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In this issue

The Myth of Police Officer Privacy

STEVE ZANSBERG AND DANA GREEN

> "Upon careful review, we have determined that disclosure of the files you have requested -- the police department's internal affairs investigation into former officer Smith's conduct (which resulted in his placement on administrative leave, prior to his resignation) -- would constitute an unwarranted invasion of officer Smith's privacy. Accordingly, we hereby deny your request to inspect those records."

The statement above is not the denial of an actual request to inspect a police internal affairs file. Nevertheless, it will be familiar to many of you as the type of denial that police departments, across the land, issue with regularity.[1] "Officer privacy" has also been cited as a potential basis for withholding footage shot on police body-worn cameras.[2] This purported "officer's right to privacy" has even been invoked as the basis for preventing ordinary citizens and journalists from photographing or videotaping an officer in discharging his or her official duties.[3]

While some states have explicit statutory provisions mandating the public availability of completed police internal investigation files,[4] several states either categorically close all such records to the public,[5] or they allow records custodians varying degrees of discretion.[6] And, as the hypothetical denial above demonstrates, police chiefs and sheriffs regularly (though not uniformly) cite officers' "right to privacy" as their reason for withholding police internal investigation files, even when those records reflect the officer's official conduct performed on a public street, sidewalk, or park.

So, is there *any* legitimacy to this claim? Unfortunately, the argument has had some traction, with some courts giving deference to police departments' (and police unions') assertions of "officer privacy." This article argues that those "outlier" decisions are erroneous as a matter of law. This article examines the claim of "officer privacy" as it has been raised in a variety of related contexts: state and federal open records laws, officers' claims of civil rights violations following the unconsented-to governmental release of such information, and common-law invasion of privacy claims. Although these are distinct areas of law, each with its own doctrinal foundations, we believe that a fair and objective review of the case law leads to one inescapable conclusion: law enforcement officers do NOT have a *reasonable* expectation of privacy with respect to records memorializing or discussing their official conduct, while on duty. Thus, it is time to lay "the myth of police officer privacy" to rest, once and for all.

STATE AND FEDERAL FOI LAWS

State and federal freedom of information ("FOI") laws routinely contain exemptions from the right of public access for records where disclosure would constitute an "unwarranted invasion of personal privacy" (or words to that effect).[7] Often, these are general exemptions, not restricted to police or public employee records, that apply to any records containing "personal"

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Steve Zansberg *is a partner at Levine Sullivan Koch & Schulz LLP in Denver, Colorado and past Chair of the ABA Forum on Communications Law.* **Dana Green** *is an associate at Levine Sullivan Koch & Schulz LLP in Washington, D.C.*

as our Forum is not going to help the ABA restore itself to fiscal viability or to relevancy in the bar.

The Myth of Police Officer Privacy

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information. Nevertheless, in numerous states, general exemptions for "personal privacy" have been cited by police departments, attorneys general, and some courts as the basis for withholding records detailing police officers' official on-duty conduct.[8]

A minority of states' public records statutes expressly exempt from public access certain records of police conduct.[9] Courts in more than a dozen states have deemed records of police conduct to be exempt from public records on these—and other—statutory bases.[10] Those decisions, however, are beyond the scope of this article, which is only concerned with the use of generalized *privacy* exemptions to justify withholding (which the legislatures in those states have already apparently considered in enacting those blanket exemptions).

Using personal privacy exemptions as a basis for denying public access to records of police officers' on-duty conduct badly misconstrues the concept of "personal privacy." First, as set out in the FOI laws, or as interpreted by the courts, FOI exceptions almost always are to be narrowly construed to maximize public access to information.[11] Expanding the "personal privacy" exemptions to withhold information about public servants' on-duty, official activities risks undermining the very purpose of FOI laws: to enable the public to monitor the conduct of official government business.

Second, as discussed below, "personal privacy" has been restricted, in a variety of legal contexts, only to information about individuals (not corporations, associations, or governmental units) that are of a highly personal and "sensitive" nature – such as HIV status, medical or psychological information, or other similar types of information that society recognizes as being subject to an objectively reasonable "expectation of privacy." While compensation and job performance information is considered "private" in the private sector employment context, it is generally accepted that public employees, and especially public officials, must reasonably expect that these data points are not entitled to hidden from public scrutiny.[12] As the Louisiana Court of Appeals held in a well-reasoned decision regarding access to police Internal Affairs Department ("IAD") files under its state freedom of information law, "[a] lthough 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."[13]

Similarly, Maryland's intermediate appellate court held that IAD files concerning allegations of racial profiling against state troopers, "do not involve private matters concerning intimate details of the trooper's private life. Instead, such complaints involve events occurring while the trooper is on duty and engaged in public service. As such, the files at issue concern public actions by agents of the State concerning affairs of government, which are exactly the types of material the [Maryland FOI] Act was designed to allow the public to see."[14]

Third, although FOI officers and courts are sensitive to the privacy interests of law enforcement, outside of that specific context, courts have been skeptical of the argument that government employees' personal privacy is a legitimate basis for withholding government records of public-facing official activity.[15]

