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PROJECT**



MID-ATLANTIC
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The Innocence Project at UVA School of Law // Innocence Project // Mid-Atlantic Innocence Project
Contact: Laurie Roberts, State Policy Advocate, Innocence Project (207-712-1033); lroberts@innocenceproject.org

Virginia Innocence Coalition
Virginia Freedom of Information Advisory Council
Wednesday, November 10, 2021, 1:00 p.m.

Supporting HB 2196

The Innocence Project at University of Virginia (UVA) School of Law, Mid-Atlantic Innocence Project (MAIP) and the national Innocence Project make up the Virginia Innocence Coalition, which advocates for policies that address and prevent wrongful convictions.

The Virginia Innocence Coalition supports House Bill 2196. We thank Delegate Mullin and the Virginia Freedom of Information Act Council for considering this legislation.

Police misconduct has been a factor in 35% of the more than 2,600 exonerations revealed in the United States to date.¹ Virginia's Freedom of Information Act (FOIA) is supposed to empower citizens to hold public officials accountable. However, FOIA gives police agencies discretion over releasing officer disciplinary records, which in practice results in few disclosures. Lack of transparency perpetuates a culture of secrecy that systematically and pervasively shields police misconduct. The public does not know whether police departments are handling complaints against officers effectively or not. Virginia should provide public access to police disciplinary records to build trust with communities and ensure misconduct isn't allowed to persist.

The Problem

Police officers committed misconduct in 35% of the over 2,600 exoneration cases that have been revealed in the United States.² Examples include witness tampering, misconduct in interrogations, fabricating evidence, concealing exculpatory evidence and committing perjury at trial. Keeping misconduct records secret hides bad actors from public scrutiny and further creates distrust in communities who have no way of knowing whether complaints are appropriately addressed. Public access to police internal affairs files not only benefits the public, but can expose disparities in discipline -- particularly for women and officers of color who may be punished more harshly than white male counterparts. There is also a financial cost to the public when taxpayers are left footing the bill for police misconduct and wrongful conviction lawsuits, both of which can result from keeping misconduct secret. Indeed, civil settlements and compensation claims associated with wrongful convictions in Virginia alone have already cost taxpayers **more than \$25 million**³ -- and this doesn't account for costs associated with litigation or imprisonment.

¹ Gross, Possley, Roll & Stephens, "Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement." *National Registry of Exonerations*, Sept. 1, 2020.

https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf

² *ibid*

³ According to civil settlement and compensation claim data collected by Jeffrey Gutman (Professor of Clinical Law, George Washington University)

Police credibility affects every phase of a case -- including initial police interactions, investigations, and trials. When a factfinder is denied information about a police witness's prior misconduct or dishonesty, assessment of an officer's credibility becomes nearly impossible and results in manifest injustice. Often, prosecutors, defense attorneys, judges, and juries are unaware of the misconduct histories of police officers whose credibility is critical in criminal matters. Factfinders should know whether an officer has a record of lying on the witness stand, planting evidence, or coercing defendants so they can make more accurate judgments about innocence and guilt.

Police departments investigate themselves; thus, it is critical that the public trust their decision making and trust that misconduct is appropriately handled. This was underscored recently when it was revealed that Norfolk Police Lt. William K. Kelly, the second in command in Internal Affairs, contributed to the defense fund of Kyle Rittenhouse, who has been charged with first-degree murder for shooting a protestor during racial justice protests last summer. Kelly offered Rittenhouse the message, "You've done nothing wrong, Every rank and file police officer supports you. Don't be discouraged by actions of the political class of law enforcement leadership."⁴ Does Lt. Kelly investigate police shootings with a similar disregard for victims? Without access to underlying investigations, this message calls into question former Lt. Kelly's -- and Norfolk's -- oversight of misconduct allegations.

Departments also rarely substantiate complaints. A 2020 report by the ACLU of Maryland found only 8% of external complaints, including resident complaints, were sustained.⁵ We learned from the records of Derek Chauvin (the officer who murdered George Floyd) and of Daniel Pantaleo (the officer who murdered Eric Garner), two examples among many others, that these officers had misconduct histories with many complaints of "unsubstantiated" but not "unfounded" complaints.⁶ Civil litigation often uncovers significant issues with the investigations that took place.

