

Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files

STEVEN D. ZANSBERG AND PAMELA CAMPOS

Across the nation, cities are beset by angry allegations that police officers are abusive and out of control.¹ Communities are torn apart by allegations of racial profiling or “driving while black” traffic stops.² The video images of Rodney King being beaten by Los Angeles Police Department officers are recycled and rebroadcast each time a police officer in another city is caught on tape using force to restrain or arrest a suspect. Such allegations and incidents of police misconduct have fostered community mistrust of police officers.

Furthering this mistrust is police departments’ routine refusal to make available for public inspection the records of internal investigations into alleged wrongdoing.³ In fending off the public’s requests to access internal affairs reports, police departments most frequently invoke two bases upon which the denials of access are premised: (1) the privacy rights of the officers involved, and (2) the deliberative process privilege attached to predecisional records recommending a policy or course of action (i.e., what, if any, disciplinary sanction to impose).

The atmosphere of mistrust can only be improved by bringing greater transparency and accountability to police departments. This article presents the argument (and supporting case law) in favor of greater public access, under states’ open records laws, to records of internal affairs investigations into alleged police misconduct.⁴ Public access would help assure citizens that their complaints are taken seriously, investigated thoroughly in an unbiased fashion, and that officers who are found to have violated departmental policies are appropriately sanctioned.

Steven D. Zansberg (szansberg@faegre.com) is a partner in the Denver office of Faegre & Benson LLP. Pamela Campos (pamela.campos@yale.edu), a 2005 J.D. candidate at Yale Law School, served as a 2004 summer associate in Faegre & Benson’s Denver office.

More specifically, this article explains why neither of the two bases most frequently asserted as the grounds for denying access to such records is justified. Although police officers may have a legitimate privacy interest in certain narrowly circumscribed portions of files concerning their off-duty, private conduct, they do not enjoy a reasonable expectation of privacy with respect to records concerning only how they discharge their official duties. Similarly, although a small subset of documents in an internal affairs file may properly be withheld under the deliberative process privilege, that privilege does not encompass the results of the investigation, such as documents reflecting whether charges were sustained and whether any discipline was imposed; nor does the deliberative process privilege properly apply to witness or officer statements recounting the events under investigation. Finally, weighing strongly against both of these objections to disclosure is the countervailing and compelling public interest in providing the public with the means to assess the propriety, thoroughness, and impartiality of the investigation into allegations of officer misconduct.

Statutory Bases for Disclosure

All fifty states have some type of open records law.⁵ The preamble or preface to many of these statutes explicitly recognize the democratic purpose of providing public access to governmental records. For instance, the New York Records Act declares thus:

The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. . . . The people’s right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. . . . The legislature therefore declares that government is the public’s business and that the public, individually and collectively and represented by a free press, should have access to the records of government.⁶

State legislators in Hawaii and Illinois, among other states, chose to preface their open records laws with similar language.⁷

In asserting that open records statutes are a critical tool for providing access to government information, state legislators have not neglected to recognize privacy rights. For example, California’s law declares, “In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”⁸ In Montana, both the right to examine documents and the right to privacy are constitutional provisions.⁹

Most states’ open records statutes resolve the tension between the need for free access to information and personal privacy rights by creating an explicit statutory exemption for records that would violate a privacy right.¹⁰ However, by statute or precedent, these exceptions are narrowly construed.¹¹ In fact, several states’ legislatures (and courts) have recognized that public officials enjoy no legitimate expectation of privacy with regard to the manner in which they discharge their official duties. In Illinois, “the disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy” for the purposes of the state Freedom of Information Act (FOIA) privacy exemption.¹² Similarly, Hawaii’s Open Records Act allows for publication of specific information related to “employment misconduct that results in an employee’s suspension or discharge,” including the nature of the conduct, a summary of the allegations of misconduct, and any formal disciplinary action taken.¹³

With regard to police files, some states have asserted that such files, like files of other public officials, do not warrant a special privacy exemption.¹⁴

Tennessee's open records law, for example, declares that all law enforcement personnel records are open for inspection, although the law does require that the party requesting information identify itself and that notice be given to the police officer in question.¹⁵

Other states' open records laws, in contrast, expressly exclude police internal misconduct reports from a more general rule permitting publication of information about discharge of official duties. The Hawaii statute, for instance, exempts police officers' files from its provision requiring release of employment misconduct information.¹⁶

In addition to privacy exemptions, most state statutes follow FOIA by including an exemption for investigatory records. (In some instances, these investigatory records must be made available when the investigation is complete or inactive.¹⁷) Police departments most frequently base their decision to withhold internal affairs files on the general privacy, investigatory records, personnel file,¹⁸ or privileged information exemptions.

