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ACCESS TO POLICE PERSONNEL FILES: PROBLEMS FOR THE PRACTITIONER

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Although the language of 42 U.S.C. § 1983 comes from the 1966 Civil Rights Act, it was not a viable means to assert or protect these rights through the judicial process for many years. Prior to the U.S. Supreme Court decision in *Monroe v. Pape*,[1] it was extremely difficult to recover compensation from either a state actor or a political entity. Even after *Monroe* made direct actions against law enforcement officers a greater possibility, there were only 172 civil rights filings in the federal courts.[2] After further decisions by the U.S. Supreme Court, particularly in *Monell v. Dept. of Social Services*,[3] which held that a municipality could be liable for damages in an appropriate case, this type of litigation exploded. In 2013, the last year available for statistics, there were more than 35,000 pending civil rights cases in state court.[4] Municipal liability is a goal in these cases because "[t]he major reason to estab-

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[1] 365 U.S. 167 (1961).

[2] *See generally*, THEODORE EISENBERG, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482 (1982). The information about 1976 filings is on page 534 of the article.

[3] 436 U.S. 658, 691 (1978).

[4] The Administrative Office of the Courts contains this information on its website as to civil rights cases. Note that this includes not only Section 1983 cases, but also other types of civil rights allegations such as voting rights, employment discrimination, and the Americans with Disabilities Act.

> Civil rights-related filings in the federal courts began to climb soon after the Civil Rights Act of 1964 was signed into law, jumping from 709 cases in 1964 to 1,123 cases by 1965. In 2013, a total of 35,307 civil rights cases (pdf) were filed in federal court, 50 times the number of cases filed in 1964, and a 27 percent jump over the last two decades.

http://www.uscourts.gov/news/2014/06/09/over-two-decades-civil-rights-cases-rise-27-percent (last accessed March 13, 2016).

lish municipal liability was elementary – to reach a deep pocket in circumstances where the municipality did not willingly indemnify its police employees." [5]

A successful civil rights action pursuant to 42 U.S.C. § 1983 against a law enforcement officer poses many hurdles for the plaintiff. There must be a showing that an officer acted under color of law. The individual acting under color of law must violate the constitutional right of another person. If a constitutional right is violated, it must be apparent from clearly established law that the action is a constitutional violation. Yet, with all of these issues, there is still no municipal liability unless it can be shown that the officer followed a policy of the hiring agency, or that the officer followed a practice or custom that was so widespread and continuous that it constitutes policy.

Unlike many other forms of liability for employers, Section 1983 cases require that the municipality which hired the officer either have a policy in place that violates the constitutional rights of another, or that a custom or practice is in place that it might as well be a policy.[6] A policy is something formal, written, and approved by the policymakers. It is seldom that a local government has a policy that violates someone's constitutional rights. The focus for local government liability, then, focuses upon whether there is a custom or practice in place that has the force of policy, even if that custom or practice is contrary to properly established policy. To use an extreme example, a departmental regulation requires that an officer be faced with actual physical resistance accompanied by a reasonable belief the officer is about to lose control of a situation before an electronic control weapon (ECW), or Taser; however, in practice, if a driver fails to provide a driver's license immediately upon requests that driver is tased; or, if a driver questions the reason for a traffic stop at all that driver is tased. Despite the lawful policy stated in the regulation, the actual practice outlined can lead to municipal liability.

To establish that a practice or custom is really how things are done, regardless of what the municipal policy statement may provide. So, the plaintiff has to obtain

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[5] G. FLINT TAYLOR, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases*, 48 DePaul L. rev. 747 (1999). (hereafter "Litigator's View").

[6] A third possibility for local government liability is that final policy making authority has been granted to a particular official, and while exercising such authority that official violates the constitutional rights of another person. Pembaur v. City of Cincinnati, 475 U.S. 468, 481-2 (1986). This basis of municipal liability is not discussed in this paper; *see also,* KAREN M. BLUM, *Section 1983 Litigation: The Maze, the Mud, and the Madness,* 23 Wm. & Mary L. J. 913, 914-20 (2015).

statistical evidence to demonstrate that the practice or custom is in place, that the municipality is on at least constructive notice of this issue and, in some cases, which the municipality is deliberately indifferent to the fact that the practice occurs.[7] The problem is how the evidence to make that claim is obtained in the first place. A general request for information – whether through litigation discovery, or an open records request – is not likely to produce the information requested. In the first situation, the discovery request is really a fishing expedition that hopes to establish a point that the plaintiff cannot prove. In the latter, the information tends to be part of an officer's personnel file, and absent some kind of disciplinary action can be protected from disclosure.

