Suffolk Journal of Trial and Appellate Advocacy

Volume 5 | Issue 1 Article 6

1-1-2000

Eroding the Blue Wall of Silence: The Need for an Internal Affairs Privilege of Confidentiality

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ERODING THE BLUE WALL OF SILENCE: THE NEED FOR AN INTERNAL AFFAIRS PRIVILEGE OF CONFIDENTIALITY

"I think it's obvious this matter would have been much easier to deal with if everyone had told the truth to begin with."[1]

I. INTRODUCTION

The above quote by Boston Police Commissioner Paul Evans reflects the Department's frustration with its investigation into the beating of Officer Michael Cox, a recent police misconduct case in Massachusetts.[2] Highly publicized incidents such as the Michael Cox beating, the shooting of Amadou Diallo in New York, the attack on Rodney King by a group of Los Angeles police officers, as well as other cases of corruption, racism, and abuses have fed the public's dissatisfaction with the management of police power in the United States.[3] Reflecting this shift in public opinion, civil rights groups, and especially the press, have

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[1] Brian MacQuarrie, *Two Found Liable in Beating of Fellow Officer, A Third Policeman Also Implicated; Another Cleared*, BOSTON GLOBE, Dec. 23, 1998, at A1, available in 1998 WL 22240828.

[2] *See id.* Cox, a black plainclothes member of the Boston Police Gang Unit, was reportedly beaten by a group of fellow officers who mistook him for a shooting suspect. *Id.* Nearly four years passed before the Boston Police disciplined any of the suspect officers. *Id.* Commissioner Evans cited the refusal of police officers brought before the Department's Internal Affairs Division as a major obstacle in the investigation. *Id.* During this period, Officer Cox filed suit against Evans and the Boston Police Department accusing them of a pattern of deliberate indifference toward police misconduct. Shelly Murphy and Ric Kahn, *Four Are Disciplined in Beating of Officer*, BOSTON GLOBE, at A1, Oct. 29, 1998, available in 1998 WL 9160978. Cox ultimately settled with the City of Boston for $900,000.00. Ralph Ranalli, *Cop Shelves Cash Bid in Beating Suit v. Officers*, BOSTON HERALD, Feb. 18, 1999, available in 1999 WL 3390856.

[3] *See* Tracy Tully and Alice McQuillan, *Congress Probe of NYPD Brutality Urged*, N.Y. DAILY NEWS, Mar. 2, 1999, at 24, available in 1999 WL 3426621 (describing calls for legislative reform in response to shooting of unarmed suspect by police officers); Jamison S. Prime, Note, *A Double-Barreled Assault: How Technology and Judicial Interpretations Threaten Public Access to Law Enforcement Records*, 48 FED. COMM. L.J. 341, 350 (1996) (reviewing incidents of police misconduct and their effects on public perception in different municipalities).

called for closer monitoring and scrutiny of police departments and their officers.[4] In Massachusetts, a trend has developed during the past thirty years toward more public disclosure of police documents in an effort to restrict the abuse of power by police officers.[5] While this may be seen as a route to increase police accountability, has the public disclosure of police files in Massachusetts gone so far as to act *against* the interests of the public by hampering internal police investigations?

This article advocates a specific statutory privilege of confidentiality for the contents of police department internal affairs files.[6] It will examine the inherent difficulties for police departments in conducting an internal investigation into an officer's conduct (the Code of Silence).[7] The note will show how a statutory guarantee of confidentiality would serve the interests of the public.[8] Such a statutory guarantee would not make internal police files completely inaccessible to public scrutiny but rather would raise the standard for disclosure.[9] By offering confidentiality to witnesses in an internal investigation, Massachusetts police departments may begin to chip away at the Code of Silence among their own officers.

II. MASSACHUSETTS PUBLIC RECORDS LAW

The 1966 Freedom of Information Act (FOIA) has become the model for the public's access to government records through its presumption of disclosure.[10] The FOIA mandates that government agencies

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[4] *See* Prime, *supra* note 3, at 348–49 (outlining calls for increased police scrutiny). *See also* Gabriel J. Chin and Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 251 (1998) (explaining pressures placed on police by general public and media for openness).

[5] *See infra* notes 56-76 and accompanying text (tracing trend toward disclosure).

[6] *See infra* notes 75-76 and accompanying text (explaining conflict between disclosure and police investigations).

[7] *See infra* notes 44-55 and accompanying text (outlining dynamics of Code of Silence).

[8] *See infra* notes 77-106 and accompanying text (stating how statutory exemptions in other states serve public interest).

[9] *See infra* notes 91-106 and accompanying text (defining disclosure standard).