Right of Privacy: *Martinelli* Test

In states that do not provide an express exemption from disclosure of police internal affairs investigation files, the battle over access is most often waged under a more general assertion by police officers of a constitutionally based right of privacy that would be violated by public release of government information about the officers.¹⁹ Perhaps the most clearly articulated ruling regarding this issue is found in the Colorado Supreme Court's seminal opinion on this topic in *Martinelli v. District Court*.²⁰

In *Martinelli*, an individual who had been arrested by several Denver police officers brought an action in state court alleging assault and battery; false arrest and malicious prosecution; violation of his rights under the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution; conspiracy among the defendants; and negligence on the part of the City and County of Denver and its police department in selecting, supervising, and retaining the individual police officers.²¹

In the civil litigation, the plaintiff served a request for production of docu-

ments, including a report of the Denver Police Department's internal affairs investigation into the events leading up to and including the plaintiff's arrest on July 15, 1976. When the Denver District Court judge granted the plaintiff's motion to compel production of that report (as well as other personnel files and job-related records of the officers in question), the police officer defendants filed an original proceeding with the Colorado Supreme Court seeking to preclude such discovery on the grounds that compelled disclosure of the internal affairs investigation file would violate the officers' constitutional right of privacy.²²

The Colorado Supreme Court announced a tripartite test for determining when an individual's privacy interests should outweigh the public interest in access to governmental records. Under *Martinelli*, the court must determine (1) whether there is a legitimate expectation that the materials or information will not be disclosed, (2) whether disclosure is nonetheless required to serve a compelling state interest, and (3) if the necessary disclosure will occur in the least-intrusive manner with respect to confidentiality rights.²³

The first step of the *Martinelli* test requires closer inquiry, for it is under this threshold standard that the officers' claim for privacy rights fails. To establish a "legitimate expectation" that information will not be disclosed, a police agency or officer must show three necessary preconditions: (1) that there exists "an actual or subjective expectation that the information . . . [will] not be disclosed," (2) that the requested material is both "highly personal and sensitive," and (3) that disclosure of the information would be "offensive and objectionable to a reasonable person of ordinary sensibilities."²⁴ Only if all three of these preconditions are satisfied does the information at issue become subject to a constitutionally based right of confidentiality or privacy, against which other rights may then be balanced.²⁵ Thus, unless the information is of a "highly personal and sensitive" nature such that its public disclosure "would be offensive and objectionable to a reasonable person," the disclosure of such information cannot, as a matter of law, constitute a vio-

lation of a person's constitutional right to privacy.²⁶

Martinelli Applied

In applying this test, courts (in Colorado and elsewhere) have almost uniformly found that information regarding the official conduct of a police officer is not highly personal and sensitive and, thus, is not protected from disclosure under the first prong of the *Martinelli* test.

The specific instance of this rule, applied in the context of police officers' discharge of their official duties, is but one manifestation of a much broader and well-recognized rule of law: "A public official has no right to privacy as to the manner in which he conducts his office."²⁷ Kentucky's attorney general has opined that "disciplinary action taken against a public employee is a matter related to his job performance and a matter about which the public has a right to know."²⁸

Public service is a public trust. When public employees have been disciplined for matters related to the performance of their employment . . . the public has a right to know about the employee's misconduct and any resulting disciplinary action taken against the employee.²⁹

It is entirely appropriate that this more general rule of law be applied with full force to gun-carrying police officers:

Police officers are public servants sworn to serve and protect the general public. The general public's health and safety are at issue whenever there is serious allegations of police [misconduct]. The manner in which such allegations are investigated is a matter of significant public interest. . . .

