TESTIMONY BEFORE THE SENATE COMMITTEE ON EDUCATION, LABOR AND EMPLOYMENT

FEBRUARY 8, 1993

Chairman McCartney and Members of the Committee:

My name is T. Anthony Gill, and I am here as the attorney for the University of Hawaii Professional Assembly, to testify on Senate Bill 1363, relating to the Uniform Information Practices Act (Modified).

The UHPA can support the intent of S.B. 1363; however, as it is written, the bill appears to **remove** all an employee's privacy interest in disciplinary matters and **compel** disclosure of the names and particulars of anyone accused of sexual harassment after 100 days following the written decision of the highest non-judicial grievance adjustment procedure which had been timely invoked by the employee or his collective bargaining agent. This is the opposite of what we think is the intended effect. We believe the intent of the bill is to maintain the privacy interest until severe discipline is upheld.

If the bill could be amended to read as follows, we believe that the substitute language suggested would meet many of the objections put forth by most of the people who have been both for and against this legislation:

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(4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except [information relating to the status of any formal charges against the employee and disciplinary action taken or information disclosed under section 92F-12(a) (14;]:

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

(B) When employment-related misconduct results in an employee's suspension or discharge, then, not sooner than 100 days following the written decision of the highest non-judicial grievance adjustment procedure timely invoked by the employee or his collective bargaining agent, and if suspension or discharge is sustained, the following information:

(i) The name of the employee, and the name of the complainant against the employee;

(ii) The nature of the employment-related misconduct;

(iii) The agency's summary of the allegations of misconduct, findings of fact, or conclusions of law, if any, as sustained; and

(iv) The disciplinary action taken by the agency against the employee;

I would be pleased to answer questions regarding this legislation.

Thank you, Mr. Chairman, for the opportunity to testify before your Committee today.

HGEA-AFSCME
Working Together for Hawaii
LOCAL 152, AFL-CIO

Hawaii Government Employees Association

RUSSELL K. OKATA
Executive Director

CHESTER C. Y. KUNITAKE
Executive Assistant

WILLARD P. MIYAKE
Executive Assistant

The Seventeenth Legislature, State or Hawaii
The Senate
Committee on Education, Labor and Employment

Testimony by
HGEA/AFSCME Local 152
February 8, 1993

SB-1363 RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED)

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO (HGEA/AFSCME) supports the general concepts of disclosure of appropriate information contained in employee personal records where it serves the legitimate public interest and safety as balanced against the employee's right to privacy. HGEA/AFSCME agrees that information disclosed under Section 92F-12(a)(14), Hawaii Revised Statutes, is an exception to information in which the individual has a significant privacy interest However, HGEA/AFSCME objects to the proposed language amending Section 92F-14(b)(4), Hawaii Revised Statutes.

We are concerned that the proposed language is in disagreement with the intent of the Legislature with regard to collective bargaining in public employment. We would like to draw the committee's attention to the Hawaii Labor Relations Board Order No. 869 dated March 23, 1992 which "...finds that the confidentiality of disciplinary proceedings is inextricably intertwined with the right to negotiate procedures relating to disciplinary actions and is therefore negotiable."

The heart of this issue is the right of persons in public employment to organize for purposes of collective bargaining and to negotiate their terms and conditions of employment. Article XIII, Section 2 of the State of Hawaii Constitution states that "persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law." Pursuant to this constitutional right, Hawaii Revised Statutes, Chapter 89 was enacted by the Legislature. Under the provisions of HRS, Chapter 89 and Article XIII, Section 2 of the Hawaii State Constitution, HGEA/AFSCME, among other labor organizations, has been selected as the exclusive bargaining representative for seven bargaining units as defined in HRS, Section 89-6.

In accordance with exclusive bargaining representative status, HGEA/AFSCME has negotiated collective bargaining agreements with the State of Hawaii and the various political

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subdivisions which provide that any disciplinary action taken against any employee in writing shall be considered confidential. Specifically, these clauses provide that all discipline shall be imposed only for proper cause, in private, and shall be confidentially administered.

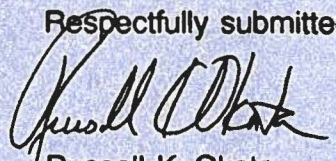
These contractual provisions were agreed upon between HGEA/AFSCME and the various public employers in order to effectively implement disciplinary procedures without humiliating or ridiculing employees so that employees can perform their work in a work environment where the use of disclosure of personal record information, in and of itself, does not become a form of discipline, in an environment relatively free from defamatory liable and slander, and in an environment that provides meaningful due process.

HGEA/AFSCME is opposed to any attempt to circumvent the collective bargaining process by creating a method whereby employees may be formally charged with employee misconduct and have their identity disclosed without the due process and protections afforded by the collective bargaining grievance procedure and other relevant articles in our union contracts that were agreed to after good faith negotiations with the employer. HGEA/AFSCME is equally concerned that the privacy rights of public employees excluded

from collective bargaining in accordance with Section 89-6(c), HRS are not diminished, and that they be afforded meaningful due process through the appropriate civil service appeal procedures.

We ask for your favorable support of our position on this matter.

