Civil Rights litigation filed under 42 U.S.C. § 1983 is generally brought against the individual officers/deputies involved in the subject contact, the head of the department (Chief of Police/Sheriff), the department itself, and the municipality employing the individual officers/deputies. In most cases, the vast majority of documents that will be used as exhibits at trial and produced during discovery will come from the Defendants. For cases involving a police contact, the documents that capture the subject incident are likely to include a police report, in car-camera footage, body worn camera footage, CAD call reports, 911 call audio, dispatch audio, and photographs. Additionally, there are also personnel and training files for the individual officers. These include their work history, hiring packet, certifications and acclamations, training file, educational history, payroll history, internal affairs files and discipline history. Other relevant records will include the Department's policies and procedures.

In responding to discovery or preparing initial disclosures, defense counsel should be aware of the law surrounding privilege as they relate to police records. This paper outlines certain privileges that are recognized by federal courts which protect certain police records.

Law Enforcement Privilege

The law enforcement privilege protects information pertaining to "law enforcement techniques and procedures," information that would undermine "the confidentiality of sources," information that would endanger "witnesses and law enforcement personnel [or] the privacy of individuals involved in an investigation," and information that would "otherwise…interfere with an investigation." *In re The City of New York* (2nd Cir. 2010) 607 F.3d 923, 944. An investigation does not need to be ongoing for the privilege to apply, as "the ability of a law enforcement agency to conduct future investigations may be seriously impaired if certain information is revealed to the public." *Nat'l Congress for P.R. Rights ex rel. Perez v. City of N.Y.* (S.D.N.Y. 2000) 194 F.R.D. 88, 95; *see also*, *Halpren v. FBI* (2nd Cir. 1999) 181 F.3d 279, 294.

The party asserting the privilege bears the burden of showing that the privilege applies to the documents in question. *In re Sealed Case,* (D.C. Cir. 1988) 856 F.2d 268, 271-72.

The privilege is qualified, not absolute, and can be overridden in appropriate cases by the need for the privileged materials. *In re Sealed Case*, 856 F.2d at 272; *Tuite v. Henry* (D.C. Cir. 1996) 98 F.3d 1411, 1417-18. However, the presumption is "pretty strong" against lifting the privilege, and thrusting the courts into the criminal investigation process. *Dellwood Farms, Inc. v. Cargill, Inc.* (7th Cir. 1997) 128 F.3d 1122, 125.

To rebut the presumption, the party seeking disclosure must show (1) that the suit is non-frivolous and brought in good faith, (2) that the information is not available through other forms of discovery or other sources, and (3) that there is a compelling need for the information sought. *In re city of New York*, 607 F.3d at 945, citing, *Friedman v. Bache Halsey Stuart Shielfs, Inc.* (D.C. Cir. 1984) 738 F.2d 1336, 1343. If the party seeking the information overcomes the presumption by a showing as above, then the Court must still balance "the

pubic interest in nondisclosure…against the need of a particular litigant to privileged information." *In re sealed Case*, 856 F.2d at 272.

"To assess both the applicability of the privilege and the need for the documents, the district court ordinarily review the documents in question." *In re the City of New York*, 607 F.3d at 948. Court suggested requiring the party with the documents to appear ex parte with the documents in question for the court to review rather than submitting them under seal. *In re City of New York*, 856 F.2d at 949.

Several circuits have adopted the law enforcement privilege covering law enforcement techniques and procedures. *See, Commonwealth of Puerto Rico v. United States* (1st Cir. 2007) 490 F.3d 50, 64, *cert denied* 552 U.S. 1295 (2008); *In re U.S. Dept. of Homeland Security* (5th Cir. 2006) 459 F.3d 565. However, the U.S. Supreme Court and the Ninth Circuit have not recognized or rejected the law enforcement privilege. *See, Shah v. Department of Justice* (9th Cir. 2017) 714 Fed.Appx. 657, fn. 1, unpublished.

Official Information Privilege

FRCP 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression or undue burden or expense. Federal common law recognizes a qualified privilege for official information. *Kerr v. United States Dist. Ct. for N.D. Cal.* (9th Cir. 1975) 511 F.2d 192, 198, *aff'd* 426 U.S. 394 (1976). Government personnel files are considered official information. *Zaustinsky v. University of Cal.* (N.D. Cal. 1983) 96 FRD 622, 625, *aff'd* 782 F.2d 1055 (9th Cir. 1985).

Federal courts have recognized this qualified privilege as generally covering the disclosure of police material and personnel file, including officers' home addresses. *King v. Conde* (E.D.N.Y. 1998) 121 FRD 180, 187-190; *Collens v. City of New York* (S.D.N.Y. 2004) 222 FRD 249, 253.

The party resisting disclosure must make a "substantial threshold showing" of a specific harm connected to the disclosure of specific information. To make the showing, and in response to a discovery request, the party asserting the privilege must serve an objection that invokes the official information privilege by name. *Kelly v. City of San Jose,* No. C8620526 (RPA) 114 F.R.D. 653, 662-663. The party must support the objection with a declaration or affidavit sworn by an agency official with personal knowledge of the matters described therein. *Id.* Specifically, the declaration must include the following:

> (1) an affirmation that the agency generated or collected the material in issue and has in fact maintained its confidentiality (if the agency has shared some or all of the material with other governmental agencies it must disclose their identity and describe the circumstances surrounding the disclosure, including steps taken to assure preservation of the confidentiality of the material), (2) a statement that the official has personally reviewed the material in question, (3) a specific identification of the governmental or privacy interests that would be threatened by disclosure of the material to the plaintiff and/or his lawyer,

(4) a description of how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to significant governmental or privacy interest, and (5) a projection of how much harm would be done to the threatened interest if the disclosure were made.

Bernat v. Cit of Cal. City, (E.D. Cal. Oct. 12, 2010) 2010 WL 4008361.

After the thresholding showing is made, then the court must balance the potential benefits of disclosure against the potential disadvantages. *Jepsen v. Florida Bd. Of Regents* (5th Cir. 1980) 610 F.2d 1379, 1384-85. Historically, Courts have applied one of two balancing tests – open or weighted – and done so inconsistently. In the open balancing test, the court compares the advantages and disadvantages starting from a neutral position where each side and interest is given equal weight. In the weighted model, the courts begin the analysis by giving weight to specific competing interests and then balancing the weightier interests along with the rest. *Kelly,* 141 F.R.D. at 661.

Protective Orders

Absent a court order, it is generally established that documents and things produced in pre-trial discovery are presumptively public. *San Jose Mercury News, Inc. v. U.S. Dist. Court* (9th Cir. 1999) 187 F.3d 1096, 1103. However, any party may seek a protective order from the Court under FRCP 26(c), and/or the parties can stipulate to a protective order before producing otherwise privileged information. Where a party seeks an order protecting information produced in discovery from public disclosure, a good cause standard applies. *Pintos v. Pacific Creditors Ass'n* (9th Cir. 2010) 605 F.3d 665, 678. To establish good cause, the party seeking a protective order bears the burden of showing that specific prejudice or harm will result if no protective order is granted. *Phillips ex rel. Estates of Byrd v. GE Motors* (9th Cir. 1999) 307 F.3d 11206, 1210.