TESTIMONY OF THE STATE ATTORNEY GENERAL

ON S.B. NO. 1363, S.D. 2

RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED)

BEFORE THE HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

DATE: Saturday, March 20, 1993

TIME: 8:30 a.m.

PLACE: Conference Room 1008
Leiopapa A Kamehameha Building
235 South Beretania Street

PERSON(S) TESTIFYING:

Robert A. Marks
Attorney General

or

Hugh R. Jones
Staff Attorney

Deliver to Rm. 1002 (35 copies)

TESTIMONY OF THE OFFICE OF INFORMATION PRACTICES

ON S.B. NO. 1363, S.D. 2

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, but was dismissed for being premature. 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, S.D. 2

A. Policy Objections to Current Draft of S.B. NO. 1363, S.D. 2

1. Special Exemption for Police Officers

As presently drafted, this bill provides a special exemption for police officers. Under this special exemption, the public would be deprived of access to information, in individually identifiable form, concerning sustained misconduct by police officers that results in their suspension or discharge.

The OIP believes that an insufficient basis exists to protect from public accessibility information concerning suspensions or discharges that are imposed upon county police department officers who are acting under color of police authority. While police organization representatives testified in previous hearings on this bill that police officers are unique in that they can be disciplined for conduct that occurs while they are off-duty, the OIP believes that, to the extent the police departments are authorized to impose employment discipline for such conduct, it is sufficiently employment related to warrant no favoritism or special exemptions for police officers.

The OIP believes that neither police officers nor other public servants have a constitutional privacy interest that would be implicated by the disclosure of information concerning employment misconduct which has been sustained and that results in a suspension or discharge. As the Alaska Supreme Court stated in a recent decision involving the disclosure of citizen complaints against police officers:

> What then is the state's interest in compelling disclosure? We have already set forth the state's interest in maintaining and preserving our system of government by ensuring openness. <u>There is perhaps no more compelling justification for public access to documents against police officers than preserving democratic values and fostering the public's trust in those charged with enforcing the law</u>.
>
> . . . We find the public policy considerations of openness, free access to the workings of government, insuring the effective operation of our judicial system,

and preserving our democratic ideals compelling.

Jones v. Jennings, 788 P.2d 732, 738-40 (Alaska 1990).

We agree with statements by police officers' organizations that most police officers are hard working, dedicated public servants. According to annual internal affairs statistics kept by the Honolulu Police Department ("HPD"), of 438 employees investigated for employment misconduct in 1992, only one employee was terminated, and 48 others were suspended. Only seventeen HPD officers were suspended for periods in excess of three days. However, the blanket of secrecy that has been cast over the identities of these officers detracts from, and does not foster or promote, public confidence and trust in those assigned the often difficult job of enforcing our laws.

For the forgoing reasons, the OIP is strongly opposed to this bill's inclusion of a special exemption from disclosure for information concerning sustained suspensions or discharges of county police department officers; all public servants should be placed on equal footing when it comes to the disclosure of this information. In the absence of such equal treatment, the UIPA, which after all, is intended to be a uniform law, will cease to be uniform in this very important public information area.

2. Conditioning Disclosure on Exhaustion of Grievance Procedures

The OIP is troubled by the possibly dangerous precedent that might be created by the provisions of this bill that condition public access to information about employment

misconduct by public employees upon the exhaustion of all collectively bargained grievance procedures.

Because such procedures, especially arbitration, often take significant periods of time to complete, the provisions of this bill would, in many cases, significantly delay public access to information about employment misconduct by public employees until months, or even years, after the occurrence of the conduct that is complained of.

Additionally, 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, deferring control of the State's information access policies to provisions established 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 employees' 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.

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, it would be difficult to apply this bill, if enacted, to misconduct by exempt and excluded employees.

B. Stylistic and Drafting Concerns with S.B. NO. 1363, S.D. 2

This bill purports to create an affirmative disclosure requirement in section 92F-14(b)(4), Hawaii Revised Statutes. As mentioned above, this section of the UIPA 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.[3]

As such, the language in the current draft stating that "the following information shall be disclosed thirty-calendar days after a written decision" should be redrafted to clearly and simply state that the information 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 the application of the "balancing test" to determine whether the public interest in disclosure outweighs the privacy interest").