Respectfully submitted,



Russell K. Okata

RKO:sf

CODE OF SILENCE/ BROKEN

P. O. Box 10447 • Honolulu • HI • 96816 • Tel: *808* 523-5173 • Fax: 944-1141

Senator McCartney and members of the Committee on Education, Labor and Employment. My name is Toni Worst and I speak today on Senate Bill 1363 for the community alliance, Code of Silence/Broken, which is concerned about the issue of sexual harassment in the workplace and society.

We applaud the intent of this bill to clarify Sections 12(a) and 14 of HRS Chapter 92F, commonly referred to as the Sunshine Law. The more open the process of government, the more empowered are citizens to participate.

We wholeheartedly support the disclosure of information regarding employment-related misconduct on the part of a public employee. However, we do <u>not</u> agree with the provision that this disclosure should only be available after 100 days following the written decision of the highest non-judicial grievance adjustment procedure. We also do <u>not</u> agree that disclosure should be made only if suspension or discharge is made in the misconduct proceedings. Disclosure at either point is too late and does not (1) establish fair and equitable treatment for the complainant; (2) protect the public interest; or (3) fully protect the State.

<u>Fair and equitable treatment of the complainant.</u>
Fair and equitable treatment includes full access by both complainant and accused to all information about the issue at hand. While we appreciate the concerns about an individual's civil rights, we feel they are well protected by libel and slander laws. Making the information public at the point a formal complaint is filed is no different than a grand jury indictment that is reported in the press.

<u>Protecting the public interest.</u>
Without prompt disclosure about misconduct on the part of an employee, continuing violation is possible, and others working with that employee may risk exposure. The public should be allowed to evaluate the risks of continuing exposure and the degree of possible harm. With regard to the 100 days, we find this to be somewhat arbitrary and capricious as there seems to be no potential benefit to waiting 100 days except to protect those formerly grieved against.

Protection for the State.

With regard to victims of sexual harassment, information on a perpetrator is particularly important in making a reasoned decision about exercising their rights. With the assurance of open information and a fair and just internal grievance process, people can be assured that internal safeguards work. Without this assurance, a complainant would be more likely to utilize external options to protect their statute of limitations for filing. This option would be costly to both complainant and the State as the time, effort, and financial commitment can be considerable.

Code of Silence/Broken feels that the **information should be made public at the point a formal complaint is filed** on misconduct charges and not wait 100 days or only if suspension or discharge should be sustained.

Thank you for this opportunity to present our testimony.

SHOPO
STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS
1717 Hoe Street, Honolulu, Hawaii 96819-3125
Telephone (808) 847-4676, FAX (808) 841-4818

WRITTEN TESTIMONY

BEFORE THE : SENATE COMMITTEE ON
EDUCATION, LABOR AND EMPLOYMENT

HEARING DATE: MONDAY, FEBRUARY 8, 1993, 3:30 P.M.

REGARDING : SENATE BILL 1363
"RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED)"

Chairman McCartney and Committee Members:

Thank you for giving me the chance to address you regarding Bill 1363. My name is John Woo and I am a Detective with the Honolulu Police Department and also the President of SHOPO.

We at SHOPO realize that this Bill seeks to promote the public's right to know what is occurring within State and County government. But as representatives of police offiers, SHOPO would like you to understand that disclosure regarding personnel must be limited at some point, in order for the Police Deparment to function properly. We believe this Bill seeks to go beyond that limit and that if enacted into law, this Bill will have a detrimental affect upon police officers in their attempt to do their jobs.

The detrimental effect of this Bill comes from its directive to name individuals who are disciplined for employment misconduct. It is detrimental because an individual police officer is merely like all of us, a person. A person with feelings and a family that feels and hurts with that officer.

This Bill seeks, whether intentionally or not, to hurt police officers as people. By making public the identities of police officers being disciplined, this Bill seeks to give out an additional and harsher penalty to the police officer. That penalty is, Public Shame and Ridicule.

Shame and ridicule in return for doing one's job. That is what this Bill concerns.

This Bill is not a Bill that will improve law enforcement. Rather it is one that will eat at a police officer's confidence to react to situations in which controversy and possibly hostility are present. Confidence which will erode because of fear of making a judgement error in the field and subsequently finding a police officer and his family shamed.

This Bill is not a Bill that will ensure the unearthing of heinous wrongdoing by police officers. Heinous wrongs committed by public officials are thoroughly investigated by the FBI, the Justice Department, the local Prosecutor's Office, the respective Police Commissions or by the Police Departments themselves. For those who have been scrutinized by these agencies and found to have committed grave wrongs, they have been publicly punished through our criminal and civil systems of justice. This Bill does nothing to improve nor detract from these systems of justice which deal with heinous wrongdoings.

What this Bill does do, is attempt to make minor wrongs of police personnel, public information. Minor wrongs such as an officer's swearing on the job, or his sleeping on the job or his missing a court appearance are examples of employment wrongs this Bill seeks to uncover. We question whether these wrongs are so grievous that all persons in the community must be informed of it. We think not.