Privacy interests are diminished when the party seeking protection is a public person subject to legitimate public scrutiny. . . . Performance of police duties and investigations of their performance is a matter of great public importance.³⁰

Accordingly, in *Stidham v. Peace Officers Standards & Training*,³¹ the Tenth Circuit found that "police internal investigation files [are] not protected by the right to privacy when the documents relate[] simply to the officers' work as police officers." Similarly, a federal district court judge in Utah found that a police officer who was subject to suspension and reprimand for on-duty conduct did not have "a legitimate expectation of privacy" because the disclosed information was "not of a highly personal and sensitive nature."³²

Recently, the South Carolina Court of Appeals expressly rejected an attempt by a sheriff's deputies to invoke a constitutional right of privacy with respect to an internal investigation into their discharge of official duties, which was found to constitute "conduct unbecoming an officer," resulting in suspension without pay:

Unless and until the Supreme Court rules otherwise, we will follow its precedent and not expand the "right of privacy" under the Fourteenth Amendment beyond those situations which the Court has ruled bear on the most intimate decisions affecting personal autonomy.³³

"[I]ndividual expectations of confidentiality must arise from the personal quality of any materials which the state possesses,"³⁴ but information concerning only the official conduct of government officials cannot, as a matter of law, be deemed "personal, private or sensitive"; thus, police officers cannot have a legitimate expectation of privacy in internal investigation materials that relate exclusively to their official conduct.³⁵ Accordingly, information in internal affairs files that relate only to the discharge of a police officer's official duties should not be shielded from public inspection on the basis of the officer's constitutionally protected right of privacy in such information.

Deliberative Process Privilege Limits

Another frequently cited ground for denying public access to internal affairs investigation files available for public inspection is the deliberative process privilege. Rooted in both the common law and in statutory codifications, this privilege allows a litigant to withhold "predecisional" and "deliberative" materials that express an opinion or recommendation for a governmental decision maker to consider in formulating government policy.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.

Courts have recognized that portions of internal affairs investigation files are properly classified as deliberative process materials.³⁷ The problem is that police departments often assert the

deliberative process privilege in an overbroad fashion, claiming that the privilege extends to any and all information gathered or considered in the course of conducting the investigation.

Clearly, by definition, the deliberative process privilege cannot extend to postdecisional records that report or document the outcome of an internal affairs investigation, whether or not the allegations against the officers were sustained.³⁸ Similarly, records that document the official actions taken by the department in response to the findings, i.e., the decision to impose disciplinary sanctions and the level of sanction imposed, do not fit within the deliberative process category but are instead a statement of departmental policy.³⁹

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.⁴⁰ A number of courts have questioned the unsupported assertion that subjecting such witness statements⁴¹ (whether from civilians or uniformed officers) to public disclosure will necessarily inhibit, or chill, the full, frank, and accurate recounting of recollections or observations of key events.⁴² "[T]he proposition," said one court, "that knowledge on the part of individual police officers that the information they provide to [internal affairs] investigators will later be subject to disclosure . . . will have a detrimental effect on frank and open communication . . . should be subject to careful scrutiny."⁴³ Another court noted that "the alternative . . . [i.e.] some possibility of disclosure" could more likely incite candor:⁴⁴

[I]n short, officers will feel pressure to be honest and logical when they know 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 the truth comes out. . . . Thus there is a real possibility that officers working in closed systems will feel less pressure to be honest than officers who know that they may be forced to defend what they say and report.⁴⁵

Documents do not have to involve results of an investigation, actions taken, or eyewitness accounts in order to be subject to disclosure. Even documents that are properly characterized as

predecisional and deliberative or commendatory in nature may still be subject to disclosure if they are expressly referenced as the basis for the department's disciplinary action.⁴⁶

Properly cabined to its policy rationale of encouraging frank and candid expression of opinions and proposals or recommendations of particular actions to policy-makers, the deliberative process privilege should be limited only to those documents in an internal affairs file containing "recommendations, advisory opinions, draft documents, proposals, suggestions, and other subjective documents that reflect the personal opinions of the writer."⁴⁷

Countervailing Public Interest

Even when courts do recognize a police officer's privacy interests in internal affairs files or the deliberative nature of certain records generated in the course of an internal affairs investigation, those interests must be balanced against the public's interest in being able to review the requested files. "[T]he general public's health and safety are at issue whenever there are serious allegations of police [misconduct]. The manner in which such allegations are investigated is a matter of significant public interest."⁴⁸ For example, in *Wiggins v. Burge*,⁴⁹ a group of Chicago newspapers petitioned the court for access to investigative records used in a case involving allegations of police torture. The court found that the officers' privacy interest in such files was outweighed by the "great public importance" of investigation into performance of police duties.⁵⁰