Attached hereto is a suggested House Draft 1 of S.B. No. 1363, S.D.2, which the OIP suggests would remedy the current stylistic flaws present in this bill. The attached re-draft retains the special exemption for police officers, to which the OIP strongly objects. We believe that suggested House Draft 1 meets with the approval of the UHPA, and other public employees organizations; however we would respectfully request that this Committee delete the special exemption for police officers.

In conclusion, the OIP supports the spirit and purpose of this bill, but is opposed to the bill as currently drafted. We will be happy to try and answer any questions.

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Editorials

Monday, April 27, 1992

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

Established July 2, 1856

Thurston Twigg-Smith, *President & Chief Executive Officer*

Philip T. Gialanella, *Publisher & Chief Operating Officer*

Gerry Keir, *Editor*

John Griffin, *Editorial Page Editor*

Anne Harpham

Susan Yim, *Managing Editor/ Features & Design*

Geor... *Edit...*

...Middlesworth ...ess Manager

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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Susan Yim, *Managing Editor/ Features & Design*

George Chaplin, *Editor-at-Large*

Mike Middlesworth, *Business Manager*

John Stroebel, ne... Jim Richards, *graphics editor*; ... Mark Matsunaga, *night city editor*; ...nieski, *Sports editor*; Rick Budden, ...or; Sandra S. Oshiro, *asst. city editor*.

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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Susan Yim, *Managing Editor/Features & Design*

Mike Middlesworth, *Business Manager*

... city editor: Mark Matsunaga, night city editor: ... Stan Pusieski, Sports editor: Rick Paddock, ...

AG

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 activities, 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.

EXHIBIT

E

Honolulu
Star-Bulletin

Published by Gannett Pacific Corporation

Stuart T. K. Ho, Chairman
Alexander Atherton, Vice Chairman
Richard E. Hartnett, President/CEO
Arlene Lum, Publisher John Flanagan, Executive Editor
John E. Simonds, Senior Editor and Editorial Page Editor
David Shapiro, Managing Editor
A.L. Smyser, Contributing Editor

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.

EXHIBIT
F

A BILL FOR AN ACT

RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Subsection (b) of section 92F-14, Hawaii Revised Statutes, is amended to read as follows:

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

(1) Information relating to medical, psychiatric, or psychological history, diagnosis, condition, treatment, or evaluation, other than directory information while an individual is present at such facility;

(2) Information identifiable as part of an investigation into a possible violation of criminal law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(3) Information relating to eligibility for social services or welfare benefits or to the determination of benefit levels;

(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) The following information related to employment misconduct that results in the employee's suspension or discharge:

(i) The name of the employee;

(ii) The nature of the employment related misconduct;

(iii) An agency summary of the material allegations of the misconduct;

(iv) Findings of fact and conclusions of law, if any; and

(v) The disciplinary action taken;

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 30 calendar days

have elapsed following the issuance of this decision; provided that this subparagraph does not apply to officers employed by county police departments;

(5) Information relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position;

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

(7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except:

(A) The record of any proceeding resulting in the discipline of a licensee and the grounds for discipline;

(B) Information on the current place of employment and required insurance coverages of licensees; and

(C) The record of complaints including all dispositions; and

(8) Information comprising a personal recommendation or evaluation."

SECTION 2. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

INTRODUCED BY: _____

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 of Hawaii
House of Representatives
Committee on Labor and Public Employment

Testimony by
HGEA/AFSCME Local 152
March 20, 1993

SB-1363 S.D. 2 — RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED)

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO, supports the intent and purpose of SB-1363, S.D. 2.

This bill proposes to amend the Uniform Information Practices Act (Modified), to clarify what information about employment-related misconduct may be disclosed and at what stage of the disciplinary process such disclosure may occur.

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 as long as adequate safeguards are in place 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.

We believe that the language of SB-1363, S.D. 2 strikes the proper balance between the public's right to access governmental records and the individual's constitutional right to due process and privacy.

We respectfully request your favorable consideration of SB-1363, S.D. 2.

Respectfully submitted,

Russell K. Okata

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Testimony Before the House Committee

on Labor and Public Employment

March 20, 1993

Chairman Yonamine and Members of the Committee:

My name is John Radcliffe, and I am the Associate Executive Director for the University of Hawaii Professional Assembly.

The UHPA can now support Senate Bill 1363, Senate Draft 2. After three years of wrangling over this matter before the Legislature and in the courts, it now appears as if reasonable compromise has been worked out by the various parties and can be agreed to by most, if not all, parties concerned.