One set of developments is to get at least information about individual officers as a part of discovery in criminal cases which involve the officers. Such a production of information can easily occur without the municipal attorney even knowing of the request. The request comes in the course of criminal discovery, and the prosecuting attorney obtains it, turns it over, and perhaps does not even seek a protective order to limit its use. If that happens, that source of information is in the public record and can typically be obtained by a request for copies of court records. The information is released in criminal discovery pursuant to *Brady v. Maryland*.[8]

Similar information becomes readily available if released in civil litigation particularly civil rights litigation, without the entry of a protective order to limit the use of the information. The purpose of this presentation is to outline the issues presented in these two situations, and to recommend arguments that can be used either to negate disclosure, or to at least limit it use beyond the immediate case for which it is granted. A little more background on the issues is important.

A Primer on how Brady may permit access to police personnel files.

In a criminal prosecution, the defendant is entitled to receive any *exculpatory* information available to the prosecutor. Evidence that would be material to guilt, for example, appears to refer to evidence such as a DNA test which questions inclusion of the defendant as a participant in a rape case. But, *Brady* also applies to

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[7] Litigator's View at 750-753.

[8] 373 U.S. 83, 87 (1963). The Court stated *Brady's* due process protection and held "the suppression…of evidence favorable to an accused upon request violates due process where the evidence is material either to guilty or to punishment." Id.

evidence which might mitigate the penalty, or that can be used to impeach a witness. *Giglio v. United States*.[9] This expands the parameters and the scope of information that a prosecutor needs to explore in a criminal case, or that a criminal defendant may request. A key, though, is that the prosecutor is to obtain and produce such evidence even in the absence of a request by the criminal defendant. *United States v. Bagley*.[10] The prosecutor is expected to make affirmative efforts to learn of any such favorable evidence known to those working on behalf of the government, including the police.[11] This affirmative obligation to discover and turn over such information is demanding, and if it is later learned that evidence available at the time of trial was not produced by the prosecution, then a new criminal trial can be ordered,[12] and civil litigation for a civil rights action may be appropriate.[13]

Even in relatively minor criminal cases – e.g., resisting arrest – attorneys assert the right to review the arresting officer's personnel file pursuant to *Brady* and its progeny. Prosecutors without a history of defending civil rights cases, and judges not accustomed to discovery disputes in civil cases, can read *Brady* and its progeny to require disclosure in that are not clear cut. For example, if a defendant faces charges for assaulting a law enforcement officer, then the officer's propensity to violence, as demonstrated in personnel or evaluative materials on the use of force, qualifies as *Brady* material. But, how far does this go to require disclosure. If a police force, for example, has an internal review system with designations such as "sustained," or "not sustained", is it permissible to obtain all force complaints against the officer, or only those which have resulted in discipline? If "not sustained" occurs because a complainant did not cooperate with the police – i.e., the officer said versus the complaint said – and there are no witnesses, should that particular information be turned over? More to the point, is that information subject to further investigation which might be presented in the criminal case; could, for example, defense counsel find a witness in a "not sustained," case to testify that the officer's actions in such a complaint are consistent with the alleged actions of the defendant on trial, and thus the fact finder should consider it when making the determination as to the defendant's guilt?

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[9] 405 U.S. 150, 154-55 (1972).

[10] 473 U.S. 667, 682 (1985).

[11] Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[12] Wearry v. Cain, 2016 WL 854158 (U.S.Sup.Ct., March 7, 2016) (*per curiam*); Lewis v. Connecticut Com'r of Correction, 790 F.3d 109 (2nd Cir 2015).

[13] *See* Poventud v. City of New York, 750 F.3d 121 (2nd Cir. 2014).

Or, the officer has been disciplined by the Department for untruthfulness, or dishonesty during an investigation, is such discoverable evidence can be admissible to impeach the officer's testimony even if the two situations lack any other similarity? For that matter, is there a statute of limitation on the use of such a record? Prior convictions, unless the circumstances demonstrate a pattern of conduct, are typically limited by evidentiary rules.[14] Of course, once such information is released, particularly if testimony is permitted, the impact is not only on the direct case in point, but it also can have an impact as to that officer's ability to serve since credibility can be a major issue in all future cases.