We think not because police officers are people. Public shame and humiliation should be reserved for the very worst of wrongs. Shaming a police officer for minor employment wrongs would only hurt him as a person. This hurt as with any person so shamed, can take the heart out of a police officer's will to do the best possible job he can.

Half hearted police work is not what our community needs or deserves. But this is what can happen should this Bill become law.

Again, police officers are extensively scrutinized by Federal, State and local agencies. The "dirty cop" has been and will be publicly rooted out of the Police Department. The good police officer, though, should not be publicly shamed for minor errors of judgment. That would be a poor management practice and hurt us all.

I would now like to move on with our arguments against this Bill.

This Bill practically denies police officers their right to due process of laws which are protected by Civil Service laws and our Collective Bargaining agreement. I say "practically" because this Bill seems to call for the public release of names of police officers following a public employer's finding that there is reasonable or probable cause to believe a complaint against an officer is true. This extremely low standard of proof would call upon an employer to publicly shame a police officer prior to the exercise of that officers' right to a full evidentiary hearing which is guaranteed him by laws and our contract.

Releasing of police officers' names prior to allowing him to fully exhaust his right to a full evidentiary hearing is wrong. I say it is wrong because during my twenty years as a police officer SHOPO member, I have seen many disciplinary actions overturned following a full hearing of all facts relating to the case. Releasing a name publicly before a full hearing does the police officer only personal harm. It matters little that he ultimately is proven innocent of charges against him, if prior to exoneration, he is publicly defamed. The damage to the police officer, his family, friends and co-workers would already have been done. This would be wrong.

Lastly, I would like to remind this Honorable Committee that pending in the Circuit Courts is a matter relating to the public disclosure of identities of public employees in disciplinary matters. My understanding is that questions relating to personal privacy under law and rights of confidentiality under collective bargaining agreements are now under review. It is SHOPO's belief that to allow this Bill to become law at this time would only add to confusion now being wrestled with by the courts.

I thank you for your time and consideration of what has been said and ask that you help SHOPO in its efforts to make law enforcement a proud profession.

Respectfully submitted,

for JOHN WOO
President, SHOPO

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WRITTEN TESTIMONY

BEFORE THE : SENATE COMMITTEE ON
EDUCATION, LABOR AND EMPLOYMENT

HEARING DATE: MONDAY, FEBRUARY 8, 1993, 3:30 P.M.

REGARDING : SENATE BILL 1363
"RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED)"

Chairman McCartney and Committee Members:

My name is Gary Witt. As has been stated in past testimony concerning this issue, it is SHOPO's position that names of its members disciplined should not be released. There are several reasons for this stance.

1. Public Shame and Ridicule. Not just the officer but his family also. In 1991, when HPD Personnel Orders were published on television, children of the officers were harassed and teased at school.

In 1979, an officer falsely accused and slandered in the media took his own life in order to save his family from further disgrace.

2. HLRB Decision #CE-07-152 issued on March 23, 1992, stated: "The Board holds that parameters of the grievance procedure, including the confidential nature of disciplinary actions, are negotiable under Chapter 89, HRS." The Board emphasizes this very strongly in its Decision.

3. There are two cases pending decision in Circuit Court that deal with this very issue. These cases will decide the balance to public right to know vs. privacy of employees.

4. Police Officers are held to higher standards than other public employees. This is rightly so. But as a result of these high standards, they are subject to discipline for things others take for granted.

5. Police work is confrontational; what the average person can walk away from, Police must confront.

Our members are not asking for special treatment, just equal treatment. If the average citizen is disciplined on the job, this is done privately. If he's arrested it becomes public knowledge. We feel this treatment is fair. If an officer's conduct results in criminal charges being filed or civil suit, his name is made public as with all citizens. Discipline is a management tool not meant to punish but to educate the employee. As such, it should be used with dignity. "Praise in Public, Criticize in Private" is probably the golden rule of management. This Bill would eliminate the ability of the employer to discipline with dignity. It will make ineffective law enforcement, by causing police officers to hesitate in time of crisis. It may make them "walk away".

As for the 100 day time limit set by this legislation, this will interfere with the due process allowed under the employee grievance process. Some grievances take as long as three years to settle.

Also, the term "non-judicial grievance adjustment procedure" is unclear. If this non-judicial adjustment is overturned in the employee's favor after 100 days, "then what?"

Public employees are not second class citizens. Therefore we ask you not support this legislation for the reasons outlined above.

Respectfully submitted,

GARY WITT
Vice Chairman
Oahu Chapter Board of Directors
SHOPO

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WRITTEN TESTIMONY

BEFORE THE : SENATE COMMITTEE ON
EDUCATION, LABOR AND EMPLOYMENT

HEARING DATE: MONDAY, FEBRUARY 8, 1993, 3:30 P.M.

REGARDING : SENATE BILL 1363
"RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED)"

Chairman McCartney and Committee Members:

Thank you for allowing me to voice on behalf of police officers throughout Hawaii, our concerns regarding S. B. #1363.

S. B. 1363 is worrisome to police officers for many reasons. Most of those concerns shall be covered by others testifying before this Honorable Committee and therefore those concerns shall not be reiterated here. The point that shall be raised here though, is that S. B. #1363 is too vague as written and would therefore possibly cause confusion and litigation.