We note, however, Mr. Chairman and Members of the Committee, that one of the problems inherent in the Office of Information Practices Act, as it applies to Chapter 89 - the Collective Bargaining Act - is that it set up a conflict of laws. It may be important to insert into the Standing Committee Report on this measure, if it is passed, some words to the effect that the Legislature has considered this factor of a conflict of laws and now believes that in this narrow and new construction, that for this purpose, and this purpose alone, the Uniform Information Practices Act supersedes Chapter 89.

Our attorneys stand ready to assist the Committee in writing language, should you wish it.

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

UNIVERSITY OF HAWAII
PROFESSIONAL ASSEMBLY

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SHOPO

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WRITTEN TESTIMONY

BEFORE THE : House Committee on Labor and Public Employment
Representative Noboru Yonamine, Chairman

HEARING DATE: March 20, 1993, Saturday, 8:30 a.m.
Conf. Room 1008, Leiopapa A Kamehameha Bldg.

REGARDING : Senate Bill 1363, S.D. 2
"Relating to the Uniform Information Practices Act (Modified)"

Chairman Yonamine and Committee Members:

Thank you for giving me the chance to address you regarding Bill 1363, S.D. 2. My name is John Woo and I am a Detective with the Honolulu Police Department and also the President of SHOPO.

We at SHOPO strongly support Senate Bill 1363, S.D. 2. We believe that this version of S.B. 1363 shall serve our Community in the best possible way because it recognizes that the good morale of police officers is essential to good police work.

We are also aware that efforts are being made to delete the "police officers" exception from S.B. 1363, S.D. 2. These efforts dismay us and we would like to address this effort by submitting to you, testimony that was previously presented at other hearings by SHOPO regarding earlier versions of S.B. 1363. This testimony reflects police officers' negative feelings about releasing identities of public employees following job related discipline. The attached is the testimony previously delivered.

Respectfully submitted,

JOHN WOO
President, SHOPO

Attachment

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.

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

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 : House Committee on Labor and Public Employment
Representative Noboru Yonamine, Chairman

HEARING DATE: March 20, 1993, Saturday, 8:30 a.m.
Conf. Room 1008, Leiopapa A Kamehameha Bldg.

REGARDING : Senate Bill 1363 SD 2
"Relating to the Uniform Information Practices Act (Modified)"

Chairman Yonamine 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

SHOPO strongly supports Senate Bill 1363, SD 2. We believe this is the best compromise possible. We would like to remind this body that the Police Departments currently disclose statistics concerning discipline on a monthly basis to assure the public that officers are being disciplined.

We ask that you pass this Bill out in its current form, in the interest of maintaining a strong pro-active law enforcement effort in the State of Hawaii.

Respectfully submitted,

GARY WITT
Vice Chairman
Oahu Chapter Board of Directors
SHOPO

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 : House Committee on Labor and Public Employment
Representative Noboru Yonamine, Chairman

HEARING DATE: March 20, 1993, Saturday, 8:30 a.m.
Conf. Room 1008, Leiopapa A Kamehameha Bldg.

REGARDING : Senate Bill 1363 SD 2
"Relating to the Uniform Information Practices Act (Modified)"

Chairman Yonamine 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

MICHAEL K. KANESHIRO
General Counsel

The Honolulu Advertiser

GERRY KEIR
Editor

March 19, 1993

Testimony on S.B. 1363, S.D. 2

Rep. Noboru Yonamine and members of the House Committee on Labor and Public Employment

Mr. Chairman and Members of the Committee:

On behalf of The Honolulu Advertiser, I urge you to drastically amend Senate Bill 1363, S.D. 2 -- or to kill it.

The attached editorial, published by The Advertiser on March 1, 1993, discusses what we feel are the major arguments against this bill in its present form.

Legislators clearly must balance the privacy rights of public employees against the citizens' right to know about government misconduct, but we feel this draft is no balance at all. It stacks all the cards in favor of the employee guilty of misconduct.

At a time when public confidence in public servants is at a low ebb, this is a step in the wrong direction.

Gerry Keir
Editor

Enclosure: Advertiser editorial of 3/1/93

News Building ● 605 Kapiolani Blvd. ● Mail Address: P.O. Box 3110, Honolulu, Hawaii 96802 Phone: (808) 525-8080

Open records

MON MAR 1 1993 AB F

Tiny step in the right direction

We've been kicking up a fuss about the five months of secrecy that surrounded the probe of altered records in the drunk driving arrest of former state Representative Karen Horita.

