

No. CAAP-14-0000889

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

PEER NEWS LLC, dba CIVIL BEAT,

Plaintiff-Appellee,

v.

CITY AND COUNTY OF HONOLULU, and
HONOLULU POLICE DEPT.,

Defendants-Appellees,

and

STATE OF HAWAI'I ORGANIZATION OF
POLICE OFFICERS

Intervenor-Defendant-Appellant.

ORIGINAL PROCEEDING
Civil No. 13-1-2981-11 (KKS))

CIRCUIT COURT OF THE FIRST
CIRCUIT, STATE OF HAWAI'I

The Honorable Karl K. Sakamoto, Circuit
Court of the First Circuit, State of Hawai'i

***AMICUS CURIAE* BRIEF BY THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFF-APPELLEE FOR
AFFIRMANCE OF THE CIRCUIT COURT'S ORDER GRANTING SUMMARY
JUDGMENT**

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***AMICUS CURIAE* BRIEF BY THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFF-APPELLEE
FOR AFFIRMANCE OF THE CIRCUIT COURT’S ORDER GRANTING
SUMMARY JUDGMENT**

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press (“RCFP” or the “Reporters Committee”) is a voluntary, unincorporated association of reporters and editors working to defend and preserve First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided guidance and research in First Amendment and Freedom of Information Act litigation since 1970. The Reporters Committee also serves as an online news organization and frequently files freedom of information and open records requests around the nation. The Reporters Committee has a strong interest in preserving access to government records, particularly those that enable citizens to evaluate the performance of government institutions and their employees, and is uniquely positioned to describe the benefits of press access to police disciplinary records across the country.

SUMMARY OF THE ARGUMENT

The policy of transparency underlying the Uniform Information Practices Act (“UIPA”), HRS § 92F-2, recognizes that the only viable and reasonable method of protecting the public’s interest is to open up government records to scrutiny. Such public oversight is particularly beneficial in the context of law enforcement. Police and other law enforcement entities and officers possess the right to use coercive force, which can be abused, and internal mechanisms for oversight may be lacking. State courts around the country have recognized the strong public interest in access to police disciplinary records for these and other reasons.

Recent news investigations around the country have revealed serious, systemic problems with the disciplinary investigations at some of the country's largest police departments. These news investigations have raised public awareness of problems with the disciplinary process and sparked reform efforts. They illustrate the benefits of media and public access to disciplinary records and reveal the potential perils of relying on law enforcement agencies to police themselves. Increased public scrutiny of the disciplinary process and reformed policies will aid law enforcement efforts to bolster their legitimacy and accountability in the eyes of the communities served. Because the public must have access to disciplinary records to monitor their government in a meaningful way, the Circuit Court's order granting summary judgment to Appellee Peer News should be affirmed.

ARGUMENT

I. Access to police disciplinary records ensures that the press and public can meaningfully evaluate the conduct and efficacy of government.

A democracy depends upon an informed citizenry to function properly. The public must have access to information about its government in order to evaluate the performance of agencies and institutions, elected officials, and other government officers. This sentiment constitutes the animating purpose of the Uniform Information Practices Act:

Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore the legislature declares that it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of government agencies—shall be conducted as openly as possible.

HRS § 92F-2. The press, as a representative of the public, plays a central role in disseminating information about the government to the public and furthering these policy goals.

Law enforcement, in particular, warrants public oversight. Police possess and exercise the right to use coercive—even deadly—force, which can easily be abused, and the oversight of

internal affairs investigations is often lacking. *Accord Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991) (stating that the press “guards against the miscarriage of justice by subjecting the police . . . to extensive public scrutiny and criticism” and that “[p]ublic awareness and criticism have even greater importance” where “they concern allegations of police corruption”). The recent protests emanating from Ferguson, Missouri, and Staten Island, New York, are only two recent reminders of the potential deadly force police officers can employ in the course of duty, and the intense public interest in monitoring allegations of police misconduct and holding police accountable for transgressions.¹

