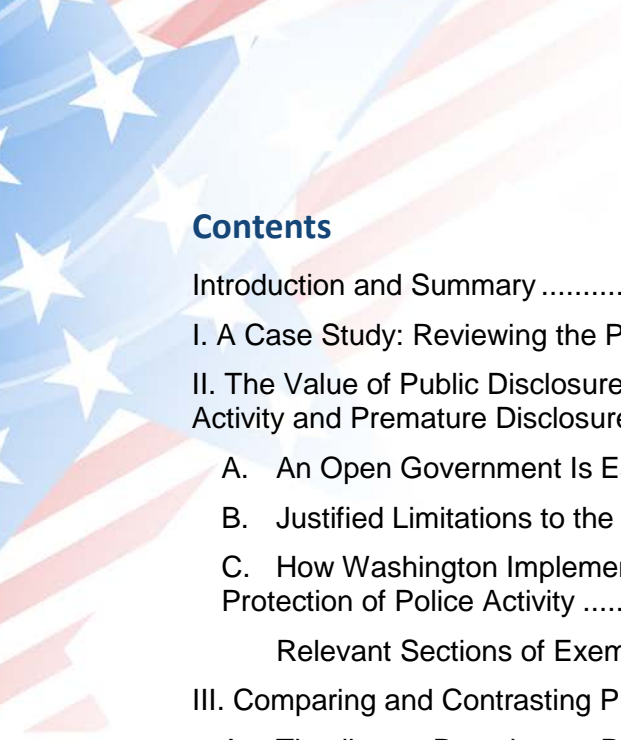


TRANSPARENCY AND  
MEDIA RELATIONS  
IN HIGH-PROFILE POLICE CASES

A BRECHNER CENTER ISSUE BRIEF



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## Introduction and Summary

The use of force by law enforcement officers is a matter of unprecedented national scrutiny, brought on in part by the universality of video-enabled smartphones and the distribution channel of social media. In this environment, all law enforcement agencies should maintain and enforce “model transparency practices” consistent not just with the disclosure requirements of state law, but with best practices in the field informed by the demands of a public accustomed to a 24/7 news cycle.

The Brechner Center for Freedom of Information has served as a source of research on the law of access to information since its founding in 1977. Our research set out to analyze the current policies and practices about public access to law enforcement information in a jurisdiction (King County, Washington) that had experienced recent public controversy over officer-involved shootings. The research focused on answering the following questions:

1. What information should the public receive, and when, about use-of-force incidents by law enforcement?
2. How do the King County Sheriff’s Office policies and practices measure up to the “state of the art?”
3. Are there jurisdictions with stronger disclosure policies and practices?
4. What does an optimal policy look like?

While the King County Sheriff’s Office’s existing policies are detailed and comparable to those in effect at law enforcement agencies throughout the country, our research identified several ways in which the policies could be enhanced to keep pace with the growing consensus about public disclosure concerning use-of-force incidents. The concluding section of our review offers recommendations for policy revisions.

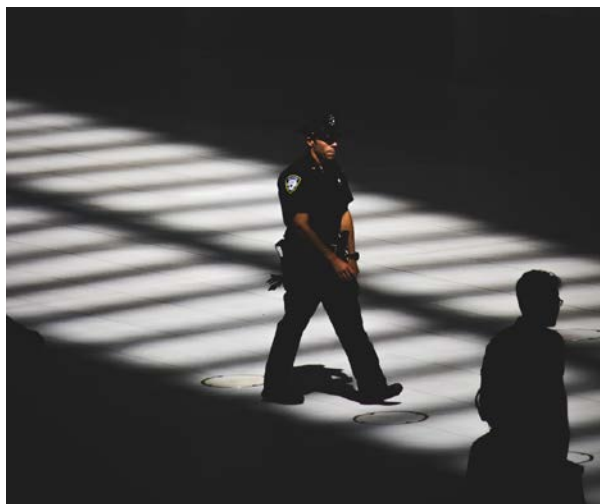


Photo by Jack Finnigan/Unsplash



## A Case Study: Reviewing the Public Record in the Shooting of Tommy Le

According to *The Washington Post*, as of August 31, 2017, there were 987 police-related deaths in the United States in 2017, 38 of which occurred in Washington State.<sup>1</sup> One of the most prominent cases in the Seattle area took place in June 2017, with the shooting death of Tommy Le by a King County Sheriff's deputy.

Twenty-year-old, Vietnamese-American Tommy Le was walking the streets of Burien, Wash., around midnight on June 14, 2017.<sup>2</sup> Le was barefoot and was reported by several observers on the scene, including police, to be carrying a knife and threatening passersby. One homeowner fired a warning shot with a handgun. Unfazed, Le allegedly charged the home yelling that he was "the Creator" and began pounding and stabbing at the door. Three deputies were dispatched and, after two attempts to subdue Le with Tasers, when he did not drop his weapon after being commanded to do so, one officer shot Le three times. Le died later in a medical facility. It was reported that Le had been scheduled to graduate and receive his high school diploma from South Seattle College that day.

The day of the shooting, the Sheriff's Office provided a press release concerning the incident. The name of the deputy who shot Le was not disclosed, but it was noted he had been placed on administrative leave, pending investigation. The release did not specify Le's weapon but stated that he was "holding a knife or some sort of sharp object." Much of the resulting press coverage seized on the idea that Le wielded a knife, and the Sheriff's Office did not correct any of the inaccurate reports. On June 23, after an article in the *Seattle Weekly*<sup>3</sup> broke the story, the Sheriff's Office issued a second statement clarifying that only a pen had been found in Le's possession, not a knife as previously reported.

Community backlash soon followed, with many questioning the lag in time to accurately report the deadly force encounter with deputies.<sup>4</sup> According to an interview by the *Seattle Times*, the King County

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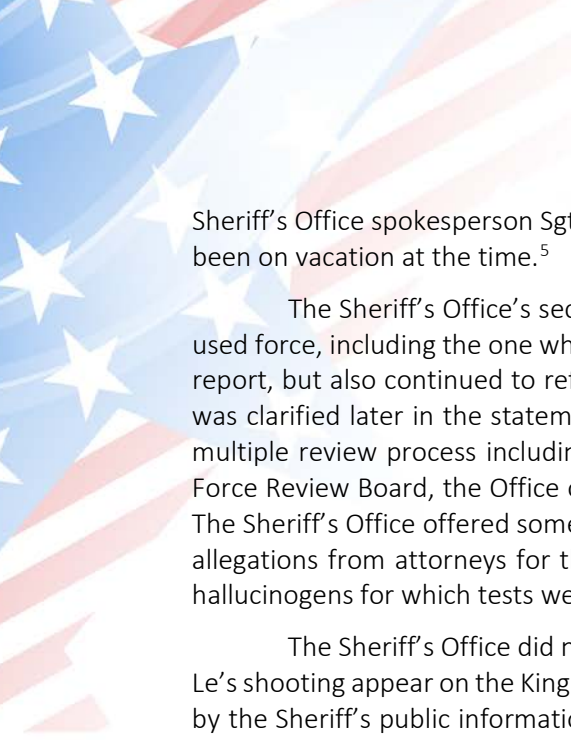
<sup>1</sup> THE WASHINGTON POST, Fatal Force, available at [www.washingtonpost.com/graphics/national/police-shootings-2017/](http://www.washingtonpost.com/graphics/national/police-shootings-2017/).

<sup>2</sup> The following narrative is derived from reporting by *The Los Angeles Times* and *The Seattle Times*. See Jaweed Kaleem, *He was 20 and unarmed. A police shooting brings Seattle's Vietnamese Americans into the world of activism*, LOS ANGELES TIMES (Oct. 5, 2017), <http://www.latimes.com/nation/la-na-tommy-le-police-vietnamese-20171005-htmstory.html>; Nina Shapiro, *Man with knife, calling himself 'the Creator,' fatally shot by police in Burien*, SEATTLE TIMES (June 14, 2017), <https://www.seattletimes.com/seattle-news/crime/man-with-knife-calling-himself-the-creator-fatally-shot-by-police-in-burien/>.

<sup>3</sup> Daniel Person, *Man Killed By a King County Deputy Last Week Was Armed With a Pen*, SEATTLE WEEKLY (June 22, 2017), <http://www.seattleweekly.com/news/man-killed-by-a-king-county-deputy-last-week-was-armed-with-a-pen/>.

<sup>4</sup> See Paige Cornwell, *Brother of Burien deputy-shooting victim Tommy Le: 'He wanted to make a positive change in the world'*, SEATTLE TIMES (July 19, 2017), <https://www.seattletimes.com/seattle-news/crime/brother-of-burien-deputy-shooting-victim-tommy-le-he-wanted-to-make-a-positive-change-in-the-world/>; Daniel Person, *Family, Community Exhort Leaders to Find Justice for Tommy Le*, SEATTLE WEEKLY (July 20, 2017), <http://www.seattleweekly.com/news/family-community-exhort-leaders-to-find-justice-for-tommy-le/>.





Sheriff's Office spokesperson Sgt. Cindi West said an earlier update would have been released had she not been on vacation at the time.<sup>5</sup>

The Sheriff's Office's second statement released on June 23, 2017, named all three deputies who used force, including the one who shot Le. The release described the event in greater detail than the initial report, but also continued to refer to the weapon Le had as a knife or "whatever was in his hand" until it was clarified later in the statement under "FAQs" as a pen. The statement explained the next steps of a multiple review process including examinations by the Sheriff's Administrative Review Team, the Use of Force Review Board, the Office of Law Enforcement Oversight, the Prosecutor's Office, as well as the FBI. The Sheriff's Office offered some additional detail in a September 2017 round of interviews responding to allegations from attorneys for the Le family, including the possibility that Le was under the influence of hallucinogens for which tests were ongoing.

The Sheriff's Office did not use social media to update the public about Le's case. No details about Le's shooting appear on the King County Sheriff's Office Facebook page at all. The Twitter account operated by the Sheriff's public information officer, @KingcsoPIO, referenced the shooting twice: first to say that the public information officer was heading to the scene,<sup>6</sup> and then later on the morning of June 14, to share a link to the initial Sheriff's Office press release.<sup>7</sup> No updates were posted after the date of the shooting, even after additional clarifying information came to light.

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<sup>5</sup> Christine Willmsen, *Man Killed by King County Deputy Was Carrying a Pen, Not A Knife as Initially Reported*, SEATTLE TIMES (June 23, 2017), <https://www.seattletimes.com/seattle-news/crime/man-killed-by-king-county-deputy-was-carrying-a-pen-not-a-knife-as-initially-reported/>.

<sup>6</sup> @kingcsoPIO, Twitter (June 14, 2017, 12:20 AM), [https://twitter.com/kingcsoPIO/status/874889246523478016?ref\\_src=twsrc%5Etfw&ref\\_url=https%3A%2F%2Fpatch.com%2Fwashington%2Fseattle%2Fsuspect-shot-killed-king-county-deputy-after-knife-incident-burien](https://twitter.com/kingcsoPIO/status/874889246523478016?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fpatch.com%2Fwashington%2Fseattle%2Fsuspect-shot-killed-king-county-deputy-after-knife-incident-burien).