That's because the public has a substantial interest in knowing of improper conduct by any state or county employee.

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

But since then, the Legislature has been struggling to fine-tune the part that deals with when action against an employee — and the employee's name — should become public.

A report from the Senate Committee on Education, Labor and Employment makes a tentative step in the right direction, but the proposal still needs substantial work.

In particular, it exempts police officers. That's simply unacceptable.

And it sounds like disclosure wouldn't come until all avenues of appeal had been exhausted — plus another 30 days. That could literally take years — the equivalent of waiting for a felony conviction to be upheld by the Supreme Court.

At a minimum, disclosure should occur when an administrator finds probable cause and takes disciplinary action. That's when the public has a right to know.

In our view, the law — and the principle of maximum openness — should govern.

Honolulu Star-Bulletin

THE PULSE OF PARADISE

JOHN M. LANAGAN
Editor and Publisher

Serving Hawaii
Since 1882

March 18, 1993

Rep. Noboru Yonamine and Members
of the House Labor and Public Employment Committee
State Office Tower
Honolulu, Hawaii 96813

Dear Rep. Yonamine and Committee Members,

Senate Bill 1363, S.D. 2, which would change the Uniform Information Practices Act, has been brought to our attention. This bill would extend the period before disciplinary action is disclosed to a month after discipline has been sustained at the highest level of review and exempt the discipline of police officers from public disclosure.

We believe this bill is unnecessary and contrary to the public interest. Additionally, we feel it will undermine public confidence in local government and in the police.

Recent events, such as the outcry against abuse of no-bid contract regulations at Aloha Stadium, widespread belief in allegations of sexual misconduct by a U.S. senator, broad-based rejection of the nomination of a political insider to the Hawaii Supreme Court and even the fact that the Democratic candidate for president failed to win a majority of the Hawaii vote, have demonstrated this erosion of confidence.

Our readers tell us Hawaii's government is one of back-room deals, favoritism, secrecy, incompetence, intimidation and turpitude. In the last election, fed-up Hawaii voters stayed away from the polls in large numbers. Even the reputation of our fine city police department is checkered. People who feel they are being misrepresented, hoodwinked, abused and ripped-off clamor for us to investigate. Against this backdrop of suspicion, imposing additional secrecy in the area of public employee misconduct is undesirable.

I am confident that our police forces are honorable organizations that deserve good reputations. However, allegations of police brutality in Hawaii are routinely made to this newspaper and have appeared frequently in the national press. The climate of secrecy in which police discipline is handled adds credibility to these charges and leaves the public to imagine the worst, that the police are a fraternity that takes care of its own before it takes care of the public.

Governments that operate in the open inspire public confidence. Certainly, there are rights to privacy guaranteed by our state constitution. Government openness, however, should not give those rights a wider berth than necessary.

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Those who govern in our nation do so at the consent of the governed. In Hawaii, that consent is eroding. I urge you to cast more light on cases of misconduct by public employees, not less. Allow that light to shine brighter on the police and inspire public confidence rather than allow police discipline to be handled in the dark — or, since we will not be told, perhaps not at all.

Please reject Senate Bill 1363, S.D. 2.

Sincerely,

John Flanagan
Editor & Publisher

Society of Professional
Journalists
HAWAII CHAPTER

P.O. Box 3141
Honolulu, Hawaii 96802

March 19, 1993

Rep. Noboru Yonamine
House Labor and Public Employment Committee
State House of Representatives
State Office Tower
Honolulu, HI 96813

Rep. Yonamine and Committee Members:

Re: S.B. 1363, S.D. 2

The board of directors of the Society of Professional Journalists wants to convey that, upon review of S.B. 1363, S.D. 2, we find the legislation to be poorly thought out.

Although the intent is to release information on the misconduct by government employees, the bill will greatly impair the public's right to know what its government is doing to solve misconduct.

SPJ prefers the original measure, sponsored by the Office of Information Practices, which discloses information at the point that the first person of responsibility makes a decision in the case. The current version would significantly delay release of information until the last administrative appeal is over. This also would eliminate disclosure of many cases.

We object to exempting police misconduct from the provisions of the measure. As recent events have shown, the public is deeply concerned about how the Honolulu Police Commission and Police Department handle police brutality cases.

