

# National Police Accountability Project

A Project of the National Lawyers Guild

## LIFTING THE BLUE VEIL OF SILENCE: LEGISLATIVE PROPOSALS TO IMPROVE TRANSPARENCY IN POLICING AND BUILD COMMUNITY TRUST

Information about police officer misconduct is a matter of high public importance. The contents of disciplinary records provide insight into an individual officer's suitability to serve in law enforcement. Similarly, these records shed light on patterns of police misconduct and help ensure communities can evaluate whether law enforcement agencies are conducting fair investigations into citizen complaints. Unfortunately, confidentiality laws in many states prohibit disclosure of this valuable information.<sup>1</sup>

Access to police misconduct records is necessary to protect the public and ensure accountability in a range of contexts. For instance, communities need to know if there is a recidivist abuser policing their neighborhoods to protect themselves and organize for the officer's removal. Civil rights plaintiffs suing to enforce their constitutional rights need to know if a department has a pattern of protecting officers who break the law in order to determine whether the city is also responsible for their harm and should be named in their lawsuit. Criminal defendants need to know whether an arresting officer has a history of problematic behavior to best prepare their case. Moreover, advocates need to know how departments deal with dangerous police to formulate proposals that will limit police brutality. The immense power that police officers have over an individual's safety, rights, and liberty creates a unique need for transparency.

Where records about police misconduct are kept secret, police violence goes unchecked, accountability is undermined, and reform is stalled. States that block public access to police disciplinary records and civilian complaints should enact legislation to open this essential information to the public.

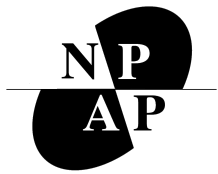
## TRANSPARENCY PROMOTES PUBLIC SAFETY, ACCOUNTABILITY, AND INFORMED POLICYMAKING

Transparency has been one of the most common reforms proposed and enacted by states in the wake of the 2020 protests.<sup>2</sup> The events of the last two years have made

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<sup>1</sup> Kallie Cox and William H. Freivogel, *Police misconduct records secret, difficult to access*, ASSOCIATED PRESS, May 12, 2021, <https://apnews.com/article/us-news-police-reform-police-government-and-politics-fa6cbd7e017b85aa715e23465a90abbe>.

<sup>2</sup> Steve Eder, Michael H. Keller, and Blacki Migliozzi, *As New Police Reform Laws Sweep Across the U.S., Some Ask: Are They Enough*, NY Times, Oct. 10, 2021; A Snapshot of Recent Policing Reform



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clear that police departments are ill-suited to police themselves. Overpoliced communities, policymakers, and advocates are essential stakeholders in ending police abuse and need access to records of misconduct to effectively press for change. However, these stakeholders cannot meaningfully participate in reform if information about police misconduct is kept secret.

### **Increased Transparency Will Help Empower Communities to Improve Their Police Departments**

Many police officers have extensive and documented histories of abusive conduct before their behavior is caught on camera. For instance, the officers who murdered George Floyd, Eric Garner, and David Jones each had a lengthy trail of citizen complaints prior to taking a life.<sup>3</sup> Closing disciplinary records from the public permits police officers to accumulate complaints of misconduct without facing consequences. Without public oversight of disciplinary processes, officers who repeatedly engage in misconduct are permitted to keep their jobs or be rehired in different cities.<sup>4</sup> Permitting the disclosure of misconduct records will ensure that civilians can identify dangerous police officers and apply public pressure on their employing agencies to take corrective action.

Access to misconduct records can also help communities advocate for institutional change.<sup>5</sup> Departmental responses to allegations of officer wrongdoing can expose problems with internal affairs investigation procedures as well as issues with department leadership. For instance, if a complaint is found unsubstantiated but the records reveal key witnesses were not contacted, advocates would know they need to focus their energy on improving the department's investigatory process. Similarly, if a police supervisor imposes light discipline for racial profiling, the public would know to question the current police chief's commitment to racial equity and develop an advocacy plan accordingly.