<sup>7</sup> @kingcsoPIO, Twitter (June 14, 2017, 7:12 AM), <https://twitter.com/kingcsoPIO/status/874992831743512576>.



## II.

### The Value of Public Disclosure of Police Records Balanced Against the Protection of Police Activity and Premature Disclosure

#### A. An Open Government Is Essential for a Democratic Society

“Information, whatever its potential value, is worthless to those who cannot obtain it.”<sup>8</sup> Timely and accurate information about crimes, and how public agencies respond to them, is essential for public confidence in the legitimacy of the law enforcement system. This is especially the case when police use the ultimate state authority: The ability to use deadly force in the name of public safety.

There are both external good-government reasons as well as internal self-interest reasons for law enforcement agencies to be affirmatively transparent about their operations, above and beyond the minimum amount of disclosure legally required. Access to reliable public information promotes informed civic participation and enables community members to play their oversight role in a democratic society. Further, transparency strengthens, and the perception of secrecy weakens, public confidence and trust in law enforcement.

Law enforcement agencies, like the courts, legislature, and other administrative bodies and governments, should always remain “mindful that theirs is public business and the public has a right to know how its servants are conducting its business.”<sup>9</sup> Recent court rulings, recognizing a constitutionally protected right to film police conducting official business in public places, have emphasized the unique importance and sensitivity of the role police play in contemporary society, making the public’s interest in transparency especially acute. As Judge Kermit Lipez of the First U.S. Circuit Court of Appeals wrote in a case involving a citizen’s constitutionally protected right to shoot video of an arrest in a public park:

In our society, police officers are expected to endure significant burdens caused by citizens’ exercise of their First Amendment rights. ... Indeed, the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state. The same restraint demanded of law enforcement officers in the face of provocative and challenging speech . . . must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.<sup>10</sup>

While news organizations do not generally occupy a “preferred” status in the eyes of the law, they do serve a representational function in bringing “fulfillment to the public’s right to know.”<sup>11</sup> Accordingly, even where it is impractical to directly inform the public on a real-time basis of evolving news events, the media can serve as the public’s proxy and disseminate information both through traditional publishing and

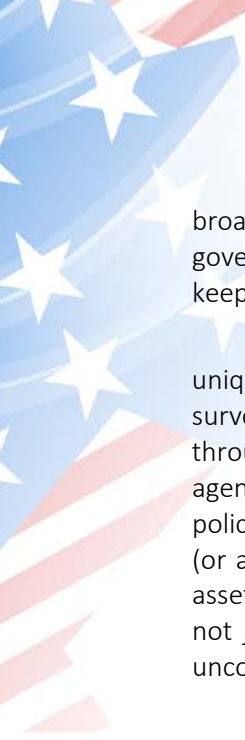
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<sup>8</sup> FREDERICK WILLIAMS & JOHN PAVLIK, *THE PEOPLE’S RIGHT TO KNOW* 80 (1993).

<sup>9</sup> *Sheridan Newspapers v. Sheridan*, 660 P.2d 785, 791 (Wyo. 1983).

<sup>10</sup> *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

<sup>11</sup> *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972).



broadcasting channels and through affiliated social media accounts. Simultaneously, police and government entities have the ability to use the same social media channels to reach the public directly and keep the public informed.

Local news media are well-situated to serve a “rumor control” function because they occupy a unique relationship of trust with the public. The Pew Research Center reports that 82 percent of Americans surveyed regard local news media as trustworthy, while only 34 percent say they trust information received through social media.<sup>12</sup> Access to information concerning crime and the activities of law enforcement agencies can facilitate the public’s understanding of the rule of law and the police’s efforts in collaborative policing, giving the public a chance to ask questions and hold law enforcement accountable for their actions (or at times inaction) in response to matters of public concern. Because public legitimacy and trust are assets in safe and effective policing, there is a self-interest argument that maximizing disclosure benefits not just journalists and the public, but law enforcement agencies themselves, even when disclosure is uncomfortable and the information is unflattering.

As technology makes the sharing of information faster and less costly, law enforcement agencies, like all units of government, should adapt. When it comes to government transparency, access delayed can effectively mean access denied. In practice, this may require an affirmative and proactive approach in “pushing” information into the public domain, through the assistance of available technology, rather than waiting and reacting to the public’s “pull” for information.

With each high-profile instance in which the justification for police use of force upon subjects comes under scrutiny, the public’s need for reassurance increases. Police chiefs across the country have specifically been pressured to timely share available recordings or video footage after controversial shootings by officers, and most people support this type of disclosure in the name of transparency and accountability. In a survey of nearly 3,200 people in the Los Angeles area, 84 percent said that recordings of officer-involved shootings should become public, according to The Policing Project, a nonprofit based at the New York University School of Law.<sup>13</sup> Even two-thirds of the people in the survey group who work in law enforcement agreed that the public has the right to see such recordings.<sup>14</sup>

A frequent threshold question is: How quickly should a law enforcement agency release information related to officer-involved shootings? For example, regarding video footage, the same Policing Project study shows that this is where there is significant disagreement between the general public and law enforcement. Nearly half of the public respondents said that videos should automatically be released within 30 days of the incident (with an additional 16 percent agreeing that footage should be made public within 60 days). But nearly two-thirds of law enforcement officers said videos should not be released until after a

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<sup>12</sup> See Amy Mitchell *et al.*, “The Modern News Consumer,” PEW RESEARCH CENTER (July 2016).

<sup>13</sup> See The Policing Project, “Report to the Los Angeles Police Commission Summarizing Public Feedback on LAPD Video Release Policies,” NYU SCHOOL OF LAW (September 2017).

<sup>14</sup> *Id.*

district attorney has decided whether to file charges in connection with the incident or until the investigation is complete – processes that could take up to two years.<sup>15</sup>

Using a practical approach, the Associated Press attempted to answer this same question by analyzing a tale of two cities – Tulsa, Oklahoma, and Charlotte, North Carolina, in separate 2016 police-involved shootings.<sup>16</sup> In Tulsa, the public was made privy to several videos from a police helicopter feed and a dashboard camera, of an officer fatally shooting an unarmed man whose car had stalled in the center of the road. The videos were released within days of the incident, and protests in the city remained calm despite the fact that the suspect was unarmed and the police officer’s justification for shooting the suspect was that she thought he had a weapon.<sup>17</sup> In contrast, only days later, police in Charlotte shot and killed another man who police say emerged from his vehicle with a handgun and refused their verbal commands. His family, however, contended that the man was merely carrying a book. Video footage of the incident was available, but the police chief refused to disclose it to the public, and in response, violent protests “wrought destruction in the heart of the city.”<sup>18</sup> It was only after unyielding public pressure that the Charlotte Police Department released videos from the officer’s body-cam and dashboard-cam, along with photos of a gun, an ankle holster and a marijuana cigarette belonging to the deceased suspect, which validated the officers’ account.<sup>19</sup>

The contrast between these two stories illustrates that the timely and non-coerced release of video footage not only serves the purpose of protecting the public’s right to know, but also can quell emotionally charged responses to potentially volatile incidents. Reactions may not be limited to disclosure of visual images of use-of-force instances, but also to other information related to those incidents, including 911 or dispatch recordings, the release of names of the police officers involved, and other important details.<sup>20</sup>

## B. Justified Limitations to the Right of Access to Police Records

Every state, including Washington, has a freedom-of-information (“FOI”) statute that starts with the strong presumption that every record used or maintained by a government agency – including law

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<sup>15</sup> *Id.* at 2.

<sup>16</sup> Sean Murphy & Justin V. Juozapavicius, *The Tale of the Tape: When Should Police Videos be Released?*, AP NEWS (Sep. 23, 2016), <https://apnews.com/1533ad91d2fc425098343a310891e33c/tale-tape-when-should-police-videos-be-released>.

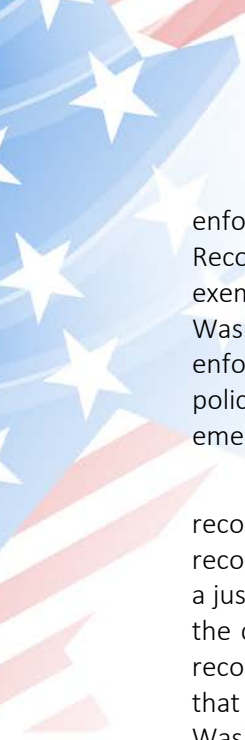
<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Renae Merle, Wesley Lowery, & Peter Holley, *Amid Pressure, Charlotte Police Release Videos in Shooting of Keith Lamont Scott*, WASH. POST (Sep. 25, 2016), [https://www.washingtonpost.com/national/amid-pressure-charlotte-police-release-video-in-shooting-of-keith-lamont-scott/2016/09/24/f22e8fa8-82a0-11e6-8327-f141a7beb626\\_story.html?utm\\_term=.f757e226650b](https://www.washingtonpost.com/national/amid-pressure-charlotte-police-release-video-in-shooting-of-keith-lamont-scott/2016/09/24/f22e8fa8-82a0-11e6-8327-f141a7beb626_story.html?utm_term=.f757e226650b).

<sup>20</sup> About one in five of the people fatally shot by police in 2015 were killed by police officers who have not been publicly identified for various reasons, according to a *Washington Post* analysis of police shooting data. John Sullivan et al., *In Fatal Shootings by Police, 1 in 5 Officers’ Names Go Undisclosed*, WASH. POST (Apr. 1, 2016), [https://www.washingtonpost.com/investigations/in-fatal-shootings-by-police-1-in-5-officers-names-go-undisclosed/2016/03/31/4bb08bc8-8ea10-11e5-b0fd-073d5930a7b7\\_story.html?utm\\_term=.65deeaac1aca](https://www.washingtonpost.com/investigations/in-fatal-shootings-by-police-1-in-5-officers-names-go-undisclosed/2016/03/31/4bb08bc8-8ea10-11e5-b0fd-073d5930a7b7_story.html?utm_term=.65deeaac1aca). For shootings in 2016, the *Washington Post* has only been able to identify the names of officers involved in a quarter of the cases. *Police Shootings 2016 Database*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/>.





enforcement – is to be made accessible for public inspection, with limited exceptions. Washington’s Public Records Act, RCWA 42.56.030, begins by declaring that the law “shall be liberally construed and its exemptions narrowly construed to ... assure that the public interest will be fully protected.” The Washington Supreme Court has said repeatedly that there is no categorical exemption entitling law enforcement agencies to withhold their records wholesale. Specifically, there is no exemption that enables police to withhold incident reports that memorialize the factual circumstances of a reported crime or 911 emergency-call recordings, records that the news media commonly request after a high-profile incident.<sup>21</sup>

FOI laws, including Washington’s, routinely contain exemptions from the right of public access for records where disclosure would constitute an unwarranted invasion of personal privacy or when the records would compromise an ongoing investigation. “Personal privacy” exemptions are at times cited as a justification for withholding information about police officers’ on-duty conduct, but the majority view of the courts is that “personal” privacy is just that – personal – and does not entitle agencies to withhold records describing police officers’ on-duty conduct. For example, in a 2014 ruling from California – a state that is known to have narrower and more restrictive open records laws than many states, including Washington – by the state’s Supreme Court held that the *Los Angeles Times* had the right to obtain the names of officers involved in five years’ worth of shooting cases. The court so ruled over the objection of a police union that claimed release of the records would violate personal privacy.<sup>22</sup> The justices in that case emphasized the need for individualized proof of a compelling safety need to justify withholding officers’ identities, and not just a generalized statement of concern for safety. Expansively interpreting “personal privacy” to cover officers’ on-duty performance of sensitive government responsibilities would run contrary to the universally honored principle that exemptions are applied narrowly to maximize disclosure.

