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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII ORGANIZATION
OF POLICE OFFICERS (SHOPO),

Plaintiff,

vs.

CITY AND COUNTY OF HONOLULU,

Defendant.

CIVIL NO. 1CCV-20-1512 DEO
(Declaratory Judgment)

MOTION FOR LEAVE TO FILE
AMICUS CURIAE MEMORANDUM;
MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR LEAVE
TO FILE *AMICUS CURIAE*
MEMORANDUM; EXHIBIT 1: *AMICUS*
CURIAE MEMORANDUM; and
NOTICE OF MOTION

NON-HEARING MOTION

JUDGE: Hon. Dean E. Ochiai
TRIAL: NONE

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* MEMORANDUM

Pursuant to Rule 7.2 of the Rules of the Circuit Courts of the State of Hawai'i, and this Court's inherent authority, and based on the pleadings filed in this action, Honolulu Civil Beat respectfully seeks leave to file the accompanying *amicus curiae* memorandum concerning the Uniform Information Practices Act (Modified), Hawai'i Revised Statutes (HRS) chapter 92F (UIPA), as it relates to collective bargaining agreements.

As a news organization that has requested police arbitration decisions from the City and County of Honolulu and will be directly impacted by any order entered by this Court, Movant respectfully requests to be heard.

DATED: Honolulu, Hawai`i, November 19, 2020

/s/ Robert Brian Black
ROBERT BRIAN BLACK
Attorney for Movant

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MEMORANDUM OF LAW IN
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TO FILE *AMICUS CURIAE*
MEMORANDUM

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
LEAVE TO FILE *AMICUS CURIAE* MEMORANDUM**

Honolulu Civil Beat is a Hawai`i news organization published on the Internet at civilbeat.org. The public has a right of “timely” access to government records because “[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.” HRS §92F-2. Hawai`i Supreme Court precedent, the plain language of the UIPA, and clear legislative intent require disclosure of the police arbitration decisions that Civil Beat recently requested from Defendant City & County of Honolulu, notwithstanding that SHOPO is repeating collective bargaining arguments that it made over twenty years ago and that the Hawai`i Supreme Court rejected.

Civil Beat, therefore, respectfully requests leave to file the accompanying *amicus curiae* memorandum that addresses the issues raised by this action.

DATED: Honolulu, Hawai`i, November 19, 2020

/s/ Robert Brian Black
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AMICUS CURIAE MEMORANDUM

***AMICUS CURIAE* MEMORANDUM**

Act 47 is constitutional. Compliance with the public records law is not negotiable in collective bargaining. Thus, a collective bargaining agreement (CBA) that purports to prevent an agency from complying with its statutory duty to disclose government records is unenforceable as against public policy.

Contrary arguments by Plaintiff State of Hawai'i Organization of Police Officer's (SHOPO) lead to absurd consequences such as *requiring government agencies to violate Hawai'i statutes*. Honolulu Civil Beat requested final disciplinary decisions from Defendant City and County of Honolulu (City) pursuant to the mandatory disclosure provisions of the Hawai'i public records law, the Uniform Information Practices Act (Modified), Hawai'i Revised Statutes (HRS) chapter 92F (UIPA). The Hawai'i Supreme Court directly addressed **and rejected** SHOPO's current arguments about collective bargaining over 20 years ago when SHOPO made those same claims while trying to hide disciplinary information from the public. *State of Hawai'i Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ. of Hawai'i Chapter [SHOPO v. SPJ]*, 83 Hawai'i 378, 927 P.2d 386 (1996).

This Court must apply the law as set forth in *SHOPO v. SPJ* and effect the Legislature's intent to provide the public with prompt access to police misconduct

information as requested by Civil Beat. SHOPO's request that this Court stop the City from releasing final disciplinary decisions is meritless and must be denied.

I. THE PUBLIC'S RIGHT TO ACCESS GOVERNMENT RECORDS IS NOT NEGOTIABLE IN COLLECTIVE BARGAINING.

Article XIII, section 2 of the Hawai'i State Constitution provides: "Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law."¹ Haw. Const. art. XIII, § 2. The "law" that outlines the collective bargaining rights of public employees is HRS chapter 89.