The strength of this public interest argument is echoed throughout the case law. The Montana Supreme Court stated that "[t]he conduct of our law enforcement officers is a sensitive matter so that if they engage in conduct resulting in discipline for misconduct in the line of duty, the public should know."⁵¹ In Minnesota, the state supreme court found that "[t]here is a compelling need for public accountability, particularly with law enforcement agencies."⁵² Public interest in police misconduct is so strong that courts have released records even after the individual involved has resigned.⁵³

Public interest in monitoring the conduct of its government servants in general, and police officers in particular, extends beyond the ability to assess the

actual conduct of on-duty officers;⁵⁴ it is equally important for the public to be assured that the investigations into allegations of abuse or other misconduct are themselves above reproach.⁵⁵ As one federal judge stated eloquently, “[t]he public has a strong interest in assessing the truthfulness of allegations of official misconduct, and whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely.”⁵⁶ Another court noted that “the public may have an interest in knowing that a government investigation itself is comprehensive, the report of an investigation released publicly is accurate, any disciplinary measures imposed are adequate, and those who are accountable are dealt with in an appropriate manner.”⁵⁷

The need for public scrutiny of police internal affairs files as a means of instilling confidence in the integrity of agencies’ self-regulatory function⁵⁸ is particularly acute in communities where police-community relations have been strained by a series of scandals, citizen shootings, allegations of excessive use of force, and/or racial insensitivity.⁵⁹ In Chicago, a city plagued by police violence and a series of civil rights lawsuits alleging abusive conduct, a federal judge recently ordered that public access be provided to an internal affairs investigation of police brutality, proclaiming that

[t]he allegations of police misconduct contained in the disputed files must be exposed to the light of human conscience and the air of natural opinion . . . [t]he only way to end this syndrome [of taxpayer-funded settlements of lawsuits alleging police misconduct] is to evaluate and reevaluate past practices. . . . Some of these issues require public debate and appropriate media scrutiny.⁶⁰

Public review of police internal affairs files may well be a prerequisite to fostering strong community relations that are necessary for effective law enforcement. As one California appellate panel stated,

[I]t is the attitude of the public toward the police discipline system that will determine the effectiveness of the system as an element of police-community relations. 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.⁶¹

Recently, the Massachusetts Court of Appeals eloquently articulated the vital role that public access to police internal affairs files plays in maintaining the public’s trust:

Unlike other evaluations and assessments, the internal affairs process exists specifically to address complaints of police corruption (theft, bribery, acceptance of gratuities), misconduct (verbal and physical abuse, unlawful arrest, harassment), and other criminal acts that would undermine the relationship of trust and confidence between the police and the citizenry that is essential to law enforcement. The internal affairs procedure fosters the public’s trust and confidence in the integrity of the police department, its employees, and its processes for investigating complaints because the department has the integrity to discipline itself. 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.⁶²

In light of this, the court concluded, “[i]t would be odd, indeed, to shield from the light of public scrutiny . . . the workings and determinations of a process whose quintessential purpose is to inspire public confidence.”⁶³

Conclusion

Police departments often react in a knee-jerk manner in denying public access to records of internal investigations concerning allegations of officer misconduct. The most frequently asserted bases for withholding access to such records, i.e., officer privacy and the deliberative process privilege, are not appropriately invoked when used to shield from public scrutiny those records reflecting only the discharge of an officer’s official duties and those documenting the outcome of an investigation.

Weighing against state interests in protecting the reputation and morale of police officers who are subject to disciplinary sanctions for violating departmental policies is the much stronger public interest in being able to assess the thoroughness, impartiality, and correctness of the police departments’ investigations and conclusions and the propriety of any disciplinary actions taken in response. 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. □

Endnotes

1. Jamie Stockwell, *Police Reforms Faulted as Slow; Prince George’s Force Found Lacking*, WASH. POST, Sept. 17,

2004, at B-5; April M. Washington, *\$6.5 Million for Police Lawsuits: Bulk of Fees Paid to Outside Attorneys in Excessive-Force Cases*, ROCKY MOUNTAIN NEWS, Apr. 12, 2004; Janine DeFao, *Oakland Settles “Riders’ Suits”*: Record \$10.5 Million Payout—Police Reforms Required, S.F. CHRON., Feb. 19, 2003; *Right Answer, Wrong Question—\$18 Million Settlement of Haggerty Lawsuit Ends Ordeal, But Will It Help Police-Community Relations?*, CHIC. SUN TIMES, June 29, 2001; Joe Swickard & Suzette Hackney, *Detroit Police Lawsuits Costly; In 3-Year Period, City Paid Out \$32 Million*, DETROIT FREE PRESS, Aug. 3, 2000.

