

## Private Eyes:

Confidentiality issues and access to police investigation records

**A** police officer is caught driving more than 100 miles per hour on the streets of Milton, Conn. A Virginia woman accuses a police officer of raping her when he responded to her 911 call in 2009. A man is killed by the gun of a Maine state police officer. An officer is charged with multiple sexual assaults during traffic stops in Charlotte, N.C.

In the last several months, stories about these incidents — and many more — were written with the aid of records that were released to the public in response to open records requests. Some of these stories were also written without some of the critical information in police files, because officials denied access to the records and the paper couldn't get the whole story.

*continued inside*

Unfortunately, many stories pertaining to similar incidents are incomplete because reporters can't gain access to the information, either because the police stonewalled or were not required to release records. State laws regarding access to police records are not uniform: Some states allow broad disclosure of records, while some allow little disclosure. Yet, openness in police departments is essential to keeping in check an arm of government that is entrusted with power and enormous responsibility.

Far too often the only stories about major crimes are those documenting a news organization's request for records under state freedom of information acts and being denied access. As recently as Oct. 15, *The Post and Courier*, in South Carolina, was denied access to performance reviews of a Charleston public safety sergeant who was fired amid allegations of misconduct. The department denied access because the records were part of an ongoing criminal investigation. Jay Bender, an attorney for the South Carolina Press Association, disagreed and told the newspaper that, in denying access to the reports, the police were "mak[ing] up their own exemptions to the Freedom of Information Act."

In Milford, Conn., police are being criticized after erasing video tapes that had been requested under the state's Freedom of Information Law. Police insist the erasure was accidental. There, an attorney for a local teen who was killed in a collision with a police car sought the videos for a resulting lawsuit. Some of the missing 348 hours of video has been recovered — only 1/5 of the amount that was requested. The story, as documented by the *Connecticut Post*, has now become about obstruction and a valid information request.

Obstacles to gaining access to internal investigation records, arrest records and juvenile records are only part of the bigger picture of problems with access to police department records. Reporters must maneuver an evolving set of standards to get information, especially as states amend their laws, as Illinois and North Carolina have done in the last year. It appears there is a trend toward greater access, but police

departments need to foster an atmosphere of compliance because, according to open government advocates, the cost to a citizen or newsroom to appeal a denial can be prohibitive.

Most states, like Alaska, California, Ohio, and Rhode Island, for example, have provisions that keep ongoing investigations into criminal conduct exempt,<sup>1</sup> which would include an ongoing internal investigation of a police officer. But even when an investigation into police misconduct is complete, records will not always be opened for inspection by the general public. Not every state will allow access to arrest records, either. And many states won't allow access to juvenile records at all.

### Internal investigation records

Gaining access to internal investigation records after police have concluded an investigation into allegations of misconduct is a difficult issue in many states.

In Maryland, this issue is currently before before the state high court. On Oct. 1, The Reporters Committee for Freedom of the Press filed a friend-of-the-court brief in the Maryland Court of Appeals in *Maryland Department of State Police v. Maryland State Conference of NAACP Branches*. The NAACP in Maryland filed a records request to obtain internal investigation records into allegations of racial profiling. The department denied the request. The dispute concerns the state's open records law, which exempts personnel records, but it is not clear whether internal investigations into individual officers falls within the scope of the term. This is the crux of the issue in many states: When an investigation has concluded, are the records open or does another exemption apply?

In most states, the question of whether or not to release internal investigation records is determined through a balancing of interests, performed either by the records custodian or by a judge, between the public benefits of disclosure and the privacy rights of the officers involved. Most states that perform a balancing test have found that the public interest in holding police accountable for their official conduct outweighs any claimed privacy interests. These states include, for example, Alaska in *Jones v. Jennings*, Georgia in *Fincher v. State of Georgia*, South Carolina in *Burton v. York City Sheriff's Department* and Utah in *Worden v. Provo City*, among others.

A common thread running through these cases is the public interest of creating and maintaining trust between the public and the police. Massachusetts, Wisconsin and Georgia courts emphasized the need for openness to foster public confidence. In Wisconsin, the court in *Isthmus Publishing*

*Co. v. City of Madison Police Dep't*, held that police have an "awesome responsibility" and the "interest of society in scrutinizing the uses to which police personnel put their powers weighs more heavily" than any privacy interest individual officers may have.<sup>2</sup>

Steve Zansberg, a partner in the Denver office of Levine Sullivan Koch & Schulz L.L.P., has argued many cases involving access to police internal investigation records. He said that the Massachusetts Court of Appeals expressed the issue best in *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester* when it held that allowing the internal investigation materials to be exempt would negate the stated purpose of having internal investigations: to instill public confidence in the police force.