The U.S. Supreme Court has never ruled that *Brady* applies to police personnel files.[15] The decisions on exculpatory evidence usually deal with material that is "in the file," which commonly refers to the case file for a discrete matter. Yet, if a police witness in the prosecution's case has been disciplined for dishonesty on numerous occasions, it is difficult to conclude that the prosecuting attorney is absolved of any obligation to review such information simply because the individual personnel file of an officer is not automatically a part of the criminal file in a prosecution. Where is the line drawn between what the prosecutor must determine and disclose, and the point where inquiries are deemed sufficient and the prosecutor has gone far enough. Is constructive knowledge of an officer's faults sufficient? Can a prosecutor appreciate how information about an officer in a personnel file could be favorable, or even crucial, to defense counsel, and if not, how can the prosecutor ever vouchsafe that all reasonable efforts have been made to make such a determination? Should such a determination be made by the trial court via an *in camera* inspection? Does the prosecutor winnow the personnel file before such an inspection so that clearly irrelevant material is excluded? Does the defense counsel get the opportunity to review the evidence to point out what the reviewing judge should consider? And, if so, is there any real safeguard against the intentional or accidental disclosure of information about an officer that otherwise would not be public knowledge?

These are all the kinds of questions that have arisen in this effort to obtain information about the personnel files of particular officers. The looming question is whether the principles that favor disclosure in a criminal prosecution automatically apply to gain access to police personnel files in a civil rights action, especially when

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[14] *See, e.g.*, Fed. R. Evid. 609 (b); *see, e.g.*, Wierstak v. Heffernan, 789 F.2d 968, 971-2 (1st Cir. 1986); Powell v. Levit, 640 F.2d 239, 241 (9th Cir. 1981).\

[15] *See* JONATHAN ABEL, Brady's *Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stanford L. Rev. 743,751 (2015). (hereafter Brady's Blind Spot")

the plaintiff seeks to prove a custom or pattern of misconduct that is the equivalent of a policy determination.

A Primer on how a Monell claim may include access to police personnel files.

It is established that a local government is not liable in a civil rights action simply because it employees a tortfeasor. Rather, the government is liable only if its policy, or a practice or custom with the force of policy, is the moving force behind a constitutional violation. *Monell v. Dept. of Social Services.*[16] This test is extremely hard to meet, but it has been done on occasion. The 2nd Circuit has found that the consistent refusal to take domestic violence claims seriously by police management – who were also the ones responsible for police training – can present a question of fact on a *Monell* custom or practice claim. *Okin v. Cornwall-on-Hudson Police Dep't,* 577 F.,3d 415, 439-40 (2009). However, even with repeated incidents of the plaintiff being ignored by the local police, in part perhaps because the assailant was friends with and socialized the local officers, the Court did not permit a trial on the *Monell* claim before it first found that police inaction shocked the conscience. This substantive Due Process standard was favored over the acceptance of a state created danger exception to municipal liability the plaintiff suggested. *Id*. In *Okin*, the plaintiff was able to establish a number of reports and calls about her situation for which no report was even made of the complaint. It was an accumulation of information that permitted the *Monell* claim to proceed to trial.

Similar results have occurred when a police agency refused to acknowledge misconduct on the part of an officer who later committed a crime against a person taken into custody. The fact that an officer had a history of violence towards women was totally ignored when complaints were made to his department. So when he raped a suspect in a traffic stop, the local government was held liable because it simply ignored the history of misconduct.[17] In another such case, the Eighth Circuit found *Monell* liability on a custom and practice theory when it was established that the police department either avoided, ignored, or covered complaints of physical and sexual misconduct by one of its officers.[18] Still, the mere existence of complaints does not trigger liability; there must be proof of a refusal to pay any attention

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[16] 436 U.S. 658, 691 (1978).

[17] *See* Parrish v. Luckie, 963 F.2d 201, 204-05 (8th Cir. 1992).

