TO PROTECT, SERVE, AND INFORM: FREEDOM OF INFORMATION ACT REQUESTS AND POLICE ACCOUNTABILITY

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"A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[1]

James Madison

I. INTRODUCTION

On May 2, 2002, the Grand Rapids Police Department arrested sixteen men for soliciting prostitution in a sting operation.[2] Fourteen of the men spent the night in jail and received citations; the other two—a Kent County Sheriff's deputy and a Michigan state police trooper—did not.[3] Instead, they were simply told to contact their respective supervisors.[4] The next day, the Kent County Sheriff's department began an internal disciplinary investigation into the deputy's conduct.[5] Meanwhile, the Grand Rapids Press received an anonymous tip that the officers had been arrested in the sting and published a news article about the incident on May 5, 2002.[6] Suspecting that the officers received preferential treatment, the paper submitted Freedom of Information Act (FOIA) requests for copies of relevant documents contained in the officers' personnel files as well as the results of the internal affairs investigations.[7] These requests were denied.[8] The newspaper filed suit, and the Kent County Circuit Court ordered the release of several of the requested documents.[9] On appeal,[10] the Michigan Court of Appeals ruled that release of the documents was in the public interest because they "contained some

1. James Madison, *Letter from James Madison to W. T. Barry (Aug. 4, 1822), in* THE WRITINGS OF JAMES MADISON, VOL. 9 (Gaillard Hunt ed. 1910).

2. Herald Co. v. Kent Cty. Sheriff's Dep't, 680 N.W.2d 529, 530 (Mich. Ct. App. 2004).

3. *Id.*

4. *Id.*

5. *Id.* at 530–31. The deputy was charged on May 3, 2002.

6. *Id.* at 531.

7. *Id.* During subsequent litigation, the paper claimed that the misconduct would have been whitewashed or covered up if not for the news story.

8. *Id.* The agencies asserted that the records were exempt from disclosure under MICH. COMP. LAWS ANN. § 15.243(1)(a) (West 1977) (information of a personal nature, the disclosure of which would constitute an invasion of privacy), § 15.243(1)(s)(ix) (personnel records of a law enforcement agency), and § 15.243(1)(b)(iii) (investigating records compiled for law enforcement purposes, the release of which would constitute an unwarranted invasion of individual privacy). Only the first two claimed exemptions were preserved on appeal.

9. *Id.* The Kent County Circuit Court reviewed the documents in camera prior to ruling.

10. Herald Co. v. Kent Cty. Sheriff's Dep't, 662 N.W.2d 749 (Mich. 2003). The court of appeals peremptorily reversed the circuit court ruling, but the case was remanded back to that court after the Michigan Supreme Court ruled that the circuit court decision was subject to a "clearly erroneous" standard of review, rather than a de novo standard. *Id.* In its final ruling, the circuit court affirmed nearly all of the district court's order, with the caveat that the documents needed to be redacted to avoid releasing the deputy's personal information from three documents. *Herald Co.*, 680 N.W.2d at 530–35.

information from which the public could make a determination with respect to whether the deputy was given preferential treatment."[11]

Lack of transparency regarding internal investigations has long fueled distrust of police departments in the United States.[12] Given the underlying purpose of both state and federal Freedom of Information Acts is to make government information at all levels accessible to the public,[13] it comes as no surprise that police departments routinely receive and respond to FOIA requests.[14] However, in nearly half of the states an officer's disciplinary history is effectively confidential.[15] This is due to explicit statutory exemptions, vague legal precedents, and the discretion of individual government employees.[16] Still, in some cases FOIA records requests have led to the disclosure of information that contributed to public understanding of a police officer's background.[17] In 2015, records revealed that the police officer who shot twelve-year-old Tamir Rice had a letter in his personnel file which described his firearms qualifications as "dismal."[18]

Legal scholarship on open records acts focuses on the need to balance government employees' legitimate privacy interests with the need for governmental accountability and transparency.[19] Some scholarship has attempted to outline the different factors that weigh into this balance, describing the results in many cases as ad hoc and outcome driven.[20]

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11. *Herald Co.*, 680 N.W.2d at 535.

12. *See* Steven D. Zansberg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, 22 COMM. LAWYER 34 (2004) ("Furthering this mistrust is police departments' routine refusal to make available for public inspection the records of internal investigations into alleged wrongdoing.").

13. *See* Elizabeth O'Connor Tomlinson, *Litigation Under Freedom of Information Act*, 110 AM. JUR. TRIALS 367 § 2 (Dec. 2017 Update) ("FOIA makes government information accessible to the people. The cornerstone of FOIA is that individuals are entitled to know what the government is doing.").

14. DEP'T OF JUSTICE, CHIEF FREEDOM OF INFORMATION ACT OFFICER REPORT FOR 2013, https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/cfo-report-fy2013.pdf [https://perma.cc/2DKH-9D2H]. For example, the Department of Justice received 69,456 Freedom of Information Act Requests in 2012.

15. Robert Lewis, Noah Veltman, & Xander Landen, *Is Police Misconduct a Secret in Your State?*, WNYC (Oct. 15, 2015), http://www.wnyc.org/story/police-misconduct-records/ [https://perma.cc/DJ95-93HM] [hereinafter *WNYC Study*] ("WNYC spoke to attorneys and experts in all 50 states and reviewed relevant statutes and court cases to get a national picture of a local issue. We found that a police officer's disciplinary history is effectively confidential in almost half of U.S. states.").

16. *Id.* ("In some of these states, the law explicitly exempts these records from public view. In others, records are secret in practice because police departments routinely withhold them under vague legal standards or despite court precedents.").

17. Adam Ferrise, *Cleveland Officer Who Shot Tamir Rice had 'Dismal' Handgun Performance for Independence Police*, CLEVELAND..COM (Nov. 22, 2016), http://www.cleveland.com/metro/index.ssf/2014/12/cleveland_police_officer_who_s.html [https://perma.cc/K345-K7A6].

18. *Id.*

19. *See* Zansberg & Campos, *supra* note 12, at 34 (discussing "the tension between the need for free access to information and personal privacy rights").

20. *See* Elisabeth A. Walker & Elana C. Wills, *"Personnel Records" Under the FOIA: What Weighs in the Balance?*, 39 ARK. LAWYER 9, 12 (2004) ("It becomes apparent the balancing process is somewhat ad hoc, and that the personnel records custodian will at times be faced with difficult decisions in balancing

Scholarship has also defined the privacy interests that support nondisclosure[21] and has pointed to the particular public interest in ensuring fairly conducted police investigations.[22]

Many of the exemptions police departments claim, including the privacy interests of the individual officers and the need for candid feedback, can be resolved through redaction or simply do not apply to most requests.[23] A public interest balancing test is the best way to ensure that information contained in police personnel files is properly released under state open records acts and accompanying exemptions.[24] This will enable data-driven police reform.[25]

Part II reviews case law from Michigan and Maryland related to the application of FOIA exemptions to police personnel files.[26] Part III discusses the problem of police misconduct and structural reform litigation.[27] Part IV argues that the release of information to the public should not turn on artificial distinctions such as whether conduct occurred on- or off-duty, or whether an internal affairs investigation resulted in discipline.[28] Rather, records should be released unless a statutory exemption renders release not in the public interest.[29] State statutes can draw lines based on what factors may be considered in applying the test, but blanket exemptions run contrary to the logic of FOIA.[30] Statutory exemptions ensure that information is released when it actually serves the public interest and not ends in themselves.[31] Part V argues that state legislatures should require police to release aggregated data regarding misconduct, civilian complaints, and internal affairs

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the public and private interests at stake. . . . Ultimately, however, the outcome will be driven by the particular surrounding circumstances.").

21. *Id.* at 11.

22. *See, e.g.*, Zansberg & Campos, *supra* note 13, at 37 ("Providing public access to internal investigation files of police departments not only promotes public confidence in the ability of the police 'to police themselves,' it also builds greater trust and mutual respect between the officers in uniform and the public whose interests they have sworn to serve.").

23. *See infra* Part IV (setting out a framework for evaluating the various exemptions applicable to police personnel files).

24. *See infra* Section V.B. (a Model FOIA, requiring police to proactively release information pertaining to internal affairs investigations, citizen complaints, and records regarding the use of force by officers). As used in this article, the term "police personnel files" includes records of internal affairs investigations, citizen complaints against an officer—and records generated in response—and any records pertaining to the conduct of an individual officer.

25. *See infra* Section V.A (arguing that states should adopt legislation requiring police departments to release data to empower advocates of police reform to provide a measure of external accountability).

26. *See infra* Part II (comparing the approaches taken by two states in response to open records requests seeking police personnel files).

27. *See infra* Part III (discussing police violence and the federal response to #BlackLivesMatter).

28. *See infra* Part IV (reviewing and dismissing arguments against the release of police personnel files).

29. *See infra* Section IV.A (detailing the need for the public interest balancing test and arguing that wholesale statutory exemptions violate the ethos of the FOIA).

30. *See infra* Section IV.A.

31. *See infra* Section IV.A.

investigations.[32] In the spirit of providing legislative guidance, Part V also contains an abbreviated Model FOIA that shows how exemptions can be drafted to allow for judicial flexibility to interpret them within the confines of the public interest balancing test.[33] The Model FOIA also provides for the mandatory release of certain records pertaining to police conduct even in the absence of a request, providing an independent measure of accountability through statistics.[34] Taken together, all of these measures—steadfast adherence to the public interest balancing test, limiting exemptions based on artificial distinctions, and mandatory release of certain information—empower the public to hold their local police department accountable for officer misconduct and institutional neglect of citizen complaints.[35]

II. FOIA AND THE POLICE

All fifty states have open records statutes providing for the release of information to the public.[36] Underlying these statutes is the principle that "individuals are entitled to know what the government is doing."[37] Under FOIA law, all records bear the presumption of being subject to the light of public scrutiny.[38] However, disclosure under open records statutes is subject to numerous exemptions that limit public access to information.[39] Many of these exemptions relate to individual privacy, confidentiality, and investigatory materials.[40]

Individual agencies often invoke these exemptions after conducting a public interest balancing test to determine whether the interest in releasing the information is greater than the interest in withholding it.[41] These determinations may be reviewed in court.[42] For example, if an agency in Michigan determines that the release of requested records constitutes an "unwarranted invasion of an individual's privacy," it may choose not to

32. *See infra* Section V.A (arguing for the proactive release of data about police misconduct to allow apples-to-apples comparisons between departments).

33. *See infra* Section V.B (containing the Model FOIA).

34. *See infra* Section V.B.

35. *See infra* Section V.B.

36. Tomlinson, *supra* note 13 ("[E]ach of the 50 states has its own version of a freedom of information act.").

37. *Id.*; *see* U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (arguing that the FOIA's purpose is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny") (citing Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976)).

38. *See* Sciacca v. Fed. Bureau of Investigation, 23 F. Supp. 3d 17, 26 (D.D.C. 2014).

39. *See* MICH. COMP. LAWS ANN. § 15.243(1) (West 2006).

40. *See* Zansberg & Campos, *supra* note 12, at 35 ("In addition to privacy exemptions, most state statutes follow FOIA by including an exemption for investigatory records.").

41. *See* Stilley v. McBride, 965 S.W.2d 125, 127–28 (Ark. 1998) (describing the process behind a municipality's denial of a request for police officer's home addresses and conducting a public interest balancing test to determine that plaintiff's request was properly denied).

42. *Id.*

release the records.[43] Whether a particular invasion of privacy is warranted depends on the nature of the information contained in the records and the public's interest in reviewing the requested files.[44] Even when an agency grants a records request, it may redact information that it decides would constitute an unwarranted invasion of personal privacy; for example, a police department can redact an incident report by removing a victim's name when disclosure would not serve any public interest.[45] Statutory exemptions in some states' open records statutes bar citizens from accessing information contained in police personnel files.[46]

Cases from Maryland[47] and Michigan[48] demonstrate how state statutes exempting entire classes of documents can prevent meaningful judicial review of whether release is proper.[49] In *Montgomery County v. Shropshire*,[50] police officers sought to bar the release of records pertaining to an internal investigation of allegations that officers violated department rules in connection with an automobile accident involving an assistant fire chief.[51] Maryland's FOIA statute exempts personnel files from disclosure,[52] but allow records of investigations to be subjects of discretionary denial under limited circumstances.[53] Therefore, the question on appeal was whether the internal investigation was a "personnel record of an individual, including an application, a performance rating, or scholastic achievement information," and thus subject to mandatory withholding.[54]

Ruling five to two against the requestors, the Court of Appeals of Maryland found that the requested documents were personnel records because the investigation examined allegations that could have resulted in disciplinary action.[55] The court nevertheless identified public interest factors supporting denial of the request.[56] First, the majority argued that the officers had been cleared of wrongdoing, eliminating the public interest in disclosure of police misconduct.[57] The other factors supporting nondisclosure included fairness to the investigated officers, the confidentiality of cooperating

43. MICH. COMP. LAWS § 15.243(1)(a).

44. *See* Zansberg & Campos, *supra* note 12, at 36.

45. *See, e.g.*, State News v. Mich. State Univ., 735 N.W.2d 649, 662 (Mich. Ct. App. 2007), *rev'd in part*, 753 N.W.2d 20 (Mich. 2008).

46. *See WNYC Study*, *supra* note 15.

47. Montgomery Cty. Md. v. Shropshire, 23 A.3d 205, 206 (Md. 2011).

48. Herald Co. v. Kent Cty. Sheriff's Dep't, 680 N.W.2d 529, 530 (Mich. Ct. App. 2004).

49. *Id.*; *see infra* Section III.A for a discussion of what meaningful judicial review would look like. At a bare minimum, this requires a determination of whether release of the documents would serve the public interest.

50. *Shropshire*, 23 A.3d at 206.

51. *Id.* at 208.

52. MD. CODE ANN. Gen. Provisions § 4-311(a) (West 2014).

53. *Id.* § 4-351.

54. *Id.* § 4-311.

55. *Shropshire*, 23 A.3d at 205.

56. *Id.*

57. *Id.* at 216.

witnesses, and the existence of personal information about the officers in the police report.[58] The majority also distinguished the records at hand from complaints of racial profiling because the latter were significant in the aggregate, rather than pertaining to the conduct of an officer in a particular case.[59] The court did an analysis of the public interest factors implicated by the request despite holding that the statute compelled nondisclosure.[60]

The pair of dissenting judges first invoked the burden of proof, arguing that the burden rested on the party seeking to bar disclosure.[61] Turning to the principle of *ejusdem generis*,[62] the dissent argued that the requested documents were not similar in kind or nature to applications for employment, performance ratings, or scholastic achievement, and thus were not intended as "personnel files" when the legislature wrote the bill.[63] Moreover, the purpose of the request was to evaluate the investigation, not the officers individually, so the burden of the officers' individual privacy rights was outweighed by the public interest in disclosure.[64] In addition, the broad mandate of the records statute and the robust public interest in preventing police abuse by ensuring properly conducted internal investigations also supported construing the personnel files exemption narrowly.[65] The police officers subject to investigation and the Internal Affairs (IA) investigators were all engaged in public service during the events giving rise to the request.[66] Thus, the requested documents were plainly records of investigations conducted by a police department and fell under the permissible denial section of the statute.[67]

In a follow-up case, the Court of Appeals of Maryland held that, even when an internal affairs investigation sustains the complaint, the records of the investigation are personnel files not subject to disclosure.[68] The plaintiff in the case had filed the complaint, but the court ruled that she was not "the

58. *Id.* at 216–17.

59. *Id.* at 217; *see* Md. Dep't of State Police v. Md. State Conf. of NAACP Branches, 988 A.2d 1075, 1095 (Md. Ct. Spec. App. 2010), *aff'd*, 59 A.3d 1037 (Md. 2013).

60. *Shropshire*, 23 A.3d at 217–18. This is somewhat strange because records which fall under section 4-351 are statutorily barred from disclosure regardless of the public interest; differently put, the legislature has decided that disclosure of records falling into certain categories does not serve the public interest. For additional criticism of the case based on statutory interpretation, *see* Wayne Heavener, Montgomery County v. Shropshire*: Trying to Shoehorn Police Intradepartmental Disciplinary Files into the Wrong Cabinet*, 71 MD. L. REV. 925 (2012).

61. *Shropshire*, 23 A.3d at 218 (Adkins, J., dissenting).

62. *Id.* The canon of construction states that general words in a statutory provision should be interpreted restrictively by referencing the surrounding language. *Id.*

63. *Id.* at 219 (Adkins, J., dissenting).

64. *Id.*

65. *Id.* at 219–21.

66. *Id.* at 220 ("Here, the officers were on duty and engaged in public service . . . The internal affairs staff were also on duty and engaged in public service when they investigated whether the officers' investigation violated any administrative rules.").

67. *See id.* at 221–22 (reasoning that, had a county statute directed the custodian to release all records falling into the permissible denial category, the records at issue would be released).

68. Md. Dep't of State Police v. Dashiell, 117 A.3d 1, 17–18 (Md. 2015).

person of interest" in the documents—rather, the police officer was—and therefore could not invoke exceptions to the mandatory exemption provision of the Maryland FOIA.[69] Thus, internal investigation records in Maryland are not subject to disclosure even when the investigation sustains the complaint and the person requesting the records is the one who made the complaint.[70] The dissenting judges drew a distinction between sustained and un-sustained allegations of misconduct, allowing for the release of records when allegations are sustained.[71] The dissenting judge's opinion argued that the public interest in such cases extends to the administration of discipline, which reflects the judgment of the police department rather than the individual officer.[72]

Michigan case law demonstrates an alternative approach to police personnel files.[73] Michigan's FOIA statute applies a public interest balancing test to all discretionary determinations of whether a law enforcement record is exempt from disclosure.[74] Thus, a department may exempt the personnel records of law enforcement agencies unless the public interest in disclosure outweighs the interest in nondisclosure.[75] In addition, information of a personal nature may be exempted if disclosure would constitute a "clearly unwarranted invasion of an individual's privacy."[76] Finally, investigating records compiled for law enforcement purposes may be exempted, but only under certain circumstances.[77]

In *Herald*, the Michigan Court of Appeals ordered the release of documents pertaining to the arrest of two police officers in connection with a prostitution sting set up by the Grand Rapids police department.[78] The court weighed the relevant public interest factors, first holding that the defendant's characterization of the news coverage surrounding the case as "disgraceful and unwarranted" was not an argument against the release of the documents because the circuit court did not rely on news coverage when determining whether release of the records was in the public interest.[79] Second, the

69. *Id.* at 16–18.

70. *Id.*

71. *Id.* at 18–20 (Watts, J., dissenting) ("[A]cknowledging the public's right to know how law enforcement agencies respond to sustained allegations of misconduct is critical to preserving the public's confidence in law enforcement.").

72. *Id.*

73. Herald Co. v. Kent Cty. Sheriff's Dep't, 662 N.W.2d 749, 750 (Mich. App. 2004).

74. *See* MICH. COMP. LAWS ANN. § 15.243 (West 2006).

75. *Id.*

76. *Id.* § 15.243(1)(a).

77. *Id.* § 15.243(1)(b); *see Herald Co.*, 680 N.W.2d at 533–34. If the release of a record would interfere with an investigation, deprive a person of the right to a fair trial, create an unwarranted invasion of personal privacy, disclose a police informant or law enforcement techniques, or endanger law enforcement personnel, it may be exempted from disclosure. Because the *Herald* court found that the documents were not compiled for law enforcement purposes, but rather for employment purposes, the specific exemptions for investigating records were not discussed at length in the opinion. *Id.*

78. *Herald Co.*, 680 N.W.2d at 532–35.

79. *Id.* at 533 (citing MICH. COMP. LAWS ANN. § 15.243 (West 2014)).

defendant's argument that disclosing the internal affairs report would make department employees reluctant to cooperate in future internal investigations was not applicable to the facts at hand because the allegations of misconduct were not unfounded.[80] Third, the lower court's determination that the requested documents were not "investigative records compiled for law enforcement purposes" was correct because the records were compiled for employment purposes, the internal affairs investigation did not result in any criminal charge, with no ongoing investigation.[81] Although the investigation contained a potential violation of the law, this did not "transmogrify" employment records into an investigation for law enforcement purposes.[82] In other words, the exemption for law enforcement investigations does not apply to internal affairs investigations that do not result in a criminal charge once the investigation is complete.[83]

Detailing the public interest factors supporting disclosure, the court found that the reports contained information that would allow the public to draw conclusions about whether the officers received preferential treatment.[84] Specifically, one page of the requested documents implicated the presence of a double standard regarding off-duty police misconduct.[85] Moreover, documents from the deputy's personnel files dating back to before the incident giving rise to the FOIA request would allow the public to draw conclusions as to whether the department should have inquired about prior allegations of misconduct when conducting the internal affairs investigation.[86]

The court also addressed the defendant's claim that the requested documents contained information of a personal nature, the release of which would constitute an unwarranted invasion of individual privacy.[87] The court of appeals ordered the redaction of the deputy's home address, phone number, social security number, height, weight, and date of birth upon remand to the circuit court.[88] However, references in the documents indicating that the deputy admitted that he needed psychological treatment were not subject to any exemption because the public could consider those references in deciding whether the department acted properly in conducting the investigation.[89]

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80. *Id.* ("Defendant does not assert that the internal affairs investigation in this case had concluded that the allegations of misconduct were unfounded. Therefore, we find no error.").

81. *Id.*

82. *Id.* The word "transmogrify" was used in the lower court's opinion.

83. *Id.*

84. *Id.* at 534.

85. *Id.*

86. *Id.* at 535.

87. *Id.* at 534–35.

88. *Id.* at 534.

89. *Id.*

Another recurrent issue in cases involving the release of police personnel files is the degree to which records generated in the process of making a policy decision should be available to the public.[90] In *Watkins v. McCarthy*,[91] an Illinois appellate court addressed the applicability of the deliberative process exemption[92] to internal affairs documents contained in a police officer's personnel file.[93] The court held that the documents could not be entirely withheld despite the fact that they contained opinions and recommendations preliminary to a departmental decision to discipline an officer.[94] Rather, the court decided that an in camera review was necessary to test the applicability of the exemption, and directed the trial court conducting the review to redact protected pre-decisional opinions.[95] *Watkins* demonstrates the principle that factual information contained in pre-decisional internal affairs documents should be released even if the recommendations themselves are part of a deliberative process.[96]

These cases demonstrate the promises and pitfalls of FOIA litigation.[97] Generally, scholars recognize that "the realities of the FOIA do not deliver all that the statute promises" in many cases.[98] FOIA requests at the state level are more likely to trigger more political and personal concerns than those at the federal level.[99] An officer's personnel files are "effectively confidential" in over half of the states, including Maryland.[100] In California, New York, and Delaware, the FOIA statute explicitly exempts police personnel files from disclosure.[101] In fifteen states, including Michigan, records are subject to disclosure in limited circumstances.[102] In twelve other states, police

90. *See infra* Section III.C (attempting to resolve this issue by arguing for redaction of purely opinionated statements about what course of action to take in a particular case).

91. Watkins v. McCarthy, 980 N.E.2d 733 (Ill. App. Ct. 2012).

92. ILL. COMP. STAT. 140/7(f) (West 2016). The Illinois FOIA allows the withholding of "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body." *See infra* Section III.C for additional discussion of the exception.

93. Watkins v. McCarthy, 980 N.E.2d 733, 743 (Ill. App. Ct. 2012).

94. *Id.*

95. *Id.* at 741 ("To the extent that any of the documents contained in the [complaint register] files include protected pre-decisional matters, those portions may be redacted, and the documents need not be withheld in their entirety.").

96. *Id.* at 743 (citing Harwood v. McCarthy, 799 N.E.2d 859 (Ill. App. Ct. 2003)).

97. *See infra* Section V.

98. Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387, 393, 414 (2010).

99. *Id.* at 414–15 (arguing that at the state level, ignorance of procedures, familiarity with the requestor, connections between the official responding to the request and the request's target, and the perception that requests are acts of aggression combine to frustrate open access to records).

100. *See WNYC Study, supra* note 15.

101. *See id.*

102. *Id.*

disciplinary records are generally available unless an investigation is ongoing.[103]

The lack of public access to information regarding police misconduct is a serious problem for advocates of reform.[104] Especially at the local level, police behavior is "notoriously difficult to judge" in the absence of standardized data collection efforts.[105] The result is a dearth of external accountability.[106] Indeed, policies governing the police use of force are toothless absent any institutional-level measures to ensure compliance.[107] This is especially tragic given the pervasive nature of the problem of police misconduct.[108]

III. THE PERVASIVE PROBLEM OF POLICE MISCONDUCT

A. Police Misconduct and Structural Reform Litigation

The police killed 1,154 people in 2016—an average of more than three killings per day.[109] An entire movement, encapsulated by the mantra #BlackLivesMatter, reinvigorated academic and policy discussions of the problem of police misconduct.[110] In response, President Barack Obama commissioned the Task Force on 21st Century Policing to recommend police practices that build public trust and strengthen community relationships.[111] This approach draws from the legitimacy theory of community policing, which leverages inclusivity in decision making to increase the legitimacy of the police.[112] One of the task force's final recommendations was that police departments should collect and report data on officer-involved shootings and

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103. *Id.*

104. *See* Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1420 (2015) ("Local police behavior is also notoriously difficult to judge because most agencies collect little data on officer behavior").

105. *Id.*

106. *Id.* ("[E]xternal monitoring . . . ensures that frontline officers substantively, rather than symbolically, comply with stated requirements").

107. *Id.*

108. *See infra* Section II.A (detailing the nature and extent of the problem as well as efforts taken by the Department of Justice to combat it).

109. *Killed by Police*, MUTUAL AID (2016), http://www.killedbypolice.net/kbp2016 [https://perma.cc/7NE4-WKJQ]. This website keeps a running tab of fatal police shootings using media reports.

110. *See* Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 793 (2016) (stating that #BlackLivesMatter "has become synonymous with a movement that condemns police violence" and led to "renewed discussion" of the problem).

111. *Id.* at 793–94.

112. *Id.* at 794; *see* Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 671–72 (2016) (arguing that inclusive decision making in policing will become increasingly important over time and result in a police force that is "better able to focus on its mission").

in-custody deaths.[113] The U.S. Department of Justice (DOJ) also began investigating more police shootings, opening thirty-six investigations into police departments and reaching consent agreements with twenty-one through a process of structural reform litigation.[114] However, the DOJ has retreated from these efforts under current Attorney General Jeff Sessions.[115]

In structural reform litigation, the United States Attorney General initiates action against local police departments engaged in a pattern or practice of unconstitutional misconduct, seeking injunctive or equitable relief.[116] This takes place after the DOJ investigates the police department and prepares a report, which then forms the basis for a consent decree between the DOJ and the police department.[117] Academic research into the efficacy of these agreements has found them relatively successful.[118] However, the process as a whole is subject to inherent limits, including the DOJ's low rate of involvement, the failure of consent decrees to give third-party standing to victims of police violence, and the inability to actually compensate the victims of police misconduct giving rise to the litigation.[119] Despite these limits, structural reform litigation offers a model for generally applicable policies requiring affirmative disclosures from police departments.[120]

FOIA requests have played a role in ensuring compliance with consent decrees resulting from structural reform litigation.[121] For example, in

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113. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 21 (2015) ("Policies on use of force should also require agencies to collect, maintain, and report data to the Federal Government on all officer-involved shootings, whether fatal or nonfatal, as well as any in-custody death.").

114. Patel, *supra* note 110, at 794; *but see* John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOW. L. J. 621, 633 (2016) (arguing that despite these efforts, "under-investigation of police misconduct is certainly a national problem").

115. ATT'Y GEN., MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS AND UNITED STATES ATTORNEYS (Mar. 31, 2017) ("It is not the responsibility of the federal government to manage non-federal law enforcement agencies"); *see* Sari Horwitz et.al., *Sessions Orders Justice Department to Review All Police Reform Agreements*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/world/national-security/sessions-orders-justice-department-to-review-all-police-reform-agreements/2017/04/03/ba934058-18bd-11e7-9887-1a5314b56a08_story.html?utm_term=.3ce8d2accb4a [https://perma.cc/JG9Y-78ZH] (stating that the memorandum threw enforcement of consent decrees into question); Stephen Rushin, *Police Reform During the Trump Administration*, 2017 U. ILL. L. REV. ONLINE (Apr. 29, 2017) (casting the memorandum as a "drastic reorientation of federal priorities on police reform" which "threatens to upset decades of progress in police reform").

116. *See* Rushin, *supra* note 104, at 1347; 34 U.S.C.S. § 12301 (LexisNexis 2018).

117. Acevedo, *supra* note 114, at 632–33, 640.

118. *See* Patel, *supra* note 110, at 794–95 (highlighting these programs' "success in reforming recalcitrant police departments").

119. Acevedo, *supra* note 114, at 640–41 (arguing that the DOJ "focuses on larger departments to the exclusion of smaller ones," and criticizing consent decrees for making enforcement "completely at the mercy of the DOJ").

120. *See infra* Section IV.A (arguing that state legislatures should amend open records acts to require that police departments actively disclose certain information regarding officer misconduct).

121. *See* Md. Dep't of State Police v. Md. State Conf. of NAACP Branches, 988 A.2d 1075, 1076 (Md. Ct. Spec. App. 2010), *aff'd*, 59 A.3d 1037 (Md. 2013).

