

# DISCLOSURE OF POLICE SUSPENSION RECORDS UNDER THE UIPA

The Hawaii Supreme Court (Supreme Court) issued a decision on June 9, 2016, regarding disclosure of police suspension records under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes (HRS) (UIPA). In [\*Peer News LLC v. City and County of Honolulu\*](#), 138 Haw. 53, 376 P.3d 1 (2016) (including [concurrency](#) by Justice Pollack) (*Peer News*), the Supreme Court clarified its decision rendered 20 years earlier, regarding disclosure of police misconduct records in *State of Hawaii Organization of Police Officers v. Society of Professional Journalists*, 83 Haw. 378, 97 P.2d 386 (1996) (*SHOPO*). While *Peer News* determined that the state Office of Information Practices (OIP) was “palpably erroneous” in its 1996 interpretation of the *SHOPO* opinion and conclusion that the UIPA requires the disclosure of suspended police officers’ disciplinary records, the Supreme Court nevertheless agreed with OIP’s analysis and balancing of interests discussed in [OIP Opinion Letter Number \(Op. Ltr. No.\) 97-1](#) and other OIP decisions. Here is a brief summary of these important and lengthy cases relating to the disclosure of police suspension records.

## *Peer News Case History*

In *Peer News*, the online news publication Honolulu Civil Beat (Civil Beat) asked the Honolulu Police Department (HPD) in October 2013 to provide information regarding twelve police officers who received suspensions of twenty days or more due to employment misconduct from 2003 to 2012, as reported in HPD’s annual disclosure of misconduct to the State Legislature. Civil Beat’s record request to HPD asked for the suspended officers’ names, nature of the misconduct, summaries of allegations, and findings of facts and conclusions of law. HPD denied Civil Beat’s record request, asserting that the UIPA’s “clearly unwarranted invasion of personal privacy” exception protected the suspended officers’ identities.

In November 2013, Civil Beat filed a lawsuit against the City and County of Honolulu (City) in the First Circuit Court (circuit court), seeking disclosure of the records under the UIPA. In March 2014, the circuit court granted Civil Beat’s Motion for Summary Judgment and ordered the City to disclose the requested records about the suspended police officers. The circuit court’s finding was based on *SHOPO*’s holding that the Hawaii Constitution does not afford police officers a privacy right in suspension or discharge information. An appeal to the Intermediate Court of Appeals (ICA) was filed by Intervenor State of Hawaii Organization of Police Officers, and was subsequently transferred to the Supreme Court in February 2015, upon Civil Beat’s application. The City and HPD filed a notice stating that neither party was taking a position in the appeal.

Ultimately, in *Peer News*, the Supreme Court vacated the circuit court's judgment and remanded the case with instructions to conduct an *in camera* review of the police suspension records and weigh the competing public and privacy interests in the disclosure of the requested records.

### **SHOPO Case, Act 242, and OIP Op. Ltr. No. 97-1**

In the *SHOPO* case, the requester sought disclosure of the misconduct records of suspended and discharged police officers, which the police union opposed as being an impermissible invasion of police officers' right to privacy under article I, section 6 of the Hawaii Constitution. The common issue in both *Peer News* and *SHOPO* was the application of HRS § 92F-14(b)(4), the UIPA provision generally requiring disclosure of certain information (names, nature of the misconduct, summaries of allegations, and findings of facts and conclusions of law) relating to employment misconduct of Hawaii state and county employees that results in a suspension or discharge. The specific point of contention involved the statute's special exception from disclosure for police officers' misconduct information.

Act 242, which was passed in 1995 while *SHOPO* was being considered by the Supreme Court, amended HRS § 92F-14(b)(4) to provide that suspended, as distinguished from discharged, police officers have a significant privacy interest in records relating to their employment misconduct.<sup>1</sup> In its 1996 *SHOPO* opinion, the Supreme Court held that Act 242 did not moot the litigation concerning police misconduct records and decided the case based on the prior version of the UIPA, which was in effect at the time of the *SHOPO* record request and did not recognize a significant privacy interest in police officers' disciplinary suspension records. Based on the prior version of HRS § 92F-14(b)(4), the Supreme Court concluded in *SHOPO* that records relating to police misconduct and the resulting discipline were not highly intimate or personal information and their disclosure did not infringe upon the right to personal privacy afforded by article I, section 6 of the Hawaii State Constitution.

Following the 1996 *SHOPO* decision, OIP was asked in 1997 to specifically consider the impact of Act 242 upon the disclosure of police suspension records. In Op. Ltr. 97-1, OIP recognized that "[w]hen there is a request for personnel information in which an employee has a significant privacy interest the UIPA requires the application of a balancing test" to determine whether the public's interest in disclosure outweighs the privacy interest in keeping the information confidential. Op. Ltr. 97-1 at 4. Because the Supreme Court was aware of Act 242 and had nevertheless determined in *SHOPO* that police misconduct records were not protected under Hawaii's constitutional right to privacy, OIP deferentially

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<sup>1</sup> Subsequent amendments to HRS § 92F-14(b)(4) in 2004, 2014 and 2015 are not relevant to this discussion.

interpreted the *SHOPO* decision as requiring disclosure of police suspension records on the basis that either a mere “scintilla” of public interest is enough to overcome suspended police officers’ privacy interest in the balancing test, or because the Court’s ruling “tips the balance heavily toward finding that the public has a strong countervailing interest about suspended police officers.” Op. Ltr. at 8-9.