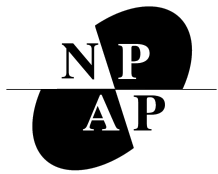
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Legislation, NYU POLICING PROJECT, Aug. 26, 2020, <https://www.policingproject.org/news-main/2020/8/25/a-snapshot-of-recent-policing-reform-legislation>.

<sup>3</sup> Claudia Lauer and Colleen Long, *Across the US, most police disciplinary records are secret*, Associated Press, June 13, 2020, <https://www.mercurynews.com/2020/06/12/across-the-us-most-policedisciplinary-records-are-secret/>.

<sup>4</sup> Rachel Moran and Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 *Cardozo L. Rev.* 1237, 1271 (2021)(a police supervisor in support of public access to police misconduct records describing how confidentiality can help dangerous police get hired at a new department without public knowledge).

<sup>5</sup> Barry Friedman and Maria Ponomarenko, *Democratic Policing*, 90 *NYU L. Rev.* 1827, 1838 (2015)(describing how transparency allows police to monitor police and exert political pressure to push for changes).



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Departmental handling of misconduct allegations can also reveal deficient training and problematic policies. Even if their written policies are not objectionable, a department's response to an incident of excessive force or a suspicion-less search can expose its true customs. An officer that receives little or no discipline for objectively unconstitutional conduct likely works in a department that is at the very least indifferent to harmful policing practices. It can also provide insight into the quality of departmental training. When recidivist officers are regularly assigned additional training as corrective action but never improve their behavior, there is reasonable concern that the training is ineffective.

### **Victims of Police Abuse Need Access to Police Misconduct Records to Pursue Justice**

Limitations on public access to complaints and disciplinary records can make it difficult for a plaintiff to investigate and build their case. Police departments are often responsible for the civil rights violations committed by their officers. Even though police misconduct is frequently attributed to a moral failing by an individual officer (i.e. the bad apple narrative), it is many times the result of their employer's failure to train and guide their employees to take appropriate action.

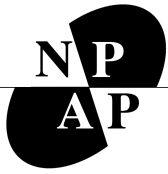
In order to sue a police agency for a civil rights violation, a plaintiff has to show their injury was the result of a departmental practice, custom, or policy.<sup>6</sup> Unconstitutional policies are usually not committed to writing and can only be demonstrated through evidence of repeated acts of misconduct.<sup>7</sup> When these acts of misconduct are made confidential, plaintiffs will be unable to include information in their complaint that will help them hold cities accountable. Another way that plaintiffs can show municipal liability is ratification by police leadership. Without access to disciplinary records, victims will be in the dark about whether the police agency approved of their mistreatment and should be held accountable for their suffering.

Access to police records is essential to evaluate case strength and prepare pleadings that will survive a quick dismissal. Accordingly, legislation that creates greater transparency will help those harmed by police violence seek justice and promote legal accountability for police agencies that have created a culture of misconduct.

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<sup>6</sup> *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978).

<sup>7</sup> Michael Avery et. al. *Police Misconduct Law and Litigation* (2020) §6:12.



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### **Confidentiality Laws Often Prevent Lawmakers from Informed Decision-making About Accountability, Training, Police Budgets.**

Lawmakers and government entities frequently do not have better access to police records than the average citizen. Indeed, some states have explicitly decided that government decisionmakers are members of the public for freedom of information act purposes and therefore not entitled to confidential records.<sup>8</sup> In these states, elected officials who receive complaints about police abuse are unable to tell their constituents whether the offending officer has been disciplined.<sup>9</sup> At the state-level, legislators make many decisions that would benefit from liberal access to police records. For instance, lawmakers deciding whether to enact mandatory bias training, fund a police academy, or strengthen their use of force statute would benefit from knowing about specific instances where officers in their state are falling short. High-level data on discipline rates and civilian complaints provide an incomplete picture of these problems. Agencies with ineffective internal affairs departments are going to have a low number of substantiated civilian complaints even in situations where there is considerable evidence of police wrongdoing.<sup>10</sup> Similarly, union contracts and LEOBOR laws severely limit officer discipline,<sup>11</sup> making raw data on discipline rates a poor metric for the actual prevalence of abusive policing. Access to records can provide lawmakers with a more accurate depiction of what types of policing reforms are needed.