We believe the better position is that articulated by, for example, the Kentucky Attorney General, that police officers are to be treated like any other public employee:

> A public employee's name, position, work station, and salary are subject to public inspection, as well as portions of the employee's resume reflecting relevant prior work experience, educational qualifications, and information regarding the employee's ability to discharge the responsibilities of public employment. In addition, reprimands to employees regarding job-related misconduct, and disciplinary records generally, have traditionally been treated as open records. . . . Conversely, this office has affirmed agency denial of access to a public employee's home address, social security number, medical records, and marital status on the grounds that disclosure would constitute a clearly unwarranted invasion of personal privacy. Such matters are unrelated to the performance of public employment.[16]

Police personnel records, internal affairs records, or other records of on-duty conduct may differ from other public employees because those records reveal information about law enforcement techniques, confidential informants, national security, or other sensitive law enforcement matters. But other exemptions authorize the withholding of such information, and redaction is the appropriate response, rather than categorical withholding.[17] There is no sound basis for treating law enforcement differently from other public servants when it comes to FOI laws and records of official acts, on duty, especially where they occur in public.

CIVIL RIGHTS CLAIMS BY POLICE OFFICERS

Origins of the Constitutional Right to Informational Privacy

The second context in which "officer privacy" has been raised is where a government agency releases records containing information about police officers' official activities, without the consent of the subject officers. In those circumstances, officers sometimes bring claims against the agency, asserting the unauthorized disclosure violated their constitutional right to privacy.[18] That right arises from two separate sources in our nation's Constitution.

Of course, the word "privacy" does not appear in the U.S. Constitution. Even the Fourth Amendment, which protects persons from unreasonable search and seizure of places, papers, persons, or effects by the government, does not itself include the "private"

modifier. Nevertheless, interpreting that amendment, the United States Supreme Court has recognized that such transgressions can occur only when government agents intrude, unjustifiably, into one's sphere of personal privacy.[19]

The sphere of personal privacy protected by the Fourth Amendment is circumscribed by two necessary conditions: an individual must have an actual, subjective expectation of privacy and that expectation must also be objectively reasonable. Thus, to be entitled to the protections against unwarranted interceptions of communications or the search of one's person, papers or effects, it is not sufficient for the subject of the intrusion subjectively to consider them "private;" they must *also* be the type of materials or activities whose privacy "society is prepared to recognize as reasonable."[20] As the Supreme Court has held, the Fourth Amendment "does not protect all *subjective* expectations of privacy, but only those that society recognizes as 'legitimate.'"[21]

This objective component of the "reasonable expectation of privacy" varies by context, and necessarily incorporates societal norms and mores balanced against other countervailing public interests.[22] Thus, under the "open fields" doctrine, there is no reasonable expectation of privacy in one's real property that is readily visible to the public,[23] and under the "plain view" doctrine, this exception extends to matters that are within the view of a government agent who is lawfully present in a particular "private" location.[24] As demonstrated below, these concepts—rooted in the "search and seizure" context—have been transmuted into the related context of government *disclosure* of information about individuals.

The second "source" of the constitutional "right of privacy" comes not from any specific textual provision of the Constitution, but has been judicially found to arise under the "penumbra" of other rights protected in the Bill of Rights.[25] One aspect of this "right to privacy" is what has been deemed "informational privacy" – the right to control when the government may publicly release private information about private individuals.[26] The Supreme Court first recognized this related area of privacy rights in *Whalen* v. *Roe*, in which recipients of government benefits raised concerns about the gathering of private and personal information by the government, in part, because such information might later be publicly disclosed without the citizen's consent.[27] As the Court put it:

> The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. . . . [I]n some circumstances *that duty arguably has its roots in the Constitution* . . . .[28]

Nevertheless, the Court found that the government's precautions against inadvertent disclosure of "personal and private" information were sufficient; the gathering of highly personal information by government authorities did not violate recipients' right of privacy.[29]

The Supreme Court extended the "right of informational privacy" to public officials in *Nixon v. v. Administrator of General Services,* which involved President Nixon's claim that his own "personal privacy" prevented government disclosure, without his consent, of audio recordings he had made of his conversations in the Oval Office (a/k/a/ "the Nixon tapes").[30]

The Court acknowledged that public officials are not wholly without constitutionally protected privacy rights *in matters of personal life unrelated to any acts done by them in their public capacity*."[31] For example, the Court observed that "matters concerned with family or personal finances" or "private communications between [the President] and, among others, his wife, his daughters, his physician, lawyer, and clergyman" might be legitimately deemed "private" and precluded from public disclosure.[32] This was also the reason given by former Secretary of State Hillary Clinton for withholding many of her email messages that, she asserted, concerned purely private matters, such as planning her daughter's wedding.[33]

