Legardy v. Las Vegas Metropolitan Police Department,
Discovery Commissioner Opinion #9 (June, 1992)

PRODUCTION OF POLICE PERSONNEL AND INTERNAL AFFAIRS RECORDS

A. Background

This dispute over production of documents arose out of the Joint Case Conference Report, filed on or about January 28, 1992. A discovery conference was held February 25, 1992, wherein counsel were directed to submit additional briefs concerning the production of Las Vegas Metropolitan Police Department Internal Affairs Bureau files for the individual Defendant officers in this case. Plaintiff seeks past records of incidents of alleged excessive use of force, as well as the entire IAB file for the complaint filed in the present case. Plaintiff's Points and Authorities were filed March 4, 1992, and Defendants' Points and Authorities were filed March 13, 1992.

Plaintiff, Billy Legardy, is a 66 year old black man who alleges he was beaten and falsely arrested by four LVMPD officers when he objected to the officers taking a car from him which he said was in his custody. Plaintiff filed a 42 USC § 1983 Civil Rights action, alleging that the officers were acting pursuant to LVMPD de facto policies which included the 1) encouragement of officers to engage in excessive use of force and to beat up black citizens; 2) failure of LVMPD to sanction officers who engaged in use of excessive force in the past; 3)

covering up by LVMPD of excessive use of force complaints in the past; and 4) failure of LVMPD Internal Affairs bureau to adequately investigate Plaintiff's incident, thereby condoning the Defendant officers' conduct in this case.

Defendants make several arguments in opposition to production of any documents. Initially they say the documents are not relevant nor has the Plaintiff shown the needed information to be unavailable elsewhere. [Defendants' brief filed March 13, 1992, at pp. 14 and 15] Secondly, as general grounds for non-production, Defendants argue the public interest would suffer if confidences were exposed and the police department's need for confidentiality outweighs the Plaintiff's need for disclosure. [Defendants' brief at pp. 4 and 15] More specifically, the Defendants rely upon N.R.S. 49.335 and 49.345 which protect the identity of police informants. Defendants also make the argument that people can make complaints to police, about the police, without fear of retaliation, only if their identities are kept secret. To allow discovery of internal investigation files would discourage citizens from coming forward. A fourth argument advanced by the Defendants says that police officers who give information about other officers would stop doing so, for fear of jeopardizing their careers, if their cooperation were known. [Defendants' brief at p.5]. Further, individual police officers are compelled to cooperate with internal affairs, as they can be terminated from

the department for failure to cooperate; therefore, procedural due process may be denied and Fifth Amendment rights may be violated. [Defendants' brief at pp. 6 and 7]. An effective Internal Affairs Bureau is necessary to preserve the integrity of the department and to provide a self-evaluation program to improve the quality of our police force. If IAB information were not confidential, a "chilling" effect would subvert the department's ability to gather candid information from witnesses and other police officers, as well as obtain critical opinions of police actions from appropriate supervisory personnel. [Defendants' brief at pp. 5 through 7]. In contrast to Defendants' position, Plaintiff contends it is clearly in the public interest and more important to have a police force which honors the constitutional rights of its citizens and, therefore, Defendant should produce all of the requested documents. [Plaintiff's brief filed March 4, 1992, at p. 9].

B. Confidential Police Information and Privilege

It should be noted from the outset that because this is a case brought under Federal Statutes, the questions of privilege must be resolved by Federal Law, as it has been agreed it would make no sense to permit State Law to determine what evidence is discoverable in cases brought pursuant to Federal Statutes, especially when the particular statute is designed to protect citizens from abuses of power by State and Local authorities. Henneman v. City of Toledo, 520 N.E.2d 207 (Ohio 1988); Kerr v.

U.S. District Court, 511 F.2d 192 (9th Cir. 1975) aff'd. 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). However, State Laws cannot be ignored, when analyzing privilege issues in Civil Rights cases and State Law, while not binding, can provide meaningful comment when analyzing privilege issues in these cases, Burke v. N.Y. City Police Department, 115 F.R.D. 220 (S.D.N.Y. 1987).