[10] *See* Freedom of Information Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (codified as 5 U.S.C.A. § 552 (1999)). The congressional intent of the FOIA was to "open agency action to the light of public scrutiny." Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

shall make available for public inspection and copying any opinions, orders, policy statements, staff instructions and manuals, and generally any other documents requested by the public.[11] This presumption of disclosure of government materials is limited by a set of statutory exemptions, many of which speak specifically to the records of law enforcement agencies.[12] While the federal statute allows for specific exemptions from disclosure for confidential law enforcement sources, such statutory language is absent from the Massachusetts public records law.[13]

The Massachusetts public records statute follows the FOIA in its presumption of public records disclosure.[14] In the Commonwealth, "public records" are defined to mean:

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[11] *See* 5 U.S.C.A. § 552 (1999) (creating liberal disclosure policy of government documents).

[12] *See id.* Section 552 provides in pertinent part as follows:

> This section does not apply to records that are records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the *Id*entity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

Id.

[13] *Compare* 5 U.S.C.A. § 552 (West 1999) (revealing increased confidentiality afforded federal law enforcement) with MASS. GEN. LAWS ANN. ch. 4, § 7, cl. 26 (West 1999) (reflecting less specific exemptions to disclosure).

[14] MASS. GEN. LAWS ANN. ch. 66, § 10a (West 1999). The statute states in pertinent part as follows:

> Every person having custody of any public record . . . shall, at reasonable times and without unreasonable delay, permit it, or any divisible portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee.

Id.

> all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth . . . or of any authority established by the general court to serve a public purpose.[15]

This current definition of public records, introduced in 1973, greatly expanded the previous definition of what constituted a public document.[16] By expanding the definition of what constitutes a public record, numerous government documents that had previously been privileged were now open to public inspection.[17]

Following the FOIA public records model, Massachusetts limits its presumption of public records disclosure with a number of exemptions.[18] Unlike its federal counterpart, however, the exemptions allowed

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[15] MASS. GEN. LAWS ANN. ch. 4, § 7, cl. 26 (West 1999). *See infra* note 30 (describing investigatory exemption of cl. 26(f)).

[16] *See* MASS. GEN. LAWS ANN. ch 4, § 7, cl. 26 (West 1999) (defining public document in Massachusetts). The previous statutory definition limited public records to printed materials that are the property of the Commonwealth or have been received by a public employee "in or on which any entry has been made or is required to be made by law." MASS. GEN. LAWS ANN. ch. 4, § 7, cl. 26 (West 1972). This language had been construed to represent what came to be known as the "legal requirement test" for public records. *See* Commonwealth v. Holt, 1995 WL 670141, at *1 (Mass. Super. Oct. 17, 1995) (emphasizing invalidation of legal requirement for public records from change in statutory construction); Hastings & Sons Publ'g Co. v. Treasurer of Lynn, 374 Mass. 812, 815-16, 375 N.E.2d 299, 302 (1978) (stating post-1973 statutory construction eliminated legal requirement); Wolfe v. Massachusetts Port Auth., 366 Mass. 417, 421, 319 N.E.2d 423, 426 n.3 (1974) (discussing expanded definition of public records). Compare Bougas v. Chief of Police of Lexington, 371 Mass. 59, 65-66, 354 N.E.2d 872, 877 (1976) (explaining post-1973 statutory construction) with Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. 682, 685, 282 N.E.2d 379, 381 (1972) (stating pre-1973 statutory construction).

[17] *See Holt*, 1995 WL 670141, at *1 (invalidating legal requirement due to statutory change).

[18] *See* MASS. GEN. LAWS ANN. ch. 4, § 7, cl. 26 (West 1999) (offering twelve exemptions to disclosure mandated in MASS. GEN. LAWS ch. 66, § 10). The exemptions include privileges for public records (a) exempted from disclosure by statute, (b) related solely to internal personnel rules and practices of the governmental unit, (c) personnel and medical files the disclosure of which may constitute an unwarranted invasion of personal privacy, (d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency, (e) notebooks and other materials prepared by a state employee not maintained as a file of the agency, (f) investigatory materials compiled by law enforcement or other officials the disclosure of which would probably so prejudice the possibility of effective law enforcement that disclosure would not be in the

in the Massachusetts statute are less specific and more ambiguously worded.[19] This dearth of specificity has left the constructions of these exemptions to the state's judiciary who have increasingly minimized their meaning over the past two decades.[20]

III. THE TREND TOWARD DISCLOSURE OF POLICE FILES

We may trace the trend toward disclosure of police files away from a police privilege toward nearly complete disclosure by examining case law beginning in the 1960's through the present. In *United States v. Mackey*,[21] the district court for the District of Columbia held that it could not compel a police department to produce documents pertaining to its internal operations.[22] The court constructed its decision around a separation of powers argument by reasoning the Metropolitan Police Department was an Executive agency.[23] The court went on to state that law enforcement records should be regarded as confidential and not subject to public disclosure.[24]

While *Mackey* concerned the disclosure of police files in the context of a criminal trial, the court in *Kott v. Perini*[25] expanded the

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public interest, (g) trade secrets, commercial or financial information voluntarily provided to an agency for policy development under a promise of confidentiality, (h) sealed proposals and bids, (i) appraisals of real property acquired or to be acquired until such real property is no longer controverted by litigation, (j) personal information within firearm permits, (k) deleted, (l) testing materials, (m) health care service contracts between a government facility and a health maintenance organization. *Id.*

[19] *Compare* 5 U.S.C.A. § 552 (b) (West 1999) (carving out specific exemptions) *with* MASS. GEN. LAWS ANN. ch. 4, § 7, cl. 26 (West 1999) (providing more ambiguous exemptions than federal statute).