Municipal lawmakers also need to know the details of how specific instances of officer misconduct are handled to make informed decisions about funding and accountability measures. Police misconduct lawsuits are a huge expense for many cities.<sup>12</sup> Local elected officials need to know the nature of civilian complaints and how police departments handle them to create policies that would preempt costly lawsuits.<sup>13</sup> Additionally, disciplinary records can help city councilmembers evaluate whether

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<sup>8</sup>See e.g. Kan. Att’y Gen. Op. No. 17-10 at 1–2 & n. 1 (July 11, 2017), [http://ag.ks.gov/docs/default-source/agopinions/2017/2017-010.pdf?sfvrsn=bf29d51a\\_6](http://ag.ks.gov/docs/default-source/agopinions/2017/2017-010.pdf?sfvrsn=bf29d51a_6).

<sup>9</sup> See e.g., Marc Levy, *City councilors can’t know of police discipline, they are informed by head of head of Law Department*, Cambridge Day, May 12, 2020, <https://www.cambridgeday.com/2020/05/12/city-councillors-cant-know-of-police-discipline-they-are-informed-by-head-of-law-department/>.

<sup>10</sup> See, e.g., Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 10 Ohio St. J. Crim. L. 653, 656 (2004) (noting that citizen review agencies do not necessarily substantiate more complaints than internal investigative units).

<sup>11</sup> Kevin M. Keenan and Samuel Walker, *An Impediment to Police Accountability? An Analysis of Use of Statutory Law Enforcement Officers’ Bills of Rights*, 14 PUB. INT. L.J. 185, 200 (2005).

<sup>12</sup> Cheryl Corley, *Police Settlements: How the Cost of Misconduct Impacts Cities and Taxpayers*, NPR, Sept. 19, 2020, <https://www.npr.org/2020/09/19/914170214/police-settlements-how-the-cost-of-misconduct-impacts-cities-and-taxpayers>.

<sup>13</sup> Hannah Bloch-Wehba, *Alternative Channels to Police Transparency*, LAWFARE, Oct. 27, 2021, <https://www.lawfareblog.com/alternative-channels-police-transparency>.



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civilian oversight structures and other activist demands are needed. Details from police misconduct records can also inform debates on whether to defund the police. Specific information about how police officers treat members of the public and how departments respond to that treatment can guide discussions about whether the police are suited to carry out certain services. For instance, an analysis of civilian complaints stemming from police-led crisis interventions can help councilmembers discuss whether community experiences can be improved by training, or alternatively, shifting responsibilities to a civilian municipal agency.

### **Access to Police Misconduct Records Is Essential to Integrity of the Criminal Legal System.**

Some state confidentiality laws make it difficult for criminal defendants and their attorneys to obtain police officer misconduct records.<sup>14</sup> This interferes with the ability of people facing criminal prosecution to identify and challenge police officer misconduct that may have contributed to their arrest. Moreover, disclosure of police officer misconduct records can help attorneys challenging wrongful convictions through habeas proceedings.

Police records can help those facing charges focus their pre-trial investigation on misconduct that would justify evidence suppression or dismissal of their charges. For instance, if an officer has received past complaints or discipline for conducting improper searches, the defense attorney will know to scrutinize their client's arrest for similar in appropriate actions. Additionally, certain police records can implicate an officer's credibility. Conduct bearing on credibility is generally an appropriate topic for cross-examination and defense attorneys will need this information to effectively defend their client. Depriving criminal defendants of information about prior officer conduct undermines their ability to effectively contest charges and undermines the fairness of their prosecution.<sup>15</sup>

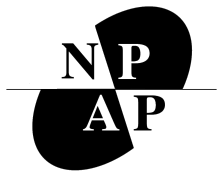
Access to records is also important to protect integrity of the criminal justice system in post-hoc proceedings. Many people are convicted and currently incarcerated because of police officer misconduct that did not emerge during their initial prosecutions.<sup>16</sup> Nearly 40% of exoneration cases involved police misconduct. Transparency about officers who violated policies or otherwise participated in

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<sup>14</sup> See *Eg.* Rachel Moran, *Contesting Police Credibility*, 93 Wash. L. Rev. 1339, 1383 (2018).