"If the whole process is shrouded in secrecy, it's counterproductive," Zansberg said. "It's not only necessary to allow the public to assess the conduct of the [accused] officer, but also to allow an assessment of the quality of the investigation into alleged misconduct, especially when there is a finding of no fault."

Other courts, like the Washington Supreme Court in *Cowles Publishing Co. v. State Patrol*, have found that there is no privacy right for police officers when they act in their official capacity. Police officers are public servants and public employees on all levels have a lower expectation of privacy about records that reflect how they conduct government business, Zansberg said. And courts are generally reflecting that belief, he added.

Despite what Zansberg called a trend towards openness, there are still a significant number of states that limit access to these records.

For example, Vermont makes police internal investigations confidential, exempting a "disciplinary investigation by any police" with only limited information made public. The Ohio Supreme Court held in *Ohio Patrolmen's Benevolent Association v. City of Mentor* that internal investigation records were exempt from open records laws under existing exemptions for ongoing investigations to the extent that the documents would reveal the identities of uncharged suspects. Further, the North Carolina Supreme Court held in *News and Observer Publishing Co. v. Poole* that any record that involves disciplinary actions, suspensions or terminations is exempt under the personnel files exemption to the state public records law.

The New Hampshire Supreme Court interpreted its public records statute to exclude internal investigation records in *Union Leader Corp. v. Fenniman*. "These files plainly 'pertain to internal personnel practices' because they document procedures leading up to internal personnel discipline,

For more information on police and personnel records, see the Open Government Guide on our website at [www.rcfp.org/ogg](http://www.rcfp.org/ogg).

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a quintessential example of an internal personnel practice,” the court held.

While the language in the New Hampshire statute appears ambiguous, the court found that the legislative intent was to keep the records out of the public eye and held that a balancing test to determine “whether the benefits of nondisclosure outweighed the benefits of disclosure” was inappropriate because the records are “categorically exempt.” The case was brought by a newspaper that already had the results of the investigation, but wanted access to the documents collected during the process.

Most states have a personnel records exemption to their open records law.

A few states have statutorily opened these records or not exempted personnel records at all. Tennessee makes law enforcement personnel records open, subject to minor exceptions. Illinois has a statute that negates any privacy claim in records involving the public duties of public employees. North Dakota has no personnel record exemption at all, and the state Supreme Court has twice held that personnel files are public records.

Zansberg approves of those states that have adopted a balancing test to determine openness. He says that there are some records, in rare cases, that should be shielded, like financial information or the identity of undercover officers. However, he thinks that the balancing test should start with a strong presumption of openness and that some courts fail to give the proper weight to the public interest.

In the end, disclosing internal investigation records benefits all sides, Zansberg said. “To keep this information under wraps is a disservice. It does more damage to police in their ability to engage the community. It makes citizens less likely to cooperate and assist in investigations.”

### Arrest records

Arrest records are generally open to the public unless they concern an active or ongoing investigation. A few states restrict the information that can be obtained from an arrest record, especially when it concerns individuals who were never charged, were acquitted or had their records expunged. Again, the determination will often result in a balancing test comparing the public’s interest in disclosure against the individual



privacy interest.

In Vermont, for example, arrest records are open unless they are part of an ongoing investigation. In *Caledonian Record Publishing Co. v. Walton*, the Vermont Supreme Court held that, in general, arrest records are the product of the investigation, rather than part of an ongoing investigation, so the records are presumptively open. Oklahoma, Arkansas and Ohio courts have also ruled to allow access to arrest records.<sup>3</sup>

Wisconsin and Texas courts follow a slightly different approach, where access to general arrest sheets has been allowed when searching into a specific incident, but the courts have been less persuaded when the request concerns personal histories and arrest records. In *Newspapers Inc. v. Breier*, the Wisconsin Supreme Court held that the police must allow inspection of the police blotter and a chronological list of arrests. The court, although not ruling on the matter, expressed doubt about whether a request for an individual’s personal arrest history would pass a balancing test between public and private interests.