### **Peer News Holding**

In the 2016 *Peer News* majority opinion, the Supreme Court found “palpably erroneous”<sup>2</sup> OIP’s interpretation of the *SHOPO* decision and its conclusion that suspended police officers’ records must be disclosed under HRS § 92F-14(b)(4), as amended by the Legislature in Act 242. *Peer News*, 138 Haw. at 67. The Supreme Court in *Peer News* stated that the *SHOPO* decision applied only to the prior version of the UIPA, did not consider or nullify the Legislature’s amendments in Act 242, and merely determined the question of whether disclosure of police officers’ suspension records would violate the Hawaii Constitution. The Court explained that the Legislature has the authority to enact broader privacy protections than had been articulated in the *SHOPO* opinion and that Act 242’s amendments to HRS § 92F-14(b)(4) recognized a “significant privacy interest” in suspended<sup>3</sup> police officers’ records, but that nowhere in the UIPA does the Legislature indicate that disclosure of suspension information constitutes a “clearly unwarranted invasion of personal privacy” referenced in HRS § 92F-13(1). *Id.* at 67, 70. Rather, the Supreme Court concluded that the significant privacy interest created by Act 242 “does not absolutely preclude disclosure, and must still be weighed against the public’s interest in the information.” *Id.* at 67.

Citing its *SHOPO* analysis, the UIPA’s legislative history, and OIP’s interpretations of HRS § 92F-14(b)(4), the Supreme Court reasoned that once a significant privacy interest is recognized under HRS § 92F-14(b), it must be balanced against the public interest to determine whether disclosure of the information would constitute a “clearly unwarranted invasion of privacy” that would allow HPD overcome the general rule of disclosure and instead withhold the suspension records under HRS § 92F-13(1). Ultimately, the Court held that Act 242 recognized that suspended

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<sup>2</sup> As the Supreme Court recognized, “OIP’s interpretations of its governing statutes are entitled to deference unless found to be ‘palpably erroneous.’” 138 Haw. at 67, n. 10 (citing *Kanahele v. Maui Cnty. Council*, 130 Haw. 228, 245-46, 307 P.3d 1174, 1191-92 (2013); see also HRS §§ 92F-15(b) and 92F-27(b) (establishing the “palpably erroneous” standard of review when OIP opinions are challenged in court).

<sup>3</sup> The Supreme Court made it clear that discharged police officers have no privacy interest in their misconduct records that led to the discharge. *Peer News*, 138 Haw. at 64, n 8. Thus, discharged police officers’ disciplinary records must be disclosed, subject to the other conditions of HRS § 92F-14(b)(4), as amended in 2014.

police officers have a significant privacy interest in their suspension records, but their interest must still be weighed against the public's interest in disclosure.<sup>4</sup> The Court noted that “[t]he more egregious the misconduct, and the more closely connected to the officer’s performance of his or her duties as an officer, the more compelling this public interest.”<sup>5</sup> *Id.* at 71. The case was remanded to the circuit court to conduct a case by case analysis of the facts and the balancing test for each suspended police officer.

## **Conclusion**

The *Peer News* opinion makes clear that under HRS § 92F-14(b)(4), suspended (but not discharged) police officers have a significant privacy interest in the information relating to employee misconduct that results in the suspension. While overruling OIP’s conclusion in Op. Ltr. 97-1 that the *SHOPO* decision required disclosure of police suspension records, the Supreme Court in *Peer News* also rejected the police union’s argument that Act 242 precluded disclosure. Instead, the Supreme Court agreed with OIP that the UIPA requires the use of a balancing test to weigh a suspended police officer’s significant privacy interest against the public’s interest in disclosure, in order to determine whether there was a clearly unwarranted invasion of privacy that would exempt police suspension records under HRS § 92F-13(1) from the general rule of disclosure. As the majority noted, the public interest in disclosure increases with the egregiousness of the misconduct, so police suspension records may still be disclosable, depending on a case by case analysis.

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<sup>4</sup> Another issue decided in *SHOPO* was whether police disciplinary records may be withheld from disclosure under the UIPA exception based upon “frustration of a legitimate government function.” HRS § 92F-13(3) (2012). The Supreme Court ruled that “only the relevant government agency—in this case HPD—may invoke this exception” and discussed OIP Op. Ltr. No. 98-02 (reaching the same conclusion when a submitter of information asserted this exception but the agency maintaining the information did not assert it).

<sup>5</sup> Although the case was remanded for the circuit court’s case-by-case analysis, the Supreme Court noted that it was clear from the brief descriptions of the records requested by Civil Beat that serious police misconduct was involved and that two of the records appeared to involve particularly egregious conduct, as demonstrated by a 77-day suspension in one and 626-day suspension in another. *Peer News*, 138 Haw. at 74.