Whether information about use-of-force cases can be withheld on the grounds of interference with an open criminal investigation comes down to the question of whether the disclosure would be so prejudicial to effective law enforcement that it is in the public interest to maintain secrecy. In deciding that question, courts have considered that such an exemption aims at “the prevention of the disclosure of confidential investigative techniques, procedures, or sources of information, the encouragement of individual citizens to come forward and speak freely with police concerning matters under investigation, and the creation of initiative that police officers might be completely candid in recording their observations, hypotheses and interim conclusions.”<sup>23</sup>

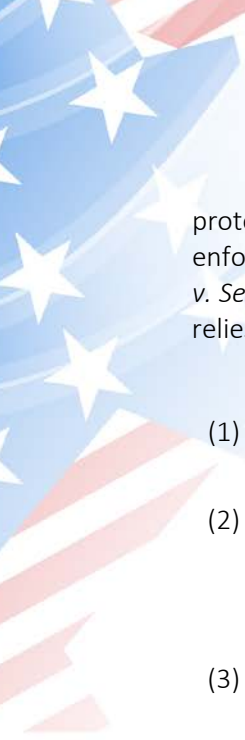
The Public Records Act exemptions that enable law enforcement agencies to withhold or redact otherwise-public records are set forth in RCWA 42.56.240. The key portion of subsection 240 exempts “[s]pecific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the

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<sup>21</sup> See, e.g., *Cowles Publ’g Co. v. Spokane Police Dept.*, 987 P.2d 620 (Wash. 1999) (as amended 2000) (*en banc*) (ordering disclosure of police incident reports requested by newspaper publisher under the Public Records Act and rejecting police department’s argument that incident reports can be withheld as “investigative records”).

<sup>22</sup> *Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal.4th 59 (Cal. 2014).

<sup>23</sup> *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 62 (1976).



protection of any person's right to privacy(.)" The exemption for records "essential to" effective law enforcement is applied sparingly, as explained by the Washington Supreme Court in a 2013 ruling, *Sargent v. Seattle Police Department*.<sup>24</sup> Several principles emerge from the *Sargent* case and the cases on which it relies:

- (1) The exemption for records "essential" to effective law enforcement "applies categorically in a narrow set of circumstances" and rarely will justify withholding a document in its entirety.
- (2) Law enforcement agencies can withhold the investigative files of open criminal cases entirely, up to the point that an arrest is made and the case is referred to prosecutors to evaluate for charging, where disclosure might interfere with the apprehension of a suspect. (The exemption applies specifically to the investigative file, and not to all information about the case.)
- (3) There is no special rule of confidentiality for internal investigations of police-misconduct cases, and the same general principles of the Public Records Act apply. Specifically, there is no categorical exemption that, in the ordinary course of business, would entitle a police agency to withhold the names of officers. If an agency seeks to withhold or redact documents that identify officers, the withholding must fit within one of the aforementioned narrow statutory exemptions.<sup>25</sup>

Washington's Criminal Records Privacy Act, RCWA 10.97.080, restricts to some degree the information that a law enforcement agency may affirmatively volunteer about a suspect's criminal history – specifically, details about any criminal charge that resulted in an acquittal, dismissal, or decision not to prosecute. However, the statute is narrow and does not limit the ability to disclose prior convictions or pleas, nor does it apply to ongoing criminal cases that have not yet worked their way to a resolution, which can be disclosed.

Whatever confidentiality interests may otherwise exist cease to be meaningful, both legally and practically, once the information has become public through other means, such as eyewitness interview accounts, bystander cellphone videos, and social media sharing. In those instances, nondisclosure makes little sense: "[I]t is impossible to erase from public knowledge information already released,"<sup>26</sup> or to unring a bell, as one might say. As a practical matter, information that has already entered the public domain cannot negatively affect the investigatory process any more than it already has; arguably, the release of reliable and authoritative information can counteract any detrimental impact of the "viral" dissemination of witness accounts.


An oft-cited rationale for withholding video of police confrontations is that the video may be misleading and give the public a false impression. One University of South Carolina professor, Geoffrey Alpert, says these records are often imperfect and should not be viewed as conclusive:

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<sup>24</sup> 314 P.3d 1093 (Wash. 2013) (*en banc*).

<sup>25</sup> See *King County v. Sheehan*, 57 P.3d 307 (Wash. App. 2002) (Public Records Act does not exempt full names of King County officers from disclosure).

<sup>26</sup> *Globe Newspaper Co.*, 419 Mass. at 860.



For example, college and professional football use multiple cameras and depending on the angle, direction and actions of the players, these videos, examined by professionals in the booth cannot always tell if a touchdown was scored, where the ball should be placed or if a foul was committed . . . While these cameras have helped us all understand the actions better, and have resolved some of the conflicts, they are not perfect. . . . The same must be said about videos of police action. Even with multiple body cameras and smartphone videos, it is not clear what an actor did and what was the result. We have to be careful to understand these are tools not adjudicators.<sup>27</sup>

Concerns for completeness or reliability are, however, rarely regarded as sufficient to justify concealing public records. Records regularly are made public even when they contain disputed facts later subject to being disproved, such as the complaints filed in lawsuits or the narrative of criminal indictments. The fact that the assertions in those documents may be incomplete or may ultimately prove untrue does not disentitle the public to review and assess them.

### C. How Washington Implements the Balance Between the Right to Access and the Protection of Police Activity

Agencies are required to make all public records, including use-of-force incident reports, available for inspection or copying unless the record falls within the specific exemptions of Title 42.56 RCW or some other statute, which exempts or prohibits disclosure of specific information or records.<sup>28</sup>

In interpreting statutes relating to public access to public records generally – including police records – the applicable rule is that these statutes should be construed liberally.<sup>29</sup> The agency bears the burden of proof to show that its refusal to allow access to public records “is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.”<sup>30</sup>

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<sup>27</sup> Steve Miletich, *Seattle Police-Shooting Videos Released Faster than Most, but Full Answers not Always in View*, SEATTLE TIMES (Jan. 27, 2017), <https://www.seattletimes.com/seattle-news/crime/seattle-police-quick-release-video-policy-officer-shootings/> (quoting Professor Alpert).

<sup>28</sup> WASH. REV. CODE § 42.56.070(1).

<sup>29</sup> WASH. REV. CODE § 42.56.030; *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128 (1978); *see also* *Koenig v. City of Des Moines*, 158 Wn.2d 173, 180 (2006).

<sup>30</sup> WASH. REV. CODE § 42.56.550; *see also* *Bellevue John Does 1-11 v. Bellevue Sch. Dist.*, 164 Wn.2d 199, 209 (2008).



Relevant Sections of Exemptions to the Washington Public Records Act:

Investigative, law enforcement, and crime victims.

- (1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, . . . the nondisclosure of which is essential to effective law enforcement or for the protection of any person’s right to privacy;
- (2) Information revealing the identity of persons who are witnesses to or victims of crime . . . if disclosure would endanger any person’s life, physical safety, or property.
- (14) Body worn camera recordings to the extent nondisclosure is essential for the protection of any person’s right to privacy . . . , including, but not limited to, the circumstances enumerated in (a) of this subsection. . . .
  - (a) Disclosure of a body worn camera recording is presumed to be highly offensive to a reasonable person . . . to the extent it depicts:
    - (ii) The interior of a place of residence where a person has a reasonable expectation of privacy;
    - (iii) A minor;
    - (iv) The body of a deceased person; . . .
  - (b) The presumptions set out in (a) of this subsection may be rebutted by specific evidence in individual cases.<sup>31</sup>


Invasion of privacy, when.

A person’s “right to privacy” . . . is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public. The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public’s right to inspect, examine, or copy public records.<sup>32</sup>

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<sup>31</sup> WASH. REV. CODE § 42.56.240.

<sup>32</sup> WASH. REV. CODE § 42.56.050.



Certain personal and other records exempt.

- (1) No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons.
- (2) Inspection or copying of any specific records exempt under the provisions of this chapter may be permitted if the superior court in the county in which the record is maintained finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function.
- (3) Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.<sup>33</sup>

Agency party to controversy.

Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.<sup>34</sup>

Prompt responses required.

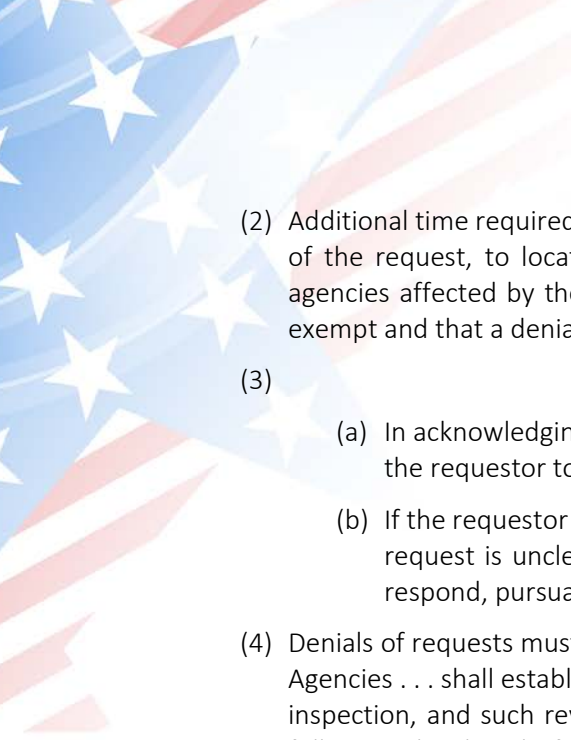
- (1) Responses to requests for public records shall be made promptly by agencies . . . . Within five business days of receiving a public record request, an agency . . . must respond in one of the ways provided in this subsection (1):
  - (a) Providing the record;
  - (b) Providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record or allow the requester to view copies using an agency computer;
  - (c) Acknowledging that the agency . . . has received the request and providing a reasonable estimate of the time the agency . . . will require to respond to the request;
  - (d) Acknowledging that the agency . . . has received the request and asking the requestor to provide clarification for a request that is unclear, and providing, to the greatest extent possible, a reasonable estimate of the time the agency . . . will require to respond to the request if it is not clarified; or
  - (e) Denying the public record request.

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<sup>33</sup> WASH. REV. CODE § 42.56.210.

