

SUBJECT: Proposed amendment to the Code of Public Local Laws of Baltimore City (Article 4, Maryland Code of Public Local Laws) regarding the inspection of disciplinary records of police officers in the Baltimore Police Department

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Purpose

To amend the Code of Public Local Laws of Baltimore City to allow the inspection of disciplinary records of police officers in the Baltimore Police Department (BPD) *if* the records result from allegations of the following conduct arising out of or occurring in the course of a police officer's duties: 1) dishonesty or untruthfulness; and 2) the verbal or physical abuse of a citizen, including the use of excessive force or brutality.

Background

- The current provisions of the Maryland Public Information Act (MPIA) categorically exempt a "personnel record" of an individual from public disclosure. Although the statute gives some examples (application, performance rating, and scholastic achievement information) there is no definition of "personnel record" in the MPIA. The General Assembly left it to the courts to flesh out a definition.
- In *Montgomery County v. Shropshire*, 420 Md. 362 (2011), the Court referred to its earlier decision in *Governor v. Washington Post*, 360 Md. 520 (2000) that held that "personnel records were those [records] relating to hiring, discipline, promotion, dismissal, or any matter involving an employee's status." The Court went on to hold in *Shropshire* that the record of an internal affairs investigation into an alleged violation of administrative rules by a police officer therefore was a "personnel record" of that officer and could not be disclosed.
- For the reasons described in *Baltimore City Police Department v. Andrew*, 318 Md. 3 (1989), the General Assembly may enact a public local law governing the BPD that preempts or creates exceptions to provisions of a public general law of statewide application. Section 1-206 of the General Provisions Article of the State Code states that "where a public general law and a public local law enacted by the General Assembly are in conflict, the public local law shall prevail."
- The proposed bill provides that, subject to explicit exceptions set forth in the bill, the disciplinary records of BPD officers *are* protected from disclosure. In my opinion, putting the entire rule regarding the confidentiality of BPD disciplinary records (including the exceptions) in one place is by far the best drafting approach.

Proposed bill

Subtitle 16. Police Department

[new] § 16-15. *Disciplinary records.*

(a) “Public record” defined. - - “Public record” has the meaning stated in the General Provisions Article, § 4-101(j), of the State Code.

(b) “Disciplinary record” includes. - - For purposes of this section, a disciplinary record is a public record of any of the following:

(1) the allegations or complaint that initiated consideration of possible disciplinary action against a police officer by the department;

(2) the investigation of the allegations or complaint conducted by or on behalf of the department, including any findings and recommendations;

(3) the proceedings and findings and recommendations of the Civilian Review Board of Baltimore City;

(3) the proceedings, outcome, findings of fact, and recommendations of a hearing board constituted under the Public Safety Article, § 3-107, of the State Code; and

(4) the final decision by the commissioner on whether to impose disciplinary action, the disciplinary action imposed, and any explanation of the decision.

(c) In general. -- Except as provided in subsection (d), a custodian shall deny inspection of a disciplinary record of a police officer.

(d) Inspection of disciplinary record of police officer. -- Subject to subsections (e) and (f), a custodian shall allow inspection of a disciplinary record of a police officer resulting from an allegation or complaint of the following conduct arising out of or occurring in the performance of the officer’s duty:

(1) Dishonesty or untruthfulness; or

(2) Verbal or physical abuse of a citizen, including the use of excessive force or brutality.

(e) Temporary denial. -- A custodian may deny inspection of all or part the record of an investigation governed by the Public Safety Article, § 3-104 of the State Code, until a hearing board constituted under the Public Safety Article, § 3-107 of the State Code, issues its decision.

(f) Expunged record. – A custodian shall deny inspection of a record expunged under the Public Safety Article, § 3-110 of the State Code.

Explanation of provisions

4-328(a). I incorporated the definition of “public record” from the definition in the MPIA. It is worth noting that as the term is used in the MPIA, a “record” refers to a discrete document or set of documents – *not* to a list such as an individual’s driving record, criminal record, or “disciplinary record.” Therefore, *as applied to a given disciplinary action*, disciplinary “record” refers to the documentary materials specific to that action, not to a listing of the discipline imposed on an individual during the entirety of the individual’s employment.

4-328(b). This section specifies the recorded information that is within the scope of a “disciplinary record.” It is intended to be comprehensive and include everything from the initial complaint to the final decision. It includes the records of the proceedings of a police disciplinary hearing board constituted under the LEOBR.

4-328(c). Provides that, except as described in subsection (d), inspection of a disciplinary record of a public employee shall be denied.

4-328(d). Specifies the alleged conduct by a police officer for which inspection of a disciplinary record must be permitted. The alleged conduct must have arisen out of or occurred in the performance of the officer’s duty.

I included “verbal abuse” because such conduct can be a precursor to physical abuse. Citizens have the right to know how a police department is responding to known “red flags” to prevent misconduct from escalating from verbal to physical abuse.

“Arising out of” has a somewhat broader meaning than “occurring in” the performance of an officer’s duties, but still requires a nexus between the duties and the conduct. Under analogous circumstances courts have held that criminal or deliberate tortious conduct lies outside the scope of a police officer’s duties. *See, e.g., Wolfe v. Anne Arundel County*, 374 Md. 20 (2003). “Arising out of” therefore is intended to include criminal or deliberate conduct that may not have been part of an officer’s duties but was related to (arose from) those duties in some manner.

4-328(e). Allows but does not require the custodian to delay public inspection of all or part of the record of an investigation governed by the LEOBR until a police disciplinary hearing board issues its decision. The provision is intended to protect the integrity of the investigation and the hearing process.

There are a number of reasons for withholding public inspection of an investigatory report until a matter has gone to hearing, not the least of which is to avoid compromising the case against the accused officer. In light of the dust-up between the Civilian Review Board and the City Solicitor regarding access to internal affairs investigations under § 16-45 of the Code of Public

Local Laws, I emphasize that the denial of public access does *not* mean that the Civilian Review Board could be denied access.

4-328(f). The LEOBR allows the expungement of a disciplinary complaint against a law enforcement officer three years after a final disposition of the complaint that exonerates the officer. This provision would prohibit a custodian from allowing inspection of a record expunged under the LEOBR.

Other defined terms. “Commissioner,” “department,” and “police officer” are terms defined in § 16-1 of the Code of Public Local Laws of Baltimore City.