Much like the Wisconsin court, the Texas Court of Civil Appeals held in *Houston Chronicle Publishing Co. v. City of Houston* that some information may be released to the public, but other more detailed information must remain confidential due to privacy concerns. On one hand, the court held that when researching a specific incident, the arrest sheet was not exempt from the state’s public records law: “The press and the public have a constitutional right of access to information concerning crime in the community, and to information relating

to activities of law enforcement agencies.”

However, the court held that personal histories and arrest records of individuals are exempt from disclosure: “A holding that the Personal History and Arrest Record must be open to inspection by the press and public would contain the potential for massive and unjustified damage to the individual.”

Joseph Larsen, special counsel at the law firm of Sedgwick, Detert, Moran & Arnold, L.L.P. in Houston said that the *Houston Chronicle* decision set the pattern for everything that followed in Texas regarding access to police documents. Larsen, who also works with the Freedom of Information Foundation of Texas, says the state attorney general’s office in Texas has taken the *Houston Chronicle* precedent even further by systematically broadening the category of records that are being withheld from the public, including mug shots and autopsy reports, which Larsen believes violate the public’s rights to access.

“The [attorney general’s office] very rarely rules against law enforcement,” said Larsen. “The public is being deprived of this information when I think the law requires its release.”

One of Larsen’s biggest complaints is that he feels the state attorney general’s office and the police departments are misinterpreting the *Houston Chronicle* ruling and denying access to records that do not properly fit into an exemption. Arrest histories, which are exempt in Texas and most other states, and arrest records, which are not, are very different, Larsen said. Arrest records are the records that are stored by police departments after an incident,



Relatively few court opinions exist regarding access to juvenile records because many state laws contain explicit exemptions for these types of records. However, Georgia and Virginia courts have advocated a balancing test in such circumstances, refusing to enforce a blanket prohibition on disclosure of juvenile records.

The Virginia Circuit Court, in an unpublished decision in *In re Richmond Newspapers, Inc.*, found that an absolute rule barring access to juvenile records would be inappropriate. However, the court didn't allow access to the records of a juvenile who was charged with murder. The court remanded the case and

whereas arrest histories “are almost like work product,” Larsen said. They involve the accumulation of records from all over the state and country.

Larsen pointed to a few examples of what he believed were instances where the police wrongly denied access to information. But few cases make it past the attorney general's review in Texas. He says the cost of an appeal is often prohibitive to newspapers and other media companies, and there's just too much bad law on the books.

When records are found to be exempt, it is generally because the court found that the records were part of an open investigation. The federal Freedom of Information Act and most state open records laws have an exemption for ongoing investigations. In Texas, the law requires that only basic information must be released and additional information will only be released when there is either a conviction or a deferred adjudication, Larsen said.

Arrest records contain personal information and courts have held that the risk inherent with releasing information that is not always up-to-date and can be highly prejudicial to individuals if they are released because an arrest records does not always reflect instances where charges have been expunged or an individual was pardoned, was never charged or was acquitted. Courts have relied on this reasoning in keeping some records secret, but Larsen feels the police have other reasons for wanting these records kept confidential.

Law enforcement is protective of its own and keeping these records confidential keeps other issues out of the public eye as well, like use of force and other problems that may arise in the course of an investigation, he said.

“The police are arguably the most powerful part of the government because they can take your stuff away - take you away,” Larsen said. “It is extremely important that law enforcement be accountable.”

Arrest records, Larsen says, are just one of the many things that the Texas government is keeping out of the hands of reporters and out of the hands of the public. “If we're going to limit government, we've got to know what it's doing,” he said. “You can't have a limited government if the government controls all the critical information.”

#### Juvenile records

Most state open records laws contain an exemption for juvenile records, protective custody and delinquency records.<sup>4</sup> For most juvenile records, access is limited to the juvenile, his or her parents or guardians, or other parties directly involved in a legal matter. Some states, such as Tennessee and Colorado, allow for some disclosure depending on the age of the juvenile and the severity of the crime. Tennessee will permit access in cases where the juvenile is 14 years old or older and is charged with a serious crime. Colorado will open records if the juvenile is 12 years old or older if he or she is charged with a violent crime.

ordered the lower court to conduct a balancing test to weigh the interest of public disclosure against the interest in shielding juveniles from exposure and scrutiny from the press and public. The court held that society's interest in “shielding juveniles from the same level of scrutiny which sometimes attaches to adults” is “just as compelling as society's interest in gaining access to court records.”