<sup>34</sup> WASH. REV. CODE § 42.56.290.



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- (2) Additional time required to respond to a request may be based upon the need to clarify the intent of the request, to locate and assemble the information requested, to notify third persons or agencies affected by the request, or to determine whether any of the information requested is exempt and that a denial should be made as to all or part of the request.
  - (3)
    - (a) In acknowledging receipt of a public record request that is unclear, an agency . . . may ask the requestor to clarify what information the requestor is seeking.
    - (b) If the requestor fails to respond to an agency request to clarify the request, and the entire request is unclear, the agency . . . need not respond to it. Otherwise, the agency must respond, pursuant to this section, to those portions of the request that are clear.
  - (4) Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies . . . shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute final agency action or final action by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.<sup>35</sup>

In keeping with the admonition that exemptions to the Public Records Act are to be narrowly construed to maximize public access, Washington courts have strictly applied the statutory exemption (Wash. Rev. Code § 42.56.240(1)) that entitles agencies to withhold law enforcement investigative records. In *City of Fife v. Hicks*, 186 Wash. App. 122 (2015), the Court of Appeals determined that records identifying supervisory police officers subject to whistleblower complaints of misconduct, as well as the name of the whistleblowing officer himself, were subject to disclosure under the Public Records Act. Even though the records were part of an ongoing criminal investigation, the court held that that alone did not justify their concealment, absent proof that nondisclosure was “essential” to protect the integrity of the investigation or individuals’ personal privacy, neither of which applied to records involving on-the-job police misconduct.

As with most exemptions to the Public Records Act, the exemption for investigative records in Wash. Rev. Code § 42.56.240(1) is a discretionary rather than mandatory one, meaning that the department may choose to withhold records that qualify for the exemption but is not affirmatively required to do so, nor would there be any statutory penalty for the “over”-disclosure of potentially exempt documents.

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<sup>35</sup> WASH. REV. CODE § 42.56.520.



### III.

## Comparing and Contrasting Public Records Policies Related to Officers' Use of Force

#### A. Timeliness: Reactive vs. Proactive Disclosure

Most freedom of information and public records laws that govern public records are vehicles for “reactive disclosure.”<sup>36</sup> This means that a question must be asked or a request for information has been submitted prior to the information being disclosed. Proactive disclosure, on the other hand, is the release of information before anyone asks for it; the information is provided as part of a public service policy. Policies that require proactive releases of information serve as evidence that an agency has adopted a presumption in favor of disclosure. This presumption is of particular importance when reporting on officer-involved shootings and officers' use of force, as proactive disclosure helps an agency not only gain trust in its community but also maintain control of the message that is being released.

The Louisville Metro Police Department (“LMPD”) exemplifies the practice of proactive disclosure in its policy concerning officer-involved shootings.<sup>37</sup> In accordance with its policy, the department's Media and Public Relations Office is required to inform the media of such incidents immediately, so that members of the media can arrive at the scene. Once there, a press briefing is conducted by the Chief of Police or a member of the Chief's executive staff, where they provide initial information to the media.<sup>38</sup>

The LMPD policy also requires the Chief to hold a press conference within 24 to 72 hours of the incident to present any updates to the media regarding the current stage of the investigation and to identify the officers or units involved.<sup>39</sup> This press conference serves the purpose of explaining to the media the department's investigative process and providing an anticipated time frame for the conclusion of the investigation.<sup>40</sup> Furthermore, “[i]n situations deemed by the Chief to be a matter of great public concern, the Chief may release investigative details or evidence to provide transparency and context.”<sup>41</sup>

The Las Vegas Metropolitan Police Department (“LVMPD”) has also adopted a progressive and proactive approach to the disclosure of information related to officers' use of force.<sup>42</sup> In accordance with

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<sup>36</sup> *Open Data Policy Guidelines*, SUNLIGHT FOUNDATION, <https://sunlightfoundation.com/opendataguidelines/>.

<sup>37</sup> *Officer-Involved Shooting Investigation Procedures*, LOUISVILLE METRO POLICE DEP'T, <https://louisvilleky.gov/government/police/officer-involved-shooting-investigation-procedures>.

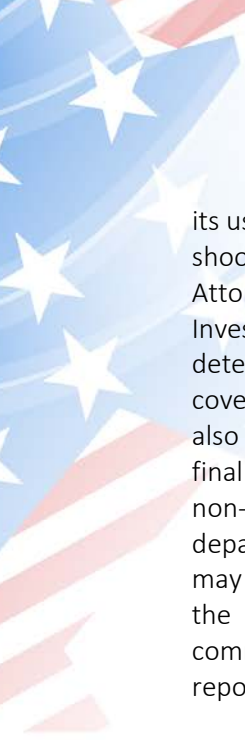
<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *Statistical Data and Reports*, LAS VEGAS METRO POLICE DEP'T, <https://www.lvmpd.com/en-us/InternalOversightConstitutionalPolicing/Pages/StatisticalDataandReports.aspx> (providing the department's statistical analyses and reports for deadly and non-deadly use of force).



its use-of-force policy,<sup>43</sup> LVMPD releases a slew of information on both fatal and non-fatal officer-involved shootings. For every use of deadly force, the department releases to the public three reports: (1) District Attorney decisions related to the incident; (2) criminal investigation reports, otherwise known as Force Investigation Team (FIT) reports, which contain all releasable evidence found by the investigating homicide detectives; and (3) the Office of Internal Oversight (OIO) Review, which contains the internal review that covers key conclusions and outcomes of each use of deadly force incident.<sup>44</sup> Since 2014, the department also posts to its website videos of the initial on-scene briefing and media briefings, along with initial and final press releases and information regarding the officers involved.<sup>45</sup> The department releases reports for non-fatal shootings similar to the way it releases reports in events resulting in death.<sup>46</sup> However, as the department explains, many non-fatal shootings result in a related criminal charge – in those cases, LVMPD may not release reports that may “jeopardize the judicial process” until it determines that the release of the information will not affect a pending criminal matter. The department nonetheless claims a commitment to transparency and promises to “monitor the status of the open criminal cases” and make reports available to the public when they become public records.<sup>47</sup>

By contrast, the Los Angeles Police Department (“LAPD”) has historically taken a more reactive and restrictive approach toward public disclosure, though that approach is in the process of being revisited. While its 48-page Media Relations Handbook is aimed to assist “the media in getting timely news information” from the department by “providing both the media and [its] officers with a basic outline of releasable information,”<sup>48</sup> the handbook states that most information is to be provided upon request, as opposed to being volunteered. For instance, the department’s stance on public disclosure of crime and arrest reports is laid out in its policy, which declares that arrest reports are provided only upon request and are to include information such as any resistance by the suspect, whether the officers involved were required to chase the suspect prior to arrest, use of weapons by the suspect, use of force by the officers, and the identity of the arresting and investigating officers.<sup>49</sup> Notwithstanding the official policy, in practice the LAPD does regularly engage in at least a limited degree of proactive disclosure through news releases, as is common practice throughout the field.<sup>50</sup> (By its terms, the LAPD’s policy does not cover instances in

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<sup>43</sup> *Use of Force Policy*, LAS VEGAS METRO POLICE DEP’T, <https://www.lvmpd.com/en-us/InternalOversightConstitutionalPolicing/Documents/Use-of-Force-Policy-2017.pdf>.

<sup>44</sup> *Fatal Officer Involved Shootings*, LAS VEGAS METRO POLICE DEP’T, <https://www.lvmpd.com/en-us/InternalOversightConstitutionalPolicing/Pages/FatalOfficerInvolvedShootings.aspx>.

<sup>45</sup> *Id.* Initial press releases are published the same day of the incident, while final press releases and names of officers are typically released 48 to 72 hours after the incident.


<sup>46</sup> *Non-Fatal Officer Involved Shootings*, LAS VEGAS METRO POLICE DEP’T, <https://www.lvmpd.com/en-us/InternalOversightConstitutionalPolicing/Pages/NonFatalOfficerInvolvedShootings.aspx>.

<sup>47</sup> *Id.*

<sup>48</sup> *Media Information*, LOS ANGELES POLICE DEP’T, <http://assets.lapdonline.org/assets/pdf/guide-2008.pdf> at 1.

<sup>49</sup> *Id.* at 2-3.

<sup>50</sup> *Newsroom*, Los Angeles Police Dep’t, <http://www.lapdonline.org/newsroom>. See, e.g., *Officer Involved in Shooting in Pacific Division NRFO59-17rn*, LOS ANGELES POLICE DEP’T (Sept. 12, 2017), [http://www.lapdonline.org/newsroom/news\\_view/62885](http://www.lapdonline.org/newsroom/news_view/62885); *Officer Involved Shooting in Pacific Division NRFO59-17rn*, LOS ANGELES POLICE DEP’T (Aug. 29, 2017),



which an arrest has not been made, so it is unclear whether the policy would apply to all officer-involved shootings – for instance, where a shooting results in the death of a bystander.)

Los Angeles is in the midst of updating its policies to incorporate the recommendations of its Police Commission and Inspector General to be more forthcoming with the public in light of intensifying scrutiny of policing practices everywhere.<sup>51</sup> In a May 2017 report, the Inspector General emphasized the need for “building a culture of transparency and accountability in order to build trust with the community,” which specifically includes “having clear, neutral policies for the release of as much information about incidents and operations as possible given confidentiality rules.”<sup>52</sup> In particular, the report of Inspector General Alex Bustamante released by the Police Commission called for revisiting the LAPD’s procedures for informing the press and public “swiftly, openly and neutrally” following “serious” use-of-force incidents, disclosing “as much information to the public as possible” within the bounds of confidentiality laws, even when the investigation is preliminary and unfinished.<sup>53</sup>

Following a series of stakeholder interviews and an analysis of policies at comparable law-enforcement agencies, the LAPD updated its media-relations policy as of January 2017 (although the changes have not yet been memorialized in the official handbook) to contemplate the “expedited” release of information to the public in the event of an officer-involved shooting. As part of that effort, the LAPD began as of January 2017 publishing an online chart of officer-involved shootings that includes, at a minimum, the date and location of the shooting, the name and condition of the person shot, and a narrative description of the circumstances of the shooting (including the name of the officer or officers, the status of the investigation, and how the public can contact the department to offer information).<sup>54</sup> This affirmative disclosure of the factual details of high-profile use-of-force incidents reflects a growing national trend toward making “open data” accessible without the need for a freedom-of-information request (discussed in more detail in subsection C, below).

To summarize, where the legal entitlement to information is clear and where disclosure (either directly or through eyewitness accounts) is inevitable, the better practice is to affirmatively and proactively “push” information to the public rather than to wait until the information is “pulled” by way of media request. This may preempt public outcry for more facts and decrease the public’s impulse to fill in the gaps with speculation and rumor.

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[http://www.lapdonline.org/newsroom/news\\_view/62844](http://www.lapdonline.org/newsroom/news_view/62844); *Officer-Involved Shooting in Hollywood Division NRFO58-17bm*, Los ANGELES POLICE DEP’T (Aug. 29, 2017), [http://www.lapdonline.org/newsroom/news\\_view/62843](http://www.lapdonline.org/newsroom/news_view/62843).