2. Cecilia M. Vega, *Police to Investigate Allegations of Racial Profiling—Officer Put on Leave After Being Accused of Harassing Dozens of Latino Drivers*, S.F. CHRON., Aug. 5, 2004, at B5; Associated Press, *Federal Judge Allows Racial Profiling Lawsuit to Proceed*, Aug. 11, 2004 (discussing lawsuit brought against Scituate, R.I., police); Karin Brulliard, *More Than Highway Divides Austin—Study of Police Shootings Leads to Accusations of Racism*, HOUSTON CHRON., May 23, 2004, at 32; *ACLU of New Jersey Sues Manalapan Police for Targeting African-American Youths*, Aug. 24, 2004, available at www.aclu.org/news/RacialEquality/RacialEquality.cfm?id=16306&c=133 (last visited Oct. 4, 2004).

3. Requests for access to internal affairs records most frequently arise in two contexts: (1) in discovery, when a civil rights lawsuit is filed alleging excessive use of force or some other misconduct on the part of officers, and (2) when records are requested under a state’s open records statute. This article discusses only the latter, in which the relevancy restriction of civil discovery rules do not apply.

4. For an excellent, although dated, article on this topic, see Lynne Wilson, *The Public’s Right of Access to Police Misconduct Files*, 4:7 POLICE MISCONDUCT & CIV. RTS. REP. 73 (Jan.-Feb. 1994).

5. See 37a AM. JUR. 2D *Freedom of Information Acts* § 5 (2004).

6. N.Y. PUB. OFF. L. § 84 (Matthew Bender 2004).

7. HAW. REV. STAT. § 92F-2 (1996); 5 ILL. COMP. STAT. ANN. 140/7 (Matthew Bender 2004).

8. CAL. GOV’T CODE § 6250 (Deering 2004).

9. MONT. CONST., art. II, §§ 9, 10.

10. See, e.g., CAL. GOV’T CODE § 6254 (2004); GA. CODE ANN. §§ 50–18–70, –72 (2004); IDAHO CODE § 9–335 (Michie 2004); N.Y. PUB. OFF. L. §§ 84, 87(2) (2004); S.C. CODE ANN. § 30–4–40(a) (Law. Co-op. 2003). But c.f. OHIO REV. CODE ANN. § 149.43 (2004) (limiting access to peace officer information but defining such information to include only

address and identifying information).

11. *See, e.g.*, *Griffith Lab v. Metro. Sanitary Dist.*, 522 N.E.2d 744 (Ill. App. Ct. 1988). *But cf.* *Williams v. Superior Court*, 852 P.2d 377 (Cal. 1993) (finding that law enforcement exceptions should be construed liberally).

12. ILL. COMP. STAT. § 140/7.

13. HAW. REV. STAT. § 92F-14 (Supp. 1996).

14. *See, e.g.*, ARK. CODE ANN. § 25-19-105(c)(1) (Michie 1992 & Supp. 1993); GA. CODE ANN. § 50-18-72(a)(5) (2004); LA. REV. STAT. ANN. § 40:2532 (West 2004); OKLA. STAT. tit. 51, § 24A.7.B.4 (2004); UTAH CODE ANN. § 632-301(o) (2004).

15. TENN. CODE ANN. §10-7-503 (Supp. 1996).

16. HAW. REV. STAT. § 92F-14(b)(4)(v). Other states' laws expressly declare that police internal affairs files are exempt from disclosure. *See, e.g.*, CAL. PENAL CODE § 832.7 (Deering 2004); MD. STATE GOV'T CODE ANN. § 10-618 (2004); R.I. GEN. LAWS § 38-2-2 (2004); VT. STAT. ANN. tit. 1, § 316 (2004); WYO. STAT. ANN. § 16-4-203 (Michie 2003).

17. *See, e.g.*, IDAHO CODE §9-335(2) (Michie Supp. 2000).

