TESTIMONY OF THE OFFICE OF INFORMATION PRACTICES

ON S.B. NO. 1363, S.D. 2, H.D. 1

RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED)

BEFORE THE HOUSE COMMITTEE ON JUDICIARY

DATE: FRIDAY, April 2, 1993

TIME: 2:00 p.m.

PLACE: Conference Room 802
Leiopapa A Kamehameha Building
235 South Beretania Street

PERSON(S) TESTIFYING:

Kathleen Callaghan
Director
Office of Information Practices

or

Hugh Jones
Staff Attorney

Deliver to rm. 803 (40 copies)

TESTIMONY OF THE OFFICE OF INFORMATION PRACTICES

ON S.B. NO. 1363, S.D.2, H.D.1

The Office of Information Practices ("OIP"), supports the purpose of this bill, but has reservations about its substance that the OIP respectfully requests this Committee to consider before considering its passage. The OIP also suggests the bill be revised to include certain clarifying, stylistic, and non-substantive amendments, which are set forth in Exhibit "A."

I. OIP SUPPORTS BILL'S DISCLOSURE PROVISIONS WITH RESERVATIONS

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 make "recommendations for legislative changes." Haw. Rev. Stat. § 92F-42(7) (Supp. 1992).

The UIPA, a comprehensive public records law that applies to all State and county agencies, 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-2 (Supp. 1992). Another very important purpose of the UIPA was to repeal a patchwork-quilt of existing records policies and to establish uniform policies applicable the public's right to

inspect and copy records and information maintained by State and county government agencies. See H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817 (1988) ("the current confusion and conflict which surround existing records laws are plainly unacceptable").

The purpose of this bill is to amend the UIPA to clarify: (1) what individually identifiable information about employment misconduct by State and county employees must be disclosed to the public upon request, and (2) what stage in an agency's disciplinary process that such disclosures may occur. This bill also represents an attempt to finally lay to rest the controversy, administrative proceedings, and litigation that followed the 1990 issuance of two OIP advisory opinions letters and an Attorney General's opinion concerning the public's right to know about misconduct by public employees.

The OIP believes that the clarification of the UIPA's provisions concerning the public's right to know about disciplinary action taken against State and county employees is a matter that should be resolved by the Legislature, not the courts. After the 1991 and 1992 legislative sessions in which efforts to resolve this controversy have stalled, significant strides have been made during the 1993 legislative session to put this controversy to rest through amendments that clarify whether and at what stage, disciplinary action imposed upon public employees may be made publicly accessible upon request.

Under this bill, disciplinary action amounting to either a suspension or discharge must be made publicly available by an agency upon request, but: (1) only after the exhaustion of non-judicial grievance procedures established in collective bargaining agreements of public employees' organizations, and (2) only if such procedures result in decision sustaining the suspension or discharge. The OIP sincerely has concerns with this approach because the exhaustion of such grievance procedures can significantly delay the public's right to know about serious misconduct by public employees to months or, in some cases, years after the occurrence of the alleged misconduct. For this reason, the OIP definitely prefers the approach set forth in S.B. No. 561, which would permit public access to information concerning disciplinary action involving either a suspension or discharge if the allegations of misconduct are found to be true by the person in the agency authorized to impose such discipline.

Nevertheless, the OIP recognizes that reasonable persons may differ on this controversial issue. The OIP also believes that the adoption of the provisions of this bill conditioning the public's right to know upon the conclusion of non-judicial grievance procedures would at least lift the present shroud of secrecy concerning employment misconduct that results in a suspension or discharge of a public employee. Since February 1990, as a result of preliminary injunctions issued by the circuit court at the request of public employees' organizations, and by a decision of the Hawaii Labor Relations

Board, government agencies have not been releasing this information in an individually identifiable format. Thus, while the OIP has serious reservations with some of the provisions of this bill, we also believe that their adoption will provide the public with more information than it is presently receiving due to pending litigation.

