have been suspended or discharged for employment-related misconduct.

DISCUSSION

During the 1993 session of the Seventeenth Legislature, the Legislature adopted, and the Governor approved, an Act effective June 9, 1993, ch. 191, 1993 Haw. Sess. Laws 290 ("Act 191"). Act 191 amended section 92F-14(b), Hawaii Revised Statutes, which contains a list of government records, or information contained therein, in which an individual is deemed to have a significant privacy interest. As amended by Act 191, section 92F-14(b)(4), Hawaii Revised Statutes, provides:

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

. . . .

(4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except:

(A) Information disclosed under section 92F-12(a)(14); and

(B) The following information related to employment related misconduct that results in an employee's

- suspension or discharge:
- (i) The name of the employee;
 - (ii) The nature of the employment related misconduct;
 - (iii) The agency's summary of the alleged misconduct;
 - (iv) Findings of fact and conclusions of law; and
 - (v) The disciplinary action taken by the agency;
- when the following has occurred:
the highest non-judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and thirty calendar days have elapsed following the issuance of the decision;

Haw. Rev. Stat. §92F-14(b)(4) (Comp. 1993) (emphasis added).

Section 92F-14(b), Hawaii Revised Statutes, is virtually identical to section 3-102(b) of the Uniform Information Practices Code ("Model Code") upon which the UIPA was modeled by the Legislature. The commentary to the Model Code indicates:

Portions of subsection (b)(1), (2), (4), and (8) not only identify information possessing a significant individual privacy interest, but also identify **closely** related information that is **outside** the scope of the privacy interest. This latter information is subject to disclosure as though it were a part of the Section 3-101 enumeration of disclosable information.

Model Code § 3-102 commentary at 24 (1980) (boldface in original, emphasis added).

As demonstrated by parallel provisions of the Model Code upon which the UIPA was modeled by the Legislature, the disclosure of information that is excepted from the scope of a significant privacy interest under section 92F-14(b)(4), Hawaii Revised Statutes, is disclosable as though it were a part of the enumeration of records in section 92F-12, Hawaii Revised

Statutes, that must be disclosed "[a]ny provision to the contrary notwithstanding." Accordingly, the disclosure of information falling within the provisions of Act 191 would not "constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1) (Comp. 1993).

Act 191, creates certain prerequisites to an agency's disclosure of the identities of agency employees who have engaged in employment-related misconduct:

1. The employee must have been suspended or discharged by the agency;
2. The suspension or discharge must have been the result of employment-related misconduct;
3. The disciplinary action must have been sustained in any non-judicial grievance adjustment procedure "timely invoked by the employee or the employee's representative;" and
4. In the event that the grievance adjustment procedure proceeds to arbitration, the information is not disclosable until a written decision sustaining the suspension or discharge has been issued, and thirty calendar days have elapsed following the issuance of the decision.¹

Where an agency employee is suspended or discharged for employment-related misconduct, and the employee or the employee's representative elects not to timely invoke established grievance procedures, it is the opinion of the OIP that the information described by Act 191 must be disclosed after the expiration of

¹In hearings before the legislative committees that heard S.B. 1363, 17th Leg., 1st Sess. (1993), T. Anthony Gill, the attorney for the University of Hawaii Professional Assembly explained, in response to questions concerning the need for the thirty-day delay in the disclosure of information, that after the issuance of an arbitrator's decision, the parties often seek clarification or reconsideration of the arbitrator's decision. Thus, it is the OIP's opinion that the thirty day delay provision of Act 191 applies to grievances that proceed to arbitration. For grievances that do not proceed to arbitration, it is necessary for the agency to await the expiration of period for the employee's filing of a grievance at the next step in the grievance process. After the expiration of this period, the employee will have exhausted any non-judicial grievance adjustment procedure.

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the period to timely file a grievance about the discipline. The report of the conference committee assigned to resolve differences between the House and Senate versions of the bills that led to the adoption of Act 191 provides:

The purpose of this bill is to amend section 92F-14, Hawaii Revised Statutes (HRS), the Uniform Information Practices Act (Modified) to clarify what type of information, regarding employment-related misconduct, may be disclosed and when such disclosure may be made.