The public has a right to know about these cases, and this measure would close the door on disclosure.

Thank you for your time and attention.

Sincerely,

Diane Chang

Diane Chang
President, Society of Professional
Journalists—Hawaii Chapter
Senior Editor & Editorial Page Editor,
Honolulu Star-Bulletin

BIG ISLAND PRESS CLUB
Box 1920 • Hilo, Hawaii 96720

To: House of Representatives, Hawaii State Legislature
Committee on Labor and Public Employment
S.B. No. 1363, S.D. 1
Mar. 20, 1993

From: Big Island Press Club
P.O. Box 1920
Hilo, HI 96721

Honorable Chairman Noboru Yonamine and members of the Committee on Labor and Public Employment. The Big Island Press Club opposes S.B. No.1363, S.D. 1, "A Bill for an Act Relating to the Uniform Information Practices Act (Modified)" as written.

The Press Club supports the basic body of the bill providing for disclosure of information relating to employee misconduct in cases of suspension or discharge. The Press Club opposes the exception for police officers and believes the exception should be deleted.

We believe police officers should be treated neither better nor worse than other governmental employees. Special burdens should not be imposed on them, nor should special privileges be granted to them.

We understand that there is a concern that officers, because of the 24-hour-per-day definition of their duties, are concerned about the disclosure of trivial offenses they may commit during nominally off-duty hours. An example frequently used is that of an officer disciplined for arguing with his wife or her husband during off-duty hours.

We believe such an example to be faulty. We have confidence in the officer's superiors not to impose suspension or dismissal for such minor offenses not connected with the employee's status as an officer.

On the other hand, a more serious infraction by an officer, such as demanding free entry to a sporting event because of his or her status as a police officer, might subject him or her to suspension.

If the officer's superiors determine a suspension is warranted, the Press Club believes public disclosure of the misconduct is also warranted.

The Press Club is troubled by the absence from the report of the Senate Committee on Judiciary of an analysis of why a special exception is proposed for police officers.

Members of the public may rightfully ask why the Legislature would propose special privileges for police officers without providing justification.

The Press Club believes there is no justification and this special privilege should not be granted.

Sincerely,

Hunter Bishop, President
Big Island Press Club.

HAWAI'I GREEN PARTY

P. O. BOX 61796, Honolulu, Hawai'i 96839 (808) 528-1225

March 20, 1993

Chairman Yonamine and members of the House Committee on Labor and Public Employment, my name is David Anstine and I'm here today to testify for the Hawai'i Green Party.

We are very pleased with the intent of SB 1363, SD 2, to give the public more information about our government and our employees. However, we think several changes must be made to this draft of the bill in order to realize the intent of the bill.

(1) We definitely want information made public about employee misconduct by police officers. Police officers should not be excluded from this bill. They are our employees, too, and we want to know about their misconduct, especially since their work entails the use of violence and could result in abuse of that empowerment.

(2) We think the information about public employee misconduct should be made available at the time the complaint is filed, not only after a person is suspended or discharged. This is consistent with the legal system's method of making accusations public when they are alleged, not after the person is convicted and sentenced.

Thank you for this opportunity to testify.

Sincerely,

David Anstine
O'ahu Co-chair, Hawai'i Green Party

CODE OF SILENCE/BROKEN

P. O. Box 10447 . Honolulu, Hawai'i 96816 . Tel: 808 733-2038/944-1141

March 20, 1993

Chairman Yonamine and members of the House Committee on Labor and Public Employment: my name is Toni Worst and I speak today for Code of Silence/Broken, a community alliance which is concerned about the issue of sexual harassment in society. I am testifying today on Senate Bill 1363, Senate Draft 2, because this bill affects the issue of sexual harassment.

According to the National Council of Research of Women study (Nov. 1991), 50-85% of all women suffer some form of sexual harassment sometime in their academic or working life and only 10% of sexual harassment cases are reported. Ninety-seven percent (97%) of all victims are women While this bill is about open government and public information, it's also about women's rights, because it impacts the prevention and punishment of sexual harassment.

We support the intent of this bill to make government processes more open by disclosing information about public employee misconduct. The more open and accessible the system is, the more citizens are encouraged and empowered to participate and the more public accountability is increased; these are both laudable legislative goals.