<sup>15</sup> See Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle the Prosecution Team*, 67 Stan. L. Rev. 743, 746 (2015).

<sup>16</sup> *What You Need to Know About Police Misconduct and Wrongful Convictions*, The Innocence Project, Sept. 30, 2020, <https://innocenceproject.org/police-misconduct-wrongful-convictions-what-you-should-know/>.



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deprivations of individual rights often signals to attorneys and other advocates to scrutinize past convictions that may have been tainted by investigatory or other misconduct.<sup>17</sup>

### THE PUBLIC'S CLEAR INTEREST IN TRANSPARENCY FAR OUTWEIGHS ANY GOVERNMENT JUSTIFICATION FOR SECRECY.

Limitations on public access to police misconduct records are typically justified as necessary to protect police officer privacy and ensure due process.<sup>18</sup> However, these concerns can be easily addressed through redactions and other selective restrictions on disclosure. Even if these fixes were not available, the public's interest in police misconduct records overrides any purported government goal in confidentiality.<sup>19</sup>

First, it is important to note police officers do not have a federal legal right to privacy or due process in most police misconduct records. No court has found that a public employee has a federal constitutional privacy interest in their disciplinary history at work.<sup>20</sup> While there may be information, like medical information, in records that should be legally protected from disclosure, it can be redacted. Similarly, courts have consistently declined to recognize a due process right to prevent the release of police misconduct records, including the disclosure of unsubstantiated civilian complaints.<sup>21</sup> Absent special state constitutional protections, there are no legal reasons that states cannot give the public access to police records. Instead, concerns about privacy and due process are rooted in the belief that police officers are entitled to unique protections. When civilians engage in misconduct, information about the incident becomes a public record as a matter of course unless the person is a minor.<sup>22</sup> Even unproven allegations of misconduct are generally revealed to the public.<sup>23</sup> Any privacy or due process concerns asserted by police officers would be equally applicable to people being investigated and disciplined for wrongdoing outside of the law enforcement profession.

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<sup>17</sup> Barry Scheck, *The Integrity of Our Convictions: Holding Stakeholders Accountable in An Era of Criminal Justice Reform*, 48 Geo. L. J. Ann. Rev. Crim. Proc. iii (2019).

<sup>18</sup> Katherine J. Bies, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officers Misconduct*, 28 Stan. L. & Pol'y Rev. 109, 117 (2017).

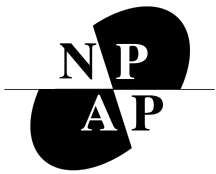
<sup>19</sup> Courts have consistently found the public's interest in disclosure outweighed police privacy interests. *See Eg. State Org. of Police Officers v. City & Cty. of Honolulu*, 494 P.3d 1225 (2021); *In re Atty. Gen. Law Enforcement Directive Nos. 2020-5 and 2020-6*, 465 N.J. Super. 111 (2020).

<sup>20</sup> *See Eg. Nelson v. NASA*, 562 U.S. 134, 135 (2011)(acknowledging that employment history information does not implicate privacy interests); *Ward v. Bolek*, 2014 US Dist. LEXIS 25155 at \*37 (D. Or. 2014)(finding no clearly established informational privacy right in police officer personnel file that included employment evaluations, use of force reports, and civilian complaints).

<sup>21</sup> *See eg. In re Atty. Gen. Law Enforcement Directive Nos. 2020-5 and 2020-6*, 246 N.J. 462.

<sup>22</sup> *See eg. Kevin Lapp, American Criminal Record Exceptionalism*, 14 Ohio St. J. Crim. L. 303 (2016)

<sup>23</sup> *Id.* noting the public proliferation of arrest records.