However, the OIP has important structural and stylistic concerns with the present draft of S.B. No. 1363, and we would respectfully request that this Committee consider amending the bill to include the stylistic and non-substantive revisions set forth in Exhibit "A" attached hereto. The OIP's concerns are explained in detail below.

II. CLARIFICATION OF PROVISO FOR MISCONDUCT BY POLICE OFFICERS THAT OCCURS WHILE ACTING IN AN "UNOFFICIAL CAPACITY"

The OIP strongly believes that the disclosure provisions of this bill should apply equally to police officers employed by county police departments. As was recently stated by the Alaska Supreme Court concerning the public disclosure of citizen complaints against police officers:

> What 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>.

<u>Jones v. Jennings</u>, 788 P.2d 732, 738-740 (Alaska 1990).

As a result, the OIP strongly supports the amendment to this bill made by the House Committee on Labor and Public Employment that substantially narrows and tightens the bill's special proviso for misconduct by county police department officers. Because the UIPA is intended to be a uniform law, the OIP ardently believes that the State of Hawaii's policies concerning the disclosure of personnel information should be fair and uniform, devoid of special loopholes and special provisions for particular categories of public employees. The adoption of such loopholes and special provisions in favor of particular individuals would be inimical to the Legislature's intent that the UIPA repeal and eliminate the patchwork-quilt of conflicting policies that predated the UIPA.

The OIP also recognizes, however, the unique nature of police work in that off-duty officers have the capacity and ability to transfer to "on-duty" status to respond to the scene of a crime, to make an arrest, or to lend assistance and back-up support to other on-duty officers. Accordingly, as a conceptual matter, the OIP is not opposed to this bill's exception for conduct by a police officer that does not occur while the officer is acting in the capacity of as a police officer. However, the OIP believes that as presently worded, the proviso concerning police officers is ambiguous, lacks the legal precision that is required in this controversial question, and is likely to result in further disagreements concerning its intended coverage and scope.

As presently worded, the bill excludes misconduct by police officers while "acting in an unofficial capacity." Does this language include situations where an off-duty officer, on the officer's own initiative, resumes "on-duty" status to investigate a crime, make an arrest, or lend support and back-up assistance to other on-duty officers? Is a police officer acting in an "unofficial capacity" when the officer is in-uniform and performing "special duty" at construction sites or at public events and for which the officer is privately paid? The use of the phrase "unofficial capacity" is likely to result in future disputes, future advisory opinion requests to the OIP, and perhaps additional litigation.

To eliminate any possible ambiguity, the OIP would recommend that the bill's proposed proviso in section 92F-14(b)(4)(B) for police officers be re-drafted to read as follows:

> provided that this subparagraph shall not apply to a county police department officer with respect to misconduct that occurs while the officer is not acting in the capacity as a police officer;

The inclusion of the language suggested by the OIP would substantially clarify that if an off-duty or out-of-uniform police officer is actually exercising police powers (such as making an arrest, investigating a crime, or performing traffic control at the scene of an accident or a crime), conduct by the officer that results in the officer's suspension or discharge which is sustained by the grievance process, would be available

to the public upon request. Significant legal arguments can be made that conduct by an off-duty police officer who is exercising police powers involves the officer acting in "an unofficial capacity." We do not believe that the House Committee on Labor and Public Employment intended this phrase to be so construed, and so the OIP recommends that the scope of the proviso be clarified by the House Committee on Judiciary.

III. STRUCTURAL AND STYLISTIC CONCERNS WITH PRESENT DRAFT OF S.B. NO. 1363, S.D. 2, H.D. 1

As presently drafted, this bill proposes to amend section 92F-14(b)(4), Hawaii Revised Statutes, to create a subparagraph (B) that would include the phrase "the following information shall be disclosed." See page two, lines 7-8.