Moreover, for law enforcement agencies to function properly, the public must trust the police. Police departments depend upon appearing fair, legitimate, and accountable to the communities they serve. *See* Eric Holder, U.S. Attorney General, Remarks at Press Conference on Investigation into Cleveland Division of Police (Dec. 4, 2014), *available at* <http://www.justice.gov/opa/speech/attorney-general-holder-delivers-remarks-press-conference-investigation-cleveland> (“accountability and legitimacy are essential for communities to trust their police departments, and for there to be genuine collaboration between police and the citizens they serve”). When trust exists between the police and the community, individuals are more likely to report crimes, give police useful information about crimes, and support the department’s interests institutionally through allocation of tax dollars and supporting political candidates who advance law enforcement interests. *See* Catherine Gallagher, et al., *The Public Image of the Police: Final Report to the International Association of Chiefs of Police by the*

¹ *See* Paula Mejia, *Ferguson, Eric Garner Protests Spread Worldwide*, Newsweek (Dec. 6, 2014, 12:53 PM), <http://www.newsweek.com/ferguson-eric-garner-protests-sprawl-worldwide-289867> (“The protests, which demand a focus on civil rights and accountability for police brutality, are sprawling outward from the United States and internationally.”).

Administration of Justice Program George Mason University (2001) (discussing the benefits of a positive image of police), available at <http://www.theiacp.org/The-Public-Image-of-the-Police>; see also Mark Puente, *Undue Force*, Baltimore Sun, Sept. 28, 2014 (same), available at <http://data.baltimoresun.com/news/police-settlements>.

Transparency is integral to developing community trust and promoting accountability and legitimacy. See U.S. Dep't of Justice, *Principles for Promoting Police Integrity* 12–13 (2001) (recommending that agencies regularly disseminate information about misconduct investigations and discuss investigations, among other things, at regular community meetings). Having a right of access to disciplinary records furthers those ends. Either the records will demonstrate a well-functioning, fair review process of alleged misconduct, and help foster trust of the police and eliminate concerns about bias or unfairness, or the records will identify room for improvement and allow the public to advocate for change in a more meaningful way.²

State courts across the country have recognized the public interest in access to police disciplinary records and internal investigations. See *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) (holding that access to internal investigation records will “allow the public to gauge the police department’s responsiveness to specific instances of misconduct,” “assess whether the agency is accountable to itself internally,” and determine if a “systemic infirmity in management oversight and control” exists) (internal quotation marks omitted); *Kalven v. City of Chicago*, 7 N.E.3d 741, 749 (Ill. App. Ct. 2014) (holding that complaint register files and lists of

² Transparency also provides other benefits to law enforcement agencies. For example, a disciplinary system that is perceived to be unfair or biased may contribute to internal strife among officers and management within police departments. See Los Angeles Police Department, *Perspectives on the Disciplinary System of the LAPD* 6 (Nov. 2014), available at http://www.lapdpolicecom.lacity.org/111814/BPC_14-0412R.pdf (discussing widespread perceptions that the internal review process is tainted with gender, racial and ethnic bias).

police officers who amassed the most misconduct complaints are public records); *Charleston Gazette v. Smithers*, 752 S.E.2d 603, 620 (W. Va. 2013) (stating that “because the dissemination of public information by the press is an important cornerstone of a vivacious democracy,” the “public interest” factor weighed in favor of the requesting newspaper); *Bainbridge Island Police Guild v. City of Puyallup*, 259 P.3d 190, 198 (Wash. 2011) (*en banc*) (finding that the public has “a legitimate interest in how a police department responds to and investigates” alleged misconduct); *Worcester Telegram & Gazette Corp. v. Chief of Police*, 787 N.E.2d 602, 607 (Mass. App. Ct. 2003) (“A citizenry’s full and fair assessment of a police department’s internal investigation of its officer’s actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights.”); *Direct Action for Rights & Equality v. Gannon*, 713 A.2d 218, 224 (R.I. 1998) (holding that “police civilian complaint reports” and “reports made by the Providence police department hearing officers . . . that contain the final disposition of the chief of police thereon” are public records and must be disclosed); *Obiajulu v. City of Rochester*, 213 A.D.2d 1055, 1056 (N.Y. App. Div. 1995) (“Disciplinary files containing disciplinary charges, the agency determination of those charges, and the penalties imposed, however, are not exempt from disclosure”); *Jones v. Jennings*, 788 P.2d 732, 735 (Alaska 1990) (stating that “[f]ree access to public records is a central building block of our constitutional framework enabling citizen participation in monitoring the machinations of the republic” and holding that documents relating to police officers’ personnel records and internal investigations of citizen complaints are not privileged and their disclosure does not violate state law).