Maryland Dept. of State Police v. Maryland State Conference of NAACP Branches, the Court of Special Appeals of Maryland reviewed a trial court order of the release of aggregate data regarding internal investigations of complaints of police racial profiling.[122] In that case, a branch of the National Association for the Advancement of Colored People (NAACP) requested all documents generated in connection with complaints of racial profiling with the names of the officers replaced by a unique identification number.[123] This information would allow the NAACP to review the department's compliance with a consent decree entered into with the DOJ.[124] In a previous case, the U.S. District Court for the District of Maryland had ruled that the consent decree required the police department to affirmatively disclose the complaints to the NAACP; thus, the only question in this case was whether the department might withhold the records of *investigations* of citizen complaints of racial profiling under the state open records act.[125] The court ruled that the files were not personnel records and therefore were not subject to mandatory non-disclosure.[126] A concurring opinion highlighted the special public interest in ensuring that the department was in compliance with the agreement it had reached with the federal government following structural reform litigation.[127]

However, the court of special appeals adopted a procedure developed by the trial court wherein citizen complaints were released with the names of the officers entirely redacted, after review by the NAACP attorneys for litigation purposes only.[128] This procedure sought to reduce the number of records needing review, while allowing the NAACP to review patterns of police conduct and citizen complaints to monitor whether the state police were following the federal consent decree intended to remedy abuse.[129] Ultimately, *NAACP Branches* demonstrates a middle ground for providing external police accountability, despite the massive amount of files involved; by ordering the redaction of the names of the officers and having the plaintiff's attorneys limit the files to be released to those which were truly relevant to the NAACP's purpose—evaluating the department's compliance with the consent decree—the court gave the requestors the opportunity to review how the department dealt with citizen complaints at the institutional

122. *Id.*

123. *Id.* at 1077–78. The requestors asked for "a unique number or code [for each] trooper . . . to ascertain whether a particular trooper [was] referenced in more than one complaint [and/or record] without divulging that particular trooper's identity." *Id.*

124. *Id.* at 1076–77.

125. *Id.* at 1079.

126. *Id.* at 1086.

127. *Id.* at 1088 (Davis, J., concurring) ("I am constrained to file this concurring opinion, not because I take issue with anything written in the Majority opinion, but rather, because I believe greater emphasis on . . . the Consent Decree . . . is warranted.").

128. *Id.* at 1087. As a cost-saving measure, the court allowed attorneys for the plaintiffs to inspect the documents in unredacted form to determine whether they would be relevant to the NAACP's request.

129. *Id.*

level.[130] Thus, FOIA has played a role in reviewing departmental compliance with consent decrees following structural reform litigation.[131]

B. FOIA Requests and Discretionary Releases Following High-Profile Police Shootings

FOIA has also played a role in drawing attention to high-profile police shootings.[132] After seventeen-year-old Laquan McDonald was shot sixteen times and killed in Chicago in 2014, it took four hundred days for the public to gain access to the dash cam video of his killing.[133] The department responsible for the officers' conduct denied fifteen records requests for the video, and a journalist had to bring a lawsuit in order to gain access.[134] The video "contradicted nearly everything police said happened" prior to its release.[135] At the time of the release, police had settled with the family for $5 million after lawyers obtained the video during discovery.[136] The eventual release of the video may have given the prosecutor no choice but to charge the officers involved in the killing because of the overwhelming public documentation of police abuse.[137] The officers eventually had administrative charges filed against them.[138]

In 2015, records revealed that the Cleveland police officer who shot twelve-year-old Tamir Rice had a letter in his personnel file, which described his firearms qualifications as "dismal."[139] The officer was no longer at the department that released the records at that time, and no records revealed whether the Cleveland department had ever seen the report.[140] The department that had the personnel file letter chose to release it as a matter of discretion, given the high-profile nature of the shooting.[141] Thus, both traditional FOIA requests and affirmative, discretionary disclosures by police

130. *Id.*

131. *Id.*

132. *See* Ferrise, *supra* note 18.

133. Marlena Baldacci & Steve Almasy, *Chicago Police Move to Fire Officers in Laquan McDonald Shooting*, CNN (Aug. 31, 2016, 5:25 AM), http://www.cnn.com/2016/08/30/us/chicago-police-laquan-mcdonald/ [https://perma.cc/G6DR-ZELU].

134. *See* Brandon Smith, *Why I'm Suing the Chicago Police Department*, CHI. READER (Aug. 7, 2015, 3:30 PM) http://www.chicagoreader.com/Bleader/archives/2015/08/07/why-im-suing-the-chicago-police-department [https://perma.cc/97QR-CJED].

135. *See* Baldacci & Almasy, *supra* note 133 ("[The video] showed McDonald walking away from police as he held a 4-inch knife, not lunging toward officers, as police had said.").

136. Smith, *supra* note 134.

137. Bruce Jackson, *When Cops Kill*, DAILY PUB. (Jan. 5, 2016, 4:00 PM) http://www.dailypublic.com/articles/01052016/when-cops-kill [https://perma.cc/5SZY-K2Y2] ("A number of people have suggested that such cases are drowning in conflict of interest from the beginning, that the only time that conflict fades into the background is when there is overwhelming documentation in the public arena giving the prosecutor no choice but to act, as in the Laquan McDonald and Walter Scott killings.").

138. Baldacci & Almasy, *supra* note 133.

139. *Id.*

140. *See id.*

141. *See id.*

departments have assisted the public in understanding the events leading up to high-profile police shootings.[142] This, combined with the role that records requests have played in reviewing compliance with consent decrees, shows how FOIA can be a tool for addressing police misconduct at both the individual and institutional levels.[143]

IV. EVALUATING THE ARGUMENTS AGAINST THE RELEASE OF POLICE PERSONNEL FILES

Police frequently rely on four arguments when refusing to release information about police personnel files: wholesale exemptions exist for police, no misconduct occurred, the record was part of a deliberative process, and officers have an individual privacy interest in their files' confidentiality.[144] Analyzing each of the arguments reveals that, except in limited circumstances,[145] the relevant FOIA exemptions do not justify entirely withholding records from the public.[146] The robust public interest in disclosure includes ensuring that police misconduct is reported, internal affairs investigations are above reproach,[147] and rogue or aberrant behavior is identified and punished before it leads to tragedy.[148] Release of information to the public, including police watchdog and advocacy groups,

142. *Id.*; Ferrise, *supra* note 18.

143. *See supra* Section II.A (showing how FOIA has helped external watchdogs ensure police compliance with settlements reached with the DOJ after the completion of structural reform litigation); *see also infra* Section IV.A (arguing that more robust data collection efforts at the state level can further empower structural reform litigation and ensure meaningful review by the public and the press once a settlement is reached).

144. *See infra* Sections III.A–D (analyzing and rejecting each of these arguments as a general justification against the release of police personnel files).

145. *See infra* Sections III.D–E (arguing that entirely withholding a record is only proper when it pertains solely to an officer's off-duty conduct, does not implicate a double standard or preferential treatment, and contains no information from which the public could draw conclusions regarding the conduct of an internal affairs investigation); Section IV.B (Under the Model FOIA, release would still be proper under these circumstances if it would serve the public interest.); *see also infra* Section III.A (arguing that wholesale exemptions for police personnel files contravene the central purpose of open records acts).

146. *See infra* Section III.C (arguing that while the deliberative process exemption may apply to a limited class of records containing pre-decisional opinions regarding a policy judgement, it does not serve as a general justification for withholding entire classes of records and only warrants redaction of nonfactual material expressing a subjective opinion).

147. Zansberg & Campos, *supra* note 12, at 36–37; *see* Section III.B (supporting a public interest in reviewing the process of internal affairs investigations).

148. *See* Mary D. Fan, *Panopticism for Police: Structural Reform Bargaining and Police Regulation by Data-Driven Surveillance*, 87 WASH. L. REV. 93, 136 (2012) (arguing that a small number of rogue actors in police departments are responsible for a majority of the misconduct, including the improper use of force, that undermines community-police relations).

is the first step in implementing red-flag systems that can reduce misconduct and improve community faith in the police.[149]

A. Wholesale Exemptions

Statutory and judicially crafted exemptions for police personnel files contravene the purpose of open records acts by improperly shielding investigations into police misconduct from the light of public scrutiny.[150] The purpose of the FOIA is to provide citizens with a watchdog function over the government at all levels.[151] Vitally important requests involving police administration ensure that the public can exercise this function over the primary local governmental institution with which it interacts, and to the protection of constitutional rights.[152] A case-by-case determination that release of a record is in the public interest, at the very least, is necessary to subject internal affairs investigations to public scrutiny.[153] This is likely a matter for legislatures, rather than courts, in the states where police personnel files are statutorily exempt from disclosure.[154] Even in such states, however, courts should be skeptical of departmental attempts to expand the scope of personnel files to include all records relating to police officers' discharge of their duties.[155]

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149. *Id.*; *see infra* Sections IV.A–B and accompanying footnotes (arguing that proactive disclosures by police departments serve the public interest in creating red-flag systems to monitor and punish aberrant behavior among officers).

150. Fred H. Cate, D. Annette Fields & James K. McBain, *The Right to Privacy and the Public's Right to Know: the "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 42 (1994); *see* Md. Dep't of State Police v. Dashiell, 117 A.3d 1, 19 (2015) ("I fear that the Majority has not heeded the mandate of both the General Assembly and this Court's precedent to broadly construe the Public Information Act in favor of disclosure by narrowly construing the Public Information Act's exemptions.").

151. Cate et al., *supra* note 150.

152. *See, e.g.*, Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester, 787 N.E.2d 602, 607 (Mass. App. Ct. 2003) ("A citizenry's full and fair assessment of a police department's internal investigation of its officer's actions promotes the core value of trust between citizens and police essential to law enforcement and the protection of constitutional rights."); *see also Dashiell*, 117 A.3d at 19 ("[H]onoring the public's right to know how law enforcement agencies respond to misconduct—especially misconduct that arises out of contact with the public—is vital to maintaining the public's trust in law enforcement.").

153. *See* WNYC Study, *supra* note 15.

154. *Id.*

155. *See* Azi Paybarah, *Lawmakers Push Public Access to Police Camera Footage*, POLITICO (Aug. 6, 2015, 4:48 PM), http://www.politico.com/states/new-york/city-hall/story/2015/08/lawmakers-push-public-access-to-police-camera-footage-024366 [https://perma.cc/QTD8-GHTT] (warning against classifying body camera footage as "personnel files" in New York). For a discussion of which states allow body camera footage to be released pursuant to a FOIA request, *see Police Body Camera Policies: Retention and Release*, BRENNAN CTR. (Aug. 3, 2016), https://www.brennancenter.org/analysis/police-body-camera-policies-retention-and-release [https://perma.cc/YRY6-H5XP]; *see also* David Thomas, *CPD Videos of Shootings Get Timeline*, CHI. DAILY L. BULL. (Nov. 10, 2016) http://www.chicagolawbulletin.com/Articles/2016/11/10/CPD-videos-timeline-11-10-16.aspx [https://perma.cc/HUV9-TEAT] (detailing a court order requiring the Chicago Police Department to release all video of fatal police shootings since 2011).

B. Requiring Findings of Misconduct

FOIA requests into police misconduct should not be granted or denied solely on the basis of whether the allegations of misconduct were sustained.[156] In *Herald*, the Michigan Court of Appeals correctly held that an internal investigation into the potentially criminal actions of two police officers was subject to public disclosure.[157] The court distinguished records compiled for law enforcement purposes from those compiled for employment purposes.[158] A disciplinary investigation may be disclosed if it did not result in prosecution or a civil lawsuit.[159] Generally, the public has an overwhelming interest in ensuring fairly conducted police investigations and police investigation results being above reproach.[160] The public interest in disclosure should not be evaluated differently based on the results of the internal affairs investigation because the interest in transparency is the same whether or not the complaint is sustained.[161] The most important public interest supporting disclosure in such cases is not whether the officer actually engaged in misconduct, but whether the investigation was impartial.[162] Indeed, public scrutiny of investigations that do not result in a finding of misconduct may present an even *greater* interest; logically, an investigation finding no evidence of misconduct is more likely to be the product of internal bias than one that finds that an officer engaged in misconduct.[163] While the public has a discrete interest in ensuring that sustained complaints of misconduct result in discipline, the broader interest in transparency of internal affairs investigations subsumes specific concerns regarding punishment.[164] If the public cannot know whether the process of reviewing

156. *See* Zansberg & Campos, *supra* note 12, at 36–37.

157. Herald Co. v. Kent Cty. Sheriff's Dep't, 680 N.W.2d 529, 533 (Mich. Ct. App. 2004).

158. *Id.*

159. *Id.* at 534. A further question exists as to whether documents pertaining to the internal affairs investigation would be released once litigation concluded. The same public interest factors outlined *infra* would arguably be applicable, but the question goes beyond the limited scope of this article. That said, there are sound reasons for limiting the ability of litigants to submit records requests when discovery is ongoing. *See* Edward A. Tomlinson, *Use of the Freedom of Information Act for Discovery Purposes*, 43 MD. L. REV. 119, 129–36 (1984).

160. *See* Zansberg & Campos, *supra* note 12, at 34.

161. *Compare* Md. Dep't of State Police v. Dashiell, 117 A.3d 1, 20 (2015) (Watts, J., dissenting) (distinguishing between internal affairs investigations which reveal misconduct and those that do not reveal misconduct, and finding that the latter implicate a greater public interest) *with* Zansberg & Campos, *supra* note 12, at 36–37 ("Public interest in monitoring the conduct of . . . police officers in particular, extends beyond the ability to assess the actual conduct of on-duty officers; it is equally important for the public to be assured that the investigations into allegations of abuse or other misconduct are themselves above reproach.").

162. Zansberg & Campos, *supra* note 12, at 36–37.

163. *See* David J. Brent, *Redress of Alleged Police Misconduct: A New Approach to Citizen Complaints and Police Disciplinary Procedures*, 11 U.S.F. L. REV. 587, 608 (1977) ("A system can be theoretically sound and objective in practice but if it is not respected by the public, cooperation between the police and the public can suffer.").

164. Zansberg & Campos, *supra* note 12, at 36–37.

allegations of misconduct is neutral, releasing records regarding the punishment of such misconduct fails to answer the essential question of whether the police are properly policing themselves in the first place.[165]

Regardless of whether the officer involved was disciplined, releasing records indicating that the police department followed the correct procedures while conducting an internal affairs investigation can promote community respect for police by dispelling the notion that investigations tend to whitewash police misconduct.[166] Moreover, the distinction upon which the *Dashiell* court's dissent rested its opinion—that sustained allegations of misconduct implicate the judgment of the department and unsustained allegations do not—is indefensible.[167] The determination of whether misconduct occurred implicates the judgment of the department in evaluating the merits of the complaint and the facts of the incident.[168] In other words, the finding of misconduct and the decision of how to punish misconduct are two sides of the same coin; the public can only know that a police department is properly curtailing police misconduct if it can review the process of finding misconduct as well as the misconduct's sanction.[169] *Herald* demonstrates this effect; the matter of public interest was unequal treatment in punishing misconduct, not whether the officer in question actually solicited prostitution.[170] Requiring a finding of misconduct ignores many of the reasons why the public has an interest in the release of police records.

C. The Deliberative Process Exemption

The most serious concern with disclosing the records of internal affairs investigations is the possibility that, eventually, releasing personnel files will politicize review processes and prevent candid recommendations during internal investigations.[171] The possibility of a chilling effect is a judicially cognizable concern; however, redacting the personal information of those providing deliberative feedback preliminary to a final determination, as well as exempting statements that simply express an opinion, can practically

165. *Id.*

166. Brent, *supra* note 163, at 621 ("Eventually, when demeaning rumors about alleged 'whitewashes' of incidents are laid to rest, a greater respect and spirit of cooperation will be inspired.").

167. Md. Dep't of State Police v. Dashiell, 117 A.3d 1, 20 (2015) (Watts, J. dissenting).

168. Zansberg & Campos, *supra* note 12, at 36–37.

169. *Id.*

170. *See* Herald Co. v. Kent Cty. Sheriff's Dep't, 680 N.W.2d 529, 535 (Mich. Ct. App. 2004). (identifying the relevant public interests as "whether the deputy was given preferential treatment and whether the sheriff's department should have inquired about the deputy's alleged prior misconduct").

171. Zansberg & Campos, *supra* note 12, at 36 ("Understandably, police departments wish to induce candid and honest feedback and input when investigating possible wrongdoing among their ranks. To do so, they proclaim, requires that all, or practically all, of the information gathered and assessed by the investigators for consideration by departmental decision makers be shielded from public scrutiny, lest those providing statements and filling in reports be chilled in answering questions fully and frankly.").

eliminate this concern.[172] Moreover, issues arise when the exemption is used in an overbroad fashion.[173] Police agencies frequently assert that even the statements giving rise to an investigation are exempt from disclosure under this exemption,[174] despite the fact that very little empirical evidence exists supporting this claim.[175] At least one court has recognized that, in contrast to the claims of police departments arguing against disclosure of deliberative materials, judicial and public review of internal affairs investigations can actually increase candor.[176] When these reports never see the light of day, there is very little reason for officers to report misconduct in the first place.[177] By contrast, when an internal report is likely to be subject to public scrutiny, an officer may go to greater lengths to ensure factually correct and irreproachable statements.[178]

The category of pre-decisional opinions should be limited to those statements about what outcome—punishment or otherwise—should be reached in a particular investigation, and should not exempt statements constituting an officer's subjective narrative of the events giving rise to the investigation.[179] Allowing for release of internal affairs investigatory files forces officers participating in such investigations to consider both the external and internal influences on the officer's reports; allowing for the wholesale exemption regarding the investigatory files leaves the internal influences creating bias intact without any measure of public scrutiny.[180] Especially in light of the countervailing pressures that reduce candor in internal investigations, including reciprocity and camaraderie among officers, the specter of public scrutiny can provide an "out" for those officers

172. Martinelli v. Dist. Ct., 612 P.2d 1083, 1090 (Colo. 1980) ("If they advance, as particularized reasons for applying the privilege to the files and reports, the possible chilling effect of disclosure on the process of procuring such information from citizen-complainants and the possible adverse impact on the complainants of disclosure of their identities, the trial court could consider avoidance of any such adverse impact through the excising of the complainants' identities from the files and reports.").

173. *Id.*

174. Zansberg & Campos, *supra* note 12, at 36.

175. *See* Kelly v. City of San Jose, 114 F.R.D. 653, 664 (N.D. Cal. 1987) (finding that "no empirical study supports the contention that the possibility of disclosure would make officers who participate . . . in internal affairs investigations less honest").

176. *Id.* at 664–65.

177. *Id.* at 665 ("A police officer who knows that no one from outside the law enforcement community will scrutinize his statements or his investigatory work may not feel the same level of pressure to be honest and accurate as would his counterpart in a system where some disclosure was possible.").

178. *Id.* ("Fear of scrutiny by knowledgeable people motivated to be aggressive is likely to inspire police officers to conduct investigations and write reports that are less vulnerable to criticism . . . officers will feel pressure to be honest and logical when they know that their statements and their work product will be subject to demanding analysis by people with knowledge of the events under investigation and considerable incentive to make sure that the truth comes out.").

179. *See* Zansberg & Campos, *supra* note 12 at 36 ("Courts should also take a skeptical view of the assertion, frequently invoked by police agencies, that even the bare collections of facts and eyewitness statements giving rise to an investigation are properly shielded from public view as deliberative process materials.").