[18] Harris v. City of Pagedale, 821 F.2d 499, 501-06 (8th Cir.), *cert. denied*, 484 U.S. 986 (1987); *see also,* Beck v. City of Pittsburgh, 89 F.3d 966 (3rd Cir. 1996); Davis v. Carter, 452 F.3d 686 (7th Cir. 2006).

to the information to establish a custom or practice of permitting or encouraging excessive force.[19]

SUGGESTED STEPS TO PROTECT POLICE PERSONNEL FILES FROM DISLOSURE

1. *Develop a relationship with the prosecutor and the relevant municipal departments with access to such information.*

PRACTICE POINTER: Establish contacts to assure the earliest possible notice of a request for police personnel files.

a. *Get a seat at the table.*

It is clear to see the interest that defense counsel in civil rights litigation has towards the protection of these files, but prosecutors and other municipal departments do not necessarily share that interest. In the case of the prosecuting attorney, particularly in areas where criminal cases to just a few judges, an initial ruling on such an issue easily becomes the common ruling on that issue. Even so, it is important to work with the prosecuting attorney's office to assure notice as soon as such as request is made so that appropriate legal action can be taken. It is not clear that in a request for criminal discovery evidence the local government has standing to challenge a motion to produce personnel files. So, assistance from the prosecuting attorney in such a case at least to make the motion, and perhaps to allow the municipal attorney to argue it, is the first step.

b. Arrange to find out as quickly as possible.

It is unlikely an involved officer will know the personnel file has been requested. With the exception of suppression motions, and bail hearings, a great deal of pre-trial criminal work does not include testimony from witnesses. Knowledge of a motion, or a subpoena, to produce a police personnel file may not reach the municipal attorney's office until it is too late. A relationship with the prosecuting attorney can help, but agreement with the Human Resources Department, or the

[19] Rogers v. City of Little Rock, 152 F.3d 790, 799 (8th Cir. 1998).

appropriate Division of the Police Department, that the municipal attorney be notified as soon as a request is made can provide valuable time to resist disclosure. Further, it can also prevent a prosecutor from a commitment to produce such information, and then have to appear before the same judge with a contrary position.

2. *Know what the law in your jurisdiction provides in terms of access to these files.*

PRACTICE POINTER: There are numerous laws and court decisions that could impact how access to police personnel files is determined. There is no general rule. Determine what law applies in your State, how access is provided, and what steps much be taken.

There are numerous ways that state law has addressed the issue of disclosure of police personnel files, even in criminal cases pursuant to *Brady*.[20] One of the most established approaches is in California where disclosure arose from state court decisions, and then become codified as part of state procedural rules.

a. *An example of a state that provides "no access" approaches.*

In California there are approximately 500 separate law enforcement jurisdictions that employ approximately 80,000 officers. This constitutes one tenth of all employed law enforcement officers in the United States.[21] State law makes the personnel records of law enforcement are confidential and not subject to disclosure in criminal or civil trial proceedings "unless the party seeking the information shows 'good cause for the discovery or disclosure sought.'"[22] The statutory protections arose out of a decision of the California Supreme Court which permitted criminal defendants to subpoena material from police personnel files. *Pitchess v. Superior Court*.[23] In 1978, four years after this decision, the California legislature enacted

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[20] *See infra n.* 15. Some state laws do not permit access to police personnel files. Brady's Blind Spot at 762-76. Other states have public access regimes in place, and these statutes significantly impact requests for such information. *Id.,* 770-772. There is also a group of states that not only permit access, but have specific disclosure regimens in place. *Id.,* 77-774. Finally, there are a group of states that permit access, but preclude disclosure. *Id.,* 775-779.

[21] Brady's Blind Spot at 762-3.

[22] *Id.* at 763.

[23] 522 P.2d 305, 309 (Cal. 1974)(en banc).

legislation intended to preclude discovery of these files in civil cases. However, even prosecuting attorneys were held to be precluded from access to these files.[24] This conclusion has recently been challenged by decisions of the California appellate courts.[25]

b. *An example of public access approaches.*

Perhaps the Florida approach is the standard for this type of access to these files. It makes records of police misconduct publicly accessible. There is no reason for the prosecuting attorney to seek access to this information because it is available to the public. Even so, in some of these states the prosecuting attorney wishes to review the files before they are actually disclosed. Of course, there is nothing to preclude a similar request by the municipal attorney.[26]

c. *An example of access and disclosure approaches.*

These states permit prosecutors access to police personnel files, but do not permit similar access to criminal defendants. The State of Washington provides an example of this approach. By model rules adopted statewide by various groups, the prosecutor is allowed file access to determine if any possible *Brady* material exists.[27] If *Brady* material is found, then the prosecutor provides that information to the criminal defendant.

