Column

Ian Lind: It's Time To End The Secrecy Surrounding Police Officers

As prior court cases have shown, there's no evidence that airing complaints against the police department result in any kind of harm to officers or the agency.

17

By Ian Lind / September 20, 2017

A police officer shook things up earlier this month when he urged the Honolulu Police Commission to dig deeper into the police department's handling of internal complaints, which he alleged have been used to bury evidence of misconduct and retaliate against those critical of the department.

Officer Denny Santiago, a 21-year veteran of HPD, urged the commission to independently review HPD administrative inquiries, in order to hold the department accountable by making a fresh determination of whether complaints are investigated and disposed of appropriately.

In his testimony, Santiago said secrecy surrounding the department's administrative investigations allows favoritism and cronyism to prevail within the department, and allows the department—or perhaps more accurately, those who control the department—to escape accountability.

Honolulu Police officer HPD Ofc. Denny Santiago pleads with the Honolulu Police Commission to help eliminate what he sees as widespread corruption within the department.

Santiago "didn't want to talk about his pending complaints within HPD, saying that he signed a confidentiality clause when he filed the complaints," Civil Beat's Nick Grube reported.

Exactly what Santiago meant isn't clear from his testimony. Was he required to sign a confidentiality agreement in order to exercise his right to pursue an internal complaint through HPD's administrative channels?

That unfortunately wouldn't be out of character for our police department. HPD is notorious for trying to prevent information about misconduct by police officers from becoming public.

SHOPO, the union representing police throughout the state, has successfully lobbied to obtain special treatment for police officers under the state's public records law. As a result, information about misconduct by or disciplinary action against police officers is required by law to remain confidential unless the officer is fired, a considerably more restrictive standard than applies to all other public employees.

Further, the current SHOPO contract requires "all matters" regarding internal administrative investigations or disciplinary actions to remain confidential, although the contract includes a disclaimer that this could conflict with the state's open records law "and may be subject to legal challenge."

Even the Police Commission's own form available online and used to lodge a complaint against a police officer includes the following paragraph, placed immediately above the line for the signature of the complainant.

"I further understand that the Rules of the Honolulu Police Commission, a court of competent jurisdiction, as well as Hawaii Revised Statutes 92F, may permit the disclosure of the information contained in this statement. Subject to the disclosure under these circumstances, I request that the information provided by me in this statement be kept confidential to the extent possible."

The commission's form provides no option for a person to indicate they want their own complaint to be public, although I'm pretty sure many people who go through the trouble of filing a complaint with the Police Commission really want a public forum in which to air their experiences dealing with inappropriate, unprofessional, or illegal police behavior.

Protecting Public Officials

At one time, it was common for government agencies that handle complaints against public officials, including those administering laws regarding government ethics, campaign finance and judicial discipline, to have heavy confidentiality requirements that prevented public disclosure of any information about complaints except under limited circumstances.

After all, the agencies argued, it would be unfair to the reputations of public officials, and would discourage complainants from stepping forward, if information about minor or unsubstantiated complaints were made public.

For example, Hawaii's ethics and campaign spending laws used to require all information about complaints to remain confidential until their respective commissions had determined whether there was probable cause a violation had occurred. The confidentiality requirement applied not only to the commission's own staff and proceedings, but prevented a complainant from disclosing a complaint had been filed. In other cases on the mainland, similar laws had been interpreted to even prevent a newspaper from reporting what it had legally learned about a complaint.

But in a series of court decisions in jurisdictions across the country, laws with broad confidentiality requirements have been struck down as unconstitutional limitations on the First Amendment rights of freedom of speech and freedom of the press.

A federal lawsuit against the Hawaii State Ethics Commission led to a 1991 agreement that the part of state law preventing someone from disclosing they had filed an ethics complaint was unconstitutional and unenforceable.

Striking Down Excessive Secrecy

The following year, I was the plaintiff in a lawsuit challenging a similar provision of Hawaii's campaign spending law, which at that time made it a crime — although a petty misdemeanor — to publicly disclose information about a complaint concerning campaign law violations unless and until the commission made a finding of "probable cause."