180. Watkins v. McCarthy, 980 N.E.2d 733, 743 (Ill. App. Ct. 2012).

who would otherwise be disinclined to offer information to an internal affairs investigator.[181] Indeed, given these pressures, the possibility of disclosure to the public is no more likely to make officers lie or fail to disclose pertinent information than the possibility of disclosure to a supervisor.[182] If officers are going to lie, public scrutiny will not make them more likely to do so, but the opposite effect is possible.[183] As the burden is on the individual agency, rather than the FOIA requestor, to demonstrate the need for an exemption, in most cases the deliberative process privilege should not prevent release of internal affairs documents under the public interest balancing test.[184] Given that government agencies have been "spectacularly successful" at expanding the deliberative process privilege at the federal level, police watchdogs and courts should recognize the privilege's outer limits.[185]

Finally, the case of Tamir Rice shows that candid feedback does nothing if it is not made available to the proper people.[186] The police department responsible for the officer claimed that it never saw the report on the officer's failure to use weapons properly.[187] In sum, unless a record expresses an opinion regarding what type of punishment is appropriate, it should be released.[188] Thus, factual information contained in pre-decisional IA documents falls under the FOIA, even protected recommendations or part of a deliberative process.[189]

D. The Privacy Interests of Individual Officers

Police have a legitimate individual interest in protecting the results of investigations of their off-duty conduct when the investigation would reveal embarrassing or intimate details, but no illegal conduct or preferential treatment.[190] However, when on-duty, the general privacy interest of a police

181. *Id.*

182. *Kelly*, 114 F.R.D. at 665 ("[T]he possibility of disclosure to a civil litigant probably adds almost nothing to the pressure to dissemble that officers already would feel; those who are going to lie are going to do so regardless of whether there is some chance of disclosure to a citizen complainant.").

183. *Id.* at 664–66.

184. *Id.*

185. *See* Edward J. Imwinkelried, *The Government's Increasing Reliance on—and Abuse of—the Deliberative Process Evidentiary Privilege: "[T]he Last Will Be First,"* 83 MISS. L.J. 509 (2014) (arguing that "government agencies have been almost spectacularly successful in persuading courts to both uphold assertions of the deliberative process privilege and to expand the scope of the privilege"); *see also* Nate Jones, *The Next FOIA Fight: The B(5) 'Withhold It Because You Want To' Exemption*, NAT'L SECURITY ARCHIVE (Mar. 27, 2014), https://nsarchive.wordpress.com/2014/03/27/the-next-foia-fight-the-b5-withold-it-because-you-want-to-exemption/ [https://perma.cc/YH44-FXDB] (noting that federal agencies invoked the exemption 81,752 times in 2013.).

186. *See* Ferrise, *supra* note 17.

187. *Id.*

188. *See* Zansberg & Campos, *supra* note 12, at 36 (arguing that the deliberative process exemption should be limited to opinions contained in a predecisional record).

189. *Id.*; Watkins v. McCarthy, 980 N.E.2d 733, 743 (Ill. App. Ct. 2012).

190. *See* Zansberg & Campos, *supra* note 12, at 34 ("Although police officers may have a legitimate privacy interest in certain narrowly circumscribed portions of files concerning their off-duty, private

officer performing official functions of the state severely lessens.[191] Note, as the *Montgomery County* dissent did, that officers conducting IA investigations also perform a public duty by giving the public an even larger interest in reviewing officer's work.[192] Internal affairs investigations of on-duty behavior, and documents generated in response to civilian complaints against the police, should be subject to disclosure because the documents will nearly always contain information from which the public could draw conclusions about the conduct of a public function.[193]

Officers' individual privacy interests are implicated when a records request concerns an internal affairs investigation of their off-duty conduct, but the release of records may still be appropriate in certain circumstances.[194] For example, *Herald* involved an off-duty officer where the requested documents implicated illegal conduct, preferential treatment, and neutrality of the resulting internal investigation.[195] Because the court viewed the documents in camera prior to ruling, it was able to evaluate the degree to which the documents implicated the public interest in guaranteeing neutral police investigations without violating the individual privacy rights of the officer; in other words, the court only disclosed the mandated responses from the relevant information.[196] Ultimately, public interest in disclosure can outweigh an officer's individual privacy interest, even in cases involving off-duty conduct, if the requested documents have some bearing on the issue of preferential treatment.[197]

E. Visualizing the Proper Application of FOIA Exemptions to Police Personnel Files and Records of Internal Investigations

The following flow chart synthesizes the different exemptions commonly applied to police personnel files and shows the exemptions' proper application, and allows police to determine whether they should

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conduct, they do not enjoy a reasonable expectation of privacy with respect to records concerning only how they discharge their official duties.").

191. Md. Dep't of State Police v. Dashiell, 117 A.3d 1, 19 (Md. 2015) (Watts, J., dissenting) ("[H]onoring the public's right to know how law enforcement agencies respond to misconduct—especially misconduct that arises out of contact with the public—is vital to maintaining the public's trust in law enforcement."); *See* Carly Humphrey, *Keep Recording: Why on-Duty Police Officers Do Not Have a Protected Expectation of Privacy Under Maryland's State Wiretap Act*, 19 GEO. MASON L. REV. 775, 777 (2012) (arguing that under Maryland's Wiretap Act, "police officers do not have a reasonable expectation of privacy during traffic stops").

192. Montgomery Co. Md. v. Shropshire, 23 A.3d 205, 220 (Md. 2011) (Adkins, J., dissenting).

193. Herald Co. v. Kent Cty. Sheriff's Dep't, 680 N.W.2d 529, 534–35 (Mich. Ct. App. 2004).

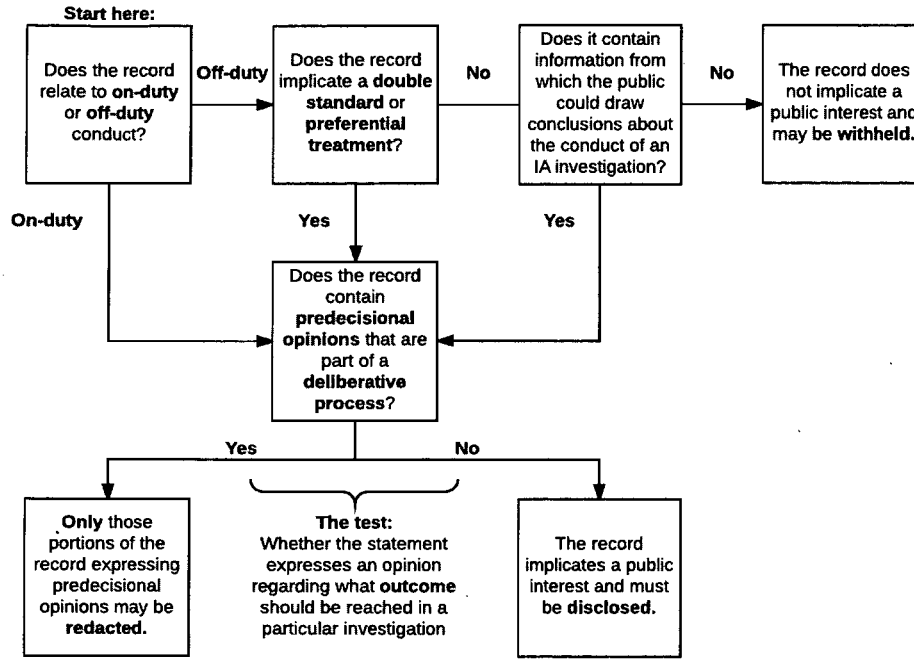
194. City of Portland v. Anderson, 988 P.2d 402, 557 (Or. Ct. App. 1999) (holding that the "factual distinction" of whether misconduct occurred on or off duty "does not dictate whether disclosure would constitute an unreasonable invasion of privacy").

195. *Herald*, 680 N.W.2d at 534–35.

196. *Id.*

197. *Id.*

release a record generated in response to a citizen complaint or internal affairs investigation:[198]



Synthesizing these exemptions into a single framework reveals that there are very few circumstances where police should not release personnel files under the FOIA.[199] However, legislatures seeking to curb police misconduct can take the next logical step under open records acts by requiring police to release certain data proactively.[200] Legislative guidance can ensure that the public has the requisite information to police the police.[201]

V. LEGISLATIVE SOLUTIONS FOR EMPOWERING POLICE REFORM USING OPEN RECORDS ACTS

A. Proactive Disclosures of Data

One possible solution for legislatures and police departments seeking to inform the public about the results of internal affairs investigations, who are wary of violating the privacy expectations of officers, is to proactively release

198. *See supra* Sections III.A—III.D (outlining the exemptions and their applicability to police personnel files).

199. *See supra* Sections III.A—III.D.

200. *See infra* Section IV.A (arguing for the aggregated release of such information).

201. *See infra* Section IV.B (setting out a Model FOIA which requires police to release certain information).

information about internal affairs investigations in the aggregate.[202] For example, a police department could compile records of internal affairs investigations, redact the identifying information of individual officers, and release aggregated data about the results of those investigations.[203] This would allow for public scrutiny of police internal affairs investigations without releasing the personal information of any individual or revealing the sources of frank communications protected by the deliberative process privilege.[204] While the FOIA in most states does not require agencies to generate aggregate records in response to a request,[205] agencies and requesters may proactively do so in order to avoid issuing duplicative or costly responses.[206] This practice benefits both agencies and requesters by enhancing transparency and efficiency.[207] Federal law requires agencies to proactively disclose information under certain circumstances, but even in the absence of an explicit statutory requirement, agencies encourage posting documents online whenever the public is interested in their release.[208] This allows FOIA professionals within agencies to reduce compliance costs and improve transparency by exercising their own judgment prior to receiving a

202. *See* Fan, *supra* note 148, at 257 ("Data-driven surveillance measures such as implementing automated early detection systems and requiring audits and supervisory review also change[] the structural context of neglect that often is identified as a contributing factor to abuses.").