However, section 92F-14(b), Hawaii Revised Statutes, was not intended to include such an affirmative agency disclosure provision, but instead, only to identify information which is, or which is not, the subject of a "significant privacy interest." In the absence of a significant privacy interest, "a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, Haw. S.J. 689, 670 (1988). In contrast, in the presence of a significant privacy interest, that privacy interest must be balanced against the public interest in disclosure to determine whether a clearly unwarranted invasion of

personal privacy would result from its disclosure. See Haw. Rev. Stat. §§ 92F-2, and 92F-14(a) (Supp. 1992).

Section 92F-12, Hawaii Revised Statutes, not section 92F-14(b), Hawaii Revised Statutes, sets forth records or information which an agency "shall disclose" any provision to the contrary notwithstanding.

Accordingly, to retain structural and stylistic integrity and consistency within and among the various sections of the UIPA, the OIP would strongly recommend that the proposed section 92F-14(b)(4)(B), Hawaii Revised Statutes, be amended to merely identify information which is "excepted" from a significant privacy interest and which, therefore, would not constitute a clearly unwarranted invasion of personal privacy. Under section 92F-11(b), Hawaii Revised Statutes, the net effect of such a revision would be to require the public availability of this information under the UIPA's general rule of required agency disclosure.

The OIP also recommends that for purposes of clarity, the lengthy proposed subparagraph (B) in section 92F-14(b)(4), Hawaii Revised Statutes, be broken down into separate clauses, as is recommended by the Hawaii Legislative Drafting Manual published by the Hawaii Legislative Reference Bureau. See Legislative Reference Bureau, Hawaii Legislative Drafting Manual, 14 (1989) ("[c]lauses are divisions of a subparagraph" and should be used in complex statutory schemes).

All of the stylistic, structural, and non-substantive amendments to S.B. No. 1363, S.D.2, H.D.1, proposed by the OIP are set forth in Exhibit "A" attached hereto. In a letter to the OIP dated February 26, 1993, the University of Hawaii Professional Assembly's attorney, T. Anthony Gill, stated that he believes the attached draft "improves the organization and coherence of the amendment, preserving the structure of section 92F-14." With the inclusion of these amendments, the OIP supports the passage of this bill, with the reservations set forth above.

IV. CLARIFICATION IN COMMITTEE REPORT OF INTER-RELATIONSHIP BETWEEN THE BILL'S PROVISIONS AND PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS TO THE CONTRARY

To avoid future controversies, the OIP strongly recommends that this Committee clarify, in its committee report concerning this bill, that it intends the bill's disclosure provisions to apply notwithstanding provisions to the contrary in collective bargaining agreements entered into under chapter 89, Hawaii Revised Statutes.

We suggest that the committee report on this bill use the following language to eliminate any misunderstanding or confusion:

> Your Committee intends the provisions of this bill concerning the disclosure of suspensions or discharges of agency employees to apply to all State and county employees regardless of their civil service status and notwithstanding the provisions of collective bargaining agreements under chapter 89, Hawaii Revised Statutes to the contrary.

We will be happy to try and answer and questions.

DRAFT

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

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

EXHIBIT

A

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 an employee's suspension or discharge:

(i) The name of the employee;

(ii) The nature of the employment related misconduct;

(iii) The agency's summary of the allegations of misconduct;

(iv) Findings of fact and conclusions of law; and

(v) The disciplinary action taken by the agency;

when the following has occurred: the highest non-judicial grievance adjustment procedure timely invoked by the employee or the employee's representative has concluded; a written decision sustaining the suspension or discharge has been issued after this procedure; and 30 calendar days have elapsed

following the issuance of the decision; provided that this subparagraph shall not apply to a county police department officer with respect to misconduct that occurs while the officer is not acting in the capacity as a police officer;

(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

DRAFT

(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: _____

END EXHIBIT A

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 JUDICIARY
REPRESENTATIVE TERRANCE TOM, CHAIRMAN

HEARING DATE: FRIDAY, APRIL 2, 1993, 2:00 P.M.

REGARDING : Senate Bill 1363 SD 2, HD 1
"Relating to the Uniform Information Practices Act (Modified)"

Chairman Tom 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".

