# THE PUBLIC'S RIGHT OF ACCESS TO POLICE MISCONDUCT FILES

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## 1. Introduction

Anyone who has tried to obtain police misconduct records knows about the vehemence with which police departments hide behind so-called state "privilege" laws. Local police departments will spend vast amounts of resources keeping these records away from anything that remotely looks like a public view. Essentially, these files are shielded from all public scrutiny.

The secrecy surrounding these records is both unnecessary and unjustified. The public does have a right of access to the records, a right that is based on basic democratic values. This article is an attempt to analyze the legal bases that are used to cloak them with unwarranted secrecy.

The ultimate justifications for the excessive secrecy cloaking local police misconduct files are 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 both exemptions far beyond their original purposes to justify keeping these records secret.

### 2. Basis for Public Access Right: State Freedom of Information Statutes

Nearly all states have statutes requiring public disclosure of government records. Most state legislatures modelled these statutes at least partly on the federal Freedom of Information Act. For simplicity sake, these statutes will be generically referred to as state "FOIA"s.

Since local police departments are state-created rather than federal agencies, no body of law exists that applies the federal FOIA law to requests for local police misconduct files. However, because of the implicit or explicit state modelling on the federal FOIA, most state courts are guided by federal law in construing their particular FOIAs, especially where the language is parallel. Where the wording is even slightly distinct, state courts will sometimes reject a federal ruling granting disclosure in favor of one requiring secrecy.

Many state FOIA statutes contain exemptions modelled on the federal FOIA "privacy right" and "investigatory record" exemptions. One or the other of these two exemptions usually form the basis for withholding police misconduct files. 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 disclosure 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 some version of the idea "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."

If a state FOIA contains language such as that found in the Illinois FOIA quoted above, 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 an agency or a court responding to a request is bound to an interpretation 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, stretching and distorting the exemptions wherever they can to find in favor of secrecy.

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, many state judges in written opinions courts have held that any exemptions are to be read narrowly.

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.

This preamble has yet to be used in a published legal case but its 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.

### 3. 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" or something similar, police misconduct is not simply an "internal" department matter: It is the public's business. As stated in the Washington preamble quoted above, citizens, not police department bureaucrats, are the ultimate arbiters of what sort of police behavior is acceptable in a democratic society.

Law enforcement officers wield extensive authority in the exercise of their duties, including the authority to use force and to deprive individuals of their constitutional rights. Whether those officers, trained and paid at taxpayers' expense, use excessive amount of 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 discipline them for breaches of standards is also clearly the public's right to know.

This 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 much stronger when a request is made concerning the investigation of alleged constitutional rights violations. Whether a department is requiring an impossible burden of proof for what are essentially constitutional violations is also 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 whether that officer is assigned to patrol or to the vice unit: 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 of disclosure for 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. 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." 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 which "directly and personally affect individual freedoms." A police officer has generally assumed "the risk of greater public scrutiny attendant to public life," and thus whether he or she is fit for duty is a matter of public concern.

The public interest is always strongest when allegations involve an officer being remiss in discharging his public duties or abusing the public's trust. 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 <u>directly</u> relates to his official duties or to his performance of those duties, the public's right to scrutinize is at its greatest.

Particularly 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 in particular, the nexus between the position and the information being disclosed to the public is particularly strong. 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 question of whether supervisors are effectively controlling the rank and file and whether and how they discipline officers who breach standards of proper conduct.

### 4. 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."

Most state FOIAs contain at least one exemption from disclosure of records to the extent that 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, this "personal privacy" exemption does not apply.

Many of the state FOIA "personal privacy" exemptions are modelled 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." 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 what an "invasion of personal privacy" is. 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."

Legal commentators define what constitutes "highly offensive to a reasonable person" as 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." However, even these intimate details cease to be private if the matter is one of "legitimate public interest."

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" concern 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 its police departments are managed. At least one state court has held that police officers have <u>no</u> privacy rights in misconduct records because the records, by definition, "involve events which occurred in the course of public

service ... matters with which the public has a right to concern itself."

5. <u>The Law Enforcement Investigative Records Exemption</u>

Most 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 "investigatory 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 never spelled out explicitly 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. 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. One judge said 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."

Some state 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 the case where the investigation involves a high level department official such as the police chief.

The problem with many state cases interpreting the "investigative records" FOIA exemption 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. As one Washington State Justice said: "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."

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, 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 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" isn't a value on which either democracy or freedom of information laws are based.

## 6. Conclusion

Police officers have few privacy rights in misconduct files because the files only concern the officer's fitness to perform his public duties. Based on the legal definition of "privacy," the public has an overriding legitimate public concern in this information. Even if it can be shown that stress might be added to the job or that an officer might be harassed if misconduct files 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.