18. Several courts have found that internal affairs investigation files are not properly characterized as personnel files. *See, e.g.*, *Johnson v. Dep't of Corr.*, 972 P.2d 692, 695 (Colo. Ct. App. 1999); *Fed. Publ'ns, Inc. v. Boise City*, 915 P.2d 21, 25 (Idaho 1996); *see also Copley Press, Inc. v. Superior Ct.*, 18 Cal. Rptr. 3d 657, 664-65 (Cal. Ct. App. 2004) (narrowly construing the scope of CAL. PENAL CODE § 832.7 to exempt "testimony of a percipient witness to events, or from documents not maintained in the personnel file").

19. *See Whalen v. Roe*, 429 U.S. 589 (1977) (recognizing that individuals' right of privacy protected by federal constitution can be violated by government's disclosure of certain highly personal and intimate information).

20. 612 P.2d 1083 (Colo. 1980).

21. *Id.* at 1086. The plaintiff in *Martinelli*, Jerre D. Malone, sought \$325,000 in actual and special damages and \$500,000 in exemplary damages.

22. *Id.* at 1091.

23. *Id.*; *see also Berniger v. Denver & R. W. R. Co.*, 139 F.R.D. 175 (D.D.C. 1991); *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976 (Alaska 1997); *Bolm v. Custodian of Records*, 969 P.2d 200 (Ariz. Ct. App. 1998); *Babets v. Sec'y of Exec. Office of Human Servs.*, 526 N.E.2d 1261 (Mass. 1988).

24. *Martinelli*, 612 P.2d at 1091.

25. *Id.* at 1092 (describing the first prong of *Martinelli*, i.e., whether the claimant has a "legitimate expectation of nondisclosure," as a "threshold matter"); *see also Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150,

1156 (Colo. Ct. App. 1998) (unless information in government's hands is "so intimate, personal or sensitive that disclosure of such information would be offensive and objectionable to a reasonable person," it is not protected by a constitutional right of privacy).

26. *See, e.g.*, *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989) ("The plaintiffs' right to privacy claim can be disposed of under the first prong of the *Martinelli* test. . . . Only highly personal information is protected."); *id.* (applying the first prong of *Martinelli* to internal affairs file and finding that "data in files 'which is not of a highly personal or sensitive nature may not fall within the zone of confidentiality.'"); *see also Stidham v. Peace Officers Standards & Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (applying *Martinelli* tripartite test and concluding "we need not address the second and third factors if the first is not met"); *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) ("The legitimacy of an individual's expectations [of privacy] depends . . . upon the intimate or otherwise personal nature of the material which the state possesses.").

27. *Rinsley v. Brandt*, 446 F. Supp. 850, 857-58 (D. Kan. 1977) (quoting *Rawlins v. Hutchinson News Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975)); *see also 37A AM. JUR. 2D Freedom of Information Act* § 254, at 262-63 (1994) (explaining that "disclosure of materials relating to investigations of alleged misconduct . . . of public officials is frequently not considered to be an unreasonable invasion of the official's privacy because investigation into official misconduct is a legitimate public concern, and incidents relating to public employment are frequently found not to be private") (citations omitted).

28. *In re Stewart*, 00-ORD-97 (2000) (quoting Op. Att'y Gen. 88-25).

29. *Id.* (quoting Op. Att'y Gen. 91-41, at 5). Notably, however, federal courts applying the federal FOIA statute have been markedly more protective of the privacy interests asserted by federal employees who are the subject of professional disciplinary investigations. *See James O. Pearson, Jr., Annotation, What Constitutes "Unwarranted Invasion of Privacy" for Purposes of Law Enforcement Investigatory Records Exemption of Freedom of Information Act*, 52 A.L.R. FED. 181 (2004) (summarizing cases); *Edmonds v. FBI*, 272 F. Supp. 2d 35 (D.D.C. 2003); *Mueller v. U.S. Air Force*, 63 F. Supp. 2d 738 (E.D. Va. 1999); *Office of the Capital Counsel v. Dep't of Justice*, 331 F. 3d 799 (11th Cir. 2003). *But see Cohen v. EPA*, 525 F. Supp. 425 (D.D.C. 1983) ("The privacy exemption does not apply to information regarding professional or business activities. . . . This information must be disclosed even if a professional reputation may be tarnished.").

30. *Wiggins v. Burge*, 173 F.R.D. 226, 229

(N.D. Ill. 1997); (quotation and citation omitted); *see also Cassidy v. Am. Broad. Cos., Inc.*, 377 N.E.2d 126, 132 (Ill. Ct. App. 1978) ("The conduct of a policeman on-duty is legitimately and necessarily an area upon which public interest may and should be focused . . . the very status of the policeman as a public official, as above pointed out, is tantamount to an implied consent to informing the general public by all legitimate means regarding his activities in discharge of his public duties.").

