

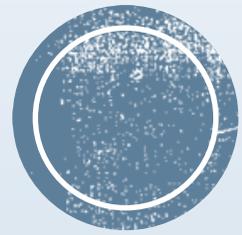
**WI DOJ/DCI OFFICER-INVOLVED
DEATH (OID) INVESTIGATION
SCHOOL • October 25, 2018**

Legal Review & Public Records

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Assistant Attorney General





Post-Investigation Legal Process

And

Public Release of Investigatory Records

OID Law

What

- Criminal investigation
- Independent investigation

Why

- Public demand
- Accountability
- Community standards





10-year effort by family

Bi-partisan authors

Accountability can protect us all



OFFICER-INVOLVED DEATH

Wis. Stat. § 175.47(1)(c):

“Officer-involved death” means a death of an individual that results directly from an action or an omission of a law enforcement officer while the law enforcement officer is on duty or while the law enforcement officer is off duty but performing activities that are within the scope of his or her law enforcement duties.



New Landscape

Wis. Stat. § 175.47(3)(a)

2013 Wis. Act 348 (Enacted Apr 24, 2014)

OIDs must be investigated

At least two investigators, “neither of whom is employed by a law enforcement agency that employs a law enforcement officer involved in the officer-involved death.”



Avoid perception of bias

Investigating officers ties to involved officer/agency

- Former employee of involved agency
- Spouse/close relative of person employed by involved agency
- Other close working relationship with involved agency or employees from that agency
- Any close relationship or former close relationship with involved officer(s)

Complications

- Perception that spirit of statute is violated
- Both investigating officer and person who works for involved agency are put in a difficult position
- Not protective of investigating officer's or relative from involved agency's mental health
- Public perception of bias; harmful in subsequent civil suit



Governor Scott Walker

"I'm proud to say I'm the only governor in America, the first one and I believe the only one today, who signed a law that says there needs to be an independent investigation any time there's a death of someone in police custody."

CNN • Sept. 13, 2015



Criminal investigation



Criminal investigation

- *The objective of the criminal investigation is to determine whether criminal charges should be filed against the officer.*
 - *Estate of Robinson ex rel. Irwin v. City of Madison, Wisconsin, No. 15-CV-502-JDP, 2017 WL 564682, at *5 (W.D. Wis. Feb. 13, 2017).*

Investigator's role: **to gather all evidence necessary** for the **DA to determine** whether criminal charges should be filed against the officer.



Independent Investigation



Independent Investigation

PURPOSE:

- **Avoid an actual conflict of interest**
- **Avoid the *appearance* of a conflict of interest**
 - Look at it from the public's perspective
 - How far removed is acceptable to the public?
 - How far removed is acceptable to the deceased's family?



Independent Investigation

STRATEGIES

- Develop guidelines
 - ❖ Highly recommend you consult your corporation counsel
 - Gives L.E.A. Expectations of cooperation
 - Gives public objective measurement



Independent Investigation

STRATEGIES

➤ Policy of objectivity

- Investigating agency *not* to weigh in on charging decision
- Not recommended for investigating officers to document personal opinions in the record or provide analytical input in charging decision
- If DA requests input, evaluate on case by case basis



Independent Investigation

STRATEGIES

➤ Transparency

- Establish a method of sharing information with the public at the conclusion of the investigation
- Establish a method of sharing information with victims and families of victims *during* the investigation



Why investigate?

- Officers doing their jobs
- Officers encounter dangerous, violent, mentally ill, intoxicated persons
- Officers attempting to apprehend people who've committed crimes, or who are in the process of committing a crime
- Officers are put in danger by suspects; why does the suspect become the victim and the officer become the suspect when an officer believes lethal force is necessary to avert imminent death or great bodily harm to one or more people?





Public demand

Negative perception of police

Imbalance of power

Fear





Civil Cases

Response to perceived failure of criminal system to prosecute officers

Response to feeling powerless

Police (the public) should all pay for mistakes by officers

Money



Community standards

- *... what happened in the stairwell on march 6, 2015 is sharply disputed.*
- *Whether Kenny's use of force was objectively unreasonable is an issue that must be resolved at trial.*

Ultimately, in any trial, whether criminal or civil, everyday, ordinary citizens decide what happened, who's right, and who's wrong



Tony Robinson Case

- Madison PD officer dispatched to apartment after 911 calls
- Officer entered home, ascended staircase to second floor, encountered Robinson
- Officer reported Robinson was physically violent
- There was a physical altercation between the officer and Robinson in the stairwell. Officer shot Robinson multiple times; Robinson found to have not had weapons on him
- Back up officers arrived on the scene seconds after shooting





**OIDs:
Who is being
investigated?**

What is being investigated?

Robinson Investigation

- Conducted homicide investigation
- The crime scene
- Neighborhood canvassing
- Audio/video: squad camera, body camera, bystanders
- Interviews with Robinson's family/friends
- Interviews re: Robinson's last day
- Investigation re: Robinson's drug use
- Investigation re: Robinson's criminal history
- Investigation re: Robinson's friends' cell phones



Investigation of officer

- Officer scene walk-through
- Officer interview
- Completely voