

Police Misconduct and Civil Rights Law Report

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THE PUBLIC'S RIGHT OF ACCESS TO POLICE MISCONDUCT FILES

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Introduction

Any attorney who has entered into a discovery battle to obtain police misconduct records, or any reporter who has requested the same information, knows first hand about the vehemence with which police departments invoke the so-called state "privilege" laws. State and local police departments spend vast amounts of time and resources to keep these records away from the public view. Invariably, legal disputes involving police misconduct files end in one of two ways: if the request is made directly under a state "public disclosure" law, the requester will sometimes manage to obtain copies of the records with all identifying details deleted, or receive nothing at all; or if the context is a discovery dispute within a civil rights lawsuit, an attorney can usually obtain less truncated copies of the same records, but only after capitulating to a strict protective order. The strictness of the protective order nearly always prohibits discussion of the information contained in the records with anyone, even an otherwise ethically required discussion with the client. Essentially, these files are shielded from all public scrutiny.

The secrecy surrounding these records is both unnecessary and unjustified. The public has a right of access to these records. This right is based on basic democratic values. This article will critically analyze the statutory

bases that state courts have used, in either a litigation or nonlitigation context, to cloak these records with secrecy. This article will also show that the public's right of access to the records is considerably broader and stronger than the state courts' limited approach.

The justification for the excessive secrecy cloaking local police misconduct files is located in two exemptions found in most state "freedom of information" statutes, the "privacy right" and the "law enforcement investigative record" exemptions. Police-friendly state court judges often stretch and distort these exemptions beyond their original purposes to justify keeping these records secret.

Basis for Public Access Right: State Freedom of Information Statutes

Nearly all states have statutes requiring public disclosure of government records. Most state legislatures modeled these statutes on the federal Freedom of Information Act, 5 U.S.C. § 552 *et seq.* A number of names have been given to these laws, e.g., Minnesota Government Data Practices Act, Minn. Stat. § 13.00 *et seq.*; Wisconsin Public Records Law, Wis. Stat. Ann. § 19.30 *et seq.*;

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Maine Freedom of Access Act, Me. Rev. Stat. Ann. tit. 1 § 401 *et seq.*; New York Freedom of Information Law, N. Y. Pub. Off. Law § 6; California Freedom of Information Act, Cal. Gov't Code § 6250 *et seq.* For simplicity sake, these statutes will hereinafter be referred to as state "FOIAs".

An example of a state statute that is to a large degree patterned on the federal FOIA, is the Illinois FOIA, Ill. Rev. Stat. ch. 116 para. 201 *et seq.* An example of a state FOIA containing language loosely modeled on the federal law but with distinct privacy and "law enforcement" language is the Washington Public Disclosure Act, Wash. Rev. Code § 42.17.250 *et seq.*

Since local police departments are state rather than federal agencies, no body of case law exists that applies the federal FOIA law to requests for police misconduct files. However, because of the implicit or explicit state modeling on the federal FOIA, most state courts are guided by federal cases in construing their particular FOIAs, especially where the language is parallel. *See, e.g., Kenyon v. Garrels*, 540 N.E.2d 11, 13 (Ill. App. 1989). Where the wording is even slightly distinct, state courts will sometimes reject a federal ruling granting disclosure in favor of one requiring secrecy. *See, e.g., Cowles Publishing Co. v. State*, 748 P.2d 597 (Wash. 1988).

Many state FOIA statutes contain exemptions modeled on the federal FOIA "privacy right" and "investigatory record" exemptions found in 5 U.S.C. § 552(b)(6) and (7). One or the other of these two exemptions usually form the basis for withholding police misconduct files. *See, e.g., Ill. Rev. Stat. ch. 116 para 207 § 7(b) and (c); Cal. Gov't Code § 6254 (c) and (f).* In addition, nearly all state FOIAs contain legislative intent provisions in favor of "the free flow and disclosure of information between government and the people" and a mandate that the law is to be construed liberally in favor of disclosure. The language contained in many of these legislative intent provisions shows that the right of public access to government records is directly tied to democratic political theory. For example, the Illinois Freedom of Information Act begins with:

Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.

Ill. Rev. Stat. ch. 116 para. 201 (1987).

Another example is found in the declaration of policy section of the Washington Public Disclosure Act. There, the state legislature directed in part that the Act's provisions "shall be liberally construed to promote . . . full access to public records so as to assure continuing public confidence [in the] fairness of . . . governmental processes, and so as to assure that the public interest will be fully protected." Wash. Rev. Code § 42.17.010(11).

If a state FOIA contains language such as that found in Illinois and Washington and a request for police misconduct files is motivated by the need to be assured of "continuing public confidence in the fairness" of a particular police department's disciplinary process, then a court addressing the question of the right of public access to the files is, it appears, bound to a liberal construction in favor of disclosure rather than secrecy. Unfortunately, state courts addressing this issue simply ignore the policy declarations and the democratic values announced in them by stretching the exemptions wherever they can to find in favor of secrecy. *See, e.g., Village of Butler v. Cohen*, 472 N.W.2d 579, 583 (Wis. App. 1991) (construing statute to contain implied "public policy interest in denying access" to police disciplinary files even where no specific exemption applied); *Law Offices of William A. Pangman v. Zellmer*, 473 N.W.2d 538 (Wis. App. 1991) (implied public interest in secrecy prohibits disclosure of disciplinary files).

Most state laws provide that restraints on public access to information are to be seen as limited exceptions to the general rule in favor of disclosure. In contexts other than a citizen's request for police misconduct files, courts have held that any exemptions are to be read narrowly. *See, e.g., Griffith Lab. v. Metropolitan Sanitary Dist.*, 522 N.E.2d 744 (Ill. App. 1988).

To avoid confusion on this issue, the Washington State Legislature in 1992 amended that state's Public Disclosure Act to include the following preamble:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

Wash. Rev. Code § 42.17.251. This preamble has yet to be cited or referenced in a published opinion, but the language further strengthens the argument, particularly with regard to public requests for police misconduct records, that the public's right of access is much closer to being absolute than most courts acknowledge.

The Public's Right to Know About Police Misconduct and the Fairness of Disciplinary Systems

Police misconduct is a matter of strong public interest. Even though many departments name their self-investigative units "internal affairs bureaus," police misconduct is the public's business, not simply an "internal" departmental matter. As stated in the Washington preamble, citizens, not police department officials, are the ultimate arbiters of what police behavior is acceptable in a democratic society.

Law enforcement officers wield extensive authority in the exercise of their duties, including the ability to use force and to deprive individuals of their constitutional rights. Whether those officers, trained and paid at taxpayers' expense, use excessive force in carrying out their responsibilities or otherwise misuse their authority is clearly the public's business. Whether police supervisors are effectively controlling officers on the street and how well they are disciplining officers for breaches of standards is also clearly the public's right to know. The public has a right to question not only police conduct but the willingness of supervisors to detect and discipline police misconduct, and to deter and prevent future episodes.

The public right to know extends to whether a particular department has raised the burden of proof to an impossible level in misconduct cases, sustaining few complaints and generally failing to impose discipline or to deter behavior that the public finds unacceptable. The right to know is particularly important with regard to excessive force investigations. A citizen's right of access is arguably stronger when a request is made concerning the investigation of alleged violations of constitutional rights.

Although a particular city's internal investigation section may explicitly investigate violations of *internal* departmental standards rather than violations of the U.S. Constitution, in reality the two inquiries are nearly identical. *Compare, e.g.,* Seattle Police Department's Use-of-Force Policy § 2.09.070 ("Officers shall use only that physical force authorized by law and which is reasonably necessary to accomplish a police task") with *Graham v. Connor*, 490 U.S. 386 (1989) (the officer's actions must be "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation). Thus, whether a department requires an impossible burden of proof for what are essentially constitutional violations is clearly the public's right to know.

The public's right of access extends even to investigations regarding an officer's off-duty behavior, although this extension may depend on the severity of the allegations. A strong public interest exists in knowledge of an internal investigation involving, for example, allegations of off-duty sexual harassment, assault, or illegal use of a

weapon. If allegations of off-duty illegal behavior against an officer have been investigated internally and sustained, the public has a right to know regardless of where that officer is assigned. Known illegal behavior, even if it occurs during off-hours, significantly undermines an officer's ability to enforce the law, and the public's interest in the functioning of its law enforcement officials is obvious.

Principles derived from defamation law apply to establish the strength of the public interest in disclosure of investigations involving both on-duty and off-duty behavior. For example, a police officer is nearly always considered a "public official" for purposes of a defamation suit. B. Sanford, *Libel and Privacy* § 7.2.3.2 (2d ed. 1991). Precisely because of their extensive law enforcement authority, officers are considered "among those with substantial responsibility for or control over the conduct of governmental affairs." *Id.* For purposes of a defamation analysis, police officers have been held to be "public officials" because of their authority to make "decisions to search and to arrest" individuals, decisions that "directly and personally affect individual freedoms." *Meiners v. Moriarty*, 563 F.2d 343, 352 (7th Cir. 1977).

A police officer has generally assumed "the risk of greater public scrutiny attendant to public life" and thus

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whether he or she is fit for duty is a matter of public concern. *Id.* Some courts, however, have restricted the "public official" category to those matters directly involving the performance of an officer's duties. As one state court said: when such an employee "does not wield general power and exercise broad discretion," exposure to increased public scrutiny is "limited to matters more closely connected to actual job performance." *Himango v. Prime Time Broadcasting*, 680 P.2d 432 (Wash. App. 1984) (police officer suit against media for broadcast report concerning his off-duty extra-marital affair).

The public interest is, however, strongest when allegations involve an officer being remiss in discharging his public duties or abusing the public's trust. The Washington Court of Appeals stated that there are two relevant variables to determining whether the public has a right to scrutinize public official behavior: "The importance of the position held, and the nexus between that position and the allegedly defamatory information." *Himango*, 680 P.2d at 436. In those instances where street-level patrol officers do not exercise broad discretion, their exposure to public scrutiny is "limited to matters more closely connected to actual job performance." When the officer's behavior at issue *directly* relates to his official duties or to his performance of those duties, the public's right to scrutinize is at its greatest. *Id.*

When a state FOIA records request involves investigations of behavior such as excessive force or racially motivated harassment, the information requested directly relates to the officer's duties and his or her fitness to perform them. With respect to these investigations, the nexus between the officer's position and the information being disclosed to the public is particularly strong. There are varying degrees of public interest. Although investigations into relatively minor complaints about rudeness are included within the right to public scrutiny, where the information being requested involves an investigation into an officer's use of deadly force, the public's interest in disclosure is at its maximum.

The same holds true for the disclosure of whether supervisors are effectively controlling the rank and file, and whether and how they are disciplining officers who breach standards of proper conduct. Although the public interest in disclosure appears to be overwhelming with regard to disciplinary records, most state courts take the opposite view. *See, e.g., Moffett v. City of Portland*, 400 A.2d 340 (Me. 1979) (collective bargaining agreement between city and police officers association precluded disclosure of disciplinary records where confidentiality was promised).

The Illusion of Police Officer Privacy Rights In Misconduct Records

The "privacy right" invoked by officers accused of misconduct is for the most part illusory. Even if the

information being sought involves sexual activities, an officer's privacy right is, in the words of one federal judge, "especially limited in view of the role played by the police officer as a public servant who must be accountable to public review." *King v. Conde*, 121 F.R.D. 180, 191 (E.D.N.Y. 1988).

Most state FOIAs contain at least one exemption from disclosure of records because such disclosure would invade a person's "personal privacy." This "personal privacy" exemption is often asserted by departments and individual officers to prohibit disclosure of misconduct records in their entirety or to prohibit disclosure of names, addresses, places, and dates. With respect to officers accused of misconduct, based on the defamation analysis above, this "personal privacy" exemption does not apply.

Many of the state FOIA "personal privacy" exemptions are modeled on language which was up until recently found in the federal Freedom of Information Act. Federal records subject to disclosure were partially exempt under the Act to the extent that production "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b). In 1986, Congress substituted the words "would constitute a clearly unwarranted invasion" with "could reasonably be expected to constitute an unwarranted invasion," but most state FOIAs do not yet contain this newer language. The words "personal privacy" are not specifically defined in the federal law.

Some state FOIAs do not use language paralleling the federal law regarding privacy, but do contain sections specifically defining an "invasion of personal privacy." The Washington Public Disclosure Act, for example, states that "a person's right to privacy . . . is invaded or violated only if disclosure of information about the person: (1) would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." Wash. Rev. Code § 42.17.255. This language is drawn explicitly from the Restatement of Torts' definition of privacy. Restatement (Second) of Torts § 652D (a person's right to privacy is violated only if the matter publicized (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public).

Comment (b) to the Restatement's definition further defines what constitutes "highly offensive to a reasonable person," i.e., the right extends to those phases of a person's life and activities "that he [or she] does not expose to the public eye, but keeps entirely to himself [or herself] or at most reveals only to family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a [person]'s life in the home, and some past history that [the person] would rather forget."

Even these intimate details cease to be private if the matter is one of "legitimate public interest." According

to Comment (d) to Section 652D, what constitutes "a matter of proper public interest" is essentially a constitutional issue that involves the law of freedom of the press and freedom of speech. If the information is contained in a public record and is truthful, no action for invasion of privacy can be maintained. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Ironically, many local police departments refer to their citizen complaint divisions as "internal affairs bureaus" or "internal investigation sections," implying that officer discipline is a "private" matter that is not of "legitimate concern to the public," further strengthening an officer's claim to privacy in the records. To the contrary, however, it would be difficult to imagine a subject matter of more legitimate concern to the public than how the local police department is managed. *King*, 121 F.R.D. at 190 ("Lawfulness of police operations is a matter of great concern to citizens in a democracy").

Based on the Restatement language incorporated into the state statute, the Washington Supreme Court has held that police officers have *no* privacy rights in misconduct records.

In contrast to the types of information listed in the Restatement's comment, the information contained in the police investigatory reports in the present case does not involve private matters, but does involve events which occurred in the course of public service. *Instances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life . . . They are matters with which the public has a right to concern itself* (emphasis added).

Cowles Publishing, 748 P.2d at 605. The *Cowles* court further stated that under a balancing test, even if an officer's personal privacy rights were implicated, those rights would be given slight weight:

If the off-duty acts of a police officer bear upon his or her fitness to perform public duty or if the activities reported in the records involve the performance of a public duty, then the interest of the individual in "personal privacy" is to be given slight weight in the balancing test and the appropriate concern of the public as to the proper performance of public duty is to be given great weight. *In such situations, privacy considerations are overwhelmed by public accountability* (emphasis added).

Id.

Essentially, the *Cowles* court said that a police officer's fitness for duty or the fairness of a department's disciplinary process is a *per se* legitimate public interest. Recent Washington cases have done away with the "balancing" test in the context of privacy right exemptions; as long as *any* legitimate public interest is involved, then no privacy right exists to withhold information from the public. *Spokane Police Guild v. Liquor Control Bd.*, 769 P.2d 283 (Wash. 1989) (police officers union had no privacy rights in Liquor Board's investigation into strip

show held on union's premises); *Brouillet v. Cowles Publishing Co.*, 791 P.2d 526 (Wash. 1990) (public teacher license revocation records subject to disclosure to media).

Many state courts struggle with whether or how their own particular "personal privacy" exemption applies to police officer misconduct files. Usually, the privacy exemption arises in the context of a public employee "personnel records" exemption and most courts refuse public disclosure even if the officer involved is a high level police official and even if the disciplinary records of other public employees are subject to disclosure where no privacy rights are implicated.

For example, the disciplinary records of school employees who may be involved in sexual misconduct with students are subject to full disclosure to the public, while police officer disciplinary files involving excessive use of force on citizens are not subject to public disclosure because of the potential threat to the officers' reputations. *Compare Ollie v. Highland Sch. Dist.*, 749 P.2d 757 (Wash. App. 1988); with *Pangman*, 473 N.W.2d 538.

This discrepancy holds true at the highest levels. While a former police chief may have a "legitimate privacy and reputational interest" in an investigative report leading to his discharge, a university professor's privacy interests are "not dispositive" since he "voluntarily took a position of public prominence." *Compare Annandale Advocate v. City of Annandale*, 435 N.W.2d 24 (Minn. 1989); with *Wisconsin State Journal v. University of Wisconsin-Platteville*, 465 N.W.2d 266 (Wis. App. 1990).

At least one state legislative body has circumvented the question entirely by passing a specific statute declaring police officer personnel records "confidential," including any information regarding excessive force and harassment complaints. New York Civ. Rights Law § 50-a; *Gannett Co. v. James*, 438 N.Y.S.2d 901 (1981), *aff'd* 447 N.Y.S.2d 781 (App. Div. 1982).

Absent such a specific statute, the *Cowles* analysis can be applied to any claim by an accused officer that the officer's privacy rights will be violated if the records or the officer's name are released to the public. Most state FOIAs refer to but do not define "privacy." The holding in *Cowles* is based directly on an application of the Restatement of Torts privacy definition, a definition that can be used to interpret the word "privacy" in any state FOIA. The analysis can be used to defeat almost any accused officer's privacy claims to his or her disciplinary files since they are, almost by definition, of "legitimate public concern." *See also King*, 121 F.R.D. at 191 ("the privacy interest in this kind of professional record is not substantial because it is not the kind of "highly personal" information warranting constitutional safeguard").

Privacy Rights of Individuals Other Than the Accused Officer in Misconduct Files

Although the accused officer may not have privacy rights in misconduct records, others involved in the misconduct investigation do have privacy interests in keeping their names confidential. Many departments will provide the internal investigation records with the names of witnesses, including other officers, and complainants redacted and will justify doing so by invoking the privacy right exemption. Many state FOIAs contain a specific clause that gives the public agency a basis for deleting identifying details from records that are made available to the public. *See, e.g.*, Wash. Rev. Code § 42.17.260(1) ("To the extent required to prevent an unreasonable invasion of personal privacy . . . an agency shall delete identifying details . . . when it makes available or publishes any public record").

Unlike the situation where an accused officer attempts to assert a privacy right over the records, the performance of the public duties of a witness (including officer witnesses) or complainant are not at issue. Since there is no "legitimate public concern" in knowing identifying details about them, complainants and witnesses do have privacy interests and a department has a legitimate basis for these redactions. Restatement (Second) of Torts § 652D.

Deletions of identifying details about officers other than the accused officer pose different issues. Whether or not a particular officer has a privacy right may depend upon the purpose for which the request is made. A records request, for example, might be made during discovery of a *Monell* claim against the city, and a reporter or community group might request the records to look at the fairness of the process. In this situation, the need for identification of a witness officer or a supervising officer relates to the performance of the internal investigation process, rather than the fitness of a specific officer. However, since the "nexus" between the information sought and the public duty is strong, there is a legitimate public concern in knowing who participated in the process and in what capacity. The witness officers would have no privacy rights to withhold their names.

On the other hand, if the request was simply for a single internal investigation file involving a single incident, the "legitimate public concern" nexus would be much weaker. In that situation, unlike the accused officer, a witness officer or a supervisory officer would be able to assert a privacy right. Because the purpose of the request would not be to assess the fairness or constitutionality of the disciplinary process, the public arguably has less of a legitimate right to know the officers names.

For complainants and witnesses other than police officers, federal FOIA cases are helpful in determining whether or not redaction of names in a misconduct file constitutes a "clearly unwarranted invasion of personal

privacy." Under the federal FOIA, a balancing test is used which involves weighing the person's privacy interests and balancing them against the public interest in disclosure. *Department of the Air Force v. Rose*, 425 U.S. 352, 372-73 (1976). The balance is strongly weighed in favor of disclosure. *Washington Post Co. v. United States Dep't of Health and Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982).

The balancing test requires identifying as to each redaction (1) the nature of the privacy interest affected, (2) the weight of the interest, and (3) the likelihood that disclosure will adversely affect it. If a department, for example, provides the requested files with names of witnesses redacted, it must identify exactly what privacy interest needs to be protected by withholding each identifying detail.

Deleting individual names is not always justifiable on the basis of a potential invasion of privacy. A person's identity is private only in context. The U.S. Supreme Court has held in the context of a request for citizenship status that any privacy interest in identity must be balanced against the public's interest in disclosure. *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602-03 (1982).

The purpose of the records request is also important in weighing the public's interest in disclosure of names of witnesses and complainants. If the requesting party can show that the names are needed as part of a public assessment of the disciplinary process, the public's right of access outweighs the individual's privacy interest. This may be, however, difficult to do in light of some recent Supreme Court rulings. *See, e.g., United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (if the purpose of the disclosure is to shed light about the conduct of a particular agency, disclosure of the names of private citizens does nothing to further that purpose).

Sometimes, the identifying details that have been deleted appear elsewhere in another public record, for example, a public police report or a news article. In that instance, the individuals involved, complainants or witnesses, do not have a privacy interest in withholding information that is already public. *Cox Broadcasting*, 420 U.S. at 494-95 (interests in privacy fade when the information involved already appears on the public record); *Washington Post v. H.H.S.*, 690 F.2d at 259 (availability of information from other sources . . . strengthens the case for FOIA disclosure by suggesting that disclosure will not seriously invade personal privacy); *Ames v. City of Fircrest*, 857 P.2d 1083 (Wash. App. 1993) (no justification for withholding name in internal investigation record if the person's identity was already public).

A witness' privacy interest is strengthened if the witness provided information to the police under an explicit promise of confidentiality and the witness's identity has

not been previously revealed. Some state statutes provide a specific exemption for the identity of persons who file complaints with or provide information to law enforcement agencies. *See, e.g.*, Ill. Rev. Stat. ch. 116 para. 207(b)(v)(1987). Other states affirmatively require that state or local law enforcement agencies release witness identities, other than those of confidential informants, to the public. *See, e.g.*, Cal. Gov't Code § 6254(f).

On the other hand, when the individual witness could reasonably expect that the information would be disclosed in pending or expected litigation or administrative proceedings, the strength of the privacy interest subsides. *Miami Herald Publishing Co. v. United States Small Business Admin.*, 670 F.2d 610, 615-16 (5th Cir. 1982). This principle also applies to accused officers since most police department regulations include provisions for a public hearing to be afforded to any officer who is suspended or otherwise disciplined by a police chief. At the time of the public hearing, the identity of everyone involved [officers, witnesses, victims] becomes a matter of public record.

The Law Enforcement Investigative Records Exemption and the Chilling Effect Analysis

Most public or discovery requests for misconduct files also involve application of the "law enforcement investigative records" exemption found in most state FOIAs. These exemptions are often, and successfully, used as the sole basis for withholding police misconduct investigation files. The case law dealing with these exemptions usually begins with a threshold determination of whether the files are "investigative records" within the meaning of the specific statutory language. A determination is then made as to whether release of the files or information would have a "chilling effect on law enforcement," and whether "the public's interest in secrecy" outweighs the public's interest in disclosure.

These latter concepts are not explicitly defined in the state laws, and seem to contradict the democratic values inherent in the public's right of access. They are almost entirely the creations of the judicial branch. *See, e.g., Pangman*, 473 N.W.2d 538 (denial of request for personnel records, including citizen complaints, based in part on "potential chilling effect on law enforcement").

A number of federal courts have seriously questioned the empirical basis for a finding that public disclosure of internal disciplinary files causes a "chilling effect" on law enforcement. Judge Weinstein of the Eastern District of New York, for example, questioned whether witness officers would be less candid if they knew the records would ultimately be subject to disclosure. "An officer's incentives to hide a friend's misconduct, or to be scrupulously forthcoming lest he be disciplined for having concealed information, are probably much more closely tied

to the internal investigation machinery than to fear." *King*, 121 F.R.D. at 192.

Judge Weinstein further stated that "if the fear of disclosure . . . does have some real effect on officers' candor, the stronger working hypothesis is that fear of disclosure is more likely to increase candor than to chill it." *Id* at 193. *Accord Mercy v. County of Suffolk*, 93 F.R.D. 520, 522 (E.D.N.Y. 1982) ("No legitimate purpose is served by conducting the investigations under a veil of near-total secrecy").

The "chilling effect on law enforcement" basis for withholding police misconduct files is drawn from narrow language found in state FOIA "investigative records" exemptions. These state exemptions are usually modeled after the federal FOIA "law enforcement investigative records" exemption, 5 U.S.C. § 552(b)(7). However, the federal FOIA exemption language shows that it is actually an affirmative requirement that records "compiled for law enforcement purposes" be released unless the public agency can show that one of six different interests (such as disclosing an informer's identity or endangering someone's life) would or could reasonably be affected. 5 U.S.C. § 552(b)(7).

In 1986, Congress amended Section (b)(7) to impose an objective standard of reasonableness on most of the six "investigative records" tests. *See Reporters Committee*, 489 U.S. at 777 n.22. Most state courts use a similar reasonableness or objective standard to assess whether disclosure of any law enforcement investigative records would bring about any of the scenarios listed. The Illinois FOIA, for example, exempts records compiled for "law enforcement purposes or for internal matters of a public body" but only to the extent that disclosure would involve any of the outcomes listed in the federal exemption. Ill. Rev. Stat. ch. 116 para. 207(c)(1992).

The initial inquiry to be made when assessing whether this exemption applies to police misconduct files is whether or not reports compiled for an internal administrative investigation are compiled "for law enforcement purposes." By way of contrast, for example, if the internal investigation involves the possible discipline of employees of a public agency not involved in law enforcement, the investigative reports are considered "personnel" files and the relevant privacy rights are evaluated in that context. *Rose*, 425 U.S. 352 (disciplinary/ethics investigative files compiled at Air Force Academy); *Brouillet*, 791 P.2d 526 ("law enforcement" investigative records exemption only applies if investigating agency enforces either criminal or civil law).

Different tests are used to determine whether an internal investigation record falls within this exemption. One court, in assessing whether records concerning internal use-of-deadly-force investigations fell within the state exemption for "confidential law enforcement investigatory" records, held that "the records do not resemble

personnel files. Rather, they appear comparable to those records compiled pursuant to criminal investigations that police routinely perform when they investigate crimes.” *State ex. rel. NBC v. City of Cleveland*, 566 N.E.2d 146, 148 (Ohio 1991). That court further held that the city could refuse disclosure only if it could prove that release of the records would create a high probability of disclosure of specific confidential investigatory techniques or procedures.

Other state courts similarly make a specific assessment of whether or not the particular records are compiled for “law enforcement purposes,” in order for the exemption to apply. One court, for example, determined that police reports concerning incidents involving contact between persons and police dogs are not “investigative records” because they were not designed to ferret out criminal activity or to shed light on malfeasance. *Cowles Publishing Co. v. City of Spokane*, 849 P.2d 1271 (Wash. App. 1993). See also *Columbian Publishing v. City of Vancouver*, 671 P.2d 280 (Wash. App. 1983) (written complaints from thirteen officers concerning police chief not protected by “investigative records” exemption).

A number of courts have held that once an internal investigation is no longer active or once a final determination has been made, the records can be made public even where the “investigatory record” exemption applies. This is particularly appropriate where the investigation involves a high level department official such as the police chief. *Annandale Advocate v. City of Annandale*, 418 N.W.2d 522 (investigative records concerning decision to fire police chief automatically changed to public once city council made firing decision in open public hearing). See also *City of Delray Beach v. Barfield*, 579 So. 2d 315 (Fla. App. 1991) (pursuant to statute, citizen complaint records concerning inactive investigation subject to disclosure after forty-five days).

In the *Cowles* case discussed above, in the context of privacy rights, a lower level appellate court originally determined that police internal investigation files were not protected by the “investigative records” exemption. *Cowles Publishing*, 724 P.2d 379. The appellate court looked at the specific exemption language in the Washington statute, which is unlike the federal exemption in that only two scenarios are included as the basis of withholding. Wash. Rev. Code § 42.17.310(d). The exemption covers specific law enforcement investigative records “the nondisclosure of which is essential to effective law enforcement or for the protection of any person’s right to privacy.” *Id.*

Even though this language is unique, the court looked to the “analogous” federal investigatory records exemption to decide whether police misconduct files were investigative records compiled for “law enforcement purposes.” In deciding that the files were not protected by the exemption, the court looked to a D.C. Circuit case

which pointed out that nearly any “internal monitoring conceivably could result in disciplinary action. . . . *But if this broad interpretation is correct, then the exemption swallows up the Act. . . [and] defeats one central purpose of the Act to provide public access to information concerning the Government’s own activities.*” *Cowles*, 724 P.2d at 388, citing *Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984).

Even though the court determined that the records were not “investigative records” for purposes of the exemption, it went on to analyze whether withholding the accused officers’ names was, pursuant to the exemption’s language, “essential to effective law enforcement.” *Cowles*, 724 P.2d at 388. The trial court held a fact-finding hearing on this issue and heard live testimony.

During the fact-finding hearing, a number of patrol officers testified that there was a high level of apprehension and anxiety arising from the filing of complaints. High ranking officers testified that if the names of complainants, witnesses or accused officers were released to the public, the “investigative process” would be inhibited because fellow officers “would be reluctant to assist.” *Cowles*, 748 P.2d at 599. A police psychologist testified that an internal affairs investigation added a significant amount of stress to an already stressful job and that allowing the names of officer complainants to be made public would create a “code of silence” among the officers, resulting in instances of misconduct not being reported. *Id.*

Based almost entirely on this testimony, the trial court entered fact findings as follows:

- (1) Witnesses were promised confidentiality;
- (2) Confidentiality encourages complaints;
- (3) Complaint investigation would be impaired if names were disclosed because witnesses, including officers, would be reluctant to come forward; and
- (4) The morale of the agencies would seriously suffer, with such negative impacts as harassment of officers and their families and an adverse psychological affect on the individual officer.

Cowles, 724 P.2d at 388; 748 P.2d at 600. The trial court found that nondisclosure of officers’ names was “essential to effective law enforcement.”

In reversing the trial court, the Washington appellate court found that the trial court’s findings of fact did not support its legal conclusion that the “investigatory record” exemption applied. *Cowles*, 724 P.2d at 389. It also disputed the fact findings, stating:

- (1) That disclosure of the officers names in sustained complaint files would not disrupt the internal affairs investigative process based in part on the

officer's awareness that a public hearing could result if he or she challenged the finding;

- (2) That officer morale was not necessarily a problem and that, in any event, "the courts are charged by statute to liberally allow public scrutiny of records even though inconvenience or embarrassment may occur"; and
- (3) The "code of silence" has never stopped officers from reporting misconduct in the past, if they are inclined to do so, and identities are usually already known before public disclosure takes place.

Id.

The Washington Supreme Court reversed the court of appeals, reinstating the trial court's conclusions that withholding of officer names, even those with sustained complaints, was "essential to effective law enforcement." Even though it held that, pursuant to the Restatement (Second) of Torts test, the officers had no privacy interests in the misconduct files, it upheld the trial court on the department's assertion that the records were compiled for law enforcement purposes and were thus covered by the "investigatory records" exemption. The court held that application of the exemption was conditioned on a department's "showing that disclosure would make law enforcement ineffective," and that the police agencies had proven that "countervailing interest."

The Washington court based this ruling on the trial court's fact findings and also held that these facts were not subject to appeal. The court ruled that "the confidentiality of the names of persons reflected on the records of internal investigations is necessary to effective law enforcement." *Cowles*, 748 P.2d at 608. Since the files had already been released with all names redacted, the court narrowed the ruling to say that "where internal investigation files have already been released, the names of the complainants, witnesses and officers involved are exempt from disclosure" under the "investigatory record" exemption of the state FOIA. *Id.*

The *Cowles* decision can be criticized in many ways. The most obvious one is that even if confidentiality of witness identity is helpful to internal investigations, and even if it is necessary as the court found, that does not make it *essential to law enforcement*. Also, the case involved files where the complaints had been sustained against officers and the court made no distinction between records involving allegations upheld as true versus investigations held to be groundless. *See also King*, 121 F.R.D. at 193 ("without some basis for believing that real police officers conceal or distort their statements to internal investigatory bodies, courts should reject [the chilling] contention"); *Wood v. Breier*, 54 F.R.D. 7, 13 (E.D. Wis. 1972)(doubting "real world" harm to police department's internal investigations from disclosure).

The primary problem with *Cowles* and similar cases in other states is a general judicial failure to include balancing of any law enforcement interest against the public's nearly absolute right of access to information concerning police officers' fitness for duty. Some kind of balancing seems to be required, and a balancing requirement is directly implied in the strong democratic value language contained in the preambles to most state laws.

In the *Cowles* decision, unfortunately, the only place where this interest is even marginally made reference to is in the dissent. The dissenting justice stated in language that would have been more appropriate in a majority opinion had the court used a modified balancing test:

Contrary to the majority, I believe it is the disclosure of these names which is "essential to law enforcement," rather than their concealment. It is important for the public to know how their law enforcement employees are performing their official duties and to know whether the standards within these agencies are being maintained and enforced. Disclosure of the names of officers involved in misconduct in the performance of their official duties would add credibility to the public's perception of the police internal affairs process.

Cowles, 748 P.2d at 610 (Dolliver, J., dissenting).

Unless an internal investigation has not been completed, unless promises of confidentiality have been explicitly made and the names of witness, complainants and officers are not otherwise known, and unless it can be explicitly shown that some specific and serious harm will be inflicted on an officer or a witness from disclosure of a specific file, the "law enforcement investigatory record" exemption does not provide a basis for a police department to withhold information contained in internal investigation files. Treating police officers, as the *Cowles* court did, as if they need special protection from some imagined "harassment" does neither them nor the public any service. The public has no interest in "secrecy." "Secrecy" is not a value on which democracy and, in turn, freedom of information laws, are based.