Privilege law has been developed on a case by case basis and, as pointed out by Magistrate, Wayne D. Brazil, in an excellent analysis of the law in this area, courts have borrowed privilege concepts from a number of areas of law in an effort to define and refine concerns over various categories of confidential governmental information. Kelly v. City of San Jose, 114 F.R.D. 653 (N.D.Cal. 1987). Courts have wrestled with the confidentiality of police internal affairs documents, while talking about executive privilege, self-critical analysis privilege, deliberative process privilege, State secrets privilege and privacy privileges as analogous concepts. Kelly v. City of San Jose, supra. Brazil takes the time in his opinion to trace the background of each of the privileges enumerated above, as well as some other fringe privileges, and finally settles upon the designation, "official information privilege," to describe the protection for the confidentiality which is at stake in cases such as the one at bar.

To decide the extent of protection this privilege should

offer to information collected by law enforcement agencies, courts are obliged to weigh and compare the conflicting interests in § 1983 or similar cases. This balancing of interests between executive and judicial concerns seems to have its common law roots in the Supreme Court case of U.S. v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), wherein the Court said judicial control over evidence in a case could not be abdicated to the whim of executive officers. In general the battle lines are drawn between the public interest in the confidentiality of governmental information on the one side and the needs of the civil litigant to obtain data, not otherwise available to him and which he needs to pursue a non-frivolous cause of action, on the other side. Elliott v. Webb, 98 F.R.D. 293 (D.Ct.Id. 1983).

The original "Proposed Federal Rules of Evidence" called for an "official information" privilege which, in part, would have provided protection for "investigatory files compiled for law enforcement purposes," if it were shown production would be "contrary to the public interest." [see "Proposed Federal Rules of Evidence," Rule 509, 56 F.R.D. 183 (1972)]. The showing required in the Rule was a compromise between complete judicial control and accepting as final the decision of a departmental officer. The proposed Rule was never adopted; however, the Advisory Committee notes made it clear that discovery in civil cases was broad and raised problems calling for exercise of

judicial control, when considering the discovery of confidential governmental information. see Advisory Committee Note to Proposed Rule 509 (B) and (C), 56 F.R.D. at p. 253.

Neither State nor Federal Privacy Acts contemplate denial to a litigant of information from investigatory files, personnel files or other documents that are necessary to a party to prepare his case. Skibo v. City of New York, 109 F.R.D. 58 (E.D.N.Y. 1985); Boyd v. Gullett, 64 F.R.D. 169 (D.Ct.Md. 1974). For example, exceptions in the Freedom of Information Act were not framed as evidentiary privileges because the Act recognized, by implication, that materials needed by private litigants were still subject to production. 5 U.S.C. § 552; Burke v. New York City Police Dept., supra.

Nevada has come to grips with the "official information" privilege in the case of Donrey of Nevada v. Bradshaw, 106 Nev. 630, 798 P.2d 144 (1990), wherein a public newspaper sought disclosure of an alleged "investigative report" prepared by the Reno Police Department, concerning dismissal of some criminal charges against Joe Conforte by the Reno City Attorney's Office. The media relied upon N.R.S. 239.010, our Public Records Act and equivalent of the Federal Freedom of Information Act, contending the report was a public record, as it had not otherwise been declared by law to be confidential. The Police argued that under N.R.S. 179A, the Criminal History Records Act, the investigative report would be confidential and therefore was not

to be released. A majority of the Supreme Court disagreed, concluding the entire report was subject to disclosure, based on a balancing of the interests involved. Donrey of Nevada v. Bradshaw, supra. After an extensive and learned review of the policies behind the legislation dealing with freedom of information on both Federal and State levels, dissenting Justice Steffen felt no interest balancing was required, because the report was never intended to be public information. However, it seems even the dissent would agree the act would allow inspection by a private civil litigant to the extent allowed by law, which would be that allowed after the application of an appropriate balance of interests test. Donrey of Nevada v. Bradshaw, supra at pp. 636 - 646.

It is extremely important to point out that in the context of discovery of police internal investigation files in a civil rights action, only a very strong public policy should be permitted to prevent disclosure, since enforcement of 42 USC § 1983 has been placed solely in the hands of individual citizens acting in the capacity of private attorneys - general. Wood v. Breier, 54 F.R.D. 7 (E.D.Wis. 1972); Tyner v. City of Jackson, 105 F.R.D. 564 (S.D.Miss. 1985); Denver Policemen's Protective Association v. Lichtenstein, 660 F.2d 432 (10th Cir. 1981). Policies underlying the civil rights laws are profoundly important, Black v. Sheraton Corporation of America, 47 F.R.D. 263 (D.Ct.D.C. 1969), and to justify withholding evidence in a

civil rights action, a claim of privilege must be meritorious enough to overcome the fundamental importance of the law meant to protect each citizen from unconstitutional State action. Unger v. Cohen, 125 F.R.D. 67 (S.D.N.Y. 1989). Upholding a claim of privilege may exclude relevant evidence from consideration, and public confidence in our system of justice is threatened, when relevant evidence is not made available. Denver Policemen's Protective Association v. Lichtenstein, supra; Kelly v. City of San Jose, supra. Finally, independent of public perception of the system is the fact that there are few things more important than doing justice in fact in individual cases. Kelly v. City of San Jose, supra.

When such high-powered competing interests are at stake, it is clear in most cases there can be no absolute protection for all files nor can there be absolute discovery of all files. Burka v. N.Y. Transit Authority, 110 F.R.D 660 (S.D.N.Y. 1986); Donrey of Nevada v. Bradshaw, supra. Judges have attempted to categorize these interests and then balance them to arrive at a fair disclosure policy in each individual case. e.g., U.S. v. King, 73 F.R.D. 103 (E.D.N.Y. 1976); Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D.Pa. 1973). Judge Becker considered the following points:

> 1. The extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information.

2. The impact upon persons who have given information of having their identities disclosed.

3. The degree to which government self-evaluation and consequent program improvement will be chilled by disclosure.

4. Whether the information sought is factual data or evaluative summary.

5. Whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question.

6. Whether the police investigation has been completed.

7. Whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation.

8. Whether the plaintiff's suit is non-frivolous and brought in good faith.

9. Whether the information sought is available through other discovery or from other sources.

10. The importance of the information sought to the Plaintiff's case. [Frankenhauser v. Rizzo, 59 F.R.D. at 344].

The parties have raised most of these points in the instant case. While some courts have attached more importance to one or another of the above factors, it seems more appropriate to consider each factor in consequence to a particular case, assigning importance as warranted by individual circumstances. The ingredients of the balancing test will vary from case to case. Madsen v. United Television, Inc., 801 P.2d 912 (Utah 1990); Frankenhauser v. Rizzo, supra. However, prior to

reaching a decision by the balancing of interests in the present discovery dispute, a determination has to be made on the procedure to be followed to bring the competing facts into focus. The law is clear that more is needed than generalized claims of harm by each side and then a decision by the Court based upon abstract theories.

C. Asserting a Privilege

In order to assert a claim of privilege the party seeking to invoke the privilege bears the burden of justifying its application. e.g., Von Bulow v. Von Bulow, 811 F.2d 136 (2nd Cir. 1987), cert. denied, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987); Burke v. N.Y. City Police Department, supra. When dealing with confidential official information of the police department, the burden includes the obligation to specify exactly which documents are privileged. This threshold showing must explain the reasons for non-disclosure with particularity, so the Court can make an intelligent and informed choice as to each requested piece of information. King v. Conde, 121 F.R.D. 180 (E.D.N.Y. 1988). Unless the department, through competent affidavits, shows what interests of law enforcement or privacy would be harmed by disclosure, why disclosure under an appropriate protective order would still cause the harm and how much harm there would be, the Court will be unable to conduct a meaningful balancing analysis. Kelly v. City of San Jose, supra; King v. Conde, supra. Failure to make the required

showing will result in the Court having no choice but to order full disclosure. Johnson v. McTigue, 122 F.R.D. 9 (S.D.N.Y. 1986); Kelly v. City of San Jose, supra. Obviously, the Defendants have not as yet provided the appropriate affidavits in the present case, but the Commissioner will give them the opportunity to do so because the discovery policy has not been enunciated in the Eighth Judicial District prior to this opinion. However, future pro forma applications for protection under these privileges may lead to a recommendation for complete disclosure and possible Rule 11 sanctions. King v. Conde, supra.