d. *An example of access without disclosure approaches.*

In Michigan, a question arose as to the applicability of *Giglio* to state cases. It was determined that *Giglio* dealt only with federal prosecutions, so there was no duty of the prosecutor to review police personnel files for *Brady* material.[28] In one

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[24] *See e.g.*, City of Los Angeles v. Superior Court, 52 P.3d 129, 134 (Cal. 2002). For more information on the statutory and case law development in California, *see also*, MIGUEL A. NERI, *Pitchess v. Brady: The Need for Legislative Reform of California's Confidentiality Protection for Peace-Officer Personnel Information*, 43 McGeorge L. Rev. 301 (2012).

[25] Brady's Bland Spot, at 765-66.

[26] Other states that have a similar approach to these files are Texas, Minnesota, Arizona, Tennessee, Louisiana, Kentucky, and South Carolina. *See Id.*, at 770-772.

[27] *Id.*, at 773.

[28] *Id.*, at 776.

state, West Virginia, a prosecutor reported an awareness of access to these files, but only recently actually looked at the files.[29]

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The point of this review is to alert the municipal attorney to the fact that there is no "common" approach to the access question. An appendix to this paper includes a state by state review of relevant statutory provisions. The key is that while the prosecutor will be interested in a conviction that can withstand appellate scrutiny, this interest may not be totally aligned with a municipal attorney's interest that information not become a part of a public record unnecessarily, or where appropriate, pursuant to certain protections. To accomplish the above noted practice pointer, then, counsel needs to review both the statutory and case law in an individual state to know best how to proceed.

3. Problems with *in camera* review of these files.

PRACTICE POINTER: Try to obtain agreement about the scope of *in camera* review by a trial court, and who can be present at such review.

The most practical way to resolve what information should be provided to the criminal defendant readily appears to be to have an *in camera* review by the trial court. Yet, this approach produces numerous problems for the municipality in terms of future civil litigation, and also presents serious problems for the prosecutor. An agreement with the prosecutor as to the scope of such review is a critical step to take to avoid unnecessary public disclosure.

Of course, a trial judge should be able to tell what constitutes impeachment evidence in a criminal case, or exculpatory evidence such as a propensity of a particular officer to violence. The fact is that such a review may not be clear at all. What constitutes a relevant criminal defense theory may not be obvious to the trial judge. Without a sensitivity that tracks what the defense counsel believes may mean that such an investigation is of limited value. For example, if the issue is resisting arrest, the trial court may believe that the use of force in various confrontations by an officer suggests the evidence is relevant. But, there is a difference between the use of force when a criminal suspect is in the act of being arrested, and when a suspect is running from the police, hiding from the police, or otherwise is at large.

[29] *Id.*, at 777.

Too broad of a definition permits information to be disclosed that is really not relevant to the issue at hand, but the disclosure in the public record of such information creates difficulties for the officer and the municipality.

One step that should be taken is to attempt to get a specific listing of the types of information the trial court wants for such an inspection. The statutory definition in a state of a personnel record, or where a personnel record is maintained, can be a starting point. At least one state, California, has a provision that frivolous complaints against law enforcement officers are to be maintained in files separate from an officer's personnel file.[30]

4. Keep the records of police disciplinary actions as protected as possible.

PRACTICE POINTER: If a police disciplinary file is provided to opposing counsel, obtain a protective order to limit the use of that file to the case at hand, and to require the return of any materials at the conclusion of the trial. Also insist that such information be maintained under seal, and the use cannot be expanded without the express written consent of the trial court.

For states that readily apply *Brady* and *Giglio* in criminal cases to mandate the disclosure of police disciplinary matters, another mechanism to limit the potential problems that creates in a civil case is a protective order. Similarly, in civil cases where such information is sought to establish a *Monell* claim, a protective order is also available and should be used.

The plaintiff's bar in civil cases are eager to share any information or conclusions to be drawn from access to police disciplinary files. A *Monell* claim seeks to establish not only that a particular officer did not respect the constitutional rights of a plaintiff, but that an entire department – and, therefore, an entire municipality – does not respect such rights. The way to prove this is the use of statistics. With challenges to the process of discipline, the frequency of discipline, and the adequacy of discipline, plaintiffs wish to reach:

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[30] *See* Cal. Pen. Code §§ 832.5 (c); (d) (1); *see also,* JULIE C. SCOTT, *Fundamentals of Opposing Motions for Discovery of Peace Officer Personnel Records (Pitchess Motions)* (2012) at 12. (www.cacities.org/getattachment/2866733c-d868-4ab2-8e17-6904f865ec78/Pitchess-Motion-Fundamentals-for-League-Webinar-Pa.aspx) (last accessed March 14, 2016).