At that time, I was publishing a monthly newsletter about politics and money. Every month I pored over reports filed with the Campaign Spending Commission looking for tidbits to write about. In 1992, I filed a complaint alleging that the University of Hawaii Professional Assembly, the UH faculty union, had failed to disclose significant amounts spent in support of then

Gov. John Waihee's reelection campaign. These included the costs of large newspaper ads endorsing Waihee, which were not included in the union's subsequent reports to the commission.

I then wrote a brief article about the complaint in my newsletter. In response, UHPA's attorney, Tony Gill, asked the commission for "clarification" as to whether a provision in the law restricting disclosure of complaints should be applied in my case. The commission, in turn, voted to consider UHPA's move as a complaint against me, and initiated enforcement proceedings.

Facing possible criminal charges if the case went forward, I filed suit against the commission in federal court seeking to overturn the law as unconstitutional.

The case quickly took a weird turn. Just two weeks after the lawsuit was filed, the state agreed that the law was unconstitutional. However, Judge Alan Kay rejected the resulting stipulation, saying he was reluctant to "overturn an enactment of the Hawaii Legislature without careful consideration and solid caselaw in support of its decision."

> The 9th Circuit failed to find any compelling interest behind the Hawaii law.

The stipulated agreement was then withdrawn, and the state proceeded to defend the law "as applied in this instance to 'charging parties' in Campaign Spending Commission proceedings, who knowingly partake of the burdens of the confidentiality provisions when they invoke the Commission's processes, and in light of the important interests in confidentiality as furthering the important First Amendment value of free speech and association."

In April 1993, Judge Kay issued a decision rejecting the state's arguments and finding the law to be unconstitutional both on its face, and as applied to my particular case.

The state then appealed to the 9th U.S. Circuit Court of Appeals, which upheld Kay's ruling in a detailed opinion.

The 9th Circuit held the Hawaii law was clearly a "content based" restriction on speech "about political processes and governmental investigations of wrongdoing by public officials," topics "near to the core of the First Amendment." In order for a content based restriction to override First Amendment rights, it must serve a "compelling state interest" and be drawn as narrowly as possible to meet that interest, the court said.

'Dramatic Misconception'

But the 9th Circuit failed to find any compelling interest behind the Hawaii law. It rejected a number of rationales put forward by the state as insufficient to justify the burden on First Amendment rights, including protecting the reputations of officials from unfair attack, maintaining an orderly administrative process, and preventing the possibility of complainants leveraging their formal complaints to give additional stature to an otherwise baseless criticism of a candidate or their supporters.

The state, in the court's view, "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined."

Further, the court said it was a "dramatic misconception" for the state to argue that I had freely accepted the confidentiality provisions when choosing to file a complaint with the Campaign Spending Commission.

"The State may not condition Lind's ability to trigger an investigation on the theory that by filing a complaint he bargained away his First Amendment rights," the 9th Circuit ruled.

Finally, the court found the plain language of the law applied to "any person," not simply the person filing the complaint, and that it was clearly overbroad and "patently unconstitutional."

The state appealed again, this time to the U.S. Supreme Court, which denied the request and allowed the 9th Circuit decision to stand.

The case, Lind v. Grimmer, is still widely cited in cases challenging similar restrictions that still exist in other parts of the country.

It's been more than 20 years since the prohibitions on disclosure of ethics and campaign spending complaints were declared unconstitutional. None of the dire potential consequences relied on by the state's attorneys to defend the prior restrictions on disclosure have actually occurred. In the end, the prior law really reflected excessive deference to public officials, to the

detriment of both First Amendment rights and the ability to hold those officials accountable.

It's time to end that same excessive deference, and the resulting layers of secrecy, in the case of complaints against police officers and the policies of the police department.

If Officer Santiago's testimony successfully moves that process forward, we will be in his debt.

About the Author

Ian Lind

Ian Lind is an award-winning investigative reporter and columnist who has been blogging daily for 15 years. He has also worked as a newsletter publisher, public interest advocate and lobbyist for Common Cause in Hawaii, peace educator, and legislative staffer. Lind is a lifelong resident of the islands. Read his blog here.

Use the RSS feed to subscribe to Ian Lind's posts today