Transparency is as vital in Hawai’i as it is in these other jurisdictions. As Plaintiff-Appellee Peer News reported last June, the Honolulu Police Department settled scores of

lawsuits, including some alleging the use of excessive force, between January 1, 2003, and May 1, 2014, for an aggregate total of \$5.7 million.³ It is imperative that the public have access to information about these and other allegations of police misconduct in order to effectively monitor the department and guard against abuse of power. Disclosure of police disciplinary records would enable additional reporting and advance the express policy goals of the UIPA, which recognizes that the “only viable and reasonable method of protecting the public’s interest” is to open up government records to public scrutiny. HRS § 92F-2. Police disciplinary records should be accessible to the public.

II. Recent news reports demonstrate the value of providing the media and the public with access to disciplinary records.

Recent news investigations, based in part on material obtained through state open records laws, have revealed serious problems with the disciplinary review process at some of the country’s largest police departments. Together, these reports show disciplinary systems with little or no civilian oversight, and that lack legitimacy in the eyes of both police officers and the communities they serve. Some of the reports observe that individual officers who commit serious misconduct — including shooting and killing unarmed civilians — have long records of misconduct complaints filed against them. In one extraordinary case, one officer went on a shooting spree allegedly in response to what he perceived was bias and unfairness in handling personnel matters, discussed *infra* at II.C. The public response to these revelations about the disciplinary process demonstrates how important it is for the public to scrutinize how police departments investigate misconduct complaints.

³ Nick Grube, *HPD: Nearly \$6 Million in Legal Settlements in 11 Years*, Civil Beat, June 5, 2014, <http://www.civilbeat.com/2014/06/hpd-nearly-6-million-legal-settlements-11-years>.

A. Houston

In Texas, many internal affairs documents at the Houston Police Department (“HPD”) are not subject to state open records laws. As a result, “no outside party can evaluate the 850 or so complaints a year that don’t end in discipline. With only numbers and final results, it’s hard to know what goes unpunished and why.” Emily DePrang, *Crimes Unpunished*, Texas Observer, July 10, 2013, <http://www.texasobserver.org/crimes-unpunished>. However, records of arbitration hearings reviewing disciplinary decisions are public records. The *Texas Observer*, a nonprofit investigative news organization, obtained 80 such records spanning a period of approximately six years, to get a better picture of the HPD’s system. *Id.* The *Observer*’s report, which took six months to complete, revealed “an ineffective, inefficient discipline system that tolerates misbehavior, protects officers better than citizens and retains officers that no one should have to rely on in an hour of need.” *Id.* The *Observer* report illustrates the immense public benefit of access to disciplinary records, and the opportunities for reform that come with transparency.

The *Observer* described a system in which a minority of complaints resulted in any kind of discipline, and the majority of officers punished received only written reprimands. *Id.* Although it is difficult to assess whether valid complaints went unpunished or serious infractions received insufficient punishment, it is clear that the system at the HPD structurally favored the police. For instance, officers were permitted to appeal unfavorable decisions to arbitrators, who could reduce or overturn penalties, but not increase them. *Id.* Because arbitrators overturned or significantly reduced punishments in the majority of cases, according to the *Observer*’s report, the system sent a message “to all those with a stake in the disciplinary process . . . that their efforts may be for naught.” *Id.* (citation omitted). The secrecy surrounding the process

undermined law enforcement goals of establishing legitimacy and accountability with the community.

The *Observer* reported that several officers had received more than a dozen “sustained” complaints, meaning that the allegations were substantiated and constituted a violation of policy, while remaining on the force. *Id.* While not all misconduct warrants serious sanctions or removal from the police force, the investigation described several infractions that received seemingly light discipline: falsifying an officer’s time card to make it appear as though the officer, accused of raping a crime victim, was off-duty at the time of the intercourse (one-day suspension); participating in an illegal car-towing scheme (10-day suspension); accidentally tasing a suspect who was being handcuffed (one-day suspension); lying about allowing a confrontation between two citizens to escalate to the point where one had to be arrested (six-day suspension). *Id.*