However, we strongly oppose: (1) the bill's provision that public disclosure be made only if the misconduct proceedings results in suspension or discharge of the employee; (2) the delaying of disclosure until 30 days after the highest non-judicial procedure; and (3) the exception of police officers from disclosure requirements.

(1) We believe that the public pays for the services and the administration of public employees and it has the right to know about serious allegations which potentially threaten harm, at the time those allegations are formalized into a complaint and even if the complaint doesn't result in suspension or discharge. Then, as individuals, the public can decide whether or not to expose themselves to possible injury, violation, or damages. Making the information public at the time the complaint is filed is the same as criminal indictments being made public at the time they are handed down from the grand jury. There is still a legal presumption of innocence, but the public has the information at the time misconduct proceedings begin and is protected by having that information.

Granted: we also want to protect the civil rights of the very few falsely accused. To do that, we have already established very effective deterrents in the form of libel and slander laws. If someone makes a false claim which is subsequently made public, the falsely accused can sue for damages. The innocents have their protection.

It is important for this committee to know that less than 1/2 of 1% of sexual harassment claims are found to be frivolous (that is, where it's determined a complainant filed a false charge knowing that they did not have a legitimate case). For those of us advocating against sexual harassment, this statistic translates into this reality: the sooner the public knows about a sexual harassment complaint, the sooner the public is forewarned and can take whatever steps they deem necessary to protect themselves.

Additionally, our laws and procedures have established very specific and stringent requirements to prove sexual harassment; this already makes it extremely difficult to verify and prove a claim. Since sexual harassment rarely happens in front of witnesses or on video for posterity, often this means: "it'll be your word against mine, honey". Further, our society perpetuates myths about what women really mean when they say "no" and our misogynist culture presumes that women lie whenever they want to or just to get innocent men in trouble. So, in every sexual harassment case, there are really two people accused (the woman is accused of lying or "secretly wanting it" and the man is accused of harassing), BUT only one of them is legally and procedurally presumed innocent. This built-in bias against the complainant and in favor of the harasser coupled with the difficulty of proof means that many of the 99.5% of true, real, and authentic complaints will NOT result in a final decision of public employee suspension or discharge. With regards to this bill, if there's no final suspension or discharge, the misconduct information is never made public, which means that women around the harasser will never find out they're at risk of being violated until it's too late. Without public disclosure at the time of complaint, women around that harasser do not know they are at risk of being sexually violated and they cannot make their own decisions about whether and how to protect themselves.

Further, that harasser who skates through without getting suspended or discharged is now familiar with how easily he can violate women with impunity, without calling any public attention to his deviance-- that harasser will actually be encouraged to sexually harass again, only now he'll be even more careful not to leave any proof. And, with the passage of this bill, the women around him would have had no forewarning about this man's *modus operandi*. If you're saying to yourself, "Wow, if I got that close to being caught for harassing, I'd never do it again, so this argument doesn't wash"--please remember: you're presumably rational and psychologically-normal people. The sexual harasser is a psychological DEVIANT and we're talking about sexually DEVIANT behavior, and socially DEVIANT-thinking.

Additionally, keeping the complaint "gagged" means that several concurrent sexual harassment complaints could be filed against the same violator and the multiple violatees would never know that they were not alone in the harassment; effectively, it keeps groups of victims separated and isolated from one another.

We want the information information released at the time of the misconduct complaint, so the public's right to know and protect itself is enhanced. Waiting years to see if the complaint and complainant will survive to a resolution of suspension or discharge does not protect the public.

(2) This draft purports to include a compromise on timing of the misconduct information release, from the original 100 days down to 30 days after final non-judicial appeal. This is not helpful, since the bulk of the delay time is in the administrative process that the misconduct complaint must wind its way through, which can take literally years. Years for processes, forms, reports, hearings, depositions, claims, counter-claims, etc. -- we all know how long these tedious administrative procedures last, which is exactly how this bill will continue to protect the guilty from the public knowing about complaints against them for years. That foot-dragging administrative process is the largest, most critical amount of delay and the unions know this darn well; it's quite disingenuous for them to suggest that 100 days down to 30 days is a compromise.

To make our position perfectly clear: to protect the public, we want the information disclosed at the time the complaint is filed.

(3) Information about misconduct complaints against police officers should definitely be made public when the complaint is filed. Again, you don't infringe upon the interests of the innocents, because they are protected by libel and slander laws.