Specifically, the Bill is vague at §(b)(4)(B). §(b)(4)(B) utilizes the phrase, "highest non-judicial grievance adjustment procedure", to describe a point in time in the public employer's disciplinary process. That phrase though is ambiguous because it does not make it clear whether Administrative hearings such as arbitration are considered "judicial" or "non-judicial" under the words of the Bill. (The Hawaii Rules of Court, includes a section addressing Arbitration; see Hawaii Arbitration Rules).

Because of this ambiguity, the time for information to be released under S. B. #1363 is not clear and it could cause confusion.

As stated above though, police officers have other views which shall be aired by others. Those views do not favor release of identities of police officers at any time.

Respectfully submitted,

MICHAEL K. KANESHIRO
General Counsel

TESTIMONY OF THE OFFICE OF INFORMATION PRAACTICES

ON S.B. NO. 1363

RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED)

BEFORE THE SENATE COMMITTEE EDUCATION, LABOR & EMPLOYMENT

DATE: MONDAY, February 8, 1993

TIME: 3:30 p.m.

PLACE: Conference Room 305
Leiopapa A Kamehameha Building
235 South Beretania Street

PERSON(S) TESTIFYING:

Kathleen Callaghan, Esq.
Director
Office of Information Practices

or

Hugh Jones
Staff Attorney
Office of Information Practices

Deliver to rm. 307 (25 copies)

TESTIMONY OF THE OFFICE OF INFORMATION PRACTICES

ON S.B. NO. 1363

The Honorable Chairperson and Committee Members:

The Office of Information Practices ("OIP") supports the purpose and spirit of this bill, but is opposed to the passage of this bill in its current form.

The OIP, an agency attached to the Department of the Attorney General for administrative purposes only, was created by the Legislature to administer and implement the State's public records law, the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), and "to recommend legislative changes." Haw. Rev. Stat. § 92F-42(7) (Supp. 1992).

The UIPA is a comprehensive public records law that applies to all State and county agencies, and which promotes governmental accountability through a general policy of access to government records, while at the same time, recognizing the individual's constitutional right to privacy. Haw. Rev. Stat. § 92F-3 (Supp. 1992).

The purpose of this bill is to amend the UIPA to clarify: (1) what individually identifiable information about employment misconduct by public employees can be disclosed to the public upon request, and (2) at what stage in an agency's disciplinary process that such disclosures may occur. This bill also represents an attempt to finally lay to rest controversy and litigation that followed from the OIP's issuance of two advisory

opinion letters, and an Attorney General opinion, concerning the public's right to know about misconduct by public employees.

While the OIP strongly supports the purpose of this bill, as described above, we have troubling concerns with the public policy established by this bill, and legal concerns with language included in the bill which is ambiguous, and would, in effect, mix apples and oranges within section 92F-14(b)(4), Hawaii Revised Statutes. Before describing these concerns in detail, the OIP would like to provide this committee with some important background information.

I. **BACKGROUND INFORMATION**

In 1990 the OIP issued two advisory legal opinions interpreting section 92F-14(b)(4), Hawaii Revised Statutes. The issuance of these opinions has generated controversy, public debate, administrative proceedings before the Hawaii Labor Relations Board ("HLRB"), and two separate lawsuits against the State.

In OIP Opinion Letter No. 90-12 (Feb. 26, 1990), an opinion issued at the request of the University of Hawaii ("University"), the OIP concluded that under section 92F-14(b)(4), Hawaii Revised Statutes,[1] present or former

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[1]Section 92F-14(b)(4), Hawaii Revised Statutes, provides in pertinent part:

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

government agency employees do not have a significant privacy interest[2] in "information relating to the status of any formal charges against [them] and disciplinary action taken." Consequently, we advised that under sections 92F-11(b) and 92F-14(b)(4), Hawaii Revised Statutes, an agency must disclose the following information upon request:

> (1) The fact that a "formal charge" or complaint has been filed;
>
> (2) The name of the agency employee against whom the complaint has been lodged;
>
> (3) The "status" of the complaint as pending (for example, "under investigation") or concluded (for example, "dismissed");
>
> (4) The disciplinary action taken in response to the formal charge, if any; and

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> (4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, except information relating to the status of any formal charges against the employee and disciplinary action taken or information disclosed under section 92F-12(a)(14); . . . .

Haw. Rev. Stat. § 92F-14(b)(4) (Supp. 1991) (emphasis added).

[2]For information to be protected from public disclosure under the UIPA's "clearly unwarranted invasion of personal privacy exception," section 92F-13(1), Hawaii Revised Statutes, an individual must have a "significant privacy interest" in that information. In the absence of a significant privacy interest, the Legislature has stated that "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).

(5) Any other information about the agency employee which is designated as public under section 92F-12(a)(14), Hawaii Revised Statutes.

The University subsequently requested the Attorney General to provide a clarification of OIP Opinion Letter No. 90-12. This clarification was provided by the Attorney General in a letter dated December 28, 1990. In brief, the Attorney General found that there was no "clear error" in the OIP's analysis and conclusions, and that the same were "well supported in both law and logic." The additional issues raised by the University in its letter to the Attorney General were addressed by the OIP in OIP Opinion Letter No. 90-39 (Dec. 31, 1990).