The news report ignited a public conversation about reforming the disciplinary system. See Harbeer Sandhu, *Dear Chief*, Free Press Houston, Feb. 11, 2014, <http://www.freepresshouston.com/dear-chief> (describing an “open community forum” at Texas Southern University to discuss issues raised by the news report, and the resulting dialogue between a journalist and the HPD police chief). In August, the police chief announced plans to equip officers with body cameras,⁴ and members of city council have advocated further reforms. See C.O. Bradford, *A wake-up call for Houston*, Houston Chronicle, Aug. 18, 2014, <http://www.chron.com/opinion/outlook/article/A-wake-up-call-for-Houston-5696532.php> (advocating for greater community input and control over police oversight and public safety advisory

⁴ See James Pinkerton, *Chief seeks \$8 million to equip police with body cameras*, Houston Chronicle, Aug. 28, 2014, <http://www.houstonchronicle.com/news/houston-texas/houston/article/Chief-seeks-8-million-to-equip-police-with-body-5719800.php>.

committees). Without public access to the disciplinary arbitration documents, problems with the HPD disciplinary system may never have been uncovered, and public pressure for reform may not have materialized.

B. Chicago

In Chicago, *Truthout*, a nonprofit news organization, conducted a two-month investigation of misconduct complaints at the Chicago Police Department (“CPD”), using public records, legal documents, and other resources. Alison Flowers & Sarah Macaraeg, *Amid Shootings, Chicago Police Department Upholds Culture of Impunity*, *Truthout*, Oct. 22, 2014, <http://www.truth-out.org/news/item/26986>. The article contained several revelations related to officers who had been involved in shooting incidents, including that six officers who had shot and killed civilians had “a large volume of unpenalized complaints of misconduct” on their records. *Id.* According to *Truthout*, one officer, who received an award after an incident in which he and his partner shot an armed offender, had been the subject of 35 misconduct complaints in a five-year span, none of which resulted in any official discipline. *Id.* And the news outlet reported that another officer was promoted to detective despite having 55 misconduct complaints on his record, none of which had resulted in discipline. *Id.* While the high number of unpunished complaints alone does not prove that the disciplinary process is corrupt, the *Truthout* report raises important questions about whether these complaints received proper scrutiny, whether the “culture of impunity” encouraged officers to resort to the use of deadly force too quickly and too often, and whether injuries to civilians could have been avoided with stricter discipline and more public oversight of misconduct complaints.

One conclusion to draw from the report is that additional transparency into the disciplinary process is needed to assess the conduct of police officers and the ability of law

enforcement agencies to police to discipline their own officers. According to *Truthout*, the CPD's "track record of rarely delivering meaningful penalties for misconduct signals a culture in which incidents of fatal force are always deemed justifiable," creating a "culture of impunity" that results in injuries to civilians and large payouts to settle civil lawsuits. *Id.* The news report sparked a protest rally at the police department headquarters and activists called for a federal investigation of the CPD. See Wilson Dizard, *Rally planned over deaths at hands of Chicago police* (Nov. 4, 2014, 12:30 PM), <http://america.aljazeera.com/articles/2014/11/4/rally-planned-overdeathsathandsofchicagopolice.html>. The secrecy at the CPD erected barriers to assessing the CPD's disciplinary system, and likely undermined the law enforcement goals of establishing trust with the Chicago community.

C. Other investigations

Other investigations of police misconduct, although not derived directly from disciplinary records received through open records requests, underscore the benefits of public scrutiny of this material. In Baltimore, *The Baltimore Sun* ("The Sun") published a series of articles about police misconduct, including one report based on a six-month investigation of excessive force lawsuits and settlements, and another describing an internal audit of the police disciplinary process, which the paper obtained through an open records request. See Puente, *Undue Force*, *supra*; Mark Puente, *Baltimore police should revamp misconduct probes, audit says*, *The Baltimore Sun*, Oct. 20, 2014, http://articles.baltimoresun.com/2014-09-20/news/bs-md-police-audit-20140920_1_police-misconduct-misconduct-probes-maryland-sheriffs. Shortly after *The Sun* stories were published, the city responded with a new report of its own, highlighting possible policy reforms to its disciplinary process as well as those enacted within the previous two years, and the U.S. Department of Justice announced separately that it would conduct an independent

review of the city police force. See Mark Puente, *U.S. Dept. of Justice reveals plans to review Baltimore Police Dept.*, The Baltimore Sun, Oct. 20, 2014, <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-justice-probe-20141017-story.html>. One policy change by the Baltimore Police Department — altering the makeup of trial boards that hear disciplinary cases — caused the rate at which officers were held responsible for alleged misconduct to increase from 57 percent to 88 percent. Puente, *Baltimore police should revamp misconduct probes*, *supra*.