The Impact on Wrongful Convictions

To date, as least 17 Virginians have been exonerated of crimes they were wrongfully convicted of in part due to police misconduct.⁷ Several of them were wrongfully convicted in part due to the misconduct by Robert Glenn Ford; the extent of his misconduct is still not fully known. In addition to the infamous "Norfolk Four" case of four innocent sailors coerced into false confessions for rape and murder, Ford was also directly responsible for the wrongful conviction of Joseph Carter. Carter was granted an absolute pardon last month by Governor Northam on the grounds of innocence; the pardon explicitly states that he "was an unfortunate victim of Norfolk Detective Glenn Ford, who used his official capacity to extort witnesses in order to yield high solvability percentages and was eventually convicted on federal charges."⁸ Ford recently completed his 12-year sentence for taking bribes from criminal defendants and lying to the FBI.

⁴ Washington Post, April 2021, retrieved from:

<https://www.washingtonpost.com/nation/2021/04/21/norfolk-police-kyle-rittenhouse-donation/>

⁵ American Civil Liberties Union of Maryland. *Chasing Justice - Addressing Police Violence and Corruption in Maryland*, 5. (2021 January 19).

Accessible: <https://www.aclu-md.org/en/publications/chasing-justice-addressing-police-violence-and-corruption-maryland>

⁶ For a primer on key terms (unsustained, unfounded, sustained, exonerated), see attached primer from the Virginia State Police ("How the Complaint Process Works")

⁷ A complete list of exonerations in Virginia can be found here:

<https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=VA>

⁸ Joseph Carter, Absolute Pardon from the Commonwealth of Virginia, August 13 2021 (attached)

Norfolk has refused to do an audit of Ford's cases and has blocked the efforts of others to do the same. The Norfolk Police Department routinely denies requests for files of cases involving Ford. Ford was also involved in four other wrongful conviction cases that are currently being litigated or have previously been pursued by the Innocence Project at UVA School of Law.. Without disciplinary and personnel records, however, innocence organizations cannot conduct a thorough review to determine the full extent of wrongful convictions caused by Ford.

Ford is not the only law enforcement officer whom we have found through our work to have repeated instances of misconduct. The UVA Innocence Project is currently seeking the exoneration of a man who has been conditionally pardoned by Governor Northam. The officer involved in this wrongful conviction (now deceased) has a 70+ page disciplinary report, and UVA's investigation revealed that he lied under oath in the case; however, they have been unable to gain access to any portion of the disciplinary report. In yet another exoneration, the case of Beverly Monroe, the federal district court noted that tactics of the officer "were deceitful, manipulative, and inappropriate." That officer was also central to the case of Emerson Stevens, who received an absolute pardon from Governor Northam in August. We cannot allow misconduct to remain secret. The stakes are too high for Virginians, and no more innocent people should lose their liberty due to misconduct remains hidden.

The Solution

Virginia should make all complaints of police misconduct publicly available. It is critical that all complaints be accessible so the public can see that each and every allegation is handled appropriately, especially in cases where an officer was found to have acted inappropriately. It is critical that all files are made available so that the public has faith in the investigation and disciplinary process, and also to avoid creating an incentive for police departments to investigate accusations of misconduct less thoroughly or to falsely "unsubstantiate" true allegations explicitly to avoid public disclosure. This committee already heard such a prediction from one Virginia sheriff: Sheriff Lane Perry of Henry County expressed in the May 18, 2021, hearing in front of this subcommittee that he was concerned HB 2196 may lead to certain law enforcement agencies refusing to properly conduct disciplinary investigations for fear of creating a public record; this was echoed other written testimony.⁹ The Virginia Innocence Coalition agrees with this concern. The best way to address the issue is not to further restrict transparency, but rather to ensure that all records are publicly available, so that unscrupulous officers can no longer hide in the shadows.

⁹ See written testimony of Martin R. Crim, submitted for 6/14/21 hearing: "doing so would...have the opposite effect of what is intended, because it would disincentivize management from committing anything to writing regarding law enforcement officer discipline."