[20] *See* James G. Gilbert, *Free Liberty to Search and View: A Look at Public Access to Criminal Offender Record Information in the Commonwealth*, 41 Dec. B.B.J. 12, 12-13 (1997) (discussing minimization of statutory privacy protections for criminal offender record data).

[21] 36 F.R.D. 431 (D.D.C., Jan. 15, 1965).

[22] *See id.* at 433 (stating law enforcement agency records are confidential).

[23] *See id.* (reasoning separation of government powers precludes court supervision of Executive Branch).

[24] *See id.* (citing public interest in effective law enforcement precludes disclosure).

[25] 283 F. Supp. 1 (N.D. Ohio 1968).

privilege for police files to civil cases as well.[26] Here the court did not follow the *Mackey* separation of powers argument, but rather based its opinion on the public policy grounds of allowing police officers to execute their duties effectively.[27] The court predicated its decision on the "certain and chilling effect upon such record making" if there existed the possibility that confidential recorded information could be later exposed to outside parties.[28]

In *Bougas v. Chief of Police of Lexington*,[29] the Supreme Judicial Court of Massachusetts read the investigatory exemption of the state public records law as covering reports prepared by police officers in connection with a criminal investigation.[30] The court echoed the sentiment of the *Mackey* decision in reasoning the disclosure of law enforcement investigatory materials would work against the public interest by detracting from effective law enforcement.[31] The *Bougas* court extended

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[26] *See id.* at 2 (stating public policy reasons against disclosure apply to civil and criminal situations).

[27] *See id.* (describing need for confidentiality of police records).

[28] *Id.*

[29] 371 Mass. 59, 354 N.E.2d 872 (1976).

[30] *See id.* at 62 (recognizing disclosure of investigatory materials could detract from effective law enforcement). The requested reports included police observations, witness statements, and other confidential information that the court believed would have compromised police effectiveness. *Id.* The court emphasized that this exemption was not a "blanket exemption," nor did it extend to every document connected with an investigation. *Id.* at 65. The court stated the police department must show that the requested documents fall within the provided exemption. *Id.* at 65-66. The investigatory exemption states in pertinent part: "investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest" are to be exempted from the disclosure mandated by MASS. GEN. LAWS ch. 66, § 10. MASS. GEN. LAWS ANN ch. 4, § 7, cl. 26(f) (West 1999).

[31] *See Bougas*, 371 Mass. at 61-62 (returning to Mackay-style public policy arguments favoring non-disclosure). The policy considerations underlying the exemption of law enforcement materials outlined by the Bougas court set the standard for later public records cases involving police records. *Id.* These considerations include:

> the avoidance of premature disclosure of the Commonwealth's case prior to trial, 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.

this investigatory exclusion to correspondence between the public and the police.[32]

An investigation of a number of recent public records cases in Massachusetts concerning police materials reveals how sharply the courts have diverged from their earlier approach.[33] In *Doe v. Lyons*,[34] the court effectively narrowed the definition of "investigatory materials" by allowing police reports, witness statements, and witness identities to be disclosed in a civil lawsuit arising from a sexual assault.[35] In *Lyons*, the court held that the Boston Police Department had not specifically shown the release of the requested documents would have a prejudicial effect on future law enforcement.[36] The court also stated that the release of witness statements and the identities of witnesses would not deter witnesses to future crimes from coming forward.[37] *Lyons* demonstrated that the burden to be met by police in order to fall under the investigatory exemption had shifted in the years since *Bougas*, and subsequent police disclosure cases in Massachusetts have reinforced this approach to disclosure.[38]

In *Globe Newspaper Co. v. Evans*,[39] the court held that copies of Seized Money Forms filed by the Boston Police Department's Drug Control Division were not exempt from Massachusetts public records law.[40] The judiciary distinguished *Evans* from *Bougas* by reasoning that the routine nature by which the requested forms were compiled excluded

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Id. In determining whether a specific document falls within a public records exemption, the court opined that an in camera inspection may be appropriate. *Id.* at 66.

[32] *See* Koch v. Department of Justice, 376 F. Supp. 313, 316 (D.C. Cir. 1974) (including reports from private citizens under definition of investigatory material); Bougas, 371 Mass. at 63 (stating disclosure of informant letters would interfere with law enforcement investigations); *see also* Reinstein v. Police Comm'r, 378 Mass. 281, 290, 391 N.E.2d 881, 886 (1979) (stating investigative exemption designed to protect confidential sources and secret investigative procedures).

[33] *See infra* notes 34-43 (describing movement away from earlier judicial positions).

[34] No. CIV. A. 96-0341, 1996 WL 751531, at *6-8 (Mass. Super. Dec. 23, 1996).