As a result of the advice provided in the opinion letters issued by the OIP and the Attorney General, University President Albert Simone held a press conference. At this press conference, President Simone announced that, in accordance with requirements of the UIPA, the University would publicly disclose the names of faculty members against whom formal charges of sexual harassment had been lodged, the status of those charges, and any disciplinary action taken in response to the charges. However, before this information was publicly disclosed, the University of Hawaii Professional Assembly ("UHPA") and the Hawaii Government Employees Association ("HGEA") filed actions in the First Circuit Court for declaratory and injunctive relief against the University.

On January 25, 1991, the First Circuit Court for the State of Hawaii issued orders granting the UHPA's and the HGEA's motions for preliminary injunctive relief and enjoined the University from disclosing the names of any UHPA or HGEA member formally charged or disciplined under the University's sexual harassment policy pending a determination of the controversy on the merits.

Additionally, the UHPA filed a Prohibited Practice Complaint before the HLRB requesting it to find that the University's disclosure of information relating to disciplinary action taken against its members would be in violation of UHPA's collective bargaining agreement and, therefore, an unfair labor practice under chapter 89, Hawaii Revised Statutes. On March 23, 1991, the HLRB found that the University's disclosure of information concerning disciplinary action imposed upon members of the UHPA would constitute an unfair labor practice. This decision has been appealed by the State to the First Circuit Court. See Board of Regents v. Tomasu, et al, Civil No. 92-1389-04.

The OIP believes that the clarification of the UIPA's provisions concerning the public's right to know about disciplinary action taken against State or county agency employees is a matter that should be resolved by the Legislature, not the courts, and such clarification should take place this legislative session. While the circuit court cases are scheduled for trial in August of 1993, there is a good possibility that the

circuit court decision will be appealed by the adversely affected party, thus leaving the ultimate resolution of the issue to an appellate court. We believe that the best and most cost effective solutions to disputes such as this are legislative, not judicial.

Additionally, because of the importance of the issues at stake, the prompt clarification of the UIPA's provisions concerning public access to information concerning discipline imposed by State and county agencies resulting from employment misconduct is essential. The importance of resolving this matter legislatively, and as soon as possible, is reflected in the newspaper editorials attached as Exhibits "A" through "F" respectively. Further delay in the clarification of the UIPA's provisions will promote public distrust of government agencies and their officials, a result completely inimical to the Legislature's intention in adopting the UIPA. See Haw. Rev. Stat. § 92F-3 (Supp. 1992).

Moreover, the OIP continues to receive numerous inquiries from agencies, the media, private citizens, and government agency employees concerning what information, if any, may be disclosed to the public about alleged employment misconduct by public employees and officials. For example:

(1) May the Honolulu Police Department publicly disclose the names of police officers who have been suspended or discharged for violating the Department's standards of conduct?

(2) May the Department of Public Safety disclose the names of Adult Corrections Officers who were found to have engaged in non-consensual sexual conduct at womens' correctional facilities, or who wrongfully collected overtime payments of hours that were not in fact worked?

(3) May the Department of Education publicly disclose the name of a football coach who was found to have made racist remarks in the presence of student athletes, and the disciplinary action taken as a result of such conduct?

(4) May the names of public employees found to have violated employment policies prohibiting sexual harassment in the workplace be publicly disclosed?

Without a clarification by the Legislature, the OIP, (and as a result, all State and county agencies), is left without clear guidance concerning what can or cannot be disclosed about employment misconduct by public servants. In the absence of such clear guidance, the State and the counties are exposed to additional liability and potential additional lawsuits.

II. OIP'S SPECIFIC OBJECTIONS WITH THE PRESENT DRAFT OF S.B. NO. 1363

A. LEGAL AND DRAFTING CONCERNS

The OIP's legal concerns with the present draft of this bill are two fold, involving: (1) objections proposed revisions to the delicate structure of the UIPA, and (2) objections as to the bill choice of words.

1. Structural Concerns With Present Draft

First, this bill proposes to amend section 92F-14(b)(4), Hawaii Revised Statutes, which only describes information in which an agency officer or employee has, or does

not have, a "significant privacy interest."[3] The present draft of this bill would include within a section of the UIPA applying only to agency employees, information about "complainants" who may, or may not be agency employees.

As such, this bill mixes apples and oranges, and would inflict injury upon the delicate and inter-relationship between the UIPA's carefully drafted provisions. If the Legislature wishes to require the public availability of a complainant's name, it should probably be placed within section 92F-12, Hawaii Revised Statutes, which sets forth information that agencies must make available for inspection and copying "[a]ny provision to the contrary notwithstanding."

Our second structural concern with this bill is that it purports to create an affirmative disclosure requirement in section 92F-14(b)(4), Hawaii Revised Statutes. As mentioned above, this section was not intended to set forth affirmative agency disclosure provisions, but merely identify information that is or that is not subject to a significant privacy interest.