The *Nixon* Court drew a bright line between the actions of public officials that are entitled to a "reasonable expectation of privacy" and those that are not. The "overwhelming bulk" of the 42 million pages of documents and the 880 tape recordings at issue in *Nixon* pertained to "the official conduct of [Nixon's] Presidency" and not to private communications or matters.[34] Therefore, the Court concluded "only a minute portion of the materials *implicates appellant's privacy interests*," precisely because "of his *lack of any expectation of privacy* in the overwhelming majority of the materials" – those that reflected on his official conduct.[35]

Application of "Informational Privacy" to Police Officers' Records

Based on these Fourth Amendment principles, and the standards established in *Nixon*, state and federal courts have held that police officers do not have a cognizable privacy interest in records concerning their conduct while on duty—and cannot bring civil claims to prevent disclosure—so long as the records do not contain "highly personal," "intimate," or "sensitive" information.[36] For example, in addition to the information identified in *Nixon*, courts have recognized that the names of police officers' family members, their home addresses, officers' personal employment references, and details of employment prior to entering law enforcement could constitute "private" information—so long as it is irrelevant to official conduct (or misconduct).[37]

Not only are police officers' interactions with members of the public often conducted "in plain view," on public streets, sidewalks and other public thoroughfares (rendering such interactions, by definition, not "private"), they involve the exercise of official police functions. As demonstrated below, time and again, courts throughout the coun-

try have recognized that such activities by sworn peace officers involve inherently "public" functions, the contents of which – whether recorded by video, photography, or discussed in the police department's own investigative files concerning that official conduct – do not involve the officers' "highly personal and sensitive" affairs, and thus are not within the officers' sphere of "*personal* privacy."

STATE COMMON LAW CLAIMS FOR INVASION OF PRIVACY

In drawing the parameters of the public official's "reasonable expectation of privacy" in the disclosure of information maintained *by the government*, courts have also appropriately looked to the related field of "invasion of privacy" committed by *private* actors.[38] Although the precise contours vary, all states recognize at least two distinct, but closely related, civil causes of action for "invasion of privacy" committed by private actors' unjustifiable violation of another's "sphere of personal privacy."

Two Related Causes of Action for "Invasion of Privacy"

The first of these civil tort claims, known as "intrusion upon solitude or seclusion," occurs when one intrudes, without the plaintiff's consent, into an area enshrouded by a "reasonable expectation of privacy."[39] The paradigmatic examples of such places are one's bedroom, hospital room, bathroom, or other similar inherently "private" location.[40] But the tort also has been extended to unconsented to access to *records* containing highly personal and private information, including personal diaries, medical records, and psychological or psychiatric records.[41] The tort is committed upon the "intrusion" into such highly personal and private sphere, without consent or justification, and does not require (or compensate for) damages resulting from further disclosure or publicity given to the private information improperly accessed.

The second independent "invasion of privacy" tort recognized in common law is identified as "unreasonable publicity given to private facts," which provides monetary compensation for another's widespread disclosure of truthful information about an individual that is "private," "personal," and the disclosure of which is deemed "highly offensive to a reasonable person."[42]

These two independent "invasion of privacy" torts share a common requirement: the "sphere of privacy" intruded upon, or the information that was given widespread publicity, must —like the "sphere of personal privacy" protected by the Fourth Amendment against government *intrusion*, and by the Due Process Clauses against governmental *disclosure*—be both subjectively and objectively "reasonable."[43]

Both of these tort claims are therefore subject to two well-recognized exceptions that should also properly apply to records documenting police officers' official conduct: (1) activities occurring in "public" places are not entitled to a reasonable expectation of privacy; and (2) the conduct of public officials, in discharging their official duties (even in "private" places), is not entitled to an objectively "reasonable expectation of privacy."

No Privacy on a Public Street, Sidewalk, Park, Etc.

In contrast to European and other foreign jurisdictions' jurisprudence, in America, it is firmly established that individuals (whether they be royalty, celebrities, or private individuals) do *not* have a reasonable expectation of privacy with respect to their conduct in a public place. Thus, the Restatement (Second) of Torts states that there is no privacy violation when an individual is photographed, without her consent, in public:

> The defendant is subject to liability . . . only when he has intruded into a *private* place, or has otherwise invaded a *private* seclusion that the plaintiff has thrown about his person or affairs. Thus, there is no liability . . . . for observing him or even *taking his photograph* while he is walking on the public highway, since he is not then in seclusion and his appearance is public and *open to the public eye*.[44]

Under this rule of law, a "public place" includes not only streets, parks, or other publicly-controlled locations, but also businesses and other private properties that are generally open to the public.[45]

As the Supreme Court of Washington put it, "[o]n the public street or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there."[46] The court went on to explain that because an individual in public has no expectation of privacy, there also is no right to privacy in a recording or "full written description[ ] of a public sight which anyone would be free to see."[47]

These principles have been applied specifically to police officers in the context of citizens photographing and recording police officers in public. A police officer, like any other citizen, has no common law right to privacy from members of the public recording those activities or writing accounts of what they have observed. For example, in *Glick v. Cunniffe*, the First Circuit affirmed that private citizens have the right to record video and audio of public officials performing their official duties in a public place.[48] Similarly, in *Johnson v. Hawe*, the Ninth Circuit held there was no expectation of privacy where a police officer was videotaped sitting in an open vehicle, talking on a cellphone where members of the public could hear him.[49]