203. *See* Md. Dep't of State Police v. Md. State Conf. of NACCP Branches, 988 A.2d 1075, 1078 (Md. Ct. Spec. App. 2010).

204. Interview with Ellen Armentrout, Freedom of Information Act Coordinator for Michigan State University (2016).

205. MICH. COMP. LAWS ANN. § 15.233(3) (West 1977); *see* Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP, *Illinois Appellate Court Rules that Raw Database Data Is a Public Record under FOIA*, July 8, 2016, http://hlerk.com/illinois-appellate-court-rules-that-raw-database-data-is-a-public-record-under-foia/ [https://perma.cc/RX9S-2BJA] ("[A]lthough public bodies do not have a duty to generate new records in response to a FOIA request, they do have a general obligation to search and produce data stored in a database that is responsive to a FOIA request."); DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE (2004) ("Prior to the enactment of the Electronic FOIA amendments, several courts held that agencies do not have to organize or reorganize file systems in order to respond to particular FOIA requests, to write new computer programs to search for 'electronic' data not already compiled for agency purposes, or to aggregate computerized data files so as to effectively create new, releasable records. More than one court ruled, though, that agencies may be required to perform relatively simple computer searches to locate requested records, or to demonstrate why such searches are unreasonable in a given case."). The adequacy of a search of electronic records pursuant to a FOIA request is one of reasonableness under the particular circumstances of the case.

206. *See Proactive Disclosures*, U.S. DEP'T OF JUSTICE (2014) https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/proactive-disclosures.pdf [https://perma.cc/F7TL-VNS5] (stating that proactive disclosures by agencies "are an integral part of the [federal] Freedom of Information Act"); *Achieving Transparency Through Proactive Disclosures & the Use of Technology*, U.S. DEP'T OF JUSTICE at 4 (2014) https://www.justice.gov/sites/ default/files/oip/legacy/2014/07/23/proactive-disclosures_0.pdf [https://perma.cc/5VNU-JGD7] (arguing that proactive disclosures enhance transparency with more efficiency).

207. *Proactive Disclosure of Non-Exempt Agency Information: Making Information Available Without the Need to File a FOIA Request* at 3, U.S. DEP'T OF JUSTICE (2015) https://www.justice.gov/oip/oip-guidance/proactive_disclosure_of_non-exempt_information [https://perma.cc/7Y87-Z9UE].

208. *Id.* at 4 (advising agencies to "establish procedures to identify records of interest to the public on an ongoing basis and to systematically post such records").

request for a specific record.[209] Proactive release of redacted documents serves the public interest and can even obviate the need for a FOIA request.[210]

In the context of community–police relations, reviewing patterns of civilian complaints and internal investigations can reveal aberrations in police conduct that deviate from acceptable practices.[211] The practice also allows for effective data-driven surveillance, which detects problematic actors before they commit abuses that harm the reputation of a whole department.[212] Eventually, the knowledge that a system is in place to root out problematic officers can provide incentives for self-regulation and restraint at the individual level.[213] The ability to review complaints of police abuse—even just in the aggregate—can remind officers that the public is watching and they should promote better behavior.[214] When watchdogs have the ability to use data to analyze police conduct, they can provide a measure of external accountability that is often lacking in local departments with limited institutional oversight.[215]

Data collection alone, however, is not enough to combat the problem of police misconduct—the data must be made publicly available.[216] The benefit of transparency is that it empowers the public, the press, and external watchdogs to interpret the data and suggest reforms.[217] When data is made available to the public that shows a pattern of police misconduct, isolated incidents of police violence become impossible for departments to brush aside.[218] Public data can allow observers to actually test—and ultimately disprove—the claim that the problem of violence against minority

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209. *Id.* ("By virtue of their position in an agency's FOIA office, FOIA professionals are uniquely situated to identify records that are of interest to the public.").

210. *Id.* at 2, 5 (Redaction is still proper when an agency makes a discretionary release); *Id.* ("Agencies should therefore review documents they intend to proactively disclose just as they review documents for disclosure in response to FOIA requests . . . When proactive disclosures are made in partly-redacted form, all redactions must be marked and the basis for the redaction noted on the document that is posted online"). For example, after the Department of Agriculture posted its animal care inspection reports online, the agency saw a 35% decline in FOIA requests. Gavin Baker, *Best Practices for Agency Freedom of Information Act Regulations* at 9, CTR. FOR EFFECTIVE GOV'T (Dec. 2013), http://www.foreffectivegov.org/sites/default/files/info/foia-best-practices-guide.pdf [https://perma.cc/WXB5-86EJ].

211. *See* Fan, *supra* note 148, at 136 ("A minority of officers can account for a substantial amount of problematic conduct, tarring trust in a majority of hard-working officers.").

212. *Id.* ("[T]he most powerful reforms harness data to detect potentially problematic actors who harm the reputation of the whole department and to prevent future abuses.").

213. *Id.* ("[R]ed-flag systems . . . create greater incentive for individual officers to self-regulate and internalize the external gaze facilitated by data-driven transparency.").

214. *Id.*

215. *See* Rushin, *supra* note 104, at 1420.

216. Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 120 (2016) ("[D]ata alone will be insufficient to bring about widespread reform in local police departments. By making these datasets publicly available, the federal government could incentivize some police departments to prioritize reductions in police violence.").

217. *See id.* at 134 ("Transparency will also empower the public, the press, and interest groups to oversee local police conduct.").

218. *Id.* at 135.

communities by police is a matter of a few rotten apples spoiling the whole bunch.[219] Moreover, such data can point out the police force's rotten apples.[220]

State legislatures offer the greatest hope for addressing the dearth of publicly available data regarding police misconduct.[221] As a rule, local policing contains vastly different approaches, largely due to the unique challenges facing local police departments with entirely different demographics than neighboring localities.[222] Moreover, departments draw from local political preferences in setting policy, which has "devastating effects" on minorities within the jurisdiction of a police department.[223] These problems point to the need for uniform, statewide regulation of the process by which police departments collect and release data.[224] This allows for cross-departmental comparisons by external monitors.[225]

State-level regulation of police data collection and release is also necessary in light of the challenges facing the DOJ that limit the effectiveness of structural reform litigation, including resource constraints.[226] However, improved public access to uniform, statewide data regarding police use of force and misconduct can give the DOJ a basis for initiating structural reform litigation more frequently in addition to making the process appear procedurally fair.[227] It also allows for external monitoring by actors other than the DOJ.[228] The success of this approach hinges on the presence of uniform data-collection allowing for useful apples-to-apples comparisons between departments.[229]

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219. *Id.* ("In the absence of any national statistics on local behavior, it can be difficult for the public, the press, or interest groups to prove that an individual act of police misconduct is connected to a broader problem within a police department.").

220. *See* Fan, *supra* note 148, at 136.

221. *See* Rushin, *supra* note 216, at 140 (arguing that the decentralized nature of policing in America results in disparate policies and frustrates reform).

222. *Id.* at 142–43 (comparing and contrasting the challenges facing two local police departments in New Jersey).

223. *Id.* at 145.

224. *Id.* at 161 (arguing that a "a uniform metric to identify potentially problematic police departments" would "make cross-departmental comparisons more effective").

225. *Id.*

226. *See supra* Section II.A (discussing the limits of DOJ action to effect changes in police departments).

227. *See* Rushin, *supra* note 216, at 162, 164 ("[Structural Reform Litigation] is extremely rare, leading some to feel that the process lacks procedural fairness. The goal, then, for the DOJ is to establish, with limited resources, an enforcement strategy that appears procedurally fair, while also ensuring widespread compliance. This task has been virtually impossible without some national statistics on police behavior."). The procedural unfairness of structural reform litigation stems in part from the tiny percentage of departments that are ultimately reviewed. Presently, the DOJ investigates only about three municipalities per year.

228. Presently, the DOJ is the only actor with standing to challenge a police department's implementation of structural reforms. *See* Acevedo, *supra* note 114, at 640–41.

229. *See* Rushin, *supra* note 216, at 161.

B. A Model Freedom of Information Act

State legislatures have the power to draft exemptions to open records acts consistent with the principles of freedom of information.[230] Primarily, this Model FOIA ensures that an agency conducts the public interest balancing test whenever an agency seeks to withhold or redact information.[231] It also provides guidelines for determining whether the release of a record is in the public interest,[232] and requires certain proactive disclosures by police departments even in the absence of a FOIA request.[233] Unlike structural reform litigation, proactive legislative actions can prevent police misconduct before it occurs.[234]

§ 13 Records that may be withheld:[235]

(1) Information falling into one of the following categories may be withheld by a public body unless release would serve the public interest:[236]

  a. Information of a personal nature if disclosure would constitute a clearly unwarranted invasion of personal privacy.[237]

    i. Information is of a personal nature if it reveals intimate or embarrassing details about a person's life or if it reveals personally identifiable information in which an individual has a privacy interest.[238]

    ii. Information is not of a personal nature when it relates to the performance of a public official's duties.[239]

  b. Records compiled for law enforcement purposes that would:

    i. Interfere with ongoing law enforcement proceedings or deprive a person of the right to a fair trial or administrative adjudication.[240]

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230. *See* U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991) (citing Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976)).

231. *See infra* § 13(1) of the Model FOIA.

232. *See infra* § 13(1) of the Model FOIA.

233. *See supra* Section V.A. For example, Model FOIA section 13(1)(a)(i)–(ii) describes "information of a personal nature," ensuring that courts and FOIA responders properly apply the exemption. *See* Baker, *supra* note 210, at 9–10.

234. *See supra* Section II.A (discussing criticism of structural reform litigation).

235. This Model Statute draws primarily from the analysis contained *supra* Part III. However, some language is adopted from Michigan's FOIA statute, MICH. COMP. LAWS ANN. § 15.243(1) (West 2016). It is not intended to be exhaustive, but rather centers on those exemptions which are most frequently cited by police departments. *See supra* Part III (analyzing these frequently-cited exemptions).