[35] *Id.*

[36] *See id.* (demonstrating burden of proof for disclosure shifting from public to police).

[37] *See id.* (rejecting arguments that disclosure would "chill" future investigations).

[38] *See infra* notes 39-43 (illustrating Massachusetts trend toward disclosure).

[39] No. CIV. A. 97-4102-E, 1997 WL 448182 (Mass. Super. Aug. 5, 1997).

[40] *See id.* at *5 (stating public interest not served by preventing disclosure).

them from the class of investigative materials gathered in connection with a specific incident.[41] The court continued by stating that the Boston Police had not met its burden of showing that the disclosure of these forms would hamper future investigations or the ongoing internal investigation of misconduct in connection with the seizures.[42] As the judiciary moves toward more complete disclosure of police materials, this issue of officer truthfulness becomes central within the context of an internal investigation.[43]

IV. POLICE PERJURY AND INTERNAL INVESTIGATIONS

As described in the Introduction of this article, many members of the public feel that police misuse of power is on the rise.[44] Different interest groups, and especially the press, view public disclosure laws as a check against this misuse of police power.[45] A number of municipalities have begun to employ civilian review boards in order to address police misconduct complaints.[46] Like the press' call for liberal disclosure laws,

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[41] *See id.* at *3 (separating routinely compiled materials from definition of investigatory materials). Despite the fact that these seized money forms were prepared in connection with actual drug arrests and seizures, the court felt that their "ministerial" nature invalidated their investigatory quality. *Id.* at *3.

[42] *See id.* at *3-4 (illustrating court's dissatisfaction with police arguments). The court rejected the theory that the disclosure of these materials would discourage private citizens from coming forward to offer information pertaining to the misconduct investigation or compel police officers to be less than "completely candid" in their participation. *Id. But see infra* note 86 (stating negative impact of disclosure on police investigations).

[43] *See infra* notes 44-50 (describing issues of perjury in internal investigations).

[44] *See* Prime, *supra* note 3 at 349-55 (describing Americans' growing perception of police misconduct); Davis S. Cohen, Note, *Official Oppression: A Historical Analysis of Low - Level Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165, 170 (1996) (discussing dissipating trust and respect for police in urban areas); Leanora Minai, *Mistrust May Hinder Detectives*, ST. PETERSBURG TIMES, July 31, 1998, at 1, available in 1998 WL 4277935 (describing Justice Department study finding widespread mistrust of police by African-Americans in St. Petersburg, Florida); Chuck Lindell and Tara Trower, *Bridging a Chasm of Mistrust: Police Working to Mend Minorities' Frayed Confidence*, AUSTIN AMERICAN-STATESMAN, Apr. 5, 1998, at 1, available in 1998 WL 3598956 (profiling efforts by Austin, Texas police to regain trust of African-American communities).

[45] *See* Prime, *supra* note 3 at 345-49 (explaining need for public records laws with strong disclosure authority).

[46] *See id.* at 348 (describing limited usage of civilian review boards); Sean Hecker, Note, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review*

the use of these external boards has arisen out of a failure of police departments to deal with civilian complaints effectively.[47] Possibly the most difficult obstacle to overcome in a police internal affairs investigation is what has come to be known as the "Blue Wall of Silence."[48]

The terms "Blue Wall of Silence" and "Code of Silence" describe the well documented unwritten code among police officers which prohibits them from disclosing misconduct or perjury by fellow officers.[49] This Code of Silence has been called the "greatest single barrier to the effective investigation and adjudication of complaints" against police officers and is enforced by the threat of ostracism, harassment, and even life-endangering retaliation by fellow officers.[50] Recently in Massachusetts, media attention has focused on the plight of Boston Police Officer Michael Cox who was reportedly beaten by four fellow officers who mistook him for a shooting suspect.[51] Sparked by the Boston Police Department's inability to address the incident internally, the Boston Globe

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Board, 28 COLUM. HUM. RTS. L. REV. 551, 593-94 (1997) (reviewing use of civilian review boards in different municipalities); Richard S. Jones, *Processing Civilian Complaints: A Study of the Milwaukee Fire and Police Commission*, 77 MARQ. L. REV. 505, 506 (1994) (tracing creation of civilian oversight boards); Ken Takahashi, *The Release-Dismissal Agreement: An Imperfect Instrument of Dispute Resolution*, 72 WASH. U.L.Q. 1769, 1799 (1994) (describing advantages of independent civilian boards in responding to citizen complaints). *But see* Maureen Fan, *Suits v. Cops Seen Costing City Millions*, N.Y. DAILY NEWS, Nov. 16, 1998 available in 1998 WL 21934551 (contending New York City's civilian reviewed board proven ineffective).

[47] *See* Hecker, *supra* note 46 at 593-94 (describing perception that internal police mechanisms fail to discipline abuses of police power); Jones, *supra* note 46 at 507 (pointing to formation of civilian boards arising out of failure of police to regulate themselves.); Takahashi, *supra* note 46 at 1799 (arguing civilian boards are more effective than police internal affairs departments).