The logic of those decisions applies with equal force to *records* documenting, memorializing, or discussing a police officer's conduct in a public place. Police conduct—and even more so alleged *mis*conduct—often involves police activities in public places or, to the extent that it occurs on private property or inside a police station, within "plain view" of members of the public. It would defy logic for the recordings that were made in *Glick* or *Johnson* to be deemed "private" simply because they were created by the police, or were filed by citizens as part of a complaint against the officers, or because they became relevant to an internal affairs investigation.[50] Where there is no privacy in the underlying conduct itself, there cannot be a privacy interest in recordings of that same conduct.

No Expectation of Privacy in A Public

Official's Discharge of His or Her Official Duties

With respect to the "publicity given to private information" tort, the courts have limited the scope of protected information to material of a "highly personal and sensitive" nature about individuals (such that it's public disclosure "would be offensive and objectionable to a reasonable person.")[51] Information and materials that have been found to meet this standard include, for example, a person's HIV status,[52] or psychiatric or psychological treatment records.[53]

In contrast, numerous courts have held that information contained in records regarding police officers' performance of their official duties is *not* the type of "highly personal and sensitive" material that is appropriately deemed "private". For example, the Tenth Circuit repeatedly has held that "police internal investigation files [are] not protected by the right to privacy when the 'documents related simply to the officers' 'work as police officers.'"[54]

The Washington State Supreme Court similarly reasoned that:

In contrast to the types of information listed in the Restatement's comment [b], the information contained in the police investigatory reports . . . does not involve private matters, but does involve events which occurred in the course of public service. Instances of misconduct of a police officer while on the job are not private, intimate, personal details of the officer's life . . . . They are matters with which the public has a right to concern itself.[55]

Similarly, West Virginia's Supreme Court has held that disclosure of "conduct by a state police officer while the officer is on the job in his or her official capacity as a law enforcement officer and performing such duties, including but not limited to, patrolling, conducting arrests and searches, and investigating crimes" is not an invasion of that officer's right to privacy.[56] Numerous other courts, in a variety of jurisdictions, have reached the same conclusion.[57]

While police officers occupy a special role in our society, making the public's interest in their discharge of official duties perhaps more compelling than is true of other public servants, this rule is by no means unique to law enforcement. Courts across the country have found that public officials, in a variety of settings, can claim no "legitimate" or "reasonable" expectation of privacy with respect to records that memorialize or evaluate their performance of official governmental duties. For example, the Alaska Supreme Court ordered disclosure of performance evaluations of the head of the Anchorage public libraries, rejecting the claim that the official had a privacy interest in the information.[58] The court emphasized that there is a presumption that "public officials are properly subject to public scrutiny in the performance of their duties."[59] Further, "the performance evaluation did not in any way deal with the personal, intimate, or otherwise private life of [the official]."[60] Courts in a variety of jurisdictions have reached similar conclusions regarding records reflecting public officials' job performance.[61]

Applying this same rationale, several states courts have held it is not an invasion of privacy to disclose the performance evaluations of public school teachers.[62] In New York in 2010, for example, a teachers' union petitioned to keep the Department of Education from publicly releasing individual "Teacher Data Reports."[63] The court concluded that releasing the reports "would not be an 'unwarranted' invasion of privacy since the data at issue relates to the teachers' work and performance and is intimately related to their employment with a city agency and does not relate to their personal lives."[64] The court emphasized that "Courts have repeatedly held that release of job-performance related information, even negative information such as that involving misconduct, does not constitute an unwarranted invasion of privacy."[65] This was in contrast to "releasing personal information such as birth dates and personal contact information such as email addresses of state employees," which could constitute an unwarranted invasion of personal privacy.[66]

To the extent that police IAD records *do* contain discreet pieces of truly "highly personal and sensitive" information (e.g., home address, phone number, or social security numbers, the identities of undercover agents or confidential informants), redaction of such information is the appropriate remedy, not categorical withholding of police records.[67] As the Colorado Supreme Court said, in a case involving the IAD file of a deputy sheriff:

By providing the custodian of records with *the power to redact names, addresses, social security numbers, and other personal information*, disclosure of which may be outweighed by the need for privacy, the legislature has given the custodian [of such records] an effective tool *to provide the public with as much information as possible*, while still protecting privacy interests when deemed necessary.[68]

The Countervailing Public Interest in Disclosure and Transparency

As noted above, the scope of information entitled to an objectively "reasonable expectation of privacy" necessarily incorporates a balancing of the individuals' desire for confidentiality/secrecy and society's interest in having access to that information. Accordingly, the "publicity given to private facts" tort is frequently limited to disclosure of information in which there is no legitimate public interest. Indeed, the Restatement of Torts recognizes that public figures and public officials do not, by virtue of their status, relinquish all claims to a right of privacy. However, in recognition of the public's constitutionally-based right to receive information about public officials (and other persons of significant public interest), the Restatement states that:

The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.[69]

This is perhaps the underlying reason why documents (photos, videos,

and written records) that depict or describe and analyze a police officer's discharge of official duties is deemed to be inherently "public" and not "private." As the United States Supreme Court has recognized, "[t]he public . . . has a strong interest in exposing *substantial allegations* of police misconduct to the salutary effects of public scrutiny."[70] And even apart from allegations of misconduct, "the conduct of a policeman on duty is legitimately and necessarily an area upon which public interest may and should be focused."[71]

As one court put it, "[t]here 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."[72] Similarly, in a strident decision granting public access to records produced in discovery, the court in *Doe v. Marsalis*[73] assessed claims of police privacy in internal police records alleging on-duty sexual misconduct by Chicago police found them grossly outweighed by the importance of public oversight of the police. "Police misconduct creates one of the ultimate 'lose/lose' situations in our democratic society," the court wrote, noting that it has "multiple layers of victims," from the individual directly injured to the police department itself, to the public at large. "The only way to end this syndrome is to evaluate and reevaluate past practices. . . . Some of these issues require public debate and appropriate media scrutiny."[74] The court noted the positive impact of previous media scrutiny and concluded, "Clearly, if Defendant's confidentiality position were adopted by this Court, these types of articles could never be written and public debate would suffer."[75]

OTHER SOURCES

In addition to the case law discussed above, several professional associations of law enforcement agencies and officers have recognized that claiming "officer privacy" to withhold photos, videos or records discussing the official actions of particular officers on a given occasion, and those records showing how the department investigated that conduct, erodes the public trust and thereby ultimately undermines the effectiveness of law enforcement.

Responding to a string of high-profile police shootings of African American men and the riots that followed, on December 18, 2014, President Barack Obama signed an executive order establishing the Task Force on 21st Century Policing. Among its major recommendations was to "establish a culture of transparency and accountability in order to build public trust and legitimacy."[76]

Following a three-day Conference on Public Trust that brought together dozens of senior law enforcement officials from across the country, the Major County Sheriffs' Association, along with the FBI's National Executive Institute Associates, issued a report, "Public Trust: A Shared Responsibility." That report identified two noteworthy "Factors Contributing to Public's Distrust of Police":

> • No accountability for law enforcement officers' actions.
>
> • Lack of transparency by police.[77]

The conference report included the following "Action Strategies for Building Public Trust":

> The public will usually be more supportive of the police when they are upfront in acknowledging mistakes and providing the appropriate response. Covering up an incident or withholding information is totally unacceptable in today's transparent atmosphere.[78]

Perhaps most important, the conference report also noted that "Police Officers' Bill of Rights interferes with being transparent."[79]

The International Association of Chiefs of Police has also published this recommendation concerning incidents that give rise to internal affairs investigations and the imposition of discipline:

> **Ensure transparency and accountability when incidents do happen.** Share what can be shared—and do it quickly. Provide as much information as possible to internal affairs investigations. Often, regardless of the original situation or decision made, **if the chief clearly communicates what happened**–why police took a particular action; basis for its procedures; and **any disciplinary actions taken – trust can be established and sustained. The department's response to an incident can be as, or more, impactful than the original incident in sustaining trust.** [80]

CONCLUSION

We readily acknowledge that myriad situation-specific reasons justify withholding particular photos, video recordings, and documents concerning official police conduct: the disclosure of certain details in such records could compromise an ongoing investigation, expose the identities of undercover agents, or place certain officers and/or third parties in physical danger or threaten their personal safety. We do not suggest that eliminating "officer privacy" as a basis for denying access will render *all* police records, *in their entirety* automatically subject to inspection

Our thesis is far more modest: it is high time to acknowledge that "police officer privacy" – at least when it comes to records concerning the discharge of peace officers' official duties – is a myth, *not* a legitimate basis on which to deny public access to such records As the Illinois Court of Appeals put it:

> The conduct of a policeman on-duty is legitimately and necessarily an area upon which public interest may and should be focused. . . . [T]he very status of the policeman as a public official . . . is tantamount to an implied consent to informing the general public by all legitimate means regarding his activities in discharge of his public duties.[81]

Endnotes

1. *See, e.g.,* Associated Press, *Pueblo Police Officer Accused of Re-Enacting Body Cam Footage Will Be Disciplined*, The Denver Post, (Jun. 3, 2017), http://www.denverpost.com/2017/06/02/pueblo-police-officer-re-enacting-body-camera-footage (reporting significant alleged misconduct by an officer but noting that "the extent of his punish-

ment will not be released because the matter is a personnel investigation."); Muckrock, *Amherst Police Dept. Response to Public Records Request* (Sept. 21, 2016) https://www.muckrock.com/foi/amherst-2/internal-affairs-files-28160/.