Public employees are not second class citizens. Therefore we ask you not support this legislation for these 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 JUDICIARY
REPRESENTATIVE TERRANCE TOM, CHAIRMAN

HEARING DATE: FRIDAY, APRIL 2, 1993, 2:00 P.M.

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

Chairman TOM 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

TESTIMONY BEFORE THE HOUSE COMMITTEE ON JUDICIARY

APRIL 2, 1993

2:00 P. M.

Chairman Tom and Members of the Committee:

My name is John H. Radcliffe, and I am the Associate Executive Director for the University of Hawaii Professional Assembly. The UHPA strongly favors Senate Bill 1363, as amended, relating to the Uniform Information Practices Act.

It has taken all of the parties three years to be able to reach what most people now agree is an excellent compromise. The right of the people to know which public employees are accused of misdeeds is, with this legislation, balanced by the rights of an employee to go through a grievance procedure and not have his or her name revealed to the public until such time as evidence has been adduced that the employee has actually committed the act that gave rise to the complaint. Passage of this legislation will put to rest years of controversy and litigation.

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

UNIVERSITY OF HAWAII
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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 Judiciary

Testimony by
HGEA/AFSCME Local 152
April 2, 1993

SB-1363 S.D. 2 H.D. 1 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, H.D. 1.

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, H.D. 1 strikes the proper balance between the public's right to access governmental records and the individual's constitutional right to due process and privacy.

Accordingly, we respectfully request your favorable consideration of SB-1363, S.D. 2, H.D. 1.

Respectfully submitted,

Russell K. Okata

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COMMON CAUSE HAWAII

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

April 2, 1993

Testimony to the House Judiciary, Legislative Management and Comsumer Protection and Commerce Committees on SB 1363 SD2 HD1. From Common Cause Hawaii.

Thank you to the Chairs and the committee members for the opportunity to speak. My name is Larry Meacham, Executive Director of Common Cause Hawaii, the citizens' lobby for good government. We have 275,000 members nationally and 1600 locally.

We recognize that there are legitimate privacy concerns for government employees in general and police officers in particular. But there is an even greater public interest in finding out about government misconduct, since this reassures the public that things are not being swept under the rug and opens problems to public knowledge, discussion and improvement.

So, in our view, once the administrative process is completed and the facts have been fairly determined and fairly evaluated, if misconduct by any government employee has been found, the public has a right to know, without exception for police officers or anyone else.

After all, it is the public's government, paid for by the public.

Evelyn Bender of the League of Women Voters, who is on the mainland attemnding to her son's illness, has asked me to also express her support for this position.

Thank you for the opportunity to speak.

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

PRESENTED TO THE COMMITTEE ON THE JUDICIARY

STATE HOUSE OF REPRESENTATIVES

BY BEVERLY ANN DEEPE KEEVER

April 2, 1993, Leiopapa A Kamehameha Building

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Chairman Tom 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 servants by permitting public disclosure about the personnel files of only those servants who have violated public policies.

Thus, 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, former 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,

Beverly Ann Deepe Keever

THE SOCIETY OF PROFESSIONAL JOURNALISTS
University of Hawaii Student Chapter

2550 Crawford Hall
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Honolulu HI 96822-2217
Tel. 808 956 8881
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April 1, 1993

The Honorable Terrance Tom
Chairman
Judiciary Committee
State House of Representatives
The Seventeenth Legislature
State of Hawaii

Dear Chairman Tom and members of the Committee:

SB 1363 SD 2 HD 1 - RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED)

Thank you for the opportunity to submit written testimony in conditional support for this bill. The mission of the Society of Professional Journalists is to protect and expand First Amendment press freedoms and the public's right-to-know.

BACKGROUND

Each year for the last three years, the legislature has grappled with the question of how much information should be released to the public about the misconduct of government employees. Section 92F-14(4), Hawaii Revised Statutes, clearly requires that information "relating to the status of any formal charges against the [government] employee and disciplinary action" is a matter of public record.

