

Colorado Opens Police Internal Affairs Files to the Public – Can Two States Spawn a National Trend?

*A Periodic Report from
MLRC's State Legislative Committee*

By Steven Zansberg

On April 19, Colorado's Governor Jared Polis signed into law [House Bill 19-1119](#), making Colorado the second state in as many years to open to the public completed internal affairs investigation (IA) files of police and sheriff's offices. The new law, which took effect upon the Governor's signature, declares that a subset of completed IA files are now "records of official action" which, under Colorado's Criminal Justice Records Act, are *mandatory* disclosure records (no longer subject to discretionary withholding).

Not all completed IA files are subject to the new law; it applies only to IA records that concern officers' on-duty conduct "related to a specific, identifiable incident of alleged misconduct involving a member of the public." (So, alleged police misconduct towards fellow officers, corruption, false testimony, for example, are not included). Certain information in those completed IA files – Social Security numbers, driver's license and passport numbers; the identity of confidential informants, witnesses or victims; and a law enforcement officer's home address, personal phone number and email address – must be redacted prior to disclosure. Also, the new law is not retroactive; it applies only to IA files that are initiated after the law's passage.

At the signing ceremony in the Governor's office, Representative James Coleman, the House sponsor, said "the importance of this bill is making sure that we have transparency" that is so essential to "build [the community's] trust and relationship with ... law enforcement."



At the signing ceremony in the Governor's office, Representative James Coleman, the House sponsor, said "the importance of this bill is making sure that we have transparency" that is so essential to "build [the community's] trust and relationship with ... law enforcement."

Photo courtesy of Jim Anderson, AP

Two Years in the Making

The bill's passage culminated a two-year effort by government transparency advocates – led by the Colorado Freedom of Information Coalition and its constituent organizations the ACLU of Colorado, Common Cause, Colorado Broadcasters Association, Colorado Press Association, and The Independence Institute – to reform Colorado's criminal justice records law. These groups worked with Professor Margaret Kwoka at Denver University's Sturm College of Law, and two of her students (Bridget DuPey and Christopher McMichael), to survey 43 police and sheriff's departments across the state to assess how accessible, or rather inaccessible, completed IA files were under the law's existing "contrary to the public interest" discretionary withholding standard.

The DU study, "[Access Denied](#)," revealed that in the vast majority of Colorado's cities and counties, records custodians had adopted a blanket policy of denying access to all IA files, despite a Colorado Supreme Court [decision](#) that required a balancing of competing interests on a case-by-case, document-by-document basis, and which directed police chiefs and sheriffs to "redact sparingly" to "maximize the amount of information disclosed to the public."

[That study served as the factual predicate for an earlier bill](#), similar to HB-19-1119, that Representative Coleman introduced during the 2017-18 legislative session. That bill passed out of the House, but was defeated in Senate committee after the leading criminal law enforcement associations (the Sheriffs' Association, Colorado Chiefs of Police, and the District Attorneys' Council) all testified against it. They argued that opening up these records would hamper their ability to conduct internal reviews and would invade officers' privacy rights.

In response to those concerns, prior to the start of the 2018-19 session, CFOIC and its constituent organizations worked with Representative Coleman to revise his bill, limiting its reach only to a subset of completed case files concerning officers' on-duty interactions with members of the public, and setting forth itemized categories of information for mandatory and discretionary redaction. In addition, records custodians are authorized to first provide a records requester with only a summary of the file. (This is the approach taken by Denver's Department of Public Safety). Although this disclosure frequently satisfies many records requesters, they are still entitled, under the new law, to access the actual file materials, including redacted witness interviews, video and audio recordings, transcripts, documentary evidence, investigative notes and the agency's final decision regarding disciplinary sanctions, if any.



The bill's passage culminated a two-year effort by government transparency advocates.

Second Time's a Charm

As a result of these revisions to last year's bill, and extensive discussions with members of the law enforcement community prior to the introduction of HB-19-1119, the Sheriffs, Police, DAs and the Colorado Municipal League all agreed to take a "neutral" position on the bill.

Only the statewide union representing police officers, The Fraternal Order of Police, actively opposed it.

Also, in the November 2018 election, Democrats gained 8 seats in Colorado’s legislature, taking majority control of both houses. And, like many other states, Colorado has had its fair share of high-profile incidents of police abuse, with officers exonerated by their departments of wrongdoing while cities paid out substantial civil settlements. One example: In 2017, the city of Aurora, Colorado paid Darsean Kelley \$110,000 to settle his claims against a police officer who tased Kelley in the back, even though he had fully complied with the officer’s orders. Upon being tased for no reason, Kelley fell straight backward and hit his head on concrete. The [bodycam video of the incident](#) went [viral](#). An Aurora police investigation found that the officer’s actions were “reasonable, appropriate and within policy.” But Aurora refused to release the tasing officer’s IA file.