<sup>51</sup> See Kate Mather, *L.A. Police Commission approves proposals to increase transparency, training for how LAPD officers use force*, THE LOS ANGELES TIMES (Oct. 11, 2016).

<sup>52</sup> See Los Angeles Police Commission, “Review of National Best Practices” (May 2, 2017) at 22, <http://assets.lapdonline.org/assets/pdf/OIG%20Report%20on%20Best%20Practices.pdf>.

<sup>53</sup> *Id.* at 23.

<sup>54</sup> [http://lapdonline.org/use\\_of\\_force](http://lapdonline.org/use_of_force).



## B. Social Media Communications

Many law enforcement agencies are now getting their messages out via social media like Facebook and Twitter, rather than relying solely on traditional news outlets. By building a large online audience, departments can share critical information regarding crimes and catastrophic events or safety messaging directly with the community it serves, while also maintaining control and managing the integrity of the messages. Local media can also use a department's social media accounts to follow breaking news or interesting stories that would perhaps not otherwise garner its attention.

In October 2016, the Major Cities Chiefs Association and the Federal Bureau of Investigation National Executive Institute Association identified the Denver Police Department's social media program as particularly effective, putting it in the top ten list of social media followers among law enforcement agencies around the world.<sup>55</sup> The messages include both positive stories of law enforcement engagement with the community, as well as breaking critical or catastrophic events as they occur. Denver Police Department Commander Matt Murray has shared five best practices for the use of social media, following the department's success in its own practice of its policies:

- (1) *"Breaking your own news."*<sup>56</sup> Having a policy that requires a law enforcement agency to disclose important information on social media as a story unfolds allows the agency to control the message as well as timing. These messages can not only be informative for the sake of informing, but may also serve as an early warning system to followers when critical events are taking place.
- (2) *"Play show and tell."*<sup>57</sup> This allows members of the department to collectively understand what is being done within the department. The entire department is then able to see how information is being communicated to the public and how members of the community are responding to those communications.
- (3) *"Don't underestimate the power of fluffy bunnies."*<sup>58</sup> Sharing positive news of human interest may be just as important as sharing critical information in order to develop community relationships and build trust in the law enforcement agency. Such stories draw community engagement through likes, shares, and comments – especially when combined with multimedia components.<sup>59</sup>

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<sup>55</sup> *Officer Involved Shootings and the Implications of Video Evidence*, MAJOR CITIES CHIEFS ASS'N & FBI NAT'L EXEC. INST. ASS'N (Oct. 2016),

<http://static1.1.sqspcdn.com/static/f/1196634/27348582/1479856955073/OfficerInvolvedShootingsAndTheImplicationsOfVideoEvidence.pdf?token=YSffG9WCtVh%2BfcYv0FRXuDzspNE%3D> at 79-80.


<sup>56</sup> *Id.* at 79.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> To this end, the Denver Police Department provides regularly scheduled feature stories, including "Mug Shot Monday," "Tip of the Hat Tuesday," "Throwback Thursday," "Forever Home Friday—featuring an adoptable animal at the local animal shelter—and a weekly video feature titled "Sunday Matinee." *Id.*



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- (4) *Do not approach the event with fear.*<sup>60</sup> Fear of making a mistake may lead to hesitancy in releasing important information. Mistakes are sometimes inevitable as part of human nature. When mistakes are made, Murray advises to do the following: (a) always tell the truth; (b) admit when you're wrong; and (c) say what you are going to do to fix it.
  - (5) *Measure Performance.*<sup>61</sup> Tracking social media posts for performance allows the department to determine what types of communications work best. This allows the department to allocate resources where they are most effective.

Denver's social media strategy and requirements for its responses are clearly delineated in its policy, so that members of the public are clear on what information they can expect from the department.<sup>62</sup> This approach to social media undoubtedly helps build community trust and could lead to more community engagement, trust to come forward with valuable information, and willingness to accept honest mistakes made by the department.

Social media is integrated as a complement to (and not a substitute for) the department's traditional media strategy, which requires Public Information Officers to respond to media requests for information. Thus, information is often simultaneously shared to the public directly via social media and to traditional news outlets. Taking maximum advantage of technology, the Denver Police Department livestreams press briefings via Twitter's Periscope app for the purpose of providing unedited versions of briefings and press conferences in real time.<sup>63</sup> This allows the audience to get the full context of statements firsthand.

The Denver Police Department's approach fully recognizes the unique value of social platforms to connect with the community, including segments of the community that may not follow or trust traditional news sources. As part of a comprehensive social-media strategy, agencies should review and, where necessary, modernize their freedom-of-information policies to incorporate "pushing" information to the public through social channels.

### C. Open Datasets on Officer-Involved Shootings or Use of Force

Across the country, 136 police agencies have joined the Police Data Initiative,<sup>64</sup> meaning they have "committed to working closely with their communities to leverage open data for purposes of enhancing trust, understanding, innovation, and the co-production of public safety."<sup>65</sup> Participating agencies can

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 80.

<sup>62</sup> For instance, the policy requires that the Media Relations Unit respond to citizen questions and concerns through social media within two hours of the inquiry until 10:00 P.M. daily. As Murry points out, "[t]his requires dedication and is managed afterhours and on weekends by the on-call public information officer." *Id.* at 84.

<sup>63</sup> *Id.*

<sup>64</sup> POLICE DATA INITIATIVE, <https://www.policedatainitiative.org/>.

<sup>65</sup> *Participating Agencies*, POLICE DATA INITIATIVE, <https://www.policedatainitiative.org/participating-agencies/>.

provide datasets for a variety of categories including, among other things, “Officer Involved Shootings” and “Use of Force.”<sup>66</sup>

Not all 136 agencies, however, provide data for each of these categories. In fact, only 35 of the agencies<sup>67</sup> provide datasets on officer-involved shootings, while published datasets related to “use of force” are limited to only 23 agencies.<sup>68</sup> Even though it appears some agencies update their datasets with some frequency and provide quite a bit of information, other agency sites seem to be outdated or provide very limited information of practical usefulness.

The Baltimore Police Department (“BPD”) provides a dataset for officer-involved use of force.<sup>69</sup> The data exclusively include the district, location, type of force used, location coordinates, and “CC#” (without defining what this data point refers to or identifies). Even though there is some undeniable value to the collection of some of this information – especially the type of force used by the department – the information is quite limited. There is no inclusion of information related to the officers involved, for instance, or any information related to the victim or suspect who was subject to the use of force. Additionally, the data has only been updated through December 2015, making the information more than two years stale. While joining the Police Data Initiative may be a noble effort to increase transparency, it is highly questionable whether agencies like the BPD are contributing to the Initiative’s value. For these datasets to serve any useful purpose, they should not only be updated on a regular basis but also provide information of demographic and statistical importance.

By contrast, the Louisville Metro Police Department once again stands out for its effective use of open data.<sup>70</sup> The department maintains a detailed “Officer Involved Shooting Statistical Analysis Report.”<sup>71</sup> The report provides several datasets ranging in specificity and purpose. It provides aggregated general information collected from 2011 to 2017, including: the number of officer-involved shootings identified by division, month, and year; the number of officers and suspects involved during that period; the lethality of the shootings; and demographic information (race and sex) of both the subject and officer(s) involved. Separately, the report provides more specific information by year. All the following is included in this detailed dataset:

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<sup>66</sup> *Datasets*, POLICE DATA INITIATIVE, <https://www.policedatainitiative.org/datasets/>.

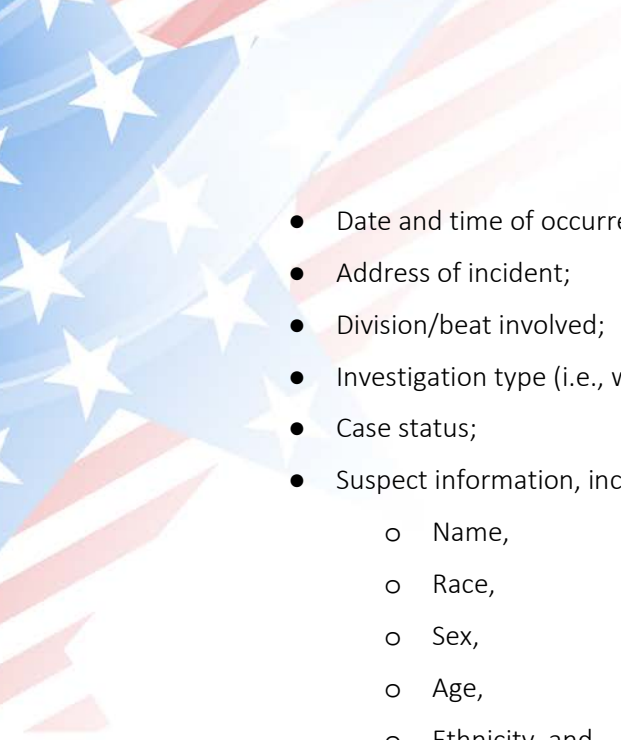
<sup>67</sup> These agencies include Atlanta, Austin, Bloomington, Charlotte-Mecklenburg, Cincinnati, Dallas, Denver, Fairfax County, Hampton, Hartford, Henderson, Indianapolis, Jacksonville, Knoxville, Lansing, Las Cruces, Los Angeles, Louisville Metro, Orlando, Philadelphia, Redondo, San Francisco, Seattle, Sparks, St. John, Tacoma, Tucson, and Vermont State. *Id.*

<sup>68</sup> The agencies included are Austin, Baltimore, Bedford, Beloit, Bloomington, Cincinnati, Dallas, Fayetteville, Henderson, Indianapolis, Las Cruces, New Orleans, University of Delaware, Norman, North Bergen, Northampton, Oakland, Orlando, Richmond, Rutland, Seattle, and St. John. *Id.*

<sup>69</sup> *BPD Officer Involved Use of Force*, OPEN BALTIMORE, <https://data.baltimorecity.gov/Public-Safety/BPD-Officer-Involved-Use-Of-Force/3w4d-kcky>.

<sup>70</sup> *See LMPD Transparency*, LOUISVILLEKY.GOV, <https://louisvilleky.gov/government/police/lmpd-transparency>.

<sup>71</sup> *Officer Involved Shooting Statistical Analysis Report*, LOUISVILLE METRO. POLICE DEP’T (May 8, 2017), [https://louisvilleky.gov/sites/default/files/police/sop\\_searchable\\_and\\_reports/lmpd\\_ois\\_database\\_updated\\_as\\_of\\_2017\\_05\\_08.pdf](https://louisvilleky.gov/sites/default/files/police/sop_searchable_and_reports/lmpd_ois_database_updated_as_of_2017_05_08.pdf).

