

August 31, 2021

Dear Virginia FOIA Council Members:

I am Associate Professor Rachel Moran from the University of St. Thomas School of Law in Minneapolis, Minnesota. I both teach and research in the field of police accountability. More specifically, I study issues regarding public access to law enforcement misconduct records, which is the topic of Virginia's proposed bill HB 2196. My research on topics related to law enforcement misconduct records has been cited by lawyers litigating in the United States Supreme Court, federal courts of appeals, the Illinois Supreme Court, and many other lower courts. I have provided written testimony or advice about proposed law enforcement records bills in multiple states, and my research has also been cited in written testimony or plans to reform policing in numerous other states and cities.

I cannot promise that increased access to law enforcement misconduct records necessarily or automatically results in decreased police misconduct, because not enough research has been done to confidently state a causal relationship between the two. But I can make five short points about why this council should have little hesitation recommending passage of HB 2196.

1. **Passing the bill would align Virginia with the majority of states now favoring access to misconduct records.** Virginia is currently among the minority of states—approximately 20—with laws preventing public access to information or records about law enforcement misconduct and discipline. Most other states are not as restrictive. In the past three years the two most populous states in the country, California and New York, have enacted laws dramatically expanding access to police misconduct records in their states. The pendulum is swinging in favor of transparency as many other states—Oregon, Michigan, Delaware, Maryland, and likely others—consider bills granting or expanding access to law enforcement misconduct records. Interest in transparency is not a partisan issue; the states favoring transparency include historically “red” states like Georgia, Alabama and North Dakota; “purple” states like Florida, Ohio, and Arizona; and “blue” states like Washington, Connecticut, and New York.
2. **We have for many decades largely trusted law enforcement agencies to police their own without public input or supervision, and it hasn't worked.** A few years ago I published research on law enforcement internal affairs departments and the methods they use to investigate complaints and discipline officers.<sup>1</sup> The results were abysmal. Internal affairs departments routinely fail in their responsibilities to impose meaningful consequences for misconduct. Preventing the public from accessing disciplinary information enables those systemic failures by allowing law enforcement agencies to operate in the dark.

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<sup>1</sup> See Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837 (2016), <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol64/iss4/4/>.

3. **HB 2196 has an appropriately broad definition of disciplinary records.** The bill defines law enforcement disciplinary records as “any record created in furtherance of a law-enforcement disciplinary proceeding . . . ,” including complaints or allegations against officers. Importantly, the bill does not limit disciplinary records to situations where discipline was actually imposed. This broader definition matters because it prevents law enforcement agencies from hindering public access by declining to impose discipline, and empowers the public to determine whether law enforcement agencies are imposing discipline in appropriate situations. In my own state of Minnesota, the public only has access to information about law enforcement misconduct in cases where discipline was imposed. After former Minneapolis police officer Derek Chauvin murdered George Floyd, many civilians were outraged to learn the Officer Chauvin had a lengthy history of at least 17 prior misconduct complaints, details about most of which were completely inaccessible to the public because the police department had not imposed any discipline. This is a painful but pertinent example of the shortfalls in statutes that limit public access to situations where discipline is imposed.
4. **The bill does not violate legitimate expectations of officer privacy.** Police unions frequently object to laws allowing public access to misconduct records on grounds that such access would violate officers’ privacy. But the kinds of information contained in police disciplinary records would not in other contexts usually be considered private.<sup>2</sup> There are some limited exceptions: for example, if information about a police officer’s mental health or substance abuse struggles is discussed in the disciplinary records, that information should generally be kept private. But for the most part, disciplinary records contain information about on-the-job misconduct by public employees and officials, which generally is not private.
5. **There is no evidence that allowing public access to misconduct records endangers officers.** In 2019 I conducted a survey of 350 law enforcement administrators across 12 states that grant public access to misconduct records, asking about their experiences with and opinions about disclosure of misconduct records.<sup>3</sup> While the administrators had a wide variety of opinions on the topic, a higher percentage said that public access benefited their departments and communities than said it harmed their officers. Of those who thought it harmed their officers, nearly all said the harm was reputational; only one administrator out of approximately 350 said he was aware of an incident involving threats of physical harm. I understand that unions often say granting public access would endanger their officers, but I am not aware of any data supporting that argument.

Thank you for your time. I would be happy to answer questions via email, phone, or otherwise.

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<sup>2</sup> See Rachel Moran, *Police Privacy*, 10 UC IRVINE L. REV. 153 (2019), <https://scholarship.law.uci.edu/ucilr/vol10/iss1/6/>.

<sup>3</sup> See Rachel Moran & Jessica Hodge, *Law Enforcement Perspectives on Public Access to Misconduct Records*, 42 CARDOZO L. REV. 1237 (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3552012](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552012).

Sincerely,

*Rachel Moran*

Rachel Moran  
Associate Professor of Law  
University of St. Thomas (MN) School of Law  
[rmoran@stthomas.edu](mailto:rmoran@stthomas.edu)  
651-962-4810