Your Committee finds that the current law regarding disclosure of public employee misconduct has led to confusion, uncertainty and controversy.

A balance needs to be drawn between the public's right to know about government functions and the public employee's right to privacy.

Your Committee notes that this measure appropriately distinguishes between minor and more serious misconduct by focusing on the disciplinary consequences, and protects the employee from the disclosure of information while formal grievance procedures are still in progress. Yet the bill also serves the public at large by refusing to provide further protection from disclosure of misconduct when the employee has exhausted non-judicial grievance adjustment procedures, and has been suspended or discharged.

Your Committee also finds that because of the unique responsibilities of police officers, special care must be taken to clearly delineate private conduct from conduct as a government employee.

Conf. Comm. Rep. No. 61, 17th Leg., 1993 Reg. Sess., Haw. S.J. 764, Haw. H.J. 900 (1993) (emphases added).

Given the foregoing, it is the opinion of the OIP that under the UIPA, the University of Hawaii must provide the UH Observer with the information that must be disclosed under Act 191, as explained above.

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Recently, the State of Hawaii Organization of Police Officers ("SHOPO") filed suit against the Honolulu Police Department ("HPD") seeking an injunction prohibiting the HPD from disclosing information about HPD officers under Act 191, in response to a request by the Society of Professional Journalists--University of Hawaii at Manoa Chapter ("SPJ").

SHOPO argued that the HPD should be enjoined from disclosing information under Act 191 because: (1) SHOPO's collective bargaining agreement either expressly or as construed by the parties prohibited the disclosure of disciplinary information; (2) Act 191 violates the privacy provisions of section 6 of article I of the Constitution of the State of Hawaii; and (3) Act 191 constitutes impermissible retroactive legislation.

On March 30, 1994, the Honorable John S.W. Lim, Acting Circuit Court Judge, denied SHOPO's Motion for Preliminary Injunction, finding that SHOPO was unlikely to succeed on the merits of its claims, and that the public interest did not favor the issuance of an injunction. SHOPO has filed a Notice of Appeal, a Petition for Mandamus, and a Motion for Injunction Pending Appeal with the Supreme Court of the State of Hawaii. The Supreme Court has not disposed of these filings. The Supreme Court, however, continued a temporary restraining order prohibiting the HPD from disclosing the information until such time as it has reviewed and disposed of the motion filed by SHOPO. On April 26, 1994, Judge John S.W. Lim denied a motion filed by SHOPO requesting the court to reconsider its order denying SHOPO's Motion for Preliminary Injunction.

Similarly, in a related action, SPJ filed suit against the HPD under section 92F-15, Hawaii Revised Statutes, seeking an order compelling the HPD to disclose information dating from the effective date of the UIPA relating to HPD officers who were suspended or discharged for employment related misconduct. Recently, the Honorable Wendell Huddy, Circuit Court Judge, granted the SPJ's Motion for Summary Judgment against the HPD. The court found that there was no genuine dispute of material fact, and that the SPJ was entitled to judgment as a matter of law. The court has stayed entry of its order for forty-five days pending Supreme Court review of the SHOPO case.

The temporary restraining order issued by the court, by its terms, applies only to the HPD and not other agencies. Further, given these two consistent rulings of the Circuit Court for the First Circuit, State of Hawaii, it is our opinion that the UH should provide the UH Observer with the information it has requested, unless and until a court of competent jurisdiction

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declares Act 191 to be invalid.

CONCLUSION

The UIPA, as amended by Act 191, Session Laws of Hawaii 1993, requires State and county agencies to disclose the names of agency employees who have been suspended or discharged for employment related misconduct after the exhaustion of any grievance procedure timely invoked by the employee or the employees' representative. Since there is no restraining order prohibiting the UH from complying with the UIPA request of the UH Observer, it is our opinion that the UH must, upon request, disclose the information required to be publicly accessible under Act 191.

Please contact me at 586-1404 if you should have any questions regarding this matter.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc

c: Mr. Jahan Byrne
Jeffrey S. Portnoy, Esq.
Mr. Bill Thomas
T. Anthony Gill, Esq.
Charles K.Y. Khim, Esq.