[48] *See infra* notes 49-50 and accompanying text (defining "Blue Wall of Silence").

[49] *See* Chin and Wells, *supra* note 3 at 237-40 (describing prevalence of Code of Silence within police departments).

[50] *See id.* at 240-41 and 254 (characterizing types of negative reinforcement that prevent police from implicating fellow officers). The torturing of Abner Louima by police officers of New York's 70th precinct precipitated an internal investigation involving the questioning of some 100 officers. *Id.* at 241-44. When two officers broke their silence to offer information, the city placed the two officers and their families under armed protection fearing retaliation by fellow officers. *Id.* Boston Police Officer Michael Cox reportedly received harassing telephone calls and suffered the vandalizing of his car after bringing suit against the Boston Police Department for failing to discipline the police officers who had beaten him. Shelly Murphy, *Beaten Officer's Lawsuit Merits Trial, Judge Finds*, BOSTON GLOBE, Nov. 25, 1998, available in 1998 WL 22236196.

[51] *See supra* note 2 (describing circumstances surrounding beating of Officer Michael Cox).

conducted an investigation of the Department and concluded that serious problems of excessive force were compounded by a Code of Silence among Boston police officers.[52] Boston Chief of Police Paul Evans blamed the ineffectiveness of the Department's four year internal affairs investigation on the refusal of officers to cooperate.[53] The fact that three of the officers implicated in the Cox beating had nine prior misconduct complaints filed against them has led to accusations of "deliberate indifference" by the Boston Police toward the misconduct of its officers.[54] If the Code of Silence among officers is reinforced by fears of reprisal,[55] then the Massachusetts judiciary's trend toward the disclosure of internal police materials is acting to reinforce this "Blue Wall" by making public record of the names of internal investigation participants.

V. JUDICIAL DISCLOSURE OF INTERNAL AFFAIRS MATERIALS

The disclosure of internal affairs materials in Massachusetts has its foundation in the judicial treatment of confidential informants.[56] The Massachusetts Supreme Judicial Court in *Commonwealth v. Johnson*[57] addressed the question of whether to disclose the name of a confidential witness in a murder trial.[58] There the court employed a balancing test to weigh the interests of the defense with those of the confidential witness in order to determine whether disclosure of the witness' identity was justified.[59] The court held for the disclosure of the witness' identity.[60] Within its decision to disclose the witness' identity, the court narrowed

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[52] *See id.* (pointing to Cox scandal as evidence of continuing code of silence among officers).

[53] *See supra* note 1 and accompanying text (quoting Police Chief Evans).

[54] *See* Shelley Murphy, *Complaints Follow Officer Accused in Cox Beating*, BOSTON GLOBE, Nov. 19, 1998, available in 1998 WL 22235065 (describing accusations of negligence against Boston Police Department).

[55] *See* Chin and Wells, *supra* note 3 (characterizing how fear of reprisal within police departments contributes to code of silence among police officers).

[56] *See infra* notes 57-69 (outlining judicial treatment of confidential witness statements).

[57] 365 Mass. 534, 313 N.E.2d 571 (1974).

[58] *Id.* at 543.

[59] *See id.* at 545 (illustrating balancing test). *See also* Roviaro v. United States, 353 U.S. 53, 60-61 (1957) (defining parameters of balancing witness *Id*entity against defendant's interests).

[60] *See Johnson*, 365 Mass. at 546 (holding for disclosure).

the scope of informant privilege by stating that no specific showing of prejudice by the defense was necessary.[61] This relaxed standard for overcoming the informant privilege would later open the gates for the generous disclosure of police internal affairs files.

In 1992, a Boston newspaper brought suit to compel the production of internal affairs files pertaining to the Boston Police Department's investigation of allegations of police misconduct during the murder investigation of Carol Stuart.[62] In response to the complaint, the Department claimed the requested materials were exempt from the public records statute under statutory, privacy, and investigatory exemptions.[63] Among other arguments in support of its defense, the Department argued that disclosure of officer statements in any Internal Affairs Department (IAD) investigation would have a "chilling effect" on future law enforcement endeavors.[64] In weighing the arguments of both parties, the court reviewed the requested materials in camera.[65] In light of its review, the court held in favor of redacting the names, addresses, and other information pertaining to citizen witnesses in the interests of protecting personal privacy.[66] The court did not, however, extend the same privilege to the names and statements of police witnesses within the IAD investigation.[67] In doing this, the court reasoned that the statements of the police officers contained neither personal information nor information

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[61] *See id.* at 547 (striking prejudice requirement for disclosure). Later cases would build on *Johnson* to more clearly define the burden to be met by the defense. *See* Commonwealth v. Hernandez, 421 Mass. 272, 276, 656 N.E.2d 1237, 1239 (1995) (consolidating standards set fourth in *Johnson* and *Lugo*); Commonwealth v. Lugo, 406 Mass. 565, 574, 548 N.E.2d 1263, 1267 (1990) (defining defendant burden as preliminary showing disclosure would provide material evidence).