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- Date and time of occurrence;
  - Address of incident;
  - Division/beat involved;
  - Investigation type (i.e., why the officer was called to the scene);
  - Case status;
  - Suspect information, including:
    - Name,
    - Race,
    - Sex,
    - Age,
    - Ethnicity, and
    - Weapon used (if any);
  - Officer information, including:
    - Name,
    - Race,
    - Sex,
    - Age,
    - Ethnicity, and
    - Years of service;
  - Whether the shooting was lethal; and
  - Notes on whether the investigation is still pending.<sup>72</sup>

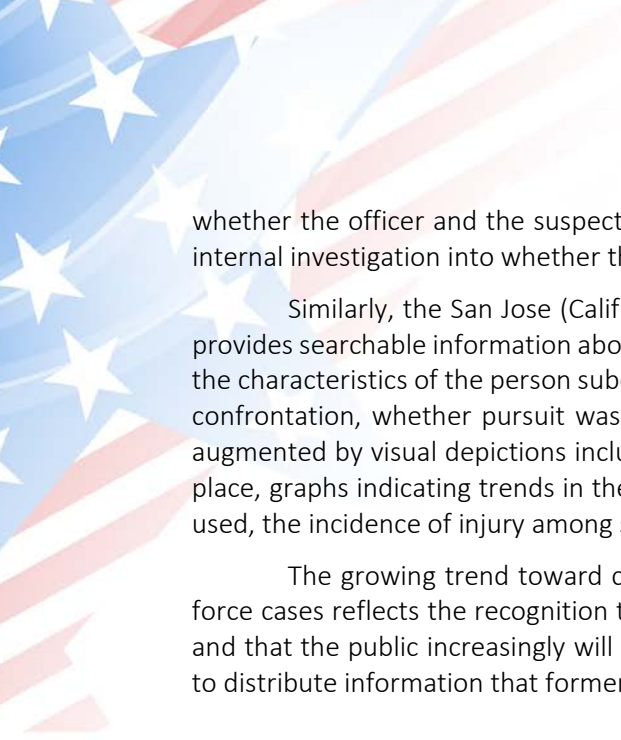
As of this writing, the LMPD data is updated through several months ago.

A forward-thinking example of the “push” approach to data is illustrated by the Norman (Okla.) Police Department (“NPD”).<sup>73</sup> Like LMPD, NPD provides detailed information related to use of force, and its information is updated even more regularly, on a quarterly basis. As with the LMPD, Norman pushes out the basic date/time/place description of each incident (although its online report includes only the ID number of the officer and not the officer’s name). But Norman provides greater detail, including (1)

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<sup>72</sup> *Id.* at 3-9.

<sup>73</sup> *Use of Force*, NORMAN POLICE DEP’T (available at <http://normanpd.normanok.gov/pd/use-force>).



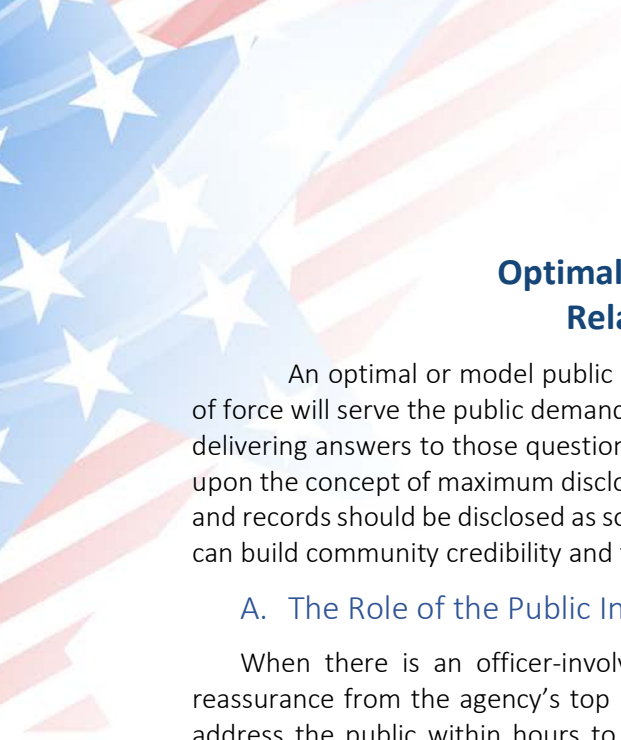
whether the officer and the suspect were injured or taken to the hospital, and (2) the disposition of the internal investigation into whether the use of force was justified.

Similarly, the San Jose (Calif.) Police Department recently launched an “online dashboard”<sup>74</sup> that provides searchable information about the location of use-of-force cases, the nature of the force used, and the characteristics of the person subdued (including demographic descriptives, as well as who initiated the confrontation, whether pursuit was involved, and whether criminal charges were brought). The data is augmented by visual depictions including maps reflecting the locations where use-of-force incidents take place, graphs indicating trends in the use of force over the preceding three years, the type of force tactic used, the incidence of injury among suspects and officers, and more.

The growing trend toward creating designated web pages where the public can monitor use-of-force cases reflects the recognition that public expectations about the speed of disclosure have changed, and that the public increasingly will expect law enforcement agencies to use online communication tools to distribute information that formerly was accessible only through documentary research.

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<sup>74</sup> <http://www.sjpd.org/CrimeStats/ForceAnalysis.asp>.



## IV. Optimal or Model Public Records Policies Related to Officers’ Use of Force

An optimal or model public disclosure policy related to officer-involved shootings or officers’ use of force will serve the public demand for detailed information about who, what, when, where, and why. In delivering answers to those questions, “[l]aw enforcement agencies must embrace a culture that delivers upon the concept of maximum disclosure with minimum delay.”<sup>75</sup> With the starting point that information and records should be disclosed as soon as is practical and not withheld as long as legally possible, agencies can build community credibility and trust, and minimize rumor and suspicion.

### A. The Role of the Public Information Officer vs. Agency Head

When there is an officer-involved shooting or other high-profile use of force, the public needs reassurance from the agency’s top leadership. The sheriff, police chief or other top commander should address the public within hours to provide the best available information.<sup>76</sup> As additional information becomes available, the public should also be made aware of those updates – although at this point, a public information officer (“PIO”) may take upon the duty of disclosing new developments. When such critical events have taken place, the community should be provided follow-up briefings; even if there are no new developments, a periodic progress report is advisable.<sup>77</sup> This practice should continue until the case has reached its final disposition, whether internally, through the justice system, or both. Where information is withheld, the public should be given the fullest possible explanation of why it is being withheld.

To serve as a credible representative of the agency, the PIO should be well-trained in law enforcement (if not a uniformed officer), have access to the agency’s leadership, and have the ability to get information quickly. But the PIO is not a substitute on matters that require a response from the agency head or chief of police directly.<sup>78</sup>

If there is an active investigative scene, news outlets should have an identifiable agency point person on-site with whom to communicate and who has the authority to do so, even after normal business hours.<sup>79</sup> The goal is to provide information to a curious public as soon as it is practicable: “Doing so will discourage the press from speculation or uninformed commentary that could be detrimental to the involved officer and the agency alike.”<sup>80</sup>

A comprehensive strategy to keep the public informed includes ongoing educational initiatives for the news media and the community, including making the department’s policies about use of force

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<sup>75</sup> *Officer Involved Shootings and the Implications of Video Evidence*, *supra* note 43 at 5.

<sup>76</sup> *Id.*

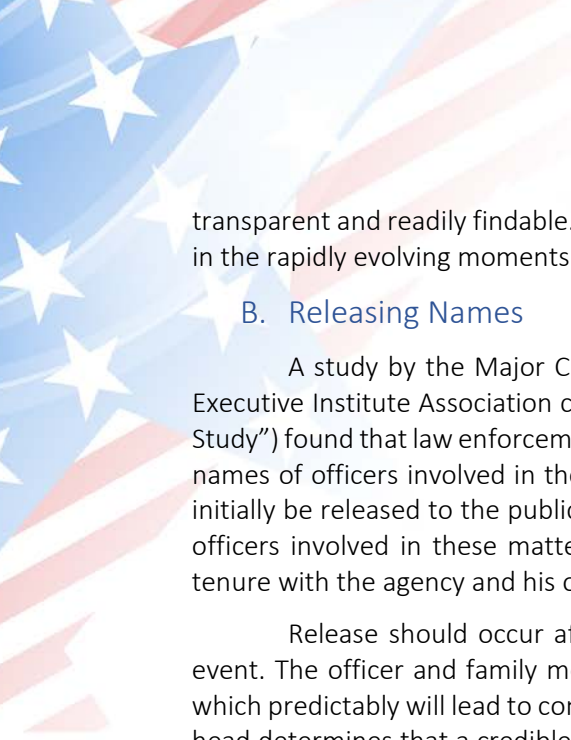
<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 77.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*





transparent and readily findable.<sup>81</sup> This approach can minimize the risk of confusion and misunderstanding in the rapidly evolving moments after a news event breaks.

## B. Releasing Names

A study by the Major Cities Chiefs Association and the Federal Bureau of Investigation National Executive Institute Association conducted in October 2016 (hereinafter referred to as “Chiefs Association Study”) found that law enforcement agencies have not yet developed a “best-practices model” for releasing names of officers involved in the use of force.<sup>82</sup> The study concluded with a proposal that names should initially be released to the public absent any “valid credible threat.” In addition to providing the names of officers involved in these matters, it also suggests that law enforcement agencies release the officer’s tenure with the agency and his or her divisional assignment.

Release should occur after a threat assessment has been made immediately following such an event. The officer and family members should be notified in advance of the decision to make a release, which predictably will lead to contacts by media (and potentially by others in the community). If the agency head determines that a credible threat exists and requires withholding the officer’s identity, the decision-maker should inform the public that the name will not be released and explain why such a measure has been taken, and also explain when the name is expected to be released.<sup>83</sup>

## C. Releasing Video Footage

The Chiefs Association Study suggests several matters to consider before releasing video footage:

- (1) Is the video footage a crucial piece of evidence that if released prior to the completion of an investigation may negatively erode the integrity of the investigation (i.e. perception that witnesses and/or involved officers can change their story to fill in the gaps with untruthful statements)?
- (2) Is the video footage of such a graphic nature that steps should be taken to prepare all involved (victims, witnesses, and involved officers) for the potential trauma it may cause by becoming part of the public domain?
- (3) Should an agreement be made with the victim(s) and/or their attorney’s [sic] to redact certain portions of the graphic nature of the video to protect the dignity of the victim (i.e. lifesaving efforts after the event ended)?
- (4) Should the law enforcement leader release the video through a media briefing or just post it for release?
- (5) Would release of the video assist in identifying suspects and/or gain more witnesses and not hinder the integrity of the investigations?<sup>84</sup>

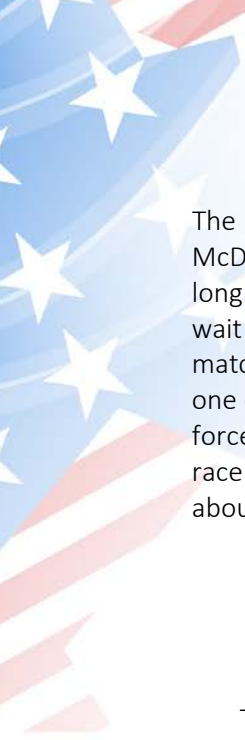
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<sup>81</sup> *Officer Involved Shootings and the Implications of Video Evidence*, *supra* note 43 at 77.