> …the major goal of plaintiff's lawyers in proving a failure to discipline case [which] is to show that the police disciplinary process, both formal and informal, is woefully inadequate, with the result that the department fails to discipline officers, as a matter of policy and practice, in the great majority of meritorious police abuse cases that are brought to its attention.

G. FLYNT TAYLOR, *A Litigator's View of Discovery and Proof in Police Misconduct Policy and Practice Cases,* 48 DePaul L. Rev. 747, 751 (1999). The ability to share the information from one case to the next, from one attorney to the next, only facilities the ability to meet this standard in a subsequent case. There are numerous problems with such sharing. For one thing, there is a difference between data, information, and knowledge.[31] Data, might be the number of investigations that an allegation of misconduct is "not sustained," or "not resolved". This classification may occur because the complainant would not cooperate, there were no witnesses, or because the information from the complainant and the officer are plausible though in conflict. When treated merely as data, a conclusion could be drawn that these cases should be included as examples of misconduct by a particular officer.[32] The disclosure of data, however, without a context lacks sufficient reliability to act on it.[33]

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[31] *See* JAMES F. GILSINAN, *The Numbers Dilemma: The Chimera of Modern Police Accountability Systems*, 32 St. Louis L. Rev. 93, 106-108 (2012). (hereafter "Numbers Dilemma").

[32] The plaintiff's bar tends to see such information in a more damning light:

> …The police and practice of failure to discipline operates hand in hand with police "code of silence," a closely related practice and custom that is manifest in all police departments. This code of silence further aids the offending officer in escaping disciplinary reproach. Additionally, another important, although not indispensable, element of the causation equation is the existence of prior complaints of brutality and misconduct against the defendant violator. "Not sustained" findings in these cases further establish the police defendant's expectation of immunity from punishment when he brutalizes the plaintiff, and demonstrate some degree of prior notice to the municipality.

Litigator's View at 752.

[33] Numbers Dilemma at 108.

Conclusion

State law governs whether access to police disciplinary files is permitted, or under what circumstances it is permitted. The combination of *Brady* and *Giglio* is being used to gain access to an officer's disciplinary history to establish a defense in a criminal case, but once such information is in the public domain it can also be used to suggest that a department follows an unconstitutional pattern or practice for purposes of civil rights litigation. In addition, open records laws, and *Monell* claims in litigation, can lead to the disclosure of a tremendous amount of data. It is important for the municipal attorney to work with the local prosecutor to minimize the release of such data in the criminal setting, and to seek protective orders as to the use or publication of such data.

APPENDIX
(State law approaches to disclosure of police personnel files)

ALABAMA

Police personnel files are generally available to the public. Ala. Code Ann. § 36-12-40.

ALASKA

While no state law expressly holds that police personnel files are confidential, local governments can approve an ordinance which would exempt the release of any law enforcement record that would constitute an unwarranted invasion of personal privacy. Alaska Stat. §§ 39.25.080; 40.25.120

ARKANSAS

Police disciplinary records are not subject to disclosure unless the records are part of an evaluation which resulted in the suspension of termination of the office. Ark. Code Ann. § 25-19-105 (c) (1)

CALIFORNIA

Law enforcement personnel files are confidential. Cal. Penal Code § 832.7

COLORADO

The disciplinary records are not expressly exempted from disclosure, but such records are withheld pursuant to the Colorado Criminal Justice Records Act which grants discretion to the custodians, and the Colorado Open Records Act which exempts personnel records from disclosure. *Freedom Colorado Information, Inc. v. El Paso County Sheriff's Dept.,* 196 P.3d 892 (2008); *see also,* Col. Rev. Stat. Ann. §§ 24-72-304-305.

CONNECTICUT

The Connecticut Freedom of Information Act exempts police disciplinary records from disclosure if it would constitute an unwarranted invasion of personal privacy. However, the Connecticut Supreme Court has made it difficult to exempt such records in *Perkins v. Freedom of Information Commission,* 228 Conn. 158, 63 A.2d 738 (1993).