Nationally, at least 13 states allow complete public access to police disciplinary records. Law enforcement in Florida and Ohio, states with public access to police disciplinary records, attest that policing is improved with transparency, not harmed.¹⁰ Virginia took a step in the right direction by passing recent reforms to improve access to police misconduct records by Commonwealth's Attorneys, increase transparency for police departments when hiring, and address issues related to decertification in instances of serious misconduct. While laudable, these reforms still leave the public in the dark and do nothing to build the public's trust that police misconduct is appropriately addressed. These reforms also minimally impact the role of misconduct in criminal matters; the reforms rely on information being turned over to Commonwealth's Attorneys, and the Commonwealth's Attorneys then identifying exculpatory information to be released to the defense -- creating a multi-step process, with layers of judgment calls, that does not guarantee all relevant players will be made aware of an officer's full disciplinary history. These reforms constitute important progress, but still leave significant room for misconduct to hide. Further, the information provided to Commonwealth's Attorneys is only as good as the police investigation that generated the findings, and whether these investigations are fair and adequate is squarely in question. Finally, while these reforms may help prevent future miscarriages of justice, they do not address the misconduct that has already led to innocent people sitting behind bars today.

Making police disciplinary records transparent will help weed out bad actors, strengthen confidence in law enforcement, and help recruit and retain good officers. HB 2196 appropriately balances redacting personal information with transparency. This bill is foundational to building trust with communities and ensuring that wrongful convictions are revealed and prevented.

Responses to Common Concerns

1. *"HB 2196 treats police officers differently -- and unfairly -- from other public employees."*

This legislation only applies to law enforcement disciplinary records for the simple reason that no other public employee is granted as much power to take life and liberty. **In exchange for the powers granted to police officers by the public, there must also be greater accountability to the public.**

2. *"Virginia already passed sufficient criminal justice reforms last session."*

Recent reforms are important, but they do not address the same issues that HB 2196 tackles. Virginia took a step in the right direction by passing recent reforms to improve access to police misconduct by Commonwealth's Attorneys, increase transparency for police departments in hiring officers who have worked in other departments, and address issues related to decertification. While laudable, **these reforms leave the public in the dark and do nothing to build the public's trust that police misconduct is appropriately addressed.** These reforms also minimally impact the role of misconduct in criminal matters; they rely on information being turned over to Commonwealth's Attorneys, and then rely on those attorneys to identify exculpatory information and release it, in turn, to defense attorneys. In matters of life and liberty, direct access for all players -- including defendants, judges, and juries -- is necessary to prevent miscarriages of justice. These reforms were a step in the right direction, but still leave significant room for misconduct to hide. Recent reforms help prevent future miscarriages of justice but do not address the misconduct that has led to innocent people sitting behind bars today.

3. *"Transparency will hurt recruitment and retention efforts for police officers."*

¹⁰ See attached letter from Newtown, OH Chief Tom Synan, Law Enforcement Action Partnership, submitted in favor of HB 2196 for the June 14, 2021 hearing of the Records Issues subcommittee.

While we recognize concerns about existing retention issues, the VA Innocence Coalition does not agree that HB 2196 will impact retention or recruitment, based on experiences in the 13 (or more) states that already provide public access to misconduct records. As Newtown, Ohio, Police Chief Tom Synan of the Law Enforcement Action Partnership explains, “This bill would bring Virginia in line with other states on this issue, such as Ohio, Florida, Colorado, Georgia, and New York. We believe that Ohio’s example shows that Virginia can pass this legislation and the sky will not fall.”¹¹ Additionally, the VA Innocence Coalition strongly believes that law enforcement agencies should want to hire officers committed to transparency and public accountability. That people who may engage in regular misconduct will be deterred from applying for policing jobs is a feature of, not a problem with, HB 2196.

Completed investigations of alleged police misconduct have been public in Florida for decades. Lisa Henning, legislative liaison for the Florida Fraternal Order of Police, was asked in 2021 by the Washington Post whether Florida’s open-records law -- which sprang from a traditionally conservative distrust of government -- makes it harder to attract officers to the state. “No, I would not say that,” she said. “Officers...are more concerned about benefits, salary and other proposed police overhaul efforts.”¹²

After New York police unions filed suit to block the release of misconduct files after the state passed legislation substantively similar to HB 2196, a [federal appeals court rejected this argument](#) explicitly, writing that, **“despite evidence that numerous other States make similar records available to the public, the Unions have pointed to no evidence from any jurisdiction that the availability of such records resulted in harm to employment opportunities.”**¹³

4. *“Transparency will result in harassment or doxxing of officers.”*

HB 2196 requires that personal information be redacted before release, including home, work, or school addresses or home or work telephone numbers of any officer, officer’s family member, complainant, complainant’s family member, witness, or witness’s family member; any social security numbers; and any medical information concerning the law-enforcement officer or the complainant.