[62] Globe Newspaper Co. v. Bratton, No. 9275171, 1993 WL 818904, at *1 (Mass. Super. Sept. 7, 1993). The BPD's own internal investigation was a response to the United States' Department of Justice's investigation of allegations of police misconduct in the investigation of suspect Willie Bennett. *Id.* at *1.

[63] *See* Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976) (explaining investigatory exemption); MASS GEN. LAWS ANN. ch. 4, § 7 cl. 26(a) (West 1999) (defining statutory exemption); MASS. GEN. LAWS ANN. ch. 4, § 7 cl. 26(c) (West 1999) (defining privacy exemption).

[64] *See Bratton* 1993 WL 818904, at *4 (referencing testimony of Boston Police detective).

[65] *See id.* at *5 (following Bougas). *See also* Bougas, 371 Mass. at 61–62 (1976) (explaining use of in camera inspection).

[66] *See Bratton*, 1993 WL 818904, at *6 (balancing public law enforcement interests with personal privacy interests).

[67] *See id.* at *7 (declining to make police witness statements privileged).

whose disclosure would impede effective law enforcement.[68] Here the court specifically rejected the notion that this sort of disclosure would deter internal police investigations, and in doing so, indirectly denied the existence of a Code of Silence among police officers.[69]

The Massachusetts judiciary applied this same attitude toward disclosure to a criminal defendant's request for an arresting officer's internal police department records in *Commonwealth v. Wanis*.[70] In *Wanis*, the party moving to compel disclosure did not argue that the requested documents were public records, so the court did not consider the applicability of statutory exemptions to the Massachusetts public records law.[71] Following the line of previous cases, the Supreme Judicial Court of Massachusetts held that no special showing of relevance or need is necessary to compel a subpoena for the production of percipient witness statements found within an IAD investigation.[72] For other information found within an internal affairs investigation, the court stated in dicta that the defense must show a specific, good faith reason for believing that the information is relevant to a material issue in the proceedings and could be beneficial.[73] The court felt confident in its decision that its standard for disclosing IAD information would "reassure" those who provide witness statements.[74] This decision and its attitude toward the confidentiality of internal affairs files grossly underestimates the force of the Code of Silence among police officers and the difficulties inherent in carrying out

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[68] *See id.* (rejecting privacy and public interest arguments against disclosure).

[69] *See id.* (stating possible prejudice to law enforcement would not outweigh public interest in disclosure). By not extending the investigatory privilege of M.G.L.A. ch. 4, § 7, cl. 26(f) to internal affairs files, the court assumed that the disclosure of an officer's name and statement who participated in an internal affairs investigation would not "impede effective law enforcement." *Id.* at *7.

[70] 426 Mass. 639, 690 N.E.2d 407 (1998).

[71] *Id.* at 642-43.

[72] *See id.* at 644 (following previous case law); Commonwealth v. Hernandez, 421 Mass. 272, 276, 656 N.E.2d 1237, 1239 (1995) (defining burden of production). The court held that under a defendant's motion pursuant to MASS. R. CRIM. P. 17, a judge should normally issue a subpoena to the internal affairs division to produce the statements of percipient witnesses. *Wanis*, 426 Mass. at 644.

[73] *See Wanis*, 426 Mass. at 644–45 (describing disclosure standard). The court went on to state that personal information about a police officer, his or her previous conduct, and the conclusions of internal affairs investigators should only be disclosed upon meeting this standard. *Id.* at 645. This standard does nothing to chip away at the police code of silence, though, as an extremely low standard needs to be met in order to disclose the names and statements of officers who volunteer information in an internal investigation.

[74] *Id.*

an internal affairs investigation.[75] One possible solution to this situation would be to extend a statutory privilege similar to those found in the federal public records statute in order to raise the standard to be met before a court could disclose IAD files.[76]

VI. A MASSACHUSETTS STATUTORY LAW ENFORCEMENT PRIVILEGE

While the Massachusetts legislature and judiciary have promoted the disclosure of public records in recent decades, the federal government has expanded the privilege for confidential sources of law enforcement agencies.[77] In order to qualify for the exemption under the federal statute, the information must have been provided under an express or implied condition of confidentiality.[78] An implied confidentiality is determined by weighing the nature of the crime involved, the relation of the source to the crime, and the risks of retaliation, harassment, or reprisal to the informant should his or her identity be disclosed.[79] While the federal statute acts as a blanket exemption once this test has been met, some

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[75] *See infra* note 86 (stating effects of disclosure on police investigations).

[76] *See infra* note 77 (providing overview of federal public records disclosure standard).