For the guidance of Defendants, they are specifically directed to provide an affidavit(s) which explains (not merely states conclusionarily) 1) how the materials at issue have been generated or collected, 2) what steps have been taken to assure preservation of the confidentiality of the material, 3) what specific governmental or privacy interests would be threatened by disclosure of the material to Plaintiff and/or his lawyer and 4) what would be the projected severity of such harm. A statement that the official has personally reviewed the materials in question must be included in any affidavit. The procedure to be followed by the Defendants is designed to discourage assertion of confidentiality in all but deserving cases. Unger v. Cohen, supra; King v. Conde, supra; Kelly v. City of San Jose, supra.

On receipt of Defendants' further objections and affidavit, Plaintiff must make a good faith determination as to whether the asserted privilege should be honored. If an appropriate E.D.C.R. 2.34 conference fails to resolve all issues, Plaintiff can then file a motion that focuses on specific documents which remain unproduced and Defendants can submit any affidavits and further argument. The Commissioner will then consider whether or not the Defendants' submissions have met the threshold requirements for proper invocation of the privilege and, if necessary, order an in camera review of the remaining disputed documents to make a determination whether or not any should be produced.

For the further guidance of the parties in this action and for counsel in other similar cases the Commissioner offers the following opinions, as to the production of certain kinds of materials and when they may or may not be privileged. The Commissioner directs counsel to review these positions prior to making follow-up motions, as time and expense may be saved by making no lengthy reargument of these decided questions.

D. Internal Affairs Reports (the incident at bar)

As far as IAB reports are concerned, even the most conservative courts have ordered production of all factual discussion contained in any Internal Affairs Division/Bureau report dealing with the incident at issue. Segura v. City of Reno, 116 F.R.D. 42 (D.Ct.Nev. 1987); Dos Santos v. O'Neill, 62

F.R.D. 448 (E.D.Pa. 1974); Elliott v. Webb, supra; Gaison v. Scott, 59 F.R.D. 347 (D.Ct.Haw. 1973). Defendants have cited the case of Maddox v. City of Los Angeles, 792 F.2d 1408 (9th Cir. 1986) for the holding that IAB investigations and measures taken as a result of those investigation are remedial in nature and therefore inadmissable at trial under Federal Rule of Evidence sections 403 and 407. (see N.R.S. 48.095 and 48.035) To argue that such reports are not discoverable because they are not admissible would be unduly restrictive. see Segura v. City of Reno, supra. For example, the reports could even be admissible, as demonstrating the feasibility of precautionary measures to prevent the incident, if those measures were controverted by the

Defendants; or the materials could be used for impeachment purposes.

Courts which have ruled on pre-trial discovery motions in police misconduct cases have applied a broad scope of relevancy. e.g. Martinelli v. District Court, 612 P.2d 1083 (Colo. 1980); Tucson v. Superior Court, 544 P.2d 1113 (Ariz. 1976); Barfield v. City of Seattle, 676 P.2d. 438 (Wash. 1984). Usually most of the internal affairs investigation consists of summarized fact statements given by Plaintiffs, police officers and other witnesses, and because those statements were made earlier in time when events were fresh, their value as impeachment material is clear. Relevancy and discoverability of these factual

revelations would seem to be beyond argument. Segura v. City of Reno, supra; Spell v. McDaniel, 591 F.Supp. 1090 (E.D.N.C. 1984); also see Ballard v. Eighth Judicial District, 106 Nev. 83, 787 P.2d 406 (1990) (production of witness statements).

Production of the remaining portions of the IAB report has generated more controversy among the courts. Portions which include evaluative comments, recommendations and other findings generated by Internal Affairs investigations have been entirely precluded from production by some courts. e.g. Elliott v. Webb, supra; Mueller v. Walker, 124 F.R.D. 654 (D.Ct.Ore. 1989). The failure of these courts to order production results from some of the arguments Defendants make in the case at bar. Problems concerning 1) the protection of informants and citizen complainants, 2) officer privacy rights, 3) officer candor towards IAB investigators, 4) interference in the department's self-evaluation process and 5) the burden of production have all been raised. However, the cases which support an absolute exclusion of evaluative material offer no empirical studies to support their position and, in fact, nearly all courts will at least conduct an in camera inspection prior to any exclusionary ruling. Boyd v. Gullett, supra; Dos Santos v. O'Neill, supra; Wood v. Breier, supra. The primary purpose of such an inspection is to allow judicial assistance in the protection of information in which the department has a genuine interest of confidentiality, such as the decision making process, ongoing

criminal investigations, identities of informants or personal information regarding individual officers. In camera inspection allows a consideration of relevancy, (see N.R.S. 48.015) prejudice versus need, (see N.R.S. 48.035), fifth amendment or other privileges and even common sense can be summoned up to draft an appropriate protective order in some cases.