Police officers are the only individuals in civil society who we legally empower to immediately and physically take away our freedom and threaten our lives, if it's deemed necessary for the public safety; they can bind us or imprison us, they can even use deadly force on us. The potential for misuse of power is always a concern for the public and that unease is heightened when we're talking about the police, because of their specific empowerment to use physical violence on us, if necessary.

In order to reassure the public that we have an open and honest government which isn't abusing the power that WE THE PEOPLE give it, when it comes to revealing public employee misconduct, the police should be at the top of the list of those whose behavior we will always make available to public scrutiny and the public record. Without that scrutiny, governments end up with police forces like those in Romania, Argentina, and El Salvador, with things like disappearances of citizens and violent intimidation of those who are critical, and years upon years of procedural delay to cover-up guilt, thwart justice, and impede reforms.

Back to sexual harassment... after a complaint is filed, the intimidation of complainants by their harassers is a harsh reality. Now, keeping in mind the permissible violence we've granted to police, the kinds of powers they are used to employing on the job, and the tradition of fraternity allegiance they enjoy, can you imagine the kinds of intimidation a harassing police officer might use? I can, and while public disclosure of misconduct complaints won't stop intimidation, BANNING that disclosure would limit the small amount of protection that can be found from the bright light of public scrutiny and would be absolutely unconscionable. We must permit public knowledge of misconduct complaints when they are made, especially where police officers are concerned.

Our group wants to prevent sexual harassment from occuring. If the public knows who has been complained against, they can make their own decisions about self-protection and prevent further incidents happening to them. Sexual harassment rarely happens in isolated incidents, so making complaints public will serve to bring common complainants together, emotionally and legally. Everything our laws do to make it even more difficult for the complainant (like gagging them, keeping them from one another, thwarting other legal courses of action, blaming them for the crime, etc.) further victimizes an already traumatized person. It also sends the wrong message to harassers that we're more interested in protecting them than their victims and increases the likelihood of additional victims.

We are in a different social environment at this stage of our American development. We now understand that victims have rights, too--not just the accused. We have devised mechanisms to protect the innocent; now we must move forward on devising ways to protect the complainants, the vast majority of which are women, which will all contribute to deterring the offending behaviors. Make no mistake: this is definitely a women's rights issue. We recognize that most laws heretofore have been written by men who probably can identify more readily with a fear of being unjustly accused than with a fear of being violated. It will take an extra effort to sympathize with women and to protect them from discriminatory and damaging behaviors most lawmakers have never had to endure.

Falsely accused public employees are protected by libel and slander laws, so the interests of the innocent are already protected. If you want to protect guilty public employees from suffering the consequences of their actions, including public knowledge of their misconduct, which is what this version of this bill does, then by all means: pass it as is. If you are interested in protecting the public's interest, you should amend this bill to: (1) make the misconduct complaint information public as soon as the complaint is filed; and (2) include police officers as public employees about whom misconduct complaints will be made public.

It is vital that we insist our employees' internal policing mechanisms work to protect the public, as well as the public employees. Thank you for this opportunity to testify.

Sincerely,

Toni L. Worst
Spokesperson, Code of Silence/Broken

COMMON CAUSE HAWAII

1109 Bethel Street, Suite 419 • Honolulu, Hawaii 96813 • Ph. (808) 533-6996

March 20 ,1993

Testimony to the House Committee on Labor and Public Employment
Regarding SB 1363, SD 2, From Common Cause Hawaii.

Thank you to the Chair and to the committee members for the opportunity to speak. My name is Donna Bullard, Vice-Chair of Common Cause Hawaii, the citizens' lobby for good government. We have 275,000 members nationwide and 1600 in Hawaii.

We support most of SB 1363, SD 2, except for the phrase on page 2, line 19, exempting police officers from disclosure of misconduct.

The argument in favor of this exemption is that police officers might be harassed if there were disclosure. However, we feel that the laws against harassment are already sufficient protection against this possibility, and feel confident that these laws would be vigorously enforced if there were any harassment of police officers.

We feel there should not be an exemption for police officers who are carrying out police duties, during duty hours or off-duty hours. When police officers are carrying out police duties, they have the responsibility to act professionally and properly. If they do not, and if they are found guilty of misconduct, the public has a right to know.

Thank you for the opportunity to speak.