[77] *See* Wolfe v. Massachusetts Port Auth., 366 Mass. 417, 421, 319 N.E.2d 423, 426 n.3 (1974) (explaining how 1973 amendment to MASS. GEN. LAWS ANN. ch.4, § 7, cl. 26 broadened scope of what constitutes public record); *supra* notes 34-43 and 52-72 (tracking judicial trend toward disclosure). *Compare* 5 U.S.C.A. § 552(b)(7)(D) (West 1985) (offering more limited confidential privilege) *with* 5 U.S.C.A. § 552(b)(7)(D) (West 1998) (expanding exemption to include states, local, foreign, or private agencies offering information on confidential basis). The 1986 amendment to the statute lightened the burden of proof on the government from showing that disclosure would reveal the identity of a confidential source to showing that disclosure "could reasonable be expected to disclose" informant identity. Providence Journal Co. v. United States Dept. of the Army, 981 F.2d 552, 564 (1st Cir. 1992). *See also* Irons v. Federal Bureau of Investigation, 811 F.2d 681, 687 (1st Cir. 1987) (explaining congressional intention of amendment).

[78] *See* United States Dept. of Justice v. Landano, 508 U.S. 165, 172 (1993) (stating that circumstances under which information is provided rather than type of information is controls); Ortiz v. United States Dept. of Health and Human Services, 70 F.3d 729, 733-34 (2nd Cir. 1995) (defining understanding of confidentiality requirement).

[79] *See Ortiz*, 70 F.3d at 733–34 (listing factors considered to determine implied confidentiality). Courts will employ in camera review to weigh these factors. *Id.*

individual states have extended more limited exemptions for the treatment of police department internal affairs files.[80]

California's statutory police privilege, found in the state's penal code, creates a presumption of confidentiality for internal affairs files.[81] This presumption may be overcome by a litigant who can show that the information sought is relevant to the lawsuit in question.[82] Courts employ in camera inspection to balance the defendant's needs with the privacy interests of the police officer in question.[83] Even when the defendant has met his or her burden for disclosure, courts have interpreted the "good cause" requirement found in the evidence code exception to limit disclosure to only minimal information.[84]

The State of New York extends a privilege to police internal affairs files somewhat similar to that of California.[85] The New York

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[80] *See Providence Journal*, 981 F.2d at 566 (illustrating limited exemptions in Rhode Island). Whether or not disclosure would identify a confidential source is irrelevant so long as the information is provided under a condition of confidentiality. *Id.*

[81] CAL. PENAL CODE § 832.7(a) (West 1999). The California code provides in pertinent part: "Peace officer personnel records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." *Id.*

[82] *See* City of Hemet v. Superior Court, 37 Cal. App. 4th 1411, 1425, 44 Cal. Rptr. 2d 532, 541 (1995) (illustrating relevancy burden).

[83] *See* City of Santa Cruz v. Municipal Court, 49 Cal. 3d 74, 81 (1989) (describing balancing test to compel disclosure).

[84] *See* Kelvin L. v. Superior Court, 62 Cal. App. 3d 823, 828-29 (1976) (interpreting "good cause" requirement in California statute). CAL. EVID. CODE § 1043(b)(3) (West 1999). The California Evidence Code states in pertinent part: "Affidavits showing good cause for the disclosure or the discovery sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records." *Id.*

[85] N.Y. CIV. RIGHTS LAW § 50(a) (West 1999). Section 50 codified the case law in this area and provides in pertinent part that:

> (1) Personnel records of the police and fire departments are not subject to inspection without the written consent of the officer except as mandated by a court order. (2) Prior to the issuance of such an order, the judge must review the request to determine if there is sufficient factual basis to warrant the production of the file for review by the court. (3) If after such a hearing, the judge finds sufficient basis, the sealed file will be sent to the judge for review to determine whether the records are relevant and material to the action. Upon such a

privilege is intended to balance the constitutional rights of the accused with the interests of law enforcement agencies.[86] In order for a defendant to breach the confidentiality of internal affairs records, the defendant must first make a clear factual showing that disclosure is warranted.[87] This requirement is to insure the defendant's request is not "merely a desperate grasping at a straw."[88] If this threshold requirement is met, the court will then perform an in camera review of the files to determine if the disclosure of relevant and material information is to be allowed.[89] Through this threshold requirement, New York's exemption works to balance the state's interest in maintaining confidentiality with the interests of the defense.[90]

Should Massachusetts enact an exemption for police personnel / internal affairs files, the procedural guidelines for disclosure would be shaped by recent case law.[91] In *Commonwealth v. Bishop*,[92] the Massa-

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> finding the court shall make relevant and material portions of the record available to the requesting parties.

Id.

[86] *See* People v. Gissendanner, 48 N.Y.2d 543, 548 (1979) (illustrating interests balanced by New York statute). In its holding, the court recognized:

> the tension between the constitutionally based rights of an accused to confront and cross-examine adverse witnesses on the one hand, and the interest of the state and its agents in maintaining confidential date relating to performance and discipline of police on the other. Among other values the latter is said to serve are the maintenance of police morale and the encouragement of both citizens and officers to cooperate fully without fear of reprisal or disclosure in internal investigations into misconduct.

Id. at 547- 48.

[87] *See* N.Y. CIV. RIGHTS LAW § 50(a)(2) (defining standard for threshold inquiry of internal police files).