On the other hand, courts which argue for liberal discovery of evaluative materials have put forth a variety of logical bases for production. Courts recognize that police department self-evaluation and remedial action do serve an important public policy, but that policy would not be hindered by disclosure of most evaluative summaries and recommendations. Kelly v. City of San Jose, supra. Such evaluations are clearly relevant to determining what the Defendants knew and when they knew it. Urseth v. City of Dayton, 110 F.R.D. 245 (S.D.Ohio, 1986); Spell v. McDaniel, supra. The investigations are conducted at taxpayer expense to determine whether the procedures of the department or individual police officers were responsible for the complained-of incident and whether disciplinary or other remedial action would be necessary to prevent the recurrence of similar incidents. Tyner v. City of Jackson, supra.

It should be pointed out that police officers would probably not be greatly concerned at the time they filed the reports, even if they knew that lawyers in civil rights lawsuits

could be reviewing the information. Wood v. Breier, supra. As one court stated, fear of disclosure would more likely increase candor than to chill it. Mercy v. County of Suffolk, 93 F.R.D. 520 (E.D.N.Y. 1982). An officer's concern about financial responsibility for a civil rights claim is likely to be slight (because he's relatively judgment proof and/or indemnified by his employer), when compared to the possibility he or his friends may already face termination or criminal prosecution as a result of internal affairs investigations. Martinez v. City of Stockton, 132 F.R.D. 677 (E.D.Cal. 1990); King v. Conde, supra. If the pending police investigation has been completed and no criminal charges have been filed as a result of the IAB review, no unacceptable impingement of the constitutional rights of the police officer would result from review by counsel in a civil case proceeding. No legitimate purpose would be served by conducting investigations under a veil of near total secrecy; rather, knowledge that a limited number of persons, such as Plaintiff's counsel and a State or Federal Court, may examine the file in the event of civil litigation may serve to ensure these investigations are carried out in a fair manner and the true facts come to light, whether they reflect favorably or unfavorably on the individual police officers involved or on the department as a whole. Mercy v. County of Suffolk, supra.

Of any material in the Internal Affairs file, the evaluative material is certainly of the nature that cannot be

located elsewhere nor adequately developed in any other way. Crawford v. Dominic, 469 F.Supp. 260 (E.D.Pa. 1979). This is particularly important in a case where the Plaintiff is alleging the establishment of a de facto policy (such as abusive treatment to blacks over a period of time), condoned by the police department in question. The Plaintiff has alleged that Metro itself, through its decision makers, and not just because of the acts of individual officers, has encouraged use of excess force in the past, failed to sanction those officers who use such force and, in fact, have "covered up" the use of excessive force. Where such allegations are made, production of documents is required to scrutinize the adequacy of police investigations, their results and their repercussions. Lawfulness of police operations is of great concern to citizens in a democracy. King v. Conde, supra.

In order to place liability upon the department, as opposed to the individual officers in this case, Plaintiff has the heavy burden of demonstrating a policy or custom of unconstitutional behavior before liability can be established on a § 1983 basis. Oklahoma City v. Tuttle, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985); Monell v. City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). If Plaintiff is trying to prove a failure to provide adequate training as a basis for liability, he must show the department policy reflects a "deliberate indifference" to the constitutional rights of a

class of citizens. City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Plaintiff need not prove an official written policy, but rather he may prove a course of action which is customarily tailored to particular situations, perhaps as we have in the case as bar. Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); Johnson v. McTigue, supra. In a § 1983 case such as the one at bar, internal supervisory evaluations may be the best evidence available as to the state of mind of Defendant police department supervisors who are responsible for personnel and policy decisions. The evaluation and recommendation part of the report may also provide support for Plaintiff's burden to prove a causal connection between the alleged policy of the department and the deprivation of the constitutional rights of the Plaintiff. Oklahoma City v. Tuttle, supra; Vippolis v. Village of Haverstraw, 768 F.2d 40 (2nd Cir. 1985).