Two separate opinions from the Office of Information Practices have upheld this provision. Yet since the law's inception in 1990, no such information has ever been released to the public. Why? Because when University of Hawaii officials were on the verge of releasing the names of its employees found guilty of sexual harassment, the HGEA and UHPA sued and won an injunction preventing such a release.

Today, that lawsuit sits idle while the court waits for legislative action. And each year, a bill moves through to amend the definition of "formal charge," only to die in conference committee after intense lobbying by unions such as SHOPO, UHPA, HGEA and others.

CONCERNS ABOUT THIS BILL

Our first concern is that the proposed language will disclose information about misconduct that results in an employee's *suspension or discharge*. That is too stringent. It is a rare occasion when a government agency will suspend or fire an employee for agency misconduct.

Most of the time, an agency will issue a written reprimand, place a negative action letter in the employee's personnel file, or provide an oral reprimand with no paper record. With the proposed language in this bill, these kinds of disciplinary action will never be disclosed to the public.

Each department is different in the way it disciplines its employees. The Honolulu Police Department routinely issues written reprimands to its officers for serious violations of departmental standards of conduct. In another county or state department, such an employee would be fired for the same type of misconduct. So the proposed language may cause an inconsistent and perhaps unfair public reporting standard of employee misconduct across government agencies.

We believe that any sustained complaint against a government employee for misconduct that results in any form of disciplinary action should be a matter of public record. Such information is not protected by any statutory or constitutional right-of-privacy of an agency employee.

Indeed, the public has an overriding interest about agency employee misconduct, for it needs to know how quickly and appropriately agencies act against the misconduct of their employees.

Our second concern is with the conditional exemption for police officers. What exactly does "acting in an unofficial capacity" mean? With their powers to arrest, detain, search and seize, police officers wield far more authority than a regular government employee and should at least be held to the same level of accountability.

In the past, police and police union representatives have argued that law enforcement agencies are somehow special and therefore deserve exclusion from laws that provide public accountability. We are accountable enough, they say. We say they are not. To use HPD again as an example, it routinely does not disclose to the complainant the status of the complaint or the type of disciplinary action the officer received, if any.

Police officers carry weapons that can unnecessarily and brutally inflict pain and injury. They can misuse the color of their badge to harass and cause emotional and physical distress. In recent years, the City and County of Honolulu has spent millions of dollars either settling or paying judgments to victims of police brutality.

We do not believe there should be any distinction in the public reporting of a police officer's misconduct while on-duty, off-duty or while on special duty. If an officer has violated departmental rules or has broken the law, then that information should be made public. We ask that the exemption for police officers be deleted in this bill.

Our third concern is that with the proposed language, information about sustained complaints may take several months or years to finally become public information. Thirty calendar days sounds hopeful, but it won't be a reality.

Agencies will crawl through their grievance procedures. Collective bargaining agents will protest and appeal each and every agency decision. And everyone will have his or her own definition of what constitutes "the highest level of non-judicial grievance" and exactly how long a time span "timely" encompasses. All of these will conspire to prevent disciplinary action information on any government employee from coming out until years after the misconduct happened.

We would like to see crisper language that provides for public disclosure at all levels of a grievance process. We would also like to see the word "timely" either deleted or replaced with a specific time span (eg. sixty calendar days) that is not subject to negotiation at the collective bargaining level.

Thank you for the opportunity to present this written testimony.

Respectfully submitted,

Jahan Byrne
SPJ-UH Chapter

PROPOSED LANGUAGE

Page 2, line 6 is amended to read: (B) For employment-related misconduct resulting in disciplinary action against the employee or former employee, the following information shall be disclosed thirty calendar days after a written decision sustaining the disciplinary action is rendered at any non-judicial grievance invoked by the agency, employee, or employee's collective bargaining unit. . .

CODE OF SILENCE/ BROKEN

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DATE: April 2, 1993

TO: HOUSE COMMITTEE ON JUDICIARY
Rep. Terrance W.H. Tom, Chair
Members of the Committee

FROM: Jo Kamae Byrne

RE: **SB1363 SD2 HD1**
RELATING TO THE UNIFORM INFORMATION PRACTICES ACT (MODIFIED.)