[88] *Gissendanner*, 48 N.Y.2d at 550.

[89] *See* N.Y. CIV. RIGHTS LAW § 50(a)(3) (describing proper use of in camera review to determine disclosure); People v. Shakur, 648 N.Y.S.2d 200, 205 (1996) (synthesizing New York process of disclosure). In *Shakur*, defendants requested to review the personal files of "any law enforcement agent who participated in the investigation" of charges of sexual assault. *Id.* The court characterized defendants' request as "boilerplate" and without merit as no reason was given to believe the requested police files contained information helpful to the defense. *Id.*

[90] *See Shakur*, 648 N.Y.S.2d at 205 (demonstrating need to meet threshold requirement).

[91] *See infra* notes 92-106 (describing procedural guidelines for disclosure).

chusetts court followed the attitude of the New York courts that defendants should not be allowed to embark on random fishing expeditions in their examination of privileged sexual assault records.[93] *Bishop* set out a five-step process by which a defendant may request the discovery of a sexual assault victim's confidential information.[94] First, the judge determines whether the requested information is protected by privilege.[95] Second, if the documents fall under a privilege, the moving party's request must indicate that the materials are relevant to an issue in the case, and if so, the judge will conduct an in camera review to limit the documents to those which are relevant.[96] Third, the judge allows both the prosecutor and defense counsel to review relevant documents to determine whether disclosure is necessary for the defense.[97] If this burden is met, the judge will permit the disclosure of those portions of the records necessary for the preparation and assertion of the defense.[98] The final stage of this process is the judge's determination at trial as to the admissibility of the documents in question.[99]

The 1996 case of *Commonwealth v. Fuller*[100] expanded the application of the *Bishop* test while clarifying its standards.[101] First, the *Fuller* court held that the *Bishop* standard and protocol should be applied to the disclosure of any privileged records.[102] The court then stated that the *Bishop* "likely to be relevant" standard for in camera inspection was

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[92] 416 Mass. 169, 617 N.E.2d 990 (1993).

[93] *See id.* at 182, 617 N.E.2d at 997 (quoting language of Gissendanner decision in defining parameters of defendant access).

[94] *See id.* at 181-84 (outlining five-step discovery procedure).

[95] *See id.* at 181(illustrating first step of Bishop test).

[96] *See id.* at 182 (utilizing in camera review to determine validity of relevancy claim).

[97] *See Bishop*, 416 Mass. at 182 (describing prosecution and defense review of documents).

[98] *See id.* at 183 (illustrating minimal disclosure).

[99] *See id.* (illustrating judge's role of determining admissibility). *See also* Adrienne Kotoski, Note, *How Confidential is this Conversation Anyway?: Discoverability of Exculpatory Materials in Sexual Assault Litigation*, 3 SUFFOLK JOURNAL OF TRIAL AND APPELLATE ADVOCACY, 65, 81-83 (1998) (discussing five steps of Bishop test).

[100] 423 Mass. 216 (1996).

[101] *See infra* notes 102 and 104 and accompanying text (broadening application and tightening *Bishop* standard).

[102] *See Fuller*, 423 Mass at 224 (expanding application of Bishop test). The court stated that Commonwealth v. Rape Crisis Program of Worcester, Inc., 416 Mass. 1001 (1993) "plainly indicates that this court intended the *Bishop* standard and protocol to apply when a defendant seeks access to any privileged records." *Id.*

too broad and would result in almost automatic production of privileged records for review.[103] The court in *Fuller* raised the standard for in camera review by requiring a showing of "good faith, specific, and reasonable basis for believing that the records will contain exculpatory evidence which is relevant and material to the issue of the defendant's guilt."[104] The *Fuller* court intended this new standard to balance the interests of both sides while recognizing the authority of a statutory privilege.[105] This line of cases reveals a growing recognition within the Massachusetts judiciary of the need for confidentiality in order to promote a public interest.[106]

VII. CONCLUSION

As issues of police misconduct gain more public attention, police departments have become more conscious of the need to be proactive and self-regulating. A statutory privilege to protect the confidentiality of an internal affairs investigation would elevate the *Wanis* standard while protecting a defendant's constitutional rights. By enacting a statutory privilege for police personnel / internal affairs files, both police officers and civilians may more readily break the Code of Silence and cooperate with an internal investigation. By identifying potential problem officers, a law enforcement agency may serve the public interest by taking appropriate action before an incident of gross police misconduct occurs.

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[103] *See Fuller*, 423 Mass. at 225 (holding standard too flexible).

[104] *See id.* at 227 (defining new standard); Kotoski, *supra* note 99 at 88 (explaining *Fuller* shift in *Bishop* standard).

[105] *See Fuller*, 423 Mass. at 226-27 (explaining balancing of interests in disclosure).

[106] *See* Commonwealth v. Bishop, 416 Mass. 169, 176, 617 N.E.2d 990, 997 (1993) (describing possible chilling effect of disclosure of sexual assault materials on victims).