Final points to be considered in the production of Internal Affairs reports or related personnel records are the privacy rights of individuals involved, safety for the policemen or citizens concerned and the burden of production. As far as the privacy and safety of individuals are concerned, reasonable redaction of the names and location of witnesses who may come within the scope of the informant privilege will be permitted. This will logically prevent unnecessary impact upon persons who have given information in the pending or prior investigations,

as well as respect the State privilege for the protection of informants. see N.R.S. 49.335 and 49.345. This would not apply to paid police officers. Where claims of privacy and privilege of the sort made by Defendants are ultimately rooted in the Constitution, or in non-constitutional considerations of public policy, they are in no manner absolute. The privacy interest in professional personnel records is not substantial because it does not contain the "highly personal" information warranting constitutional safeguard. Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). Like rights and interests generally, they are qualified and must be weighed against other legitimate private and State interests. For example, "expectations of privacy" by individual officers still do not preclude limited disclosure under some circumstances. Burka v. N.Y. Transit Authority, 110 F.R.D. 660 (S.D.N.Y. 1986); Tyner v. City of Jackson, supra.

The Defendant department has asserted the statutory "official confidence" privilege found at N.R.S. 49.285, which indicates that a public officer cannot be examined as to communications made to him in official confidence "when the public interest would suffer by the disclosure." This is clearly a conditional privilege, as the communication to a police officer would have to be first confidential and, secondly, would be privileged only when the public interest would suffer by disclosure. Madsen v. United Televisions, Inc.,

supra; Barfield v. City of Seattle, supra. An associated concern would be the protection of the nature of the investigation and the progress made, at least while ongoing, concerning the same events as the case at bar. Wood v. Breier, supra. Once again no absolute privilege is promised, but the Court is invited to consider the interest of the government/Department versus the interests of the private litigant.

The issue remains whether Plaintiff's requests may be unduly burdensome, but as long as Defendants are aware that mere allegations of burdensomeness cannot defeat a Motion to Compel Production, the Court will attempt to measure the rights of the Plaintiff against the burdens placed on the Defendant in producing the documents. Johnson v. McTigue, supra. The amount of documentation involved, the relative need of the Plaintiff for particular information, the effort required to retrieve the information and the need to obtain documents from years past, if any, will all be considered in each individual case.

E. Internal Affairs Reports (prior incidents - complaints)

When considering the production of prior Internal Affairs reports or prior complaints about individual officers with the Department, many of the considerations are the same as for the production of the report for the incident which led to the lawsuit. A Nevada case to be considered is Stinnett v. State, 106 Nev. 192, 789 P.2d 579 (1990), wherein prior complaints made

by Defendant against the police officer who arrested him, were considered relevant and admissible in Defendant's criminal case. The complaints could show bias on the part of the officer and corraborate Defendant's credibility. The court found the interest of criminal Defendant in obtaining relevant evidence outweighed the police department's generalized interest in confidentiality. Even though Stinnett was a criminal case which could emphasize different factors than a civil lawsuit, it is clear the Nevada Supreme Court is comfortable with the balancing of interests in the area of official confidential information. Also see Donrey of Nevada v. Bradshaw, supra.

The question becomes whether prior IAB reports or prior complaints against individual Defendants are relevant in the case at bar. Defendants can argue that anything which would demonstrate "prior bad conduct" would not be admissible evidence or lead to the discovery of admissible evidence. N.R.S. 48.045(2); Segura v. City of Reno, supra. However, many courts have allowed such conduct evidence to be discovered in § 1983 cases, as relevant to show the required intent of the individual officers to use excessive force, or absence of mistake in using such force. N.R.S. 48.045(2); e.g., Unger v. Cohen, supra. It is clear the information in the prior incident files would be a source of leads which resourceful counsel could use to find evidence bearing on intent or other facts at issue. Simply

because the complaint may be inadmissible at trial, discovery of those records would not be barred.