Additionally, it is already a crime in Virginia to threaten or harass a police officer, with punishment ranging from 12 months¹⁴ to 5 years confinement¹⁵ and/or up to a \$2,500 fine.

¹¹ See attached letter from Newtown, OH Chief Tom Synan, Law Enforcement Action Partnership, submitted in favor of HB 2196 at 6/14/21

¹² Thompson, Steve. “After decades of secrecy, Maryland might make police disciplinary records public.” *The Washington Post*, March 5, 2021. https://www.washingtonpost.com/local/md-politics/maryland-police-records/2021/03/05/91a6977a-717a-11eb-93be-c10813e358a2_story.html

¹³ *Uniformed Fire Officers Ass’n v. De Blasio*, No. 20-2789-cv(L) (2d Cir. Feb. 16, 2021)

¹⁴ **Va. Code Ann. § 18.2-460. Obstructing justice; resisting arrest; fleeing from a law-enforcement officer; penalties.**

B. Except as provided in subsection C, any person who, by threats or force, knowingly attempts to intimidate or impede . . . any law-enforcement officer . . . lawfully engaged in his duties . . . is guilty of a Class 1 misdemeanor.

C. If any person by threats of bodily harm or force knowingly attempts to intimidate or impede . . . any law-enforcement officer, lawfully engaged in his discharge of his duty . . . relating to a violation of or conspiracy to violate § 18.2248 [sale of controlled substance] or § 18.2-46.2 [criminal street gang participation] is guilty of a Class 5 felony.

Va. Code Ann. § 18.2-11. Punishment for conviction of misdemeanor.

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.

¹⁵ **Va. Code Ann. § 18.2-60. Threats of death or bodily injury to a person.**

A.1. Any person who knowingly communicates, in a writing, including an electronically transmitted communication producing a visual or electronic message, a threat to kill or do bodily injury to a person, regarding that person or any member of his family, and the threat places such person in reasonable apprehension of death or bodily injury to himself or his family member is guilty of a Class 6 felony. However, any person who violates this subsection with the intent to commit an act of terrorism as defined in § 18.2-46.4 is guilty of a Class 5 felony.

Va. Code Ann. § 18.2-10. Punishment for conviction of felony; penalty.

(f) For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.

Finally, a 2019 survey of 344 law enforcement administrators across 12 states with public access found only one respondent who indicated that an officer had experienced physical harm as a result of disclosure, and it was unclear from the response whether the incident involved actual or threatened physical harm.¹⁶ **Researchers also found that among surveyed officers with substantial years of experience, fewer than one in five believed that public misconduct records had harmed officers.**¹⁷

5. *“Transparency in HB 2196 is too broad, and should be limited to only sustained complaints.”*

Across the country, internal affairs departments sustain a small percentage of complaints filed against officers. **If public access is limited to sustained complaints, the majority of complaints would still be inaccessible,** and the public will have no way of knowing whether complaints are being thoroughly investigated. Some examples from around the country include:

- In 2019, the Las Vegas Metropolitan Police Department sustained 15 out of 134 complaints of excessive force.¹⁸
- A survey of over 323,000 allegations of police misconduct in New York revealed that fewer than 3% of the complaints resulted in any kind of penalty for the officers. Only twelve of those penalties (fewer than .0004% of the complaints) were terminations.
- In New Jersey in the City of Orange only 13% of complaints were sustained and only 7% resulted in major discipline¹⁹
- A 2020 report by the ACLU of Maryland found only 8% of external complaints, including resident complaints, were sustained.²⁰
- A dozen of the state’s largest police departments and sheriff’s offices gave The Oregonian/OregonLive data on excessive force complaints from 2013 through last year. The law enforcement agencies investigated at least 340 allegations and sustained only 26.²¹

6. *“Transparency will tarnish the reputations of officers who were exonerated of wrongdoing.”*

Agencies can adopt a policy permitting officers to respond to unsustained complaints, allowing the public to see all sides to an incident.²² Additionally, police agencies across the country practice community engagement through platforms such as Twitter and Facebook. If an agency or individual officer is concerned about their public reputation, they can use traditional PR tactics, as they already do, to combat those concerns.²³

7. *“Transparency will result in loss of credibility with the public.”*

¹⁶ Hodge, J., Moran, R., *Law Enforcement Perspectives on Public Access to Misconduct Records*, Unpublished. Cardozo L. Rev. 3 (2019) Accessible: <https://poseidon01.ssrn.com/delivery.php?ID=525111031127088071094093104103089124056042028006019024112094089117002121024092027070103101010014014024108094013028020101003081007025008015092024118064001085005108011019026047068093003016121072068070102068066073084028094113110107120023022111124008072000&EXT=pdf&INDEX=TRUE>

¹⁷ Hodge, supra 3

¹⁸ *Use of Force Statistical Analysis 2015-2019*, Las Vegas Metropolitan Police Department, p15.