TESTIMONY OPPOSING S.B. NO 1363, S.D.2,

PRESENTED TO THE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

STATE HOUSE OF REPRESENTATIVES

BY BEVERLY ANN DEEPE KEEVER

8:30 a.m. March 20, 1993
Conference Room 1008, Leiopapa A Kamehameha Building

\- - -

Chairman Yonamine and Committee Members:

My name is Beverly Ann Deepe Keever. I am a tenured faculty member teaching at the University of Hawaii at Manoa and am a member of the University of Hawaii Professional Assembly.

In 1987, thanks to the support of my department and its staff, I was the recipient of the Regent's Medal for Excellence in Teaching. That year I also served as the University's representative for the State Employee of the Year Award.

My remarks today reflect my individual views.

I oppose this bill. I urge the 17th Legislature to kill it and to leave the existing statutory language intact.

I. S.B. NO. 1363, S.D. 2 WILL ADVERSELY AFFECT THE IMAGE OF HAWAII'S PUBLIC INSTITUTIONS

This is a no-win bill for state and city public agencies. This bill requires public agencies to disclose by name strong action [discharge or suspension] taken against their few "bad apple" employees.

By implication, however, this bill routinely bars public agencies from disclosing the results of their investigations that

clear the names of public employees who were falsely or mistakenly accused of misconduct.

Thus those investigating agencies will only be spotlighting negatively. They will be unable to spotlight those investigations that sustain the good names of their employees.

This legislatively mandated imbalance in the release of information will paint an undeservedly bad image of Hawaii's public institutions that become embroiled in such complaints.

II. S.B. 1363, S.D.2 FAILS TO PROTECT THE COMPLAINANT, THE EMPLOYEE, THE PUBLIC AND COMPETENT EMPLOYEES BY PERMITTING DISCLOSURE ONLY OF EMPLOYEES WHO ARE DISCIPLINED

If public officials are prohibited from disclosing truthful information on a timely basis, rumors--often unfounded and anonymous--are likely to arise anyway. These dangerous rumors--often posted in public places--can not be countered because of prohibitions against disclosure of timely actions taken or truthful findings made by agency officials.

Thus, I specifically oppose the long paragraph of language proposed in (B) on page 2 because it:

(1) prevents the public from scrutinizing the quality of justice dispensed by public institutions by barring an agency from disclosing its decision rejecting the allegations made in the original complaint and the reasons for the rejection;

(2) prevents the complainant from verifying the final disposition of all possible outcomes of the complaint and the discipline imposed, if any;

(3) fails to protect the good name of an employee against

whom a complaint has been filed but whom the agency found not to have violated policies or laws as alleged in the complaint;

(4) fails to protect the good name and presumed competencies of most public employees by permitting public inspection of the personnel files of only those employees who have violated public policies.

The new language proposed in S.B. 1363, S.D. 2 essentially sets up a regulatory scheme for suppressing some state- and city-held information about public servants.

III. S.B. 1363, S.D.2 MISTAKENLY ASSUMES THAT INFORMATION CAN BE SUPPRESSED IN THIS NEW AGE OF INFORMATION

This no-win bill is unworkable. Its root problem is that it is based on the mistaken assumption that information can be suppressed in this new age of information.

A policy based on suppression of information has been rendered meaningless by the revolutionary ways audio, video, photographic and other technologies permit surveillance over the world and its people.

Suppression of information hasn't worked in the Soviet Union. "The Cold War is over, and television won," Alfred C. Sikes, chairman of the Federal Communications Commission, said recently.

Suppression of information didn't work in contemporary China. Citizens'-brand bulletins flourished on Democracy Wall.

And suppression of information didn't work on the Manoa campus either. Student-scrawled flyers naming professors as

sexual harassers were found fluttering from campus bulletin boards when the UH administration failed to disclose what was being done about complaints on this issue. Student photographers have preserved these accusations on film.

During this same period, the bulletin board in the campus building where I teach also contained an anonymous scrawl. Next to the words Sexual Harasser was a telephone number. A quick check of a Polk's Directory led one to the home telephone number of a senior University administrator.

Thus, suppression of information, instead of protecting the "bad apple" government employee, has the opposite effect of exposing numerous other employees to tainted, unfiltered, anonymous, slanderous allegations. It creates a kind of McCarthy-ism without a cause.

This bill is so flawed that the I urge 17th Legislature to kill it. If it is passed, the Governor must be petitioned to veto it.

Respectfully submitted,

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