DELAWARE

Police disciplinary records are protected from disclosure by the Delaware Law Enforcement Officer's Bill of Rights, and by the privacy exemption contained in the Delaware Freedom of Information Act.

DISTRICT OF COLUMBIA

Police disciplinary records are generally exempt from disclosure by the exemption for privacy in the District Freedom of Information Act. D.C. Code § 2-543(a)(2).

FLORIDA

Police disciplinary records, except those under active investigation, are subject to disclosure under Fla. Stat. Ann. §§ 112.533 (2)(a); 119.

GEORGIA

Police disciplinary records, except those under active investigation, are subject to disclosure under Ga. Code Ann. § 50-18-72 (a)(8) (2004).

HAWAII

Police disciplinary records that relate to a dismissal are public record. Hawaii Rev. Stat. § 92F-14. Otherwise, such records are generally confidential.

IDAHO

Police disciplinary records are exempt from disclosure. Idaho Code § 74-106.

ILLINOIS

The Illinois Freedom of Information Act has been used to withhold disclosure of police disciplinary records. However, an appellate ruling has made certain records subject to disclosure. *Kalven v. City of Chicago*, 379 Ill. 903. 467 N.E.3d 741 (Ill. App. 2014); 5 Ill. C. Stat. 140/7 (1)(n).

INDIANA

Police disciplinary records are subject to disclosure only if they relate to demotion, suspension, or termination. Ind. Code § 5-14-3.

IOWA

Police disciplinary records are confidential. However, if an officer is terminated, the fact the officer was terminated is subject to public disclosure. Iowa Code § 22-7-11.

KANSAS

As a general rule, police disciplinary records are exempt from disclosure. Kan. Stat. § 45-221.

KENTUCKY

Police disciplinary records are open to the public unless there is a compelling privacy reason not to disclose the information. Ken. Rev. Stat. § 61.878 (1)(a). The Kentucky Attorney General has stated in several Open Records Decisions that disciplinary records for on-the-job misconduct are open records.

LOUISIANA

The open records law does not preclude disclosure of police disciplinary records. Attempts to withhold disclosure under a state constitutional privacy claim has been rejected by the Louisiana Court of Appeals. *City of Baton Rouge v. Capital City Press,* (La.App. 1 Cir. 02/03/09), 7 So.3d 12.

MAINE

Police disciplinary records, except those under active investigation, are subject to disclosure under M.R.S.A. §§ 503(1)(B)(5); 7070(2)(E).

MARYLAND

Police disciplinary records are exempt from disclosure even if the person who makes the request seeks records concerning the investigation of that person's complaint. Md. Code Ann. § 4-311; *see also, Maryland Dept. of State Police v. Dashiell,* 443 Md. 435, 117 A.3d 1 (2015).

MASSACHUSETTS

Police disciplinary records are exempt from disclosure . Mass. Gen. Laws ch. 4 § 7(26)(c). However, the Supreme Judicial Court has ordered the release of records of police misconduct to a local news organization. *Worcester Telegram & Gazette Corp. v, Chief of Police Of Worcester,* 436 Mass. 378, 764 N.E.2d 847 (2004).

MICHIGAN

Police disciplinary records are generally exempt from disclosure as an unwarranted invasion of privacy, or because there is no overriding public interest in disclosure of such a record. Mich. Comp. Laws. Ann. §§ 15.243.1(a) (s).

MINNESOTA

Police disciplinary records are accessible to the public. Minn. Stat. Ann. § 13.43.

MISSISSIPPI

Police disciplinary records are exempt from disclosure. Miss. Code Ann. § 25-1-100.

MISSOURI

Police disciplinary records generally have been exempted as personnel records. Mo. Rev. Stat. § 610.021 (13). However, a Missouri appellate court has concluded that there is no privacy interest in records of on-the-job misconduct. *Chassnoff v. Mokway,* 466 S.W.3d 571 (Mo.App. 2015).

MONTANA

State statute protects such records from disclosure if there is an individual privacy interest that outweighs public disclosure. Mont. Code Ann. § 2-6-102; Art. II, § 10, Mont. Const. However, the Montana Supreme Court has permitted disclosure in disciplinary actions against public employees. *Missoula County Public Schools v. Bitterroot Star*, 278 Mont. 451, 345 P.3d 1035 (2015).