However, the Supreme Court in Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), made the determination that the only proper frame of reference for adjudication of the excessive force arrest case was the Fourth Amendment "reasonableness" standard, i.e., what would the reasonable officer have done under the circumstances. The Court found evidence of bad intent or motive had no proper place in the inquiry. But, while the prior complaint information may not be appropriate for cases against individual officers, the information is still clearly relevant to cases against the department itself, which must be shown to have ratified the actions of the police officers. The department may be exhibiting a deliberate custom or policy, or perhaps demonstrating a defacto authorization of such practices. Oklahoma City v. Tuttle, supra; City of Canton Ohio v. Harris, supra. The Graham ruling may lead to some significant procedural problems in the handling of excessive force § 1983 cases.

One court has recently ruled Plaintiff's expert may be permitted to review prior incident reports and those records may be used in depositions with managing personnel of the department, but not used in discovery with the individual Defendants. Additionally, prior complaints could be used in the

same manner by showing them to the department Supervisors and Plaintiff's experts, but otherwise restricting that use. Finally, pertinent portions of individual Defendant's personnel records could be discovered by Plaintiff and used in deposition with department Supervisors responsible for training of the individual Defendants and the personnel record of each individual Defendant could be used only in his deposition. Martinez v. City of Stockton, supra. Under this approach, Plaintiff could then proceed with discovery against both active and inactive defendants. Of course the production of any records is still subject to the same procedures in connection with the establishment of privilege by the department, as set forth above. [see part C.] If records are submitted in camera, only prior complaints or prior incident reports which are similar to those actions which are alleged in the case at bar (excessive force/discrimination) would be subject to Plaintiff's review. Martinez v. City of Stockton, supra.

Another Court has determined that bifurcated trials and bifurcated discovery would be the appropriate method of handling this type of case. Marryshow v. Town of Bladensburg, 130 F.RD. 318 (D.Ct.Md. 1991). All discovery which could be accomplished against the individual Defendants would go forward first and then a trial would determine whether any individual Defendant violated the Plaintiff's constitutional rights. Graham v. Connor, supra. If the result of the first trial is a verdict

that the individual Defendants did not violate the Plaintiff's constitutional rights, the Plaintiff would then have no claim against the Department, and it would not be necessary for the parties to incur the expense of preparation and trial of a case which would require extensive additional evidence to show the custom or pattern of constitutional violations necessary to hold the department liable. Oklahoma City v. Tuttle, supra; Monell v. City of New York, supra. If, on the other hand, a verdict should be against the individual Defendants, further proceedings may be unnecessary, as the department or its insurer may then settle both claims. In the event that Plaintiff secured a verdict against the individual Defendants, but the verdict was left unsatisfied or perhaps there were some opportunity for punitive damages, a second trial could still take place against the department, which would already be bound by the determination that the Plaintiff's constitutional rights had been violated in the incident at bar. Further discovery may be required concerning prior incidents and prior complaints, but it would not be duplicative discovery. see Marryshow v. Town of Bladensburg, supra.

The Commissioner finds the bifurcated discovery/trial procedure would be an effective method for handling this type of case without going into the great morass of discovery concerning prior conduct of the officers and/or department (although this discovery has shown to be legitimate and reasonable) in every

single case. Time and expense will be saved for all parties, yet no rights will be curtailed for the sake of such economy.

CONCLUSION

The overall object of the law in facilitating the ascertainment of truth and the fundamental importance of protecting each citizen from unconstitutional State actions have proved to be compelling reasons for production of confidential police files, including IAB reports, prior complaints and personnel files. In most instances these reasons will overcome the arguments against disclosure which revolve around impediments to police Internal Affairs investigations, expectations by police officers with regard to privacy, and interference in the department's self-evaluative process. However, the danger of doing harm to the Police Department by allowing discovery is not nearly so great as the harm that would surely result to our entire legal structure, if a case were won because the truth was hidden.

The Commissioner will offer further protection for confidences in any files ultimately produced by means of a Protective Order similar to the following:

> Inspection and access to the documents and materials produced shall be limited to Plaintiff's counsel and other such persons, as may be employed by Plaintiff's counsel in connection with preparation for trial of this case. Plaintiff shall not disclose the contents

of the documents and materials to any other persons than those described, except by Order of the Court. If Defendants are able to substantiate that discovery of certain information would result in a specific harm to an important interest, the Commissioner will consider such information in camera and will act to remove any sensitive information not useful to the Plaintiff.