In 1996, SHOPO argued that "confidentiality of disciplinary records is a condition of employment that is negotiable under HRS Chapter 89" and thus the terms of the CBA override the state public records law. *SHOPO v. SPJ*, 83 Hawai'i at 402-03, 927 P.2d at 410-11. The Hawai'i Supreme Court disagreed.

The Court rejected outright the premise that compliance with "public responsibilities" such as "duties imposed by HRS Chapter 92F and other duly enacted legislation" is negotiable in collective bargaining. *Id.* at 403, 927 P.2d at 411. And, in the end there is no conflict between the City's UIPA duties of disclosure and the law of collective bargaining because nothing about collective bargaining law "mandate[s] that HPD disciplinary records must be kept confidential." *Id.*

Simply because the City and SHOPO included confidentiality in a CBA does not make compliance with public duties negotiable. The Court made clear that it is a fundamental "flaw" to conclude that anything mentioned in a CBA is negotiable as a matter of collective bargaining law and thus subject to some form of preemptive effect. *Id.* at 403, 927 P.2d at 411. Because a confidentiality clause is outside the scope of negotiable subjects, confidentiality is only enforceable as a matter of contract law, and "the virtually unanimous weight of authority holds that an agreement of confidentiality cannot take precedence over a statute mandating disclosure." *Id.* at 405-06, 927 P.2d at 413-14. It is absurd to conclude that SHOPO and the county governments – through

¹ In its complaint, SHOPO erroneously cites Article XIII, section 1 concerning private employees, not public employees. Compl. ¶ 12.

employment negotiations – could strip away *the public's* right of access to government records under State law. *Id.* at 405, 927 P.2d at 413 (“[A] public employer is not free to bargain with respect to a proposal which would authorize a violation of a statute.”); *accord id.* at 404, 927 P.2d at 412 (quoting with approval the reasoning that it would be an “unreasonable and absurd” interpretation of collective bargaining law if “private citizens would be empowered to alter legal relationships between a government and the public at large via [CBAs]”).

The Hawai'i Supreme Court thus rejected SHOPO's claim that its confidentiality agreement with the City can override the UIPA under a collective bargaining rationale. The Court summarized its holding:

(1) HRS Chapter 92[F] is not a “conflicting statute on the same subject matter” as HRS Chapter 89, within the meaning of HRS § 89-19, and thus is not preempted by HRS Chapter 89 or any collective bargaining agreement negotiated thereunder; (2) a topic relating to conditions of employment cannot be subject to negotiated agreement if the agreement would require a public employer to fail to perform a duty imposed upon it by statute; (3) the confidentiality provision in SHOPO's CBA with the City prevents the HPD from performing its duties under the UIPA and is therefore unenforceable; (4) whether the CBA between SHOPO and the City prohibits disclosure of disciplinary records is not a genuine issue of material fact because it is the provisions of HRS Chapter 92F, rather than those of the CBA, which govern the duty of disclosure; and (5) the circuit court erroneously denied OIP's motion for summary judgment because there were no genuine issues of material fact and the OIP was entitled to judgment as a matter of law.

Id. at 406-07, 927 P.2d at 414-15.

The entire premise of SHOPO's complaint here is that the confidentiality provision of its CBA takes some form of precedence over the UIPA. Without that premise – as this Court must find as a matter of law under *SHOPO v. SPJ* – the complaint has no legal merit.

II. THE UIPA REQUIRES DISCLOSURE OF POLICE ARBITRATION DECISIONS.

As alleged in the Complaint, Civil Beat requested arbitration decisions.² *E.g.*, Compl. ¶¶ 33-34. Under the UIPA, all government records must be disclosed to the public; public disclosure is the default “unless access is restricted or closed by law.” HRS § 92F-11(a). As it concerns arbitration decisions specifically, there is a further mandatory disclosure provision that limits the basis on which a government agency may withhold those decisions. Proof that disclosure of information “would constitute a clearly unwarranted invasion of personal privacy” is the only basis to withhold “[f]inal opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases.” HRS §§ 92F-12(a)(2) & -13(1). SHOPO has not alleged – and as a matter of law cannot allege – any privacy interest that would justify withholding the arbitration decisions requested by Civil Beat.