Chairman Tom and members of the House Committee on Judiciary. My name is Jo Kamae Byrne and I speak today for Code of Silence/Broken, a community alliance concerned about the issue of sexual harassment in society. I am testifying today on Senate Bill 1363, SD2, HD1 because this bill affects the issue 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. Both are laudable legislative goals.

While this bill is about open government and public information, it also impacts the issue of sexual harassment. Code of Silence/Broken has serious concerns about (1) the bill's provision that public disclosure be

made only if the misconduct proceedings result in suspension or discharge of the employee; and (2) the delaying of disclosure until 30 days after the highest non-judicial procedure.

POINT OF PUBLIC DISCLOSURE

Our preferred position regarding public disclosure would be to disclose the name of the employee charged with misconduct at the point a formal complaint is filed, but protect the identity of the complainant. Making a comparison with grand jury proceedings, there would still be a legal presumption of innocence, but the public would have the information at the time misconduct proceedings begin and would be protected by having that information.

TIMELINESS OF PUBLIC DISCLOSURE

Our second concern is the 30 day delay after final non-judical appeal before misconduct information is released. No protection is included to prevent extensive and inefficient administrative due process procedures that could drag out inquiries on complaints. Such delays would undermine the rights of complainants and the public to protection from further misconduct.

Sexual harassment is an issue of power, not sex. The perpetrators are usually in more powerful positions socially, politically, physically or economically than the victims. Knowledge is power, and timely information can help level the imbalance between victims and perpetrators. Greater awareness means better protection for the public.

PROTECTION OF COMPLAINANTS

As a final point, we would like to express our strong support of the bill's sensitivity to and protection of complainants by not requiring disclosure of their identity. Statistics show that only 10% of sexual harassment victims file formal complaints. Fear of reprisal and further intimidation keep the other 90% from exercising that right. Until our society and system change, complainants will continue to require this protection.

To reiterate our position, Code of Silence/Broken supports the intent of this bill to make government more open through disclosure of public employee misconduct however, we would like to see the bill amended to make that disclosure at the point a formal complaint is filed.

Thank you for this opportunity to testify.

ADDITIONAL FACTS:

According to the Nov 1991 study by the National Council of Research on Women, 50-85% of all women suffer some form of sexual harassment sometime in their academic or working life. Only 10% of of these cases are reported. Of all sexual harassment cases, ninety-seven percent (97%) of the victims are women. Less than 1/2 of 1% of sexual harassment claims are found to be frivolous.

Thursday, April 1, 1993 □ A-7

HONO. STAR BULLETIN

Sexual harassment is daily routine at schools, poll finds

Reuters

BOSTON — Women and young girls endure routine sexual harassment in school and about 40 percent of the victims say it is a daily occurrence, a magazine mail-in survey said.

The survey, based on questionnaires sent in by readers of Seventeen magazine, involved girls and young women aged 9-to-19 in public and private schools nationwide.

The survey's findings suggest that sexual harassment is pervasive in the nation's schools and little is done to combat it.

"The findings are ones we hope will serve as a wake-up call to schools and communities across the country," said Susan McGee Bailey, director of Center for Research on Women at Wellesley College.

The survey found no common denominator to harassment, which appears to happen to all kinds of girls in all kinds of schools — public, private, parochial or vocational.

The most common forms of sexual harassment reported were sexual comments, gestures or looks, reported by 89 percent, and being touched pinched or grabbed, reported by 83 percent.

Nearly half said they had been "leaned over or cornered," 10 percent told the survey they were "forced to do something sexual" and 27 percent said they were pressured to do so.

Of those who reported any form of sexual harassment, 39 percent said they encountered at least one incident a day during the previous year.

Only 4 percent said they were harassed by teachers or other school staff, with 96 percent saying the harassment came from other students.