In *Florida Publishing Co. v. Morgan*, the Supreme Court of Georgia found that while there cannot be an absolute closure, there can be a presumption of confidentiality in juvenile cases. The court held that the press and the public “must be given an opportunity to show that the state's or juveniles' interest in a closed hearing is not ‘overriding’ or ‘compelling.’”

As expressed in the Virginia case, states recognize a compelling state interest in protecting juveniles, as evidenced by the laws keeping these records confidential, even when they are accused of serious crimes. It is only in limited circumstances, generally involving teens accused of serious, violent crimes, where records and proceedings are open.

The Virginia decision, however, has not led to many changes in how things are done within the state. While a Virginia circuit court opinion is not particularly persuasive, Dick Hammerstrom, of *The Free Lance-Star* thinks the issue is greater than what has been announced in that particular case. Hammerstrom, who serves on the Virginia Coalition



for Open Government, says that the norm in Virginia is to deny access to juvenile records and proceedings.

The judges make their own rules and they don't follow *In re Richmond Newspapers*, he said. In fact, he says, judges will often deny reporters access to even cases where the offenders are adults if the crime is against a juvenile.

In Tennessee, the state legislature felt there was a need to have a more open juvenile system because of the very adult crimes that minors can commit, especially after a marked increase in juvenile crimes about 10

years ago, said Frank Gibson, executive director of the Tennessee Coalition for Open Government. With a desire to increase punishments for youth offenders came an increase in openness for the proceedings, but only for the most violent offenses.

The reason these records are secret is to protect the minor from being stigmatized by the press and to be better rehabilitated, Gibson said. "I'm not sure that a 14-year-old who pulls a gun and kills two people will be stigmatized by having his name published in the paper."

The public has a right to know this in-

formation because juvenile crime affects the public just as any crime in the community does, Gibson said. People have a right to know what is going on in their community and to know if they are safe. Keeping juvenile records secret helps few people in reality, whereas secrecy can hurt. And like in Virginia, Gibson said that judges will often ignore the law and keep the proceedings closed because few parties sue over the issue and even if there is a law suit, the result is often too late to make any difference.

"Secrecy is bad in any context," Gibson said. ♦

## Endnotes

1. More than 45 states have statutes and/or legal precedent that either limit or prohibit access to ongoing police investigations. Openness varies state to state. Colorado and California, for example, have some of the most open standards, prohibiting access only in situations where it is shown that an investigation would be severely hampered by disclosing information. See Cal. Gov't Code §§ 6254(f)(1), (f)(2) and (f)(3); *City of Pretash v. City of Leadville*, 715 P.2d 1272 (Colo. App. 1985). Other states, like Delaware and Kentucky, have full bans on disclosure of these records. See 29 Del. C. § 10002(g)(3); KRS 61.878(1)(h).

2. See *Isthmus Publ'g Co. v. City of Madison Police Dep't*, 1995 WL 819176, \*12 (Wis. Cir. Ct. 1995); See also *Fincher v. State*, 497 S.E.2d 632, 636 (Ga. Ct. App. 1998); *Worcester Telegram & Gazette v. Chief of Police of Worcester*, 787 N.E.2d 602, 607 (Mass. App. Ct. 2003).

3. See *Oklahoma Publ'g Co. v. City of Moore*, 682 P.2d 754 (Okla. 1984); *Hengel v. City of Pine Bluff*, 821 S.W.2d 761 (Ark. 1991); *State ex rel. Outlet Commc'ns, Inc. v. Lancaster Police Dep't*, 528 N.E.2d 175 (Ohio 1988).

4. More than 30 states exempt juvenile records from disclosure in sum or in part. Many of these states have exceptions for when the juvenile is charged with a serious, violent crime. Those states include, among others, Tennessee, T.C.A. § 37-1-154; Arkansas, Ark. Stat. Ann. § 9-27-352; Florida, Fla. Stat. sec. 39.045(9) (1995); and Utah, Utah Code Ann. § 78A-6-209. Washington has a presumption of openness in juvenile offender proceedings, but does allow for closure in certain circumstances. RCW 13.40.140(6), 13.50.010 and .050(2), (11).

## Cases and Statutes Cited

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