The constitutional right of privacy does not protect against disclosure of police misconduct that results in a final suspension or termination of the police officer. *SHOPO v. SPJ*, 83 Hawai`i at 399, 927 P.2d at 407 (“information regarding charges of misconduct by police officers, in their capacities as such, that have been sustained after investigation and that have resulted in suspension or discharge is not ‘highly personal and intimate information’ and, therefore, is not within the protection of Hawai`i’s constitutional right to privacy.”). The Legislature has the authority to recognize privacy interests greater than those protected by the constitution, which it did from 1995 to 2020

² SHOPO’s due process arguments are frivolous in general, but have absolutely no legal basis as it concerns the arbitration decisions that it seeks to conceal from the general public here. As alleged in the Complaint, the requested arbitration decisions are the final decisions at the end of the grievance procedure – thus after a police officer has exhausted his or her alleged due process rights. Compl. ¶ 26. Moreover, nothing about “due process” requires confidentiality. To the contrary, due process typically means that proceedings are public. *E.g.*, *Freitas v. Admin. Dir. of the Courts*, 104 Hawai`i 483, 489, 92 P.3d 993, 999 (2004) (“due process requires that the hearings be public.”).

as it concerns police disciplinary suspensions.³ *Peer News LLC v. City & County of Honolulu*, 138 Hawai`i 53, 66, 376 P.3d 1, 14 (2016); see HRS § 92F-14(b)(4)(B) (1995). But after Act 47, the UIPA no longer recognizes a statutory privacy interest for suspended police officers.⁴ Act 47 (2020).⁵

Thus, SHOPO has no legal grounds for asking this Court to stop or delay the City in releasing the arbitration decisions requested by Civil Beat.⁶

DATED: Honolulu, Hawai`i, November __, 2020

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³ Legislative recognition of a privacy *interest* did not justify denying all public access to disciplinary records; but it did require further analysis of what information might fall within the UIPA privacy exception. *Peer News*, 138 Hawai`i at 67-68, 376 P.3d at 15-16.

⁴ And the Legislature expressly intended disclosure of older files, such as the decisions requested by Civil Beat. Conf. Comm. Rep. No. 3-20 (2020) (“to be consistent with all requests for information under the [UIPA], your Committee on Conference believes that a requestor should have the ability to request such information retroactively”), www.capitol.hawaii.gov/session2020/CommReports/HB285_CD1_CCR3-20_.htm; accord *SHOPO v. SPJ*, 83 Hawai`i at 391, 927 P.2d at 399 (absent a legislative distinction as to when a record was created, the UIPA disclosure obligations require “disclosure of records maintained by State agencies regardless of when the records came into existence”).

⁵ www.capitol.hawaii.gov/session2020/bills/HB285_CD1_.pdf.

⁶ To be clear, Civil Beat expects that the City will release the requested records with some redactions consistent with long-standing case law and OIP opinions that have been applied for decades, for example, in the context of police officers terminated for misconduct. For Civil Beat’s request for arbitration decisions, the only new issue after Act 47 is disclosing the identify of police officers who have received *final* disciplinary suspensions as determined by the arbitrator at the conclusion of the grievance process.

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TO: Vladimir Devens
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NOTICE IS HEREBY GIVEN that the undersigned has filed with the above-entitled court the motion attached hereto. Any response to said motion must be filed and served no later than 10 days after the service date indicated on the attached Certificate of Service. Pursuant to Rule 6(e) of the Hawai'i Rules of Civil Procedure, if the motion is served by mail, any response to said motion must be filed and served no later than 12 days after the service date indicated on the attached Certificate of Service.

DATED: Honolulu, Hawai'i, November 19, 2020

/s/ Robert Brian Black
ROBERT BRIAN BLACK
Attorney for Movant