31. 265 F.3d 1144, 1155 (10th Cir. 2001).

32. *Worden v. Provo City*, 806 F. Supp. 1512, 1515-16 (D. Utah 1992).

33. *Burton v. York Cty. Sheriff's Dep't*, 594 S.E.2d 888, 896 (S.C. Ct. App. 2004).

34. *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (citing *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977); *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432, 435 (10th Cir. 1981)).

35. *See, e.g.*, *Cowles Publ'g Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988) ("[I]nstances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life."); *Coughlin v. Westinghouse Broad. & Cable, Inc.*, 603 F. Supp. 377, 390 (E.D. Pa. 1985) ("A police officer's on-the-job activities are matters of legitimate public interest, not private facts."); *aff'd*, 780 F.2d 340 (3d Cir. 1985); *State of Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists*, 927 P.2d 386, 407 (Haw. 1996) ("[I]nformation regarding charges of misconduct by police officers in their capacities as such . . . is not 'highly personal and intimate information.'"); *King v. Conde*, 121 F.R.D. 180, 191 (E.D.N.Y. 1988) ("[T]he privacy interest in this kind of professional record is not substantial because it is not the kind of 'highly personal' information warranting constitutional safeguard."); *Obiajulu v. City of Rochester*, 625 N.Y.S.2d 779, 780 (N.Y. App. Div. 1995) ("Disciplinary files containing disciplinary charges, the agency determination of those charges, and the penalties imposed, however, are not exempt from disclosure . . . [as] 'personal and intimate details of an employee's personal life.'"); *Stidham*, 265 F.3d at 1155.

36. *See, e.g.*, *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149-50 (1975); *EPA v. Mink*, 410 U.S. 73, 86 (1973); *see also City of Colorado Springs v. White*, 967 P.2d 1042, 1053-54 (Colo. 1998) ("The primary purpose of the privilege is to protect the frank exchange of ideas and opinions critical to the government's decision-making process where disclosure would discourage such discussion in the future."); 5 U.S.C. § 552(b)(5) (1996).

37. *Martinelli v. District Court*, 612 P.2d 1083, 1090-91 (Colo. 1980); *White*, 967 P.2d at 1053-54; *Sinicropi v. County of*

Nassau, 428 N.Y.S.2d 312 (1980).

38. *See, e.g.*, Schell v. U.S. Dep't of Health & Human Servs., 843 F.2d 933, 940 (6th Cir. 1988) ("a document is pre-decisional when it is received by the decision-maker on the subject of the decision prior to the time the decision is made") (quotations and citations omitted).

39. *Id.*

40. *See Martinelli*, 612 P.2d at 1090.

41. *Compare* Wayland v. NLRB, 627 F. Supp. 1473, 1476 (M.D. Tenn. 1983) (witness statements are not deliberative in nature) with Lurie v. Dep't of Army, 970 F. Supp. 19, 34-35 (D.D.C. 1997) (witness statements that include statements of opinion and recommendations are deliberative).

42. *See, e.g.*, Welsh v. City & County of San Francisco, 887 F. Supp. 1293, 1302 (N.D. Cal. 1995) ("Defendants cannot meet their burden simply by asserting, without empirical support, that officers will refuse to cooperate with Internal Affairs investigations if their statements are subject to even limited disclosure.") (emphasis added) (quoting Kelly v. City of San Jose, 114 F.R.D. 653, 672 (N.D. Cal. 1987)); King v. Conde, 121 F.R.D. 180, 193 (E.D.N.Y. 1988) ("[I]f the fear of disclosure . . . does have some real effect on officers' candor, the stronger working hypothesis is that fear of disclosure is more likely to increase candor than to chill it.").

43. *Martinelli*, 612 P.2d at 1090.

44. *Kelly*, 114 F.R.D. at 665.

45. *Id.*

46. *City of Colorado Springs v. White*, 967 P.2d 1042, 1052 (Colo. 1998) ("[P]redecisional material can lose its protected status if the decisionmaker incorporates the material by reference, or expressly adopts it, in the final decision.") (citations omitted).

47. *White*, 967 P.2d at 1053 (citations omitted).

48. *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997).

49. *Id.*

50. *Id.*

51. *Great Falls Trib. Co. v. Cascade Cty. Sheriff*, 775 P.2d 1267 (Mont. 1989).