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Moreover, any government interest in withholding police misconduct records is trumped by the benefits of disclosure. As noted above, broad public access to misconduct information supports community empowerment, accountability, informed policymaking, and integrity in the criminal legal system. It also benefits the government by building much needed trust with the community. As law enforcement organizations have themselves noted,<sup>24</sup> government transparency about officer misconduct will lead communities to be more cooperative with the police, making it easier for them to solve and prevent future crimes.

In all, concerns justifying confidentiality of police records lack a legal foundation, can be addressed through redactions, and are trumped by the significant benefits of transparency and public disclosure.

### CORE COMPONENTS OF EFFECTIVE LEGISLATION

Not every incident of police officer discipline is a matter of public interest. For instance, whether an officer is disciplined for forgetting to wear a belt is not going to suggest that they will harm members of the public in the future. Accordingly, NPAP is not insisting on blanket public access to law enforcement disciplinary records. Transparency legislation should be crafted to provide for the release of information that matters the most to communities.

#### *Types of Misconduct That Should Be Open to the Public*

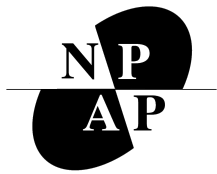
At a minimum, the public should have access to incidents where they engaged or allegedly engaged in conduct that harmed a member of the public. Public access to information about these incidents and departmental responses can empower communities to implement changes necessary to protect people from future harm. Specifically, the following types of misconduct should be covered by any police record transparency bill:

- **Use of force**—There is a well-established heightened public interest in police use of force records.<sup>25</sup> Police officers are the only government workers who carry weapons as part of their jobs. They can threaten to

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<sup>24</sup> *21st Century Policing: Pillar One—Building Trust and Legitimacy and Pillar Two—Policy and Oversight*, International Association of Chiefs of Police, <https://www.theiacp.org/sites/default/files/all/3-9/706-21stCenturyPolicingPillars1and2.pdf>; *Recommendations to Transform Policing*, Law Enforcement Action Partnership, June 3, 2020, <https://lawenforcementactionpartnership.org/national-policing-recommendations/>.

<sup>25</sup> See e.g. *Long Beach Police Officers' Assn. v. City of Long Beach*, 59 Cal. 4th 59 (Cal. 2014); *Mitchel v. City of Cedar Rapids*, 926 N.W. 2d 222, 233 (Ia. 2019).



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end someone's life or take their liberty as part of their job duties.

Therefore, their propensity to use force is a matter of great community concern;

- **Racial bias or racial profiling**—Given the documented history of police violence targeting Black and Brown people,<sup>26</sup> information about an officer's discriminatory behavior is essential to building back community trust in the police;
- **National origin or immigration status discrimination**—Immigrant communities have low confidence in the police because of concerns that they will be referred to federal immigration authorities.<sup>27</sup> This trust deficit has led to the underreporting of crimes from people in immigrant communities. Transparency about officer immigration-based harassment and their supervisors' response are essential to ensuring police services are utilized regardless of citizenship status;
- **Improper stops and searches**—Even if a police stop does not involve use of force or result in criminal charges, it can be a severely traumatic experience, particularly for people of color.<sup>28</sup> Illegal stop and search practices have severely eroded community-police relations in many cities.<sup>29</sup> Illegal stops and searches can also have cascading harmful consequences including arrest and extreme debt from the imposition of fines and fees.<sup>30</sup>
- **Job-related dishonesty**—As described above, officer dishonesty is a serious threat to the integrity of the criminal legal system. When an officer has a propensity to lie, they are a threat to the liberty of any member of the community with whom they come into contact.
- **Sexual assault**—Police sexual violence is the second most reported form of police misconduct after excessive force.<sup>31</sup> It is also an issue

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<sup>26</sup> See Wenei Philimon, *Not Just George Floyd: Police departments have 400-year history of racism*, USA TODAY, Jun. 7, 2020, <https://www.usatoday.com/story/news/nation/2020/06/07/black-lives-matters-police-departments-have-long-history-racism/3128167001/>; Laurie Levenson, *Police Corruption and New Models for Reform*, 35 Suffolk U. L. Rev. 1, 11 (2001).