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[3]See H. Stand. Comm. Rep. No. 342-88, 14th Leg., 1988 Reg. Sess., Haw. H. J. 969, 970 (1988) ("in this part are examples of those records in which the individual has a significant privacy interest. Your Committee intends these records to be available following application of the "balancing test" to determine whether the public interest in disclosure outweighs the individual privacy interest"). Thus, even where an individual has a significant privacy interest in information contained in a government record, it must be balanced against the public interest in disclosure to determine whether disclosure of that information would be a clearly unwarranted invasion of personal privacy. If the public interest in disclosure outweighs the privacy interest, disclosure would not constitute a clearly unwarranted invasion of personal privacy. See Haw. Rev. Stat. § 92F-2 and 92F-14(a) (Supp. 1992).

As such, language in the current draft stating that "the following information should be disclosed," and lines 6 through 13 of page 2 of the bill be reworded to clearly describe the information that is not subject to a significant privacy interests.

For example, in lieu of the present wording, we would suggest the following language: "the following information after 100 days following the written decision of the highest non-judicial grievance adjustment procedure . . . ." See also S.B. No. 561, for an example of phraseology suggested by the OIP. In this way, the language included will merely describe information which is not the subject of a significant privacy interest and, therefore, under the UIPA's general rule of required agency disclosure, must be made available for public inspection and copying upon request.[4]

2. OIP Concerns With Bill's Ambiguity

If requested to issue an advisory opinion concerning the effect of this legislation, the OIP would have difficulty in determining what the phrase "highest non-judicial grievance adjustment procedure timely invoked by the employee" includes. Is this language intended to include step three grievance hearings, arbitrations hearings, and hearings before the civil service commission if applicable? If so, we would recommend the

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[4]The UIPA's legislative history states that "[i]f 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." S. Conf. Comm. Rep. 235, 14 Leg., 1988 Reg. Sess., Haw. S. J. 689, 670 (1988).

bill use better legal precision in describing the type of review hearings that it is intended to encompass.

B. OIP'S PUBLIC POLICY CONCERNS

The OIP is troubled by the possibly dangerous precedent that might be created by certain provisions of this bill. Specifically, the OIP is troubled by provisions of this bill that condition public access to information about employment related misconduct by public servants upon the employee's exhaustion of all collectively bargained grievance procedures.

First, because such procedures often take significant periods of time to complete, and because the OIP understands that they can be continued by agreement, the provisions of this bill would in many cases, significantly delay public access to information about employment misconduct by public employees to months, or years after occurrence of the conduct that is complained of.

Secondly, the OIP believes that the Legislature may be setting a dangerous precedent by tying public access to this information to the exhaustion of procedures established through collective bargaining. It is the declared public policy of this State that "the formation and conduct of public policy--the discussions, deliberations, decisions and actions of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. § 92F-2 (Supp. 1992).

The OIP wonders whether, by deferring the State's information access policies to provisions established behind

closed doors through collective bargaining will lead to other erosions of the State's declared public policy. For example, under section 92F-12(a)(14), Hawaii Revised Statutes, the compensation paid to State and county employees is generally public information. May public employee's organizations collectively bargain to establish the secrecy of this information or other government records? We think not. Rather these are determinations for the legislature to make with the benefit of community input.

Additionally, the OIP is troubled by this bill's requirement that the identity of any individual lodging a misconduct complaint with a State or county agency be publicly accessible. Such a requirement may significantly deter private citizens from reporting suspected misconduct by public employees. See OIP Op. Ltr. 89-12 (Dec. 12, 1989) (generally finding identity of complainants to State or county agencies to be confidential).

Finally, while there are grievance procedures that have been established through collective bargaining, and procedures applicable to employees in the State's civil service, see section 76-42, Hawaii Revised Statutes, the OIP is not aware of any grievance procedures that may be invoked by exempt and excluded employees. If our understanding in this regard is correct, if enacted, this bill will be difficult to apply to misconduct by exempt and excluded employees.

III. RECOMMENDATIONS OF THE OIP

Any legislative solution to this controversial question must, at a minimum, address the following concerns or questions:

(1) What individually identifiable information should be disclosed about employment misconduct by public employees?

(2) At what stage in an agency's disciplinary process should such disclosures take place? For example, should the disclosure take place upon the filing of a formal charge after a probable cause determination has been made, after all collectively bargained grievance proceedings have been exhausted, or after civil service commission review, if applicable?

(3) That the above disclosures can take place notwithstanding provisions to the contrary in a public employee organization's collective bargaining agreement entered into under chapter 89, Hawaii Revised Statutes.

In its previous opinion letters, the OIP found that under sections 92F-11(b) and 92F-14(b)(4), Hawaii Revised Statutes, as currently written, present or former agency employees do not have a significant privacy interest in information relating to the status of any formal charges and disciplinary action taken. Thus, the OIP advised that as of the moment of the filing of a formal charge against an agency employee, this fact should be accessible to the public. Some members of the public and employees' organizations objected to this position on the basis that the disclosure of this information, before a finding of probable cause has been made,

could cause irreparable harm to the reputation of the employee involved.