52. *Demers v. Minneapolis*, 468 N.W.2d 71 (1991).

53. *See* Bozeman Daily Chron. v. Bozeman Police Dep't, 260 Mont. 218 (1993) (finding that even though police officer had resigned, the "nature of the alleged misconduct ran directly counter to the police officer's sworn duty to uphold the law, to prevent crime, and to protect the public"; and information regarding his behavior should be disclosed).

54. *Cowles Publ'g Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988) (explaining that instances of on-duty misconduct "are matters with which the public has a right to concern itself . . . matters of police misconduct are of legitimate public concern").

55. The Kentucky attorney general has concluded that "[i]n weighing the right of individual privacy against the right of the public to monitor the conduct of its servants, we find that complaints of misconduct and consequent disciplinary action, or the decision to take no action, are matters of legitimate public concern which outweigh the privacy rights of the public servant." *In re Stewart*, 00-ORD-97 (2000); *see also* *City of Portland v. Anderson*, 988 P.2d 402, 406 (Or. Ct. App. 1999) (where "the conduct involved directly bears on the possible compromise of a public official's integrity in the context of his public employment . . . any invasion of privacy that would result from disclosure is not unreasonable"); *Dobronski v. FCC*, 17 F.3d 275, 279 (9th Cir. 1994) (government employee's privacy interests are diminished where protection might shield "official misconduct").

56. *Welsh v. City & County of San Francisco*, 887 F. Supp. 1293, 1301 (N.D. Cal. 1995).

57. *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984); *see also* *Hawk Eye v. Jackson*, 521 N.W.2d 750, 754 (Iowa 1994) ("So long as it is barred from seeing the [internal investigation] report, the newspaper [and the public] is effectively prevented from assessing the reasonableness of the official action."); *Skibo v. City of New York*, 109 F.R.D. 58, 61 (E.D.N.Y. 1985) ("Misconduct by individual officers, incompetent internal

investigations, or questionable supervisory practices must be exposed if they exist."); *Denver Post Corp. v. Univ. of Colo.*, 739 P.2d 874, 879 (Colo. App. 1987) ("[A]ny possible danger of discouraging internal review is outweighed by the public's interest in whether the internal review was adequate, whether the actions taken pursuant to that review were sufficient, and whether those who held public office . . . should be held further accountable."); *Daniels v. City of Commerce City*, 988 P.2d 648, 652 (Colo. Ct. App. 1999) ("[M]embers of the general public have a compelling interest to see that public entities, when conducting internal reviews of [official misconduct] do so efficiently, and clearly and effectively.").

58. *See* *Jones v. Jennings*, 788 P.2d 732, 738-39 (Alaska 1990) ("There is perhaps no more compelling justification for public access to documents regarding citizen complaints against police officers than preserving democratic values and fostering the public's trust in those charged with enforcing the law.").

59. *See, e.g., supra* notes 3, 5.

60. *Doe v. Marsalis*, 202 F.R.D. 233, 238 (N.D. Ill. 2001).

61. *S.F. Police Officers' Ass'n v. Superior Court*, 202 Cal. App. 3d 183, 191 (1988).

62. *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 787 N.E.2d 602, 607 (Mass. Ct. App. 2003).

63. *Id.* at 608.

Nominees for Forum Leadership Positions Announced

The Nominating Committee has nominated **Richard Goehler** of Frost Brown Todd, in Cincinnati, Ohio, for the position of chair-elect for the one-year term commencing August 2005.

The Nominating Committee has nominated the following persons to become members of the Governing Committee for the three-year terms also starting next August 2005:

Peter Canfield

Dow, Lohnes & Albertson
Atlanta, Georgia

Josh Koltun

DLA Piper Rudnick Gray Cary US
San Francisco, California

Mary Ellen Roy

Phelps Dunbar
New Orleans, Louisiana

Cory Ulrich

Belo Corp.
Dallas, Texas

The election will be held at the Forum's Annual Meeting, on January 13, 2005, at 9:15 a.m., at the Boca Raton Resort & Club, Boca Raton, Florida, in conjunction with the Annual Conference.

The Nominating Committee is comprised of Kevin Goering of Coudert Brothers in New York, New York; Tom Kelley of Faegre & Benson in Denver, Colorado; and Kelli Sager of Davis Wright Tremaine in Los Angeles, California.