<sup>27</sup> Ileana Najarro and Monic Rhorr, *Deeper Underground: Fear drives mistrust between police, immigrant communities*, Houston Chronicle, Sept. 22, 2017, <https://www.houstonchronicle.com/deeperunderground/1/>.

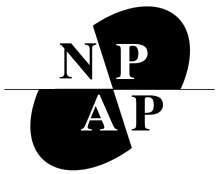
<sup>28</sup> Libby Doyle and Susan Nembhard, *Police Traffic Stops Have Little to Do With Public Safety*, Apr. 26, 2021, <https://www.urban.org/urban-wire/police-traffic-stops-have-little-do-public-safety>.

<sup>29</sup> *Stop and Frisk The Human Impact*, The Center for Constitutional Rights, 2012, <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf> at 8-9.

<sup>30</sup> *Id.* at 7; Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtor's Prison*, 51 Harv. C.R.-C.L.L. Rev. 189, 226-27 (2016).

<sup>31</sup> CATO INSTITUTE, *National Police Misconduct Reporting Project: 2010 Annual Report*, 1





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that many departments have failed to proactively address through preventative policies and hiring protocols.<sup>32</sup>

There are also reasons that police officer harm against their colleagues may be in the public interest. For instance, an officer who has been disciplined for sexual harassing a co-worker may be more likely to act in a predatory way towards women they encounter in the course of their work. Similarly, participation in off-duty events, like the January 6<sup>th</sup> insurrection, that raise questions about the officer's fidelity to the U.S. Constitution might raise community concerns about fitness to serve. Legislation should err on the side of inclusion and expansive definitions when framing what types of misconduct should be available to the public.

### *Types of Records That Should Be Accessible to the Public*

Most information in an internal affairs file could provide the public valuable insights into either an officer's suitability to serve or the adequacy of the department's response to their misconduct. Even if the full contents of the file are not made available, the following documents should be accessible if they touch on the types of misconduct relevant to community safety:

- **Unsubstantiated<sup>33</sup> and Exonerated<sup>34</sup> Civilian Complaints**—unsubstantiated and exonerated complaints can reveal weaknesses in internal affairs procedures. Moreover, these categories of complaints can also help identify officers who are repeatedly making members of the public feel unsafe or disrespected, even if those actions do not rise to the level of a rule violation. Misconduct investigations are severely restricted by union contracts and law enforcement bill of rights laws which limit interview techniques and the duration of investigations. The same contracts and laws also often impose a high evidentiary standard to reach a substantiated finding. As a result, the vast majority of civilian complaints are found to be unsubstantiated even if a violation did occur.<sup>35</sup> Repeated acts by alleged different complainants can help the public identify problematic police officers who have escaped detection due to officer protections. Any concerns that the

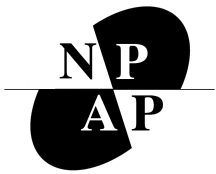
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<sup>32</sup> Dara E. Purvis & Melissa Blanco, *Police Sexual Violence: Police Brutality, #MeToo, and Masculinities*, 108 CALIF. L. REV. 1487, 1506-11 (2020).

<sup>33</sup> Unsubstantiated complaints are those where the investigator could not find corroborating evidence that a violation occurred.

<sup>34</sup> Exonerated complaints are those where the investigation revealed that the incident occurred but the officer's conduct was consistent with the department's policy and their interpretation of the law.

<sup>35</sup> See eg. David Cruz, *Why the Majority of NYPD Misconduct Complaints End Up "Unsubstantiated"*, Aug. 18, 2020, <https://gothamist.com/news/why-the-majority-of-nypd-misconduct-complaints-end-up-unsubstantiated>.