2. *See, e.g.,* Catherine Green, *There's Still Not Much Transparency Surrounding Those Transparency-Boosting Body-Cameras*, Voice of San Diego (Jun. 11, 2015) (noting that a California State Senator mentioned, among factors to consider in legislation governing access to body-worn camera footage "privacy of officers"), available at http://www.voiceofsandiego.org/topics/public-safety/theres-still-not-much-transparency-surrounding-those-transparency-boosting-body-cameras/.

3. *See, e.g.*, *Johnson v. Hawe*, 388 F.3d 676 (9th Cir. 2004).

4. *See, e.g.*, Ala. Code § 36-12-40; Ariz. Rev. Stat. Ann. §§ 39-121 - 39-128 & 38-1109; Fla. Stat. §§ 112.533(2)(a) & 119; Ga. Code Ann. § 50-18-72(a)(8); Haw. Rev. Stat. § 92F-14.

5. *See, e.g.*, Cal. Penal Code § 832.7 (2007); Neb. Rev. Stat. 84-712.95 (2007); S.D. Codified Laws § 1-27-1.5(7); Vt. Stat. Ann. tit. 20, § 1923.

6. *E.g.*, Alaska Stat. Ann. §§ 40.25.120 (access may be denied if disclosure would constitute an "unwarranted invasion of . . . privacy") & 39.25.080; Ark. Code Ann. § 25-19-105(c)(1) (police disciplinary records not public unless they pertain to an officer's suspension or termination and there is a "compelling public interest" in disclosure); Conn. Gen. Stat. § 1-210 (police disciplinary records exempt if they would constitute "an invasion of personal privacy.").

7. *See, e.g.*, 5 U.S.C. §§ 552(b)(6) & (7); N.Y. Pub. Off. §§ 89.2-89.2-a.

8. *See supra* n.1; *infra* nn.13-14, 16-17; *Bolm v. Custodian of Records of Tuscon Police Dept.*, 193 Ariz. 35 (Az. Ct. App. 1998) (affirming denial of access to IAD records in their entirety on grounds of confidentiality and privacy).

9. *See, e.g.*, *supra* n.5.

10. *See* J. R. Macht, "Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should be Open to Public Scrutiny," 45 No. 6 Crim. Law Bull. nn. 26-27 (2009) (collecting cases and statutes); WNYC-FM, *Is police misconduct a secret in your state?* (Oct. 15, 2015), available at http://www.wnyc.org/story/does-public-have-right-police-personnel-records/ (50-state guide to access to police IA investigations). Many FOI laws also exempt public employees' "personnel files" or records of criminal investigations, which have been used as an alternative basis for withholding police officers' records. *See, e.g.*, *State v. Garrison*, 711 N.W.2d 732 (Table) (Iowa Ct. App. 2006); *Union Leader Corp. v. Fenniman*, 620 A.2d 1039 (N.H. 1993).

11. *See, e.g.*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

12. *See, e.g.*, *Int'l Fed'n Of Prof'l and Tech. Eng'rs*, *Local 21, AFL-CIO v. Superior Ct.*, 165 P.3d 488 (Cal. 2007); *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584, 591 (Alaska 1990).

13. *City of Baton Rouge v. Capital City Press, LLC*, 4 So. 3d 807, 821 n.19 (La. Ct. App. 2008) (citations omitted), *modified on rehearing,* 7 So. 3d 21 (La. Ct. App. 2009).

14. *Maryland Dep't of State Police v. Maryland State Conference of NAACP Branches*, 988 A.2d 1075, 1080 (Md. Ct. Special App. 2010), *aff'd,* 59 A.3d 1037 (Md. 2013). The Maryland Court of Appeals subsequently narrowed its ruling to apply only to the release of anonymized internal affairs files, a position that, as set out in this article, we believe is erroneous.

15. *See, e.g.*, *infra* nn. 58-64.

16. Opinion of the Office of the Attorney General of Kentucky, 03-ORD-213 (Oct. 10, 2003) at *3-4 (quotation and citations omitted), *ag.ky.gov/civil/civil-enviro/orom/2003/03ORD213.doc*.

17. *City of Baton Rouge v. Capital City Press, LLC*, 7 So. 3d 21, 23 (La. Ct. App. 2009) (ordering production of IAD records redacted to remove home addresses, telephone numbers, social security numbers, and medical information *except* "medical information that is related to the alleged officer misconduct at issue.").

18. *See, e.g.*, *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989); *Kallstrom v. City of Columbus*, 165 F. Supp. 2d 686, 695 (S.D. Ohio 2001); *Int'l Fed'n Of Prof'l and Tech. Eng'rs*, 165 P.3d 488.

19. *Katz v. United States*, 389 U.S. 347 (1967).

20. *Katz,* 389 U.S. at 361 (Harlan, J., concurring). *See also Kyllo v. United States*, 533 U.S. 27, 34 (2001) (reaffirming the applicability of "[t]he *Katz* test").

21. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (emphasis added) (citation omitted).