In Los Angeles, the LAPD ordered a review of its disciplinary process after an officer “went on a shooting rampage across Southern California, killing police officers” and others, allegedly in “retribution” for being the victim of perceived racial discrimination and for being fired unfairly. Joel Rubin & Jack Leonard, *LAPD survey in wake of Dorner rampage finds bias complaints*, Los Angeles Times, Nov. 13, 2014, <http://www.latimes.com/local/california/la-me-lapd-dorner-20141114-story.html>. Although the LAPD report appeared to dispel accusations of bias based on ethnicity, the police chief recognized that the reputation of the department had suffered and pledged to adopt recommended reforms, such as publishing penalty guidelines and setting specific rules against nepotism. See Erika Aguilar, *LAPD chief will change disciplinary system to add transparency*, KPCC, Nov. 19, 2014, <http://www.scpr.org/news/2014/11/19/48172/lapd-chief-will-change-disciplinary-system-to-add>.

These examples further underscore the benefits that result from increased public scrutiny of police disciplinary processes. *The Sun* reports focused attention on police misconduct, which prompted the Baltimore Police Department to make more disclosures about its disciplinary investigations and to consider further structural reforms. The LAPD report shows how

transparency with disciplinary matters can dispel misperceptions of bias, which helps to foster a sense of legitimacy.

All of the foregoing examples highlight the perils of relying on police departments to police themselves, as well as the vital role the news media plays in ensuring public oversight of law enforcement. In Houston and Chicago, news organizations — not the government — conducted investigations that inspired calls for reform. In Baltimore, the city did not release its internal audit until *The Sun* filed a state public information act request, and the news reports sparked a larger debate about reform. In Los Angeles, the chief of police ordered a review of the disciplinary process only after a horrific incident resulting in several deaths that received widespread media attention. Rubin & Leonard, *supra*. <http://www.latimes.com/local/california/la-me-lapd-dorner-20141114-story.html>. Even then, the LAPD report, which took 20 months to complete, was limited in scope—it did “not contain an empirical analysis of” issues related to “inconsistent” investigations, adjudications and penalties, and “focused mostly on officers sent to hearings for possible termination or lengthy suspensions”—and sparked criticism that the department was not being transparent enough with its disclosures. *See* Richard Winton, et al., *LAPD study focused on small part of discipline system*, Los Angeles Times, Nov. 18, 2014, <http://www.latimes.com/local/california/la-me-lapd-dorner-20141115-story.html> (“Left unexamined, however, was the vast majority of the LAPD’s misconduct cases”); *Perspectives on the Disciplinary System of the LAPD*, *supra* at 37. The media also was instrumental in reporting on a series of scandals surrounding the Los Angeles County Sheriff’s Department, which led to the recent announcement that the County would create “a civilian oversight system to provide greater accountability for the agency.” Cindy Chang & Abby Sewell, *L.A. County Sheriff’s Dept. to get civilian oversight*, Los Angeles Times, Dec. 9, 2014,

<http://www.latimes.com/local/california/la-me-sheriff-oversight-20141210-story.html>. In these cities, the press and the public were crucial to drawing attention to police misconduct and the efficacy of internal processes for handling complaints, and inspiring debate about reform.

CONCLUSION

Public access to police disciplinary records serves vital policy goals. When news organizations are able to keep the public informed about the conduct of law enforcement agencies and officers, and how their departments respond to allegations of misconduct, both the public and law enforcement benefit. Increased transparency permits the public to monitor the conduct of law enforcement agencies to protect their interests. At the same time, law enforcement benefits from the legitimacy, accountability, and public trust that flows from openness and fairness in dealing with allegations of police misconduct.

For these reasons, this Court should affirm the entry of summary judgment by the Circuit Court of the First Circuit and hold that the disciplinary records being requested by Appellee Peer News are public records subject to disclosure.

DATED: Honolulu, Hawai'i, January 21, 2015.

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CIRCUIT COURT OF THE FIRST
CIRCUIT, STATE OF HAWAII

The Honorable Karl K. Sakamoto, Circuit
Court of the First Circuit, State of Hawaii

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