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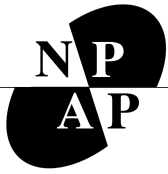
release of these records will besmirch an officer's reputation can be mitigated by the fact that other information will be released including the fact that the officer was cleared by internal affairs and the reasons why the person was cleared. Moreover, as described above, any reputational and privacy concerns are outweighed by the public's interest.

- **Substantiated Civilian Complaints**—substantiated complaints, even those that result in coaching rather than formal discipline, can help communities identify officers who present a risk to the public. Additionally, public access to complaints ensures that the severity of an incident is not diluted or obfuscated by police descriptions. Complaints often provide details and context that would not be included in other disciplinary records and should be released to guarantee the public knows how their community experiences policing.
- **Disposition of Disciplinary Proceedings**—The outcome of a disciplinary proceeding informs the complainant and the public whether or not allegations were validated by an investigation. The disposition will also reveal to the public whether an officer faced employment consequences for their misconduct and provide insight into the effectiveness of internal affairs investigations.
- **Opinion or Reasoning Supporting the Disciplinary Decision**—Where the public is allowed to know why a complaint was substantiated or unsubstantiated, police reform advocates can gain a better understanding of how the department's disciplinary process works. This knowledge will help advocates prepare more effective complaints in the future or advocate for changes to investigatory and adjudicatory processes. Public access to the reasoning behind exoneration findings benefits police officers by providing details that alleged conduct was done in accordance with internal policies. Moreover, exoneration finding rationales also help the public identify internal policy changes that are needed.

### *Mandatory Access*

Police departments often will not choose transparency unless they are required to do so by state law. Accordingly, NPAP opposes transparency legislation that would make the release of police misconduct documents discretionary. Similarly, proposals that require members of the public to obtain a judicial order for disclosure will also significantly undermine public access. The average member of the public will not be able to take on the burdens and costs of seeking a court order every time they want to review misconduct records.

### *Retroactive Access*



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Transparency bills should explicitly include records created prior to the enactment of the legislation. Past complaints, investigations, and disciplinary matters serve the public interests that transparency legislation promotes. Moreover, the express inclusion of prior police misconduct records will ensure there is no ambiguity that will lead to unnecessary litigation.<sup>36</sup>

### *Attorney's Fees*

To the extent state freedom of information laws do not already include attorney's fees for the requester, transparency legislation should provide for them.

Unfortunately, police departments will continue to withhold records even if they are legally required to disclose them and the only way the public can obtain access is through a lawsuit. The provision of attorney's fees ensures that people who cannot afford to pay for a lawyer upfront will still be able to find a lawyer and get access records.

## CONCLUSION

Even though confidentiality of records is still the default,<sup>37</sup> the legislative tides are turning in favor transparency. Since the summer of 2020, five states have enacted legislation to remove restrictions on public access and expand the types of information to be disclosed.<sup>38</sup> We urge lawmakers to continue this trend in the upcoming session. Transparency is a prerequisite to accountability and rebuilding public trust in the police. NPAP is eager to assist with these efforts. Please do not hesitate to contact us at [legal.npap@nlg.org](mailto:legal.npap@nlg.org) if you are interested in ending police secrecy and impunity in your state.

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<sup>36</sup>Following New York's repeal of its police record confidentiality law, Section 50-a, some police departments like Nassau County claimed that they did not need to release records created prior to the legislation enactment. Nicole Fuller, *NYCLU sues Nassau police department over misconduct records*, Newsday, Oct. 4, 2021, <https://www.newsday.com/long-island/nassau/nassau-police-lawsuit-nyclu-1.50380463>.

<sup>37</sup>Kallie Cox and William H. Freivogel, *Police misconduct records secret, difficult to access*, ASSOCIATED PRESS, May 12, 2021, <https://apnews.com/article/us-news-police-reform-police-government-and-politics-fa6cbd7e017b85aa715e23465a90abbe>.

<sup>38</sup> California (SB 16), New York (SB 8496), Massachusetts (SB 2963), Colorado (HB 19-1119), Virginia (HB 2004).