¹⁹ Testimony of CJ Griffin, Esq. to the Senate Committee on Law and Public Safety. Hearing on Police Reform in New Jersey. 3-4 (2020).

²⁰ American Civil Liberties Union of Maryland. *Chasing Justice - Addressing Police Violence and Corruption in Maryland*, 5. (2021 January 19). Accessible: <https://www.aclu-md.org/en/publications/chasing-justice-addressing-police-violence-and-corruption-maryland>

²¹ https://www.oregonlive.com/police-fire/2017/12/police_brutality_and_incompetence.html

²² Nevada has adopted this. NEV. ST. § 289.057.

²³ *Public Relations in Law Enforcement: Is the PIO Obsolete?* 2020.

<https://www.police1.com/media-relations/articles/public-relations-in-law-enforcement-is-the-pio-obsolete-C3ExN4qFndlv46jo/> (suggesting tactics to law enforcement to maintain public image).

Plenty of evidence from around the country dispels this concern. In a **2005 report of best practices, the National Institution of Justice** referenced a survey of 30 police agencies that resulted in **researchers recommending disclosure of the police disciplinary process and resulting discipline** for public scrutiny to enhance integrity of police agencies. The researchers explained that disclosure may deter individuals and organizations from concealing misconduct.²⁴

In 2008, Professor Brian Forst, American University, presented to the Bureau of Justice Statistics that public “scrutiny is essential to making the police more accountable and effective, and to giving it legitimacy.”²⁵

A United States District Court of Northern Illinois explained, “the general public is sophisticated enough to understand that a mere allegation of police torture . . . does not constitute actual proof of misconduct.”²⁶ An agency need not worry about loss of credibility from mere allegations.

8. *“Transparency is an invasion of officer privacy.”*

In addition to current bill language in HB 2196 mandating redactions to preserve officer privacy, **federal courts have found that revealing on-duty misconduct is not an invasion of privacy** for purposes of exempting police disciplinary files under open records requests. In *King v. Conde*, federal district court Judge Jack Weinstein wrote, “the privacy interest in this kind of professional record [of a police officer] is not substantial, because it is not the kind of ‘highly personal’ information warranting constitutional safeguard.”²⁷

9. *“Transparency will have a chilling effect on police work/filing complaints.”*

As the associate general counsel for the Miami Herald said in 2009, “the fact is that people have not been chilled or inhibited from filing complaints,” because complaints are made public.²⁸ Indeed, news reports indicate that cities with open access to misconduct investigations earn the highest marks for integrity in the country. For example, the National Institute of Justice found that St. Petersburg Police in Florida have “exemplary” integrity.²⁹

In a 2019 survey of 344 law enforcement administrators in twelve states with public access, **fewer than 8% of respondents indicated that records transparency negatively affected their officers’ job performance.**³⁰

²⁴ Gonzales, A., Schofield, R., Schmitt, G., *Enhancing Police Integrity*. U.S. Dep’t of Justice, National Institute of Justice. 6, 2005.

<https://www.ncjrs.gov/pdffiles1/nij/209269.pdf>

²⁵ Forst, B. *Improving Police Effectiveness and Transparency: National Information Needs on Law Enforcement*, 1 (2008).

<https://www.bjs.gov/content/pub/pdf/Forst.pdf>

²⁶ *Wiggins v. Burge*, 173 F.R.D. 226, 230 (N.D. Ill 1997).

²⁷ Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*. 22 CUNY L.Rev. 12, (2019). quoting *King v. Conde*, 121 F.R.D. 180, 191, (1998).

²⁸ Machet, J.R. *Should Police Misconduct Files by Public Record? Why Internal Affairs Investigations and Citizens Complaints Should be Open to Public Scrutiny*. 45 No.6 Crim. Law Bulletin Art 5, 8 (2009)

²⁹ Machet, *supra* at 14.

³⁰ Hodge, *supra* at 18.