<sup>82</sup> *Id.* at 6.

<sup>83</sup> *Id.* at 7.

<sup>84</sup> *Id.*



The experience of the Chicago Police Department following the shooting death of 17-year-old Laquan McDonald demonstrates what happens when transparency fails and video is withheld for an unreasonably long time without substantial justification. In that case, a freelance journalist was forced to go to court and wait 13 months for the release of dash-cam video showing that the circumstances of the shooting did not match the public accounts given by officers on the scene, a revelation that led to murder charges against one officer and conspiracy charges against three accused of aiding the cover-up.<sup>85</sup> In the aftermath, a task force issued a 190-page report comprehensively examining the police department’s history of community race relations, which in part questioned the agency’s lack of transparency and specifically its lack of a policy about making video of disputed cases available to the public:

[T]he absence of a clear, written policy led to inconsistencies, confusion and mistrust on the part of the public, as well as a proliferation of expensive and time-consuming litigation conducted under the Freedom of Information Act. In many cases, it also left the public in the dark about matters of serious public interest.<sup>86</sup>

The legal system generally treats dash-cam and body-cam footage differently. Dash-cam video is always treated as a public record, because by definition it is shot on a street or in a parking area where the law recognizes no reasonable expectation of privacy.<sup>87</sup> Body-cam video, by comparison, can be recorded in private spaces, so legislatures have crafted more restrictive access rules that make it easier to justify blurring, redacting, or withholding footage. Washington’s open-records law provides a limited exemption for body-cam video “to the extent nondisclosure is essential for the protection of any person’s right to privacy,” including where video is shot inside a private home, or depicts an identifiable child or a dead body.<sup>88</sup>

#### D. Social Media Policy Framework

Law enforcement agencies can no longer take a position of silence and simply wait to see if there is any media interest when officer-involved shootings or critical events take place. Such a reactive position that waits for the media to make an inquiry may be perceived by the community as a “negative action,”<sup>89</sup> which in turn can erode trust and confidence in the agency – an environment where conspiracy theories thrive. Therefore, law enforcement agencies must lead with important news, and social media is the perfect means to that end.

Many agencies begin to disclose information via social media as soon as officers are dispatched to the scene and as events unfold. For instance, during the chaos and terror of the Boston Marathon bombing event in April 2013, the Boston Police Department used Twitter to provide citizens with accurate and up-

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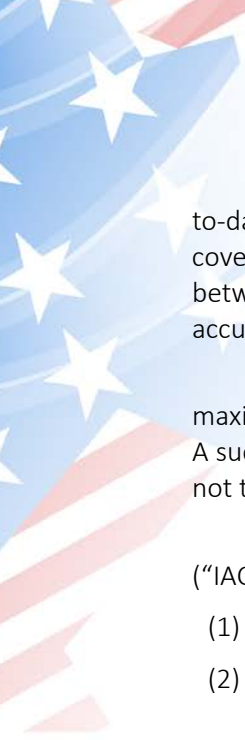
<sup>85</sup> Nausheen Husain, *Laquan McDonald timeline: The shooting, the video and the fallout*, CHICAGO TRIBUNE (June 27, 2017).

<sup>86</sup> Police Accountability Task Force, *Recommendations for Reform: Restoring Trust between the Chicago Police and the Communities they Serve* (April 2016) at 131.

<sup>87</sup> See *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wash.2d 515 (Wash. 2014) (recognizing police cruiser dash-cam video as a public record subject to disclosure under Washington’s PRA).

<sup>88</sup> WASH. REV. CODE § 42.56.240(14).

<sup>89</sup> *Id.* at 6.



to-date information.<sup>90</sup> In fact, the public came to rely on the police department’s tweets over the media’s coverage of the event, as some initial media reports proved to be inaccurate.<sup>91</sup> This illustrates how trust between a law enforcement agency and its community can be attained, simply by providing timely and accurate information through its own messaging system.

Law enforcement agencies have successfully built an audience for their social-media accounts, thus maximizing their reach and impact, by incorporating “good news” items and humor, when appropriate.<sup>92</sup> A successful social-media presence requires a following, and the most effective way to build a following is not to wait until an emergency.

When implementing a new social media policy, the International Association of Chiefs of Police (“IACP”) has identified five key policy considerations:<sup>93</sup>

- (1) *Scope.* Determine what areas the policy must cover.
- (2) *Official Use.* It is vital that a policy articulates the authorization for and administration of any department sanctioned sites.
- (3) *Personal Use.* Consider who is authorized to post on behalf of the department and when.
- (4) *Legal Issues.* The First Amendment, public records laws, and public retention laws all come into play when crafting a social media policy. Considering some of these laws are unclear as to how they apply within the social media realm, it becomes even more imperative that a social media policy is clear in its guidelines.
- (5) *Related Policies.* Some issues that arise with the use of social media may be resolved by citing other policies already in place within a law enforcement agency (e.g., policies regarding internet use, personal mobile devices, electronic messaging, and code of conduct).<sup>94</sup>

## E. Technology Policy Framework

Law enforcement agencies should regularly update their technology policy framework to address new “technology objectives, deployment, privacy protections, records management, data quality, systems security, data retention and purging, access and use of stored data, information sharing, accountability,

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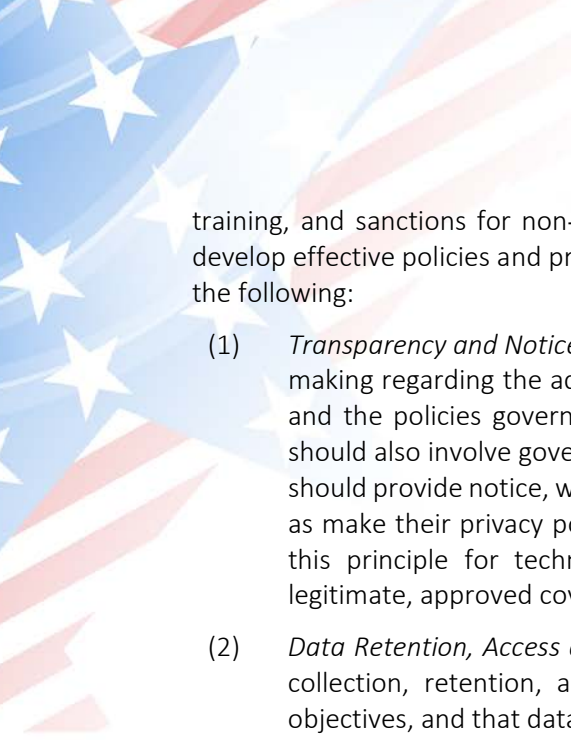
<sup>90</sup> *Officer-Involved Shootings: A Guide for Law Enforcement Leaders*, U.S. DEPARTMENT OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES (2016) at 30.

<sup>91</sup> Katherine Bindley, *Boston Police Twitter: How Cop Team Tweets Led City From Terror to Joy*, HUFFPOST (Apr. 26, 2013).

<sup>92</sup> E.g., Jennifer Earl, *Gainesville Cop’s Response to Teens Playing Basketball Goes Viral*, CBS NEWS (Jan. 22, 2016).

<sup>93</sup> IACP Center for Social Media: Policy Development, INT’L ASS’N OF CHIEFS OF POLICE, <http://www.iacpsocialmedia.org/getting-started/policy-development/>.

<sup>94</sup> IACP’s National Law Enforcement Policy Center offers model policies on these topics. *Model Policies*, INT’L ASS’N OF CHIEFS OF POLICE, <http://www.theiacp.org/Model-Policies-Alphabetical-Order>.



training, and sanctions for non-compliance.”<sup>95</sup> The IACP also provides a set of principles as a guide to develop effective policies and procedures for new technologies. Some of those key considerations include the following:

- (1) *Transparency and Notice*—Agencies should employ open and public communication and decision-making regarding the adoption, deployment, use, and access to technology, the data it provides, and the policies governing its use. When and where appropriate, the decision-making process should also involve governing/oversight bodies, particularly in the procurement process. Agencies should provide notice, when applicable, regarding the deployment and use of technologies, as well as make their privacy policies available to the public. There are practical and legal exceptions to this principle for technologies that are lawfully deployed in undercover investigations and legitimate, approved covert operations.<sup>96</sup>
- (2) *Data Retention, Access and Use*—Agencies should have a policy that clearly articulates that data collection, retention, access, and use practices are aligned with their strategic and tactical objectives, and that data are retained in conformance with local, state, and/or federal statute/law or retention policies, and only as long as it has a demonstrable, practical value.<sup>97</sup>
- (3) *Access and Use*—Define what constitutes authorized use of data captured, stored, generated, or otherwise produced by a technology. Define who is authorized to approve access and use of the data, for what purposes, and under what circumstances.<sup>98</sup>

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<sup>95</sup> *IACP Technology Policy Framework*, INT’L ASS’N OF CHIEFS OF POLICE (Jan. 2014), <http://www.theiacp.org/Portals/0/documents/pdfs/IACP%20Technology%20Policy%20Framework%20January%202014%20Final.pdf> at 2.

<sup>96</sup> *Id.* at 3-4.

<sup>97</sup> *Id.* at 4.

<sup>98</sup> *Id.* at 6.

## V.

### Control of the Flow of Information at Crime Scenes

Interactions between journalists and law enforcement have been marked by tensions over the right to record police activity. It is now well-settled law, nationally and in Washington State, that the public has a constitutionally protected right to shoot photos and record audio and video of police in publicly visible places, so long as the recording activity is not itself physically disruptive.<sup>99</sup> It is also well established that police may not avail themselves of the “self-help” remedy of erasing images or ordering journalists to do so; in one recent such case, the federal government paid an \$18,000 settlement to the *Toledo Blade* to settle a lawsuit over military police officers’ seizure and destruction of photos shot outside a Ford Motor Company plant that builds tanks.<sup>100</sup>

The federal Privacy Protection Act<sup>101</sup> governs interactions between government agencies and the news media, giving journalists a heightened right of privacy in their recordings, notes, and other unpublished work material. Specifically, the Privacy Protection Act provides that government agents investigating a criminal offense may not (with narrowly limited exceptions) “search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication” without first seeking a court order at an open hearing at which the journalist has the opportunity to be represented.<sup>102</sup> A comprehensive policy about law enforcement relations with news media should reinforce the public’s right to record at crime scenes, and journalists’ specific right to be free from the seizure or search of their unpublished work product when covering crime scenes.