NEBRASKA

Police discipline information is exempt from public disclosure. Neb. Rev. Stat. Ann. § 84-712.05 (7).

NEVADA

As a general rule, police disciplinary records are confidential. Nev. Admin. Code § 284.718.

NEW HAMPSHIRE

Police disciplinary records are exempt from disclosure as personnel records. N.H. Rev. Stat. Ann. § 91-A:5.

NEW JERSEY

Police disciplinary files are confidential and exempt from disclosure. N.J. Stat.Ann. § 47:1A – 10.

NEW MEXICO

In *Cox v. New Mexico Dept. of Public Safety,* 148 N.M. 934, 242 P.3d 201 (2010), a New Mexico appellate court concluded that citizen complaints and investigations were public records. The case was initially granted review by the New Mexico Supreme Court, but that decision was later quashed.

NEW YORK

Police disciplinary records are confidential under New York law. New York Civil Rights Law § 50-a.

NORTH CAROLINA

While the date of the suspension or demotion of a police officer is subject to public disclosure, disciplinary records or even the reasons for suspension or demotion are not subject to release. However, if an officer is terminated, the reason for the termination is subject to public disclosure. N.C. Gen. Stat. §§ 153A-98; 160A-168.

NORTH DAKOTA

Police disciplinary records are public records. N.D. Cent. Code § 44-04-18.

OHIO

Police disciplinary records are public. Ohio Rev. Code. Ann. § 149.43.

OKLAHOMA

If police disciplinary records are final, and result in the loss of pay, suspension, demotion, or termination, they are subject to disclosure. Okla. Stat. Ann. § 551-24A.7.

OREGON

Police disciplinary records and other records that concern discipline actions are generally exempt from disclosure. Or. Rev. Stat. Ann. § 192.501(12).

PENNSYLVANIA

Police disciplinary records are generally exempt from disclosure. Pa. Cons. Stat. Ann. § 67.708(b). However, a demotion or termination is public information although the reason for such disciplinary action is not.

RHODE ISLAND

Individual police disciplinary files are confidential. R.I. Gen. Laws Ann. § 38-2-2(4)(A)(1)(b). Aggregate information about complaints or police misconduct is subject to disclosure if all personal identifying information is redacted.

SOUTH CAROLINA

Police disciplinary records appear to be protected by S.C. Code Ann. § 30-4-40. However, records that provide information about unethical or illegal activities committed by law enforcement on duty have been held not to be exempt from disclosure. *Burton v. York Sheriff's Dept.,* 358 S.C. 339, 594 S.E.2d 888 (2004).

SOUTH DAKOTA

Police disciplinary records are confidential personnel records exempt from disclosure. S.D. Codified Laws § 1-27-1.5(7).

TENNESSEE

Police disciplinary records are not expressly exempt from disclosure.

TEXAS

Police disciplinary records are generally open to the public. Tex. Gov't. Code Ann. § 552. If an officer has received a demotion or loss in pay, the civil service laws on this issue are open to disclosure. Tex. Loc. Gov't. Code § 143. Otherwise, these records are not readily subject to disclosure.

UTAH

If charges against an officer are substantiated, then police disciplinary records are subject to disclosure. Utah Code Ann. § 63G-2-301 (3)(o).

VERMONT

For local police officers, the public interest in disclosure outweighs any privacy interest asserted by the officer. *Rutland Herald v. City of Rutland,* 195 Vt. 85, 84 A.3d 821 (2013). However, this ruling does not apply to the Vermont State Police. *See Rutland Herald v. Vermont State Police,* 191 Vt. 357, 49 A.3d 91 (2013).

VIRGINIA

Police disciplinary records are exempt from disclosure pursuant to the Virginia Freedom of Information Act. Va. Code Ann. § 2.2-3705.1.

WASHINGTON

As a general rule, police disciplinary records can be disclosed to the public. Was. Rev. Code Ann. §

WEST VIRGINIA

The West Virginia appellate courts have ruled that on-the-job police misconduct is not protected from disclosure by a privacy interest. *Charleston Gazette v. Smithers,* 232 W.Va. 449, 752 S.E.2d 603 (2013).

WISCONSIN

Except for records that are part of an active investigation, police disciplinary records are subject to disclosure in Wisconsin. Wis. Stat. Ann. § 19.36 (10((b).

WYOMING

Police disciplinary records are confidential in Wymoing. Wyo. Stat. Ann. § 16-4-203(d).