One additional piece of documentary evidence proved helpful in promoting the passage of HB-19-1119 through the state legislature: last summer, CFOIC worked with an intern, Brittany Garza, a law student at the Sturm College of Law, to produce a second report, [“Dismantling the ‘Blue Wall’ of Secrecy: Experience with Other States’ Access to Completed Internal Affairs Investigation Files,”](#) which documented how major metropolitan police departments in Seattle, Atlanta, Hartford, Milwaukee, and Minneapolis (among others) routinely disclose completed IA files [as a matter of course](#); yet those departments encounter no difficulty conducting effective internal reviews while fostering greater community trust and support. Ms. Garza [testified before the House Judiciary Committee](#) about her findings, and several members of the committee said they found that testimony persuasive.

The Fraternal Order of Police sought to limit the bill only to the completed IA files where the allegations of officer misconduct were sustained; unsustained or “unsubstantiated” complaints, they argued, would subject innocent officers to undeserved stigma and reproach. Transparency advocates countered by pointing to cases like the tasing of Darsean Kelley (and others where officers were exonerated by an IA investigation, but the city paid substantial sums to settle citizen complaints) as evidence that “unsubstantiated” cases are often the most controversial. Also, allowing the continued withholding of “unsubstantiated” case files would incentivize police and sheriffs’ departments to “whitewash” (or “bluewash”) serious allegations of officer abuse in order to keep the file under wraps. Thus, FOP’s effort to limit the bill only to “substantiated” citizen complaints was defeated.

California enacted legislation opening some police internal affairs files, that is broader in some respects, and narrower in others, than Colorado’s new law.

The Start of a National Trend?

In late August 2018, California enacted legislation ([SB-1241](#)) opening some police internal affairs files, that is broader in some respects, and narrower in others, than Colorado’s new law. Narrower, because California’s law applies only to IA files that (a) involve use of weapons

against civilians, (b) sexual assault, or (c) an officer's lying in police reports; and it only applies to the subset of those files where wrongdoing was found. Unsubstantiated complaints remain sealed from public view. California's law is broader than Colorado's new law in that it applies retroactively to IA files completed before the law's passage. And, it requires that IA files finding wrongdoing be released to the public 18 months after the incident.

California's law reversed decades of secrecy afforded to police IA files. Prior to passing SB-1421, California was one of only three states in the nation whose statutes specifically prohibited the disclosure of internal police records. Introduced by Senator Nancy Skinner (D-Berkeley), the bill's success was (to a large extent), attributable to the tireless efforts of Nikki Moore, the former Vice-Chair of MLRC's State Legislative Developments Committee, during her tenure at the California Newspaper Publishers Association. Six rounds of amendments to the original bill convinced California's Chiefs of Police to affirmatively support it.

Political pressure in favor of passage increased when public records [disclosed](#) that the police union (the Peace Officers Research Association of California) had donated more than \$70,000 to seven members of the Senate Appropriations Committee (to whom the bill had been referred) and more than \$33,000 to the Senate Pro Tem, who was responsible for determining whether the bill would be advanced to the Senate floor. And, the Los Angeles Times [revealed](#) that literally the day before the vote on the bill (and another one addressing access to body worn camera footage), "the Los Angeles Police Protective League, which represents rank-and-file [LAPD] officers, gave \$4,000 a piece to a dozen Assembly Democrats seen as friendly to law enforcement interests." SB-1421 was approved by the Assembly and the Senate on August 31, 2018, the final day of California's legislative session.

To quote a recent Nobel Prize winner for literature, "the times they are a-changin'."

A New Landscape Favors Transparency

As recently as five years ago, (before Ferguson, MO, and the "Black Lives Matter" movement it spawned), neither California's nor Colorado's laws opening to the public completed IA files would have been viable. But owing to a host of changed circumstances in both states, government transparency advocates succeeded in getting these laws on the books. To quote a recent Nobel Prize winner for literature, "the times they are a-changin'." Hopefully, these two recent legislative victories will encourage other states to follow suit. "Imagine" the day when NYPD internal affairs files are open for inspection, upon request. To quote another great Twentieth Century sage, "You may say I'm a dreamer, but I'm not the only one."

Steve Zansberg is a partner in the Denver office of Ballard Spahr, LLP, and he co-chairs MLRC's State Legislative Developments Committee. He is also the President of the Colorado Freedom of Information Coalition.