236. The language "unless release would serve the public interest" ensures that the public interest balancing test will be conducted in all circumstances when an agency seeks to withhold information. *See supra* Section III.A (arguing that the test is necessary to ensure that exemptions serve their proper purpose).

237. *See* MICH. COMP. LAWS ANN. § 15.243(1)(a).

238. *See* ESPN, Inc. v. Mich. State Univ., 876 N.W.2d 593, 595–96 (Mich. Ct. App. 2015).

239. *See supra* Section III.D (arguing that the privacy interest of public officials does not extend to the performance of their public duties).

240. *See* MICH. COMP. LAWS ANN. § 15.243(1)(b)(i)–(vi).

ii. Disclose confidential law enforcement techniques or sources, or otherwise endanger the safety of law enforcement personnel.[241]

c. Communications within an agency intended to express a pre-decisional opinion, when:[242]

i. The author of the communication had an actual and reasonable expectation that it would remain confidential.

ii. The material being withheld directly relates to the exercise of policy judgment, rather than the facts or circumstances giving rise to a policy judgment.

iii. The public body seeking nondisclosure or redaction can show that in the particular instance, the public interest in encouraging frank communications among officials outweighs the public interest in the transparency of public decision-making processes.

(2) A public body responding to a request for information must redact, rather than withhold, reasonably severable portions of responsive documents to the fullest extent possible when applying the foregoing exemptions. Redaction is only proper when one of the exemptions is present and doing so serves the public interest.[243]

(3) Information that must be produced by law enforcement agencies:[244]

a. Records of complaints against law enforcement personnel, including:

i. The number of complaints received.

ii. A brief description of each complaint and the actions, such as investigation or discipline, taken in response.

iii. A uniquely identifiable number for each law enforcement personnel, such that complaints can be indexed to the individual receiving the complaint.[245]

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241. *Id.*

242. *See supra* Section III.C for the arguments supporting the language chosen in drafting this model exemption. *See also* Martinelli v. Dist. Ct., 612 P.2d 1083, 1090 (Colo. 1980) (arguing for a particular showing that release of a record would have a chilling effect on candid feedback in a deliberative process); Zansberg & Campos, *supra* note 12, at 36 (supporting the distinction between the exercise of policy judgment and the facts or circumstances giving rise to a policy judgment).

243. This provision ensures that the agency reviewing a FOIA request will rely on exemptions to the least extent possible and reiterates that redaction, as well as withholding of records, must serve the public interest. *See* Md. Dep't of State Police v. Md. State Conf. of NAACP Branches, 988 A.2d 1075, 1093–95 (Md. Ct. Spec. App. 2010) (Kehoe, J., concurring) (applying a "reasonably severable" redaction test despite finding that the records in question were police personnel files).

244. *See supra* Section V.A for the arguments supporting proactive disclosure. *See also* Fan, *supra* note 148, at 137.

245. *Md. State Conf. of NAACP Branches*, 988 A.2d at 1077. The plaintiffs initially asked for this information. While the court ultimately adopted a different procedure—redaction of the individual

iv. The name of any police officer receiving five or more complaints.[246]

b. Records of any incident involving the use of force by police personnel, including:[247]
   i. An agency determination of whether the employee(s) involved followed proper procedures throughout the incident.
   ii. A brief description of the events giving rise to the use of force.
   iii. Actions, including investigation and discipline, taken by the agency in response to the incident.[248]

c. Records of internal affairs investigations, including the facts giving rise to the investigation and the ultimate outcome of each case.[249]

d. Information produced under this section does not reduce or eliminate an agency's obligation to respond to requests for information above and beyond what is required by statute, so long as the request for additional information would not be deniable under § 13(1).[250]

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officers' names by attorneys for the plaintiff—the use of a unique number allows for requestors and police watchdogs to find aberrations in behavior, identify rogue actors, and seek additional information about the department's investigation process. *See* Rushin, *supra* note 104, at 1378–82 (describing early intervention systems that flag officers for additional review when they repeatedly depart from acceptable procedures governing the use of force). Such procedures have often been adopted pursuant to a negotiated settlement with the DOJ.

246. *See* Fan, *supra* note 148, at 135–36. This is another method of "flagging" noncompliant officers, ensuring that departments go beyond simply providing aggregated information and discipline aberrant behavior, arguing for "smarter reforms that involve not just collection of data in the aggregate, but also methods of monitoring and red-flag systems that create greater incentive for individual officers to self-regulate and internalize the external gaze facilitated by data-driven transparency." *See* Rob Arthur, *We Now Have Algorithms to Predict Police Misconduct*, FIVETHIRTYEIGHT (Mar. 9, 2016), https://fivethirtyeight.com/features/we-now-have-algorithms-to-predict-police-misconduct/ [https://perma.cc/BD23-XG6P] (arguing that algorithmic predictions of police misconduct hold "great promise"). Five or more is an essentially arbitrary number used as an example; the actual threshold for reporting would depend on the size of the department and could be determined by algorithm. Algorithms can range from a simple three strikes framework to more complex and advanced statistical models.

247. This provision responds to the public interest in ensuring that the department properly investigates incidents involving the use of force in a neutral manner. *See supra* Section III.C (arguing that the public has a particular interest in reviewing the conduct of an investigation).

248. Properly applied, the deliberative process exemption would not cover this information. *See supra* Section III.C (arguing that factual material should not be redacted or withheld under the exemption).

249. This provision serves as a catch-all to ensure that the records of internal affairs investigations are kept and made public regardless of the events giving rise to the investigation. *See* Zansberg & Campos, *supra* note 12, at 34 (discussing how the opacity of internal affairs investigations increases public suspicion of the police and undermines community-based policing).

250. This ensures that the mandatory disclosure provisions of the Model FOIA are not interpreted in a manner that restricts the public's access to information; in other words, the statute would create a floor, not a ceiling.

A court applying the provisions of this statute could characterize the exemptions in terms of shifting burdens.[251] At the outset, a presumption of disclosure exists;[252] but when the responding agency invokes an exemption, the burden shifts back to the requestor to prove that the exemption is inapplicable or that the public interest in disclosure outweighs the public interest served by the exemption.[253] Legislative guidance to the police regarding the proper application of FOIA exemptions responds to the criticism that individual agency interpretations of the public interest lead to arbitrary, ad hoc determinations.[254] By taking proactive steps, legislatures can provide a foundation for police accountability and data-driven reform.[255]

VI. CONCLUSION

The contentious nature of relations between police and the public, whom they ostensibly protect and serve, supports the broad public interest in disclosure of police personnel files and the results of internal affairs investigations.[256] Ultimately, disclosure should turn on whether the information is relevant to the public's ability to serve as a watchdog of the police, rather than the result of the investigation.[257] Given that allegations of misconduct contained in an officer's internal affairs file are effectively confidential in over half of the states, advocates of police transparency have much work to do.[258] The expansion of police body camera programs will likely provide a new battleground for FOIA litigants seeking to police the police.[259]

While the state-by-state nature of FOIA litigation makes any generalizable legal analysis difficult, review of the different exemptions police departments rely on to prevent the disclosure of documents pertaining to official misconduct reveals that utilizing in camera review and redaction avoids many of the claimed exemptions, which are inapplicable to most circumstances.[260] Making the answer turn on whether the investigation resulted in discipline misses the entire point of these requests—ensuring that the decision to discipline or not is justified by the evidence—and fails to

251. *See* Md. Dep't of State Police v. Md. State Conf. of NAACP Branches, 988 A.2d 1075, 1093–95 (Md. Ct. Spec. App. 2010) (Davis, J., concurring) (arguing that even when a statutory provision renders certain records ostensibly confidential, "trial courts must engage in a balancing procedure in making their determination to permit such a disclosure").

252. Sciacca v. Fed. Bureau of Investigation, 23 F. Supp. 3d 17, 26 (D.D.C. 2014).

253. *Id.*

254. *See* Walker & Wills, *supra* note 20, at 12.

255. *See supra* Section IV.A (supporting data-driven police reform).

256. Zansberg & Campos, *supra* note 12, at 34.

257. *See supra* Section IV.

258. *WNYC Study*, *supra* note 15, at 1.

259. *See* Paybarah, *supra* note 155; *see also* BRENNAN CENTER, *supra* note 155 (discussing the retention and release of body camera footage).

260. *See supra* Part III (finding each of the exemptions inapplicable or resolvable through redaction).

comport with the fundamental purpose of open records laws.[261] Similarly, resting the denial of a records request on the basis of whether an investigation pertains to an officer's on-duty or off-duty conduct prevents the public from meaningfully assessing whether the investigating department engaged in preferential treatment or created a double standard for investigation.[262] *Herald* demonstrates that release may be proper under these circumstances.[263]

The deliberative process privilege is arguably the strongest argument for exempting internal affairs documents as police personnel files; however, it ultimately fails as a general justification for keeping internal investigations shielded from public view.[264] Officers participating in these investigations are increasingly subject to a number of internal and external pressures, and the possibility of release to the public may give them an "out" to simply tell the truth.[265] So long as these files are stuffed in a cabinet and forgotten, an individual officer has little incentive to stand up to internal pressures, which prevents reporting a fellow officer's misconduct.[266]

Weighing heavily against all these concerns is the massive public interest in shedding light on the process of internal affairs investigations.[267] So long as these investigations are closed off to any meaningful review, the public will have every reason to distrust internal affairs investigatory results.[268] By contrast, greater transparency via affirmative disclosures can begin to repair the relationship between the police and the people that they ultimately protect and serve.[269]

261. *Id.*
262. *Id.*
263. Herald Co. v. Kent Cty. Sheriff's Dep't, 680 N.W.2d 529, 534–35 (Mich. Ct. App. 2004).
264. *See supra* Section III.C.
265. *See supra* Section III.C.
266. *See supra* Section III.C.
267. Zansberg & Campos, *supra* note 12, at 34.
268. *Id.*
269. *Id.*