We stand by the analysis set forth in OIP Opinion Letter Nos. 90-12 and 90-39, and believe that the conclusions expressed therein remain correct today. However, since the date of the OIP's advisory opinions concerning the disclosure of "formal charges," the OIP has carefully deliberated over what ought to be the public policy of the State concerning the public's right to know about employment misconduct by public servants. In adopting the UIPA, the Legislature intended to promote the public interest in disclosure and governmental accountability, as well as to implement the individual's right to privacy under the Constitution of the State of Hawaii.

In view of these sometimes conflicting policies, the OIP believes that the most appropriate legislative solution to this vexing policy question is one that permits the public to be informed of employment misconduct by present or former agency employees that: (1) is confirmed by a person in the agency who is authorized to impose discipline, and (2) results in disciplinary action involving either a suspension or discharge. The solution proposed by this bill protects employees from possible reputational harm that might result from the disclosure of allegations of misconduct before a finding of cause has been made. Additionally, by linking disclosure to discipline that involves a suspension or discharge, routine employment discipline

such as an oral or written reprimand or warning would remain confidential.

We believe that the suggested legislative scheme set forth in S.B. No. 561, introduced by Senator Andrew Levin by request, represents the best legislative approach for resolving this vexing public policy question. As such, we respectfully request that this Committee report this bill out of committee as S.B. No. 1363, S.D.1, using S.B. No. 561 as a model.

Equally important is the Legislature's clarification of whether it intends this bill's provisions to apply notwithstanding provisions to the contrary in the collective bargaining agreements of public employees' organizations. In the absence of such a clearly expressed legislative intention, it is likely that the passage of this bill will result in additional litigation in circuit court and proceedings before the HLRB. We respectfully urge that this committee address this question in its committee report on this bill.

In conclusion, we strongly support the purpose and spirit of this bill, but for the reasons set forth above, are opposed to the passage of this bill as drafted.

We will be happy to try and answer any questions.

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Open records

The Legislature's serious failure

The Legislature has again ducked its responsibility to enact rules on public disclosure of formal charges of misconduct against government employees.

Just what will it take to make the Democratic majority among lawmakers stand up to the public employee unions who provide so much election-time support to their party?

Charges of sexual harassment against UH faculty have caught public attention, but this is an issue in other areas, including misdeeds by police officers and prison guards.

Some would have any charges disclosed instantly, no matter how insignificant or unsubstantiated. At the other extreme, some would keep secret for years even the most serious cases and penalties (such as firing) until all appeals and grievance procedures are exhausted.

The Legislature must find fair middle ground reasonably protecting government employees whose reputations could be ruined by frivolous, unfounded charges. But it must also uphold the public's right to know when preliminary investigation finds there may be something to serious charges against government employees.

Meanwhile, public employee labor unions have gone into court to prevent the release of names of workers charged with misconduct and the Hawaii Labor Relations Board has ruled that the timing of the release of names is subject to collective bargaining.

That's bad, bad policy. Collective bargaining must not take precedence over state law. The unions may see their job as protecting their members at all costs, no matter what damage is done to good government. But the Legislature must not cave into this pressure.

By ducking the issue for two sessions, the Legislature leaves everyone in limbo: agencies don't know what can be released, employees don't know where they stand and the public is left in the dark.

Attempts at a please-all compromise failed. Now our lawmakers, particularly the Democrats who sit in 90 percent of the Legislature's seats, have to find the courage to be leaders and make a hard decision, even if it displeases the powerful public employee unions.

The Honolulu Advertiser

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John Griffin, *Editorial Page Editor*

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...Middlesworth *...ess Manager*

John Strobel, *news edi...* ...Matsunaga, *night city editor;* Jim Richardson, *Mar...* *...Sports editor;* Rick Padden,

EXHIBIT A

Open records

Public has right to know more

Knowing what is being done by government on citizens' behalf (and with our money) is one of the most important attributes of democracy.

But state officials have refused to release information about the companies that bid on asbestos removal from the State Capitol. That has already become a major embarrassment due to the add-ons and wildly escalating costs.

Now the work has been delayed by a suit against the state alleging the bidding was mishandled. This will certainly make it harder to get state government promptly back into a building more open to the public. And could end up costing taxpayers more money.

According to the Department of Accounting and General Services, state law makes confidential much information on bidders. If so, the law needs to be changed so the public can get a clear idea of how the state does its job.

In another case, the Honolulu Police Department does not know or won't say how many police officers failed to pass — or simply didn't take — an annual test of their ability to use firearms properly. For the safety of the public, and the officers, there's no excuse for the HPD to be lax about this, or so secretive.

In general, Honolulu can be proud of our police, but departmental secrecy continues to be troubling.

For example, the department says 16 employees were disciplined last month, including one suspended for 30 days and another fired. But rules do not allow release of more details or the offenders' names.

Naming names in severe cases would toughen the punishment and lift the shadow of suspicion secrecy casts on the whole force.

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EXHIBIT
B

AS

THE HONOLULU ADVERTISER

Editorials

Monday, April 6, 1992

Open records

Make it better, not worse.

Since 1989, Hawaii has had an estimable law called the Uniform Information Practices Act, which mostly requires that public records be public.