## VI.

### King County Sheriff’s Office News Media Relations Policy: Recommendations

The following is King County Sheriff’s Office’s current General Orders Manual policy for “News Media Relations,” section 1.06.000. Given to totality of material gathered and reviewed in this report, the Brechner Center for Freedom of Information recommends certain policy changes or enhancements to be

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<sup>99</sup> In *Fordyce v. City of Seattle*, the federal Ninth Circuit U.S. Court of Appeals recognized that a police assault on a videographer for the purpose of preventing him from recording a protest march can be a First Amendment violation, a case that has since been cited for the proposition that the First Amendment protects lawful newsgathering in public spaces. See *Fordyce*, 55 F. 3d 436 (1995). See also *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017); *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

<sup>100</sup> *The Toledo Blade Co. v. United States*, Case No. 3:14cv00746, *Stipulation for Compromise Settlement and Release* (N.D. Ohio March 5, 2015).

<sup>101</sup> 42 U.S.C. § 2000aa.

<sup>102</sup> 42 U.S.C. § 2000aa(a), (c).





considered to facilitate the public's access to information and build trust between law enforcement and the community it serves. (Passages reflecting revisions or additions to the existing policy are underlined and highlighted.)

## 1.06.000 NEWS MEDIA RELATIONS

1.06.005

### **POLICY STATEMENT** (last update 09/95)

It is the policy of this department to have positive news media relations because we depend on community support in the form of trust and confidence. In order to carry out our responsibilities, a responsive and professional approach to the news media is necessary. We intend to provide all appropriate information to the news media as expeditiously and accurately as possible. Department members shall consider the community interest in any task they have been assigned and bring important newsworthy items to the attention of the news media.

1.06.010

### **DEFINITIONS:** 09/95

For the purposes of this policy:


1. **"Media member"** means news reporters and press photographers who hold valid press identification credentials.
2. **"Normally releasable"** means information which shall be released unless there is an articulable reason to withhold.
3. **"Normally not releasable"** means information which shall be withheld unless there is an articulable reason to release.

1.06.015

### **GENERAL GUIDELINES:** 09/08

The Communications Center should be the central dissemination point of incidents likely to be of immediate news media interest when the Media Relations Officer (MRO) is not available.

1. After regular business hours, the Communications Center shall be the primary point of contact for news media members.
  - a. The Communications Center shall provide appropriate releasable information to the news media upon request pursuant to section .025.

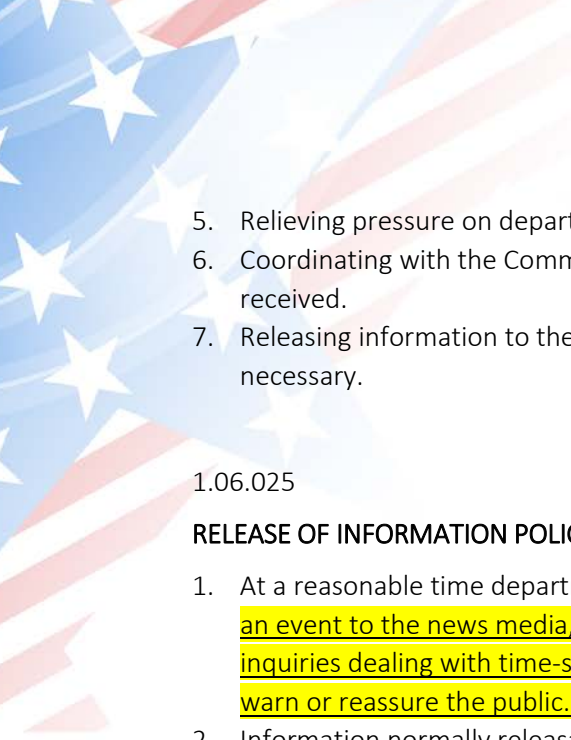
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- b. The Communications Center supervisor shall provide the media with the location of a command post or other site where the MRO, Command Duty Officer (COO) or field supervisor can be contacted.
  - c. The Communications Center supervisor shall update the News-Phone on a regular basis.
    - Includes reporting that nothing newsworthy has occurred.
  2. The Communications supervisor shall notify the MRO and the COO of significant newsworthy events.
  3. Department members shall evaluate each incident for media interest and brief the Communications Center supervisor before going off-duty.
  4. The Department will affirmatively provide to local media, and on official social media accounts, regular updates on all high-profile cases.
  5. The following incidents are likely to receive news media inquiries and shall be labeled "high profile":
    - a. Major crimes.
    - b. Child assaults.
    - c. Serious injury or fatal traffic accidents.
    - d. Significant natural or human caused disasters.
    - e. Search and Rescue operations.
    - f. TAC-30 operations.
    - g. Officer-involved shootings or other use of force resulting in serious injury or death.
  6. When the Sheriff's Office is involved with another agency, the agency which has primary jurisdiction shall have the responsibility of releasing information to the news media.

1.06.020

#### **MEDIA RELATIONS OFFICER'S RESPONSIBILITIES: 09/08**

The MRO is responsible for:


1. Coordinating effective relations between the department and the media.
  - The MRO is not the only source of news information. Each department member shall evaluate incidents and act pursuant to G.O. 1.06.025
2. Quick, concise and accurate reporting to the media.
  - a. The MRO shall provide regular updates on all high-profile cases to the department's social media accounts and to local media, including media serving diverse audiences.
  - b. If and when it becomes known that previously furnished information was inaccurate or misleading, or has become inaccurate or misleading as a result of subsequent events, the MRO shall publicly and transparently update the information as rapidly as possible, acknowledging the initial misinformation and, where possible, explaining the reason for the misinformation. The corrections/retractions shall be reported in the same format and through the same channels as the original inaccurate information.
3. Preparing and distributing media releases.
4. Arranging media conferences when necessary.

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5. Relieving pressure on department members who may be faced with a large volume of inquiries.
  6. Coordinating with the Communications Center when preliminary reports of a major event are received.
  7. Releasing information to the media using the News-Phone or other automated means when necessary.

1.06.025

#### RELEASE OF INFORMATION POLICY: 09/08

1. At a reasonable time department members will affirmatively provide all releasable information about an event to the news media, and will promptly honor requests for releasable information, prioritizing inquiries dealing with time-sensitive public-safety matters on which there is an identified need to warn or reassure the public.
2. Information normally releasable about a specific incident should include the following:
  - a. The fact that an incident has occurred and the general nature of the event.
  - b. Where the command post or other site where the MRO or field supervisor can be contacted.
  - c. Number and type of department resources used/assigned, (e.g., TAC-30, K-9, Negotiators, etc.) unless it will hinder the investigation.
  - d. That medical aid or the Medical Examiner has been called or is on-scene.
  - e. Any major highway or road blockages.
  - f. Evacuations of any number.
3. Information normally releasable about arrestees, absent unusual extenuating circumstances, should include the following:
  - a. The arrestee's name, age, sex, marital status and occupation.
  - b. General details of the alleged offense.
  - c. Circumstances surrounding the arrest including:
    - Time and place.
    - Resistance.
    - Pursuit.
    - Possession of weapons.
  - d. Prior convictions or other information known to be a part of public record with the approval of the MRO or supervisor.
4. Information not normally releasable to the media shall include the following:
  - a. Information which may allow a suspect to avoid arrest or tamper with evidence, until the suspect is in custody or the evidence is secured, including the names of suspects not yet in custody.
  - b. Admissions, confessions, or the contents of any statement or alibi relating to a suspect unless the alibi results in the suspect's release.
  - c. Results of investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory examinations.

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- d. Opinions about victims, witnesses, suspects or the strength of the case or any evidence to be used.
  - e. The home address or home telephone number of any department member.
  - f. The names of deceased persons, until released by the Medical Examiner.
  - g. The names of juveniles, whether victims, witnesses or suspects.
  - h. Prior arrests that did not result in a conviction or guilty plea. Except for subjects who have been arrested or charged, the Sheriff's Office will not release the subject's criminal history until it is requested by members of the press or public, unless the information is:
    - deemed necessary for public-safety; or
    - relevant and known to involved officers prior to a high-profile use of force.
  - i. Information that will reveal the identity of a child victim of sexual assault.
5. With limited exceptions, the names of victims and witnesses may be released with the approval of the MRO or a supervisor. The exceptions are:
    - a. If the release would endanger any person's lives, physical safety, or property.
    - b. The victim or witness expresses a desire for non-disclosure.
    - c. Identity of juveniles.
  6. Suspect photographs will be made available upon request in accordance with the Washington Public Records Act, and in the absence of a PRA request, may be affirmatively released if a significant law enforcement or public interest is served and such releases are approved by the MRO pursuant to state law.
  7. Statements regarding department policies, philosophy or enforcement procedures shall be made by the Sheriff or his/her designee.
  8. Release of information concerning confidential investigations or operations shall only be made by the MRO.
  9. Affirmative efforts will be made to convey information to media outlets serving diverse audiences, including non-English-speaking populations.
  10. Nothing in this section shall be construed as to prohibit department members from exercising their rights to speak to the news media as private individuals.
  11. Where an officer is involved in a high-profile use-of-force situation, the preceding protocols will apply, with the additional precaution that the identity of the involved officer may be withheld from release for up to 48 hours following the incident if the delay is judged to be necessary for the officer's personal and family safety.
  12. In cases involving incapacitating bodily injury or death, reasonable efforts should be made, wherever practical, to notify the injured person's or decedent's immediate family before the person's identity is released.



1.06.030

**MEDIA RELATIONS: 09/95**

1. Department members should endeavor to give the media the widest possible access to scenes, when such access does not interfere with department operations or endanger media members.
  - Supervisors seeing media arrive shall either designate a media contact or call for the MRO to respond at a reasonable time.
2. Scene perimeters shall be clearly marked, preferably with crime scene tape.
3. Members of the media should be greeted as soon as time permits. They should be informed:
  - a. That a briefing will be provided.
  - b. When and where the briefing will be; and
  - c. Location and type of any hazards or dangers to them.
4. Department members cannot interfere with photography so long as the photographer is where he/she has a right to be and neither he/she nor the use of the photography equipment interferes with the operation. Interactions with journalists are governed by the federal Privacy Protection Act, 42 U.S.C. § 2000aa, and in accordance with the Act, department members will not confiscate or search recording devices belonging to journalists or direct journalists to surrender or delete their contents.
5. Arrested persons may be photographed, but will not be posed by department members.
6. Department members shall direct all parking to areas that will not interfere with the operation.





## Acknowledgements

This report was produced in June 2018 by the legal staff at the Brechner Center for Freedom of Information and is primarily the work of Director Frank D. LoMonte and Legal Fellow Linda Riedemann Norbut, with valuable research assistance from graduate assistant Ashton Hampton.

We appreciate the warm spirit of collaboration from the King County Office of Law Enforcement Oversight, in particular its director, Deborah Jacobs, who conceived of this project as a way to memorialize, and build on, lessons learned from the experience of King County law enforcement in handling high-profile cases under intense public scrutiny. We thank Ms. Jacobs and her colleagues Toshiko Hasegawa, Casey Bloom and Adrienne Wat for helpful guidance in making this report clearer and more useful.

We encourage those responsible for managing public information to visit the Brechner Center's website at [www.brechner.org](http://www.brechner.org) and to contact us at [brechnerreport@jou.ufl.edu](mailto:brechnerreport@jou.ufl.edu) or at (352) 392-0448 with questions about the law of access to information or projects for further study.