22. *Veronia Sch. Dist. 47J*, 515 U.S. at 654; J. Thomas McCarthy, *Rights of Publicity and Privacy* § 5:98 (2d ed. 2010) (recognizing that the zone of privacy "that is legally protected is dependent upon both the social customs and norms which govern a given context") (citation omitted).

23. *Hester v. United States*, 265 U.S. 57, 57 (1924); *Oliver v. United States*, 466 U.S. 170, 179 (1984).

24. *Horton v. California*, 496 U.S. 128 (1990).

25. *See Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965); *Roe v. Wade*, 410 U.S. 113, 152-53 (1972) (collecting cases).

26. *See* Timothy Azarchs, *Informational Privacy: Lessons From Across the Atlantic*, 16 U. Pa. J. Const. L. 805 (2014).

27. 429 U.S. 589 (1977).

28. *Whalen*, 429 U.S. at 605 (emphasis added).

29. *Id.* at 605-06.

30. 433 U.S. 425 (1977).

31. *Id.* at 457 (emphasis added).

32. *Id.* at 457-59.

33. Zeke Miller, *Hillary Clinton Did Not Keep Personal Emails*, TIME, Mar. 10, 2015.

34. *Id.* at 459.

35. *Id.* at 461-65.

36. *See e.g., Flanagan*, 890 F.2d 1557; *City of Loveland v. Loveland Publ'g Corp.*, No. 03 CV 513, 2003 WL 23741694, at *3 (Colo. Dist. Ct. June 16, 2003); *Cowles Publ'g Co. v. State Patrol*, 748 P.2d 597 (Wash. 1988).

37. *See, e.g.*, *Charleston Gazette v. Smithers*, 752 S.E.2d 603, 619 (W. Va. 2013); *City of Baton Rouge*, 7 So.

3d at 23; *City of Loveland*, 2003 WL 23741694, at *3; *Puzick v. City of Colo. Springs*, 680 P.2d 1283, 1287 (Colo. Ct. App. 1983).

38. *See State of Hawai'i Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ. of Hawai'i Chapter*, 927 P.2d 386, 406 (Haw. 1996) (collecting cases), *superseded by statute as recognized in Peer News LLC v. City & Cty. of Honolulu*, 376 P.3d 1 (Haw. 2016).

39. *See* Restatement (Second) of Torts § 652B (1977). *See also* Eli A. Meltz, *No Harm, No Foul? "Attempted" Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, 83 Fordham L. Rev. 3431, 3440-43 (2015).

40. *See, e.g.*, *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964); *Kohler v. City of Wapakoneta*, 381 F. Supp. 2d 692 (N.D. Ohio 2005); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998); *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269 (Cal. Ct. App. 1973).

41. *See, e.g.*, Restatement (Second) of Torts § 652B cmt. b (intrusion need not be physical); *Shulman* 955 P.2d at 469 (intrusion extends to data); *Ferguson v. City of Charleston*, 532 US. 67, 78 (2001); *Mason v. Stock*, 869 F. Supp. 828, 833 (D. Kan. 1994).

42. Restatement (Second) of Torts § 652D.

43. *See, e.g.*, Restatement (Second) of Torts § 652B; *Shulman*, 955 P.2d at 469; *Citizens to Recall Mayor James Whitlock v. Whitlock*, 844 P.2d 74, 77 (Mont. 1992).

44. § 652B cmt. C (1977) (emphases added). *See also Salazar v. Golden State Warriors*, No. C-99-4825, 2000 WL 246586, at *2 (N.D. Cal. Feb. 29, 2000); *I.C.U. Investigations, Inc. v. Jones*, 780 So. 2d 685 (Ala. 2000); *Shulman*, 955 P.2d at 490.

45. *See, e.g.*, *Med. Lab. Mgmt. Consultants v. ABC*, 306 F.3d 806, 812-15 (9th Cir. 2002); *People v. Corley*, 2001 WL 1359530, at *5 (N.Y. Sup. Ct. Aug. 7, 2001)).

46. *Mark v. Seattle Times*, 635 P.2d 1081, 1094 (Wash. 1981) (citation omitted).

47. *Id.*

48. 655 F.3d 78 (1st Cir. 2011).

49. 388 F.3d 676 (9th Cir. 2004).

50. That is, however, an argument that some police departments have made. *See, e.g.*, *Cox v. New Mexico Dep't of Pub. Safety*, 242 P.3d 501, 507 (N.M. Ct. App. 2010) (rejecting law enforcement argument that civilian complaints are "private").

51. *Martinelli v. Dist. Ct. In and For City and Cty. of Denver*, 612 P.2d 1083, 1091 (Colo. 1980). *See also Flanagan,* 890 F.2d at 1570.

52. *Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060 (Colo. Ct. App. 1998).

53. *Kerns v. Bader*, 663 F.3d 1173, 1198 (10th Cir. 2011) (noting that "[p]sychiatric records have been afforded even greater protection" than medical records, when it comes to privacy); *Mason v. Stock,* 869 F. Supp. 828, 833 (D. Kan.1994) (psychological records are the only items in police officers' personnel files that are "so highly personal and sensitive" that they are within the constitutional zone of privacy).