For guidance of counsel in this and similar cases the Commissioner finds the following types of information should be produced subject to the limitations as stated in the opinion above.

1. Factual material generated or used in the investigation of the incident at hand or companion cases; this would include such things as witness statements, fact summaries and analyses of physical evidence. Frankenhauser v. Rizzo, supra; Wood v. Breier, supra.

2. All records of any other prior citizen or officer complaints against individually named Defendants for the same or similar actions to those in the Complaint at bar, limited to a reasonable time frame; Kelly v. City of San Jose, supra. King v. Conde, supra; Tyner v. City of Jackson, supra; Martinez v. City of Stockton, supra.

3. Police records of similar activities by a particular group within the department, limited to a reasonable time frame. Johnson v. McTigue, supra; Skibo v. City of New York, supra.

4. Records of intradepartmental communications in regard to the incident in question; Mercy v. County of Suffolk, supra; Urseth v. Dayton, supra.

5. Portions of the personnel records of the officers involved with redaction of appropriate "highly personal" information; Whalen v. Roe, supra; King v. Conde, supra.

6. Manuals or other documents describing procedures used by the Police Department in certain relevant situations; Dos Santos v. O'Neill, supra; Skibo v. City of New York, supra.

7. Evaluations of the effectiveness of individual police officers or subdivisions of the department, including effectiveness of Internal Affairs investigations, if relevant to the Plaintiff's case and if the benefit to the Plaintiff outweighs the interest in confidentiality asserted by the Police Department. Skibo v. City of New York, supra; Spell v. McDaniel, supra; Urseth v. Dayton, supra.

All suggested discovery is subject to limitation, if bifurcation of the trial is ordered by the Court.

R E C O M M E N D A T I O N S

IT IS HEREBY RECOMMENDED as follows:

1. That Defendants produce the Internal Affairs Bureau file for the Complaint filed by Billy Legardy relative to the allegations contained in Plaintiff's Complaint in this action;

2. Defendants produce Internal Affairs Bureau files for a period from February 18, 1986, to February 18, 1989, involving any incidents wherein officers A. Leach, K. McCord or R. Montes were involved with allegations of battery, false arrest, false imprisonment, excessive use of force, placing handcuffs on a suspect too tightly or discrimination against blacks;

3. For any material produced the Defendants may redact the addresses, telephone numbers or any other personal information concerning the officers involved, and the names or other identifying information of any informants;

4. If, based upon the opinion above, Defendants feel that any materials in the files to be produced should be privileged, Defendants may withhold those specific portions of the files and submit them to the Commissioner for in camera inspection and further recommendation; however, along with any in camera submission Defendants must submit an affidavit from a responsible supervisory official within the department who has personal knowledge of the principal matters to be attested to in the Affidavit and who has some relevant policy-making role; the Affidavit may not be submitted by a person who has authored any

of the documents in issue nor may the Affidavit be from a lawyer representing the department; an example of an appropriate person in the case at bar would be the head of the Internal Affairs unit; said Affidavit must include a statement that the official has personally reviewed the material in question, affirm that the department has generated and collected the materials at issue and has maintained them in confidence, specify the particular governmental or privacy interests that would be threatened by disclosure of the material to Plaintiff and his lawyer, describe how disclosure subject to the Protective Order below would create a substantial risk of harm to significant governmental or privacy interests and provide a projection as to how much harm would be done to the threatened interests if the disclosure were made;

5. A Protective Order shall be entered that inspection and access to the documents and materials produced shall be limited to Plaintiff's counsel and to such personnel, as may be employed by Plaintiff's counsel in connection with the preparation of this case; Plaintiffs shall not disclose the contents of the documents to any persons other than those described, except upon further Order by the Commissioner or the Court; [suggested form in findings].

6. Production of the documents by the Defendants must be made on or before May 29, 1992; documents which are claimed to be privileged must be submitted in camera by the same date along

with the appropriate Affidavit or Affidavits described in Recommendation number 4 and the necessary index pursuant to E.D.C.R. 2.34(g).