The law strikes a balance between open government and the constitutional right to privacy of government employees.

Since the law went into effect, however, it has become clear that it could use some adjustment. For instance:

■ Some Honolulu police officers were found to be involved in illegal activities, including taking home confiscated gambling equipment. The police department refused to say how many were disciplined, who they were, just what they did or how they were punished.

■ University of Hawaii officials were told that they must release the names of people formally accused of sexual harassment, even if their cases were still under investigation or had been dismissed.

The public records law as presently written allowed both unfortunate lapses.

In the police case, the law didn't go far enough. It cast a cloud over all the honest cops.

In the UH case, the law went too far. Names and disciplinary action taken shouldn't become public until a formal complaint has been upheld and investigated with due process.

The law needs to be clarified, in a way that favors public access to public information. Citizens need to be confident about their government and the people who work for it. It's reassuring to know that proper disciplinary action is being taken in cases where employees are accused of abusing the public trust.

EXHIBIT C

Police

More open, but still secretive

Relatively speaking, Police Chief Michael Nakamura has taken a big step toward openness in disclosing complaints against police officers investigated by the Honolulu Police Department in July.

HPD will issue such reports monthly from now on, including general descriptions of the infractions and discipline meted out. All HPD's done in recent years is report total numbers of investigations and disciplinary actions in its annual report. That's meaningless.

Nakamura

But the new reports still won't bring the department into compliance with the state's Uniform Information Practices Act. It states clearly that, when there've been formal charges of serious misconduct that could result in suspension or dismissal, the public interest in knowing about such cases — and how they're handled — outweighs a public employee's right to privacy.

This means HPD should have released names of three officers suspended as a result of the July investigations. The names of any officers involved in serious formal charges that were not upheld also should be available.

The meaning of "formal charges" is in litigation. But the Police Department has well-established, step-by-step procedures for handling serious complaints that plainly constitute formal charges.

The department's improved but limited new policy applies only to complaints investigated by the department, not those handled by the Honolulu Police Commission. The commission should follow the department's lead and begin to release meaningful information about complaints it handles.

Unfortunately, Hawaii's public employee unions may continue to be successful in blocking the release of names in serious cases until either the Legislature or a judge compels contract changes that will better serve the public interest in open government. So openness advocates must keep pushing.

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EXHIBIT D

THE HONOLULU ADVERTISER

Editorials

Saturday, October 19, 1991

Police

Secrecy casts cloud over force

It's disturbing that some Honolulu police officers were found to be involved in illegal activites, including taking home confiscated gambling equipment.

What is worse, the police department won't say how many were disciplined, who they are, just what each did or how they were punished.

In fact, almost all that's known results from a civil suit filed by another policeman who says he was harassed, in violation of the law that protects whistleblowers, for making charges against fellow vice officers. If true, it's doubly disturbing.

The city Corporation Counsel denies wrongdoing in the treatment of the whistleblower, as is to be expected in response to a civil case. Courts will determine who is right.

Once again, the HPD policy of releasing only the sketchiest outlines of disciplinary proceedings leaves the public in the dark and casts a cloud over all the honest cops.

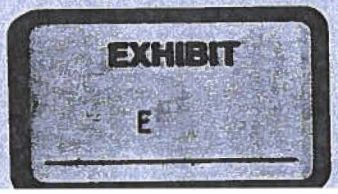
The Internal Affairs chief says one officer was suspended for five days, indicating violations were serious. One officer did resign, pleading guilty to a misdemeanor after being charged with perjury.

Last summer, Chief Michael Nakamura opened the door on police discipline a crack by starting a monthly report loosely describing infractions and disciplines, with no names. Before, at best only annual statistics were issued.

But the state's Uniform Information Practices Act says with formal charges of serious misconduct that could mean suspension or dismissal, the public has a right to know. Certainly, a suspended officer's name ought to be public.

Otherwise, the few bad apples avoid public shame, knowing that even if caught their names and deeds will be secret. And good officers will be shadowed by suspicion that they could be the ones who violated their trust.

Neither group deserves that.



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More police data

HONOLULU police are now providing more information about the disciplinary actions against their own, but the public needs more details on the identities of the officers and circumstances of the incidents.

Last month, police reported that an officer was fired for off-duty misconduct which included malicious use of physical force. It was the first time that a disciplinary firing has been reported by the police since Chief Michael Nakamura started releasing short summaries of disciplinary actions in August.

Progress by both the Police Department and the Honolulu Police Commission in sharing more information with the public has been encouraging. But concerns about protecting the privacy rights of police officers continue to prevail. This is partly because the State of Hawaii Organization of Police Officers (SHOPO) and its aggressive defense of its member officers, and because of sensitivity to Hawaii's privacy laws.

Protecting rights of the innocent is important, but a public safety employee should not have more rights of privacy than other people. Details of serious offenses involving violent behavior should not be kept secret, whether they involve a police officer or a citizen arrested in a domestic dispute.

Chief Nakamura and Police Commissioner Skip Hong deserve community support in their continuing efforts to share more of the business of police with a taxpaying public in need of knowing how well its safety services are managed.