54. *Stidham v. Peace Officer Standards And Training*, 265 F.3d 1144, 1155 (10th Cir. 2001) (quotation omitted). *Accord Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (rejecting a claim of privacy in police internal affairs investigation files; "the legitimacy of an individual's expectations [of privacy] depends . . . upon the intimate or otherwise personal nature of the material which the state possesses," and the performance of official duties is not of such a nature); *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F. 2d 432, 435 (10th Cir 1981) (police officers have no legitimate privacy interest in "documents related simply to the officers' work as police officers.").

55. *Cowles Publ'g Co.*, 748 P.2d at 605. *Accord Romero v. City of Fountain*, 307 P.3d 120, 125 (Colo. Ct. App. 2011) (refusing to stay public release of an IAD file pending appeal, because this was information which "the public would have the right to know . . . .").

56. *Charleston Gazette v. Smithers*, 752 S.E.2d 603, 619 (W. Va. 2013).

57. *See, e.g.*, *Zaffuto v. City of Hammond*, 308 F.3d 485, 490-91 (5th Cir. 2002) (no legitimate expectation of privacy in phone conversations discussing only police department policies); *Kallstrom*, 165 F. Supp. 2d at 695 (no privacy interest in disciplinary records, incident complaints from citizens, and other documents detailing how each officer is performing); *Smithers*, 752 S.E.2d at 619; *State of Hawai'i Org. of Police Officers*, 927 P.2d at 407; *Great Falls Tribune Co. v. Cascade Cty. Sheriff*, 775 P.2d 1267, 1269 (Mont. 1989); *City of Baton Rouge v. Capital City Press, LLC*, 4 So.3d 807 (La. Ct. App. 2008).

58. *Municipality of Anchorage*, 794 P.2d at 591.

59. *Id.*

60. *Id.*

61. *See, e.g.*, *Deseret News Publ'g Co. v. Salt Lake Cty.*, 182 P.3d 372 (Utah 2008); *Capital City Press v. E. Baton Rouge Parish Metropolitan Council*, 696 So. 2d 562, 567 (La. 1997); *Whitlock*, 844 P.2d at 77-78; *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975).

62. In response to these decisions, many states passed legislation specifically exempting teacher evaluations from FOI laws.

63. *Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 919 N.Y.S.2d 786, 790 (N.Y. Sup. Ct. 2011), *aff'd,* 87 A.D.3d 506 (N.Y. App. Div.).

64. *Id. Accord Herald Co., Inc., v. Ann Arbor Pub. Sch.*, 568 N.W.2d 411, 414-15 (Mich. Ct. App. 1997) (requiring disclosure of a memorandum of teacher work performance).

65. *Id. See, e.g.*, *Capital Newspapers Div. of Hearst Corp. v. Burns*, 496 N.E.2d 665 (N.Y. 1986) (sick days taken by individual police officer); *Anonymous v. Bd. of Educ. for Mexico Cent. Sch. Dist.*, 162 Misc. 2d 300 (N.Y. Sup. Ct. 1994) (settlement agreement resolving teacher disciplinary charges); *Rainey v. Levitt*, 525 N.Y.S.2d 551 (N.Y. Sup. Ct. 1988) (individuals' scores on civil service exam); *Faulkner v. Del Giacco*, 529 N.Y.S.2d 255 (N.Y. Sup. Ct. 1988) (names of prison guards accused of impropriety); *Farrell v. Village Board of Trustees*, 372 N.Y.S.2d 905 (N.Y. Sup. Ct. 1975) (written reprimands of police officers, including names).

66. *Id.*

67. *See, e.g.*, *City of Baton Rouge*, 7 So. 3d at 23 (ordering the production of internal affairs records redacted to remove home addresses, telephone

numbers, social security numbers).

68. *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 900 n.3 (Colo. 2008) (emphasis added).

69. Restatement (Second) of Torts § 652D cmt. h.

70. *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (emphasis added).

71. *Cassidy v. ABC*, 377 N.E.2d 126, 132 (Ill. Ct. App. 1978).

72. *Jones v. Jennings*, 788 P.2d 732, 738-39 (Alaska 1990).

73. 202 F.R.D. 233 (N.D. Ill. 2001).

74. *Id.* at 238.

75. *Id.*

76. Final Report of the President's Task Force on 21st Century Policing, at 12 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

77. Major Counties Sheriffs' Ass'n, Public Trust: A Shared Responsibility (2015), http://www.mcsheriffs.com/pdf/news/public_trust_final_4416.pdf.

78. *Id.* at 22-23.

79. *Id.* at 15.

80. Int'l Ass'n Chiefs of Police, IACP National Policy Summit on Community-Police Relations: Advancing a Culture of Cohesion and Community Trust at 21-22 (2015), http://www.theiacp.org/Portals/0/documents/pdfs/CommunityPoliceRelationsSummitReport_web.pdf (emphasis added).

81. *Cassidy*, 377 N.E.2d at 132.