Conclusion

Police officers have few or no privacy rights in misconduct files because the files only concern the officer's fitness to perform his public duties. Based on the definition of privacy found in the Restatement (Second) of Torts § 652D, the public has an overriding legitimate public concern in this information, thus negating any accused officer's privacy interest. Even if it can be shown empirically that stress might be added to the job or that an officer might be harassed if misconduct files or officer names were disclosed to the public, the public's interest in "maintaining control over the instruments they have created" is paramount to any tangential impact on a particular department. Only through knowledge about their particular department's disciplinary process can

citizens carry on an enlightened discussion. In most instances, after careful balancing, the "law enforcement investigatory records" exemption would not apply. Unfortunately, police-friendly state courts are ruling the other way on these issues. Perhaps it is up to us who know differently to make the change.

CASE UPDATES

In the Supreme Court

In *Harris v. Forklift Systems*, 62 U.S.L.W. 4004 (Nov. 9, 1993), the Supreme Court in a unanimous decision held that a plaintiff in a sex discrimination suit under Title VII need not show that she suffered psychological harm as a prerequisite for proving that she was subjected to an abusive and hostile work environment.

In *Harris* the plaintiff worked as a manager for the defendant rental company. The defendant's president, Charles Hardy, on numerous occasions insulted the plaintiff in front of other employees calling her a "dumb ass woman" and suggesting that they discuss her raise over at the local Holiday Inn. When the plaintiff confronted Hardy he promised to stop. Shortly thereafter, however, he again insulted the plaintiff in front of other employees by suggesting that she had offered to have sex with a customer in order to rent him some equipment.

The plaintiff quit and sued. The district court dismissed the plaintiff's case holding that while Hardy's comments were offensive they weren't so abusive or severe that one would expect them to cause the plaintiff psychological harm. The Sixth Circuit affirmed and the Supreme Court granted certiorari and reversed.

Writing for the Court, Justice Sandra Day O'Connor rejected the reasoning of the district court which focused on whether the conduct "seriously affected plaintiff's psychological well being," and instead citing to *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), held that where the work environment "would reasonably be perceived and is perceived, as hostile or abusive, . . . there is no need for it also to be psychologically injurious." 62 U.S.L.W. at 4005.

Justice O'Connor recognized that the Court's decision would leave many questions about work place harassment and what constituted abusive conduct unanswered, but did say that the duration of the abuse, its severity and whether the conduct interfered with the plaintiff's work performance were relevant factors, among others, to consider. Justice Scalia and Justice Ginsburg filed separate opinions concurring in the Court's decision.

Certiorari Granted

Review was granted in *Farmer v. Brennan*, 62 USLW 3282 (Oct. 12, 1993). In *Farmer* the Seventh Circuit affirmed, without opinion, the district court's holding that

prison officials cannot be held liable under the Eighth Amendment for a sexual assault by inmates on a transsexual inmate where prison officials were not told that the transsexual prisoner was in imminent danger.

The question presented for review is: can prison officials be held liable under the Eighth Amendment as interpreted by the Supreme Court in *Wilson v. Suter*, 59 U.S.L.W. 4671 (1991), when they knew or should have known that placing a transsexual inmate in general population would place her in great danger and where the prisoner was beaten and raped, or must a plaintiff show actual knowledge of imminent harm in order to state an Eighth Amendment violation?

In the Circuits

In *Montiel v. City of Los Angeles*, 2 F.3d 335 (9th Cir. 1993) the plaintiff filed a § 1983 excessive force complaint against several Los Angeles police officers, as well as a *Monell* policy case against the City of Los Angeles itself. The case went to trial and at the close of the evidence the district judge directed a verdict on behalf of the City and one of the officers. The jury later entered a verdict on behalf of all of the defendants and Montiel appealed. The plaintiff raised three major issues on appeal:

- (1) The district court erred in allowing the defendants to strike all of the Spanish surname jurors and two of the three African-American jurors from the venire;
- (2) The district court erred in refusing to admit portions of *The Report of the Independent Commission on the Los Angeles Police Department*, the so-called *Christopher Report*, named after Warren Christopher who chaired the Commission inquiry into the Los Angeles Police Department following the Rodney King verdict and the ensuing uprising; and
- (3) The district court's repeated pro-police comments evidenced a bias on the judge's part in favor of the police defendants.

The Ninth Circuit reversed.

The Ninth Circuit found that the judge's failure to hold any meaningful inquiry into the defendant's use of five of their seven peremptory challenges to strike persons with Spanish surnames and African-Americans could not be justified under *Batson v. Kentucky*, 476 U.S. 79 (1986). The court went on to note that this case presented "a good reason why, . . . district courts should exercise their discretion under . . . Fed. R. Civ. P. 47(a) (civil case) to expand the amount of time permitted parties to voir dire jury panels. Providing parties with an opportunity to question more fully prospective jurors often flushes out parties' true motivations in exercising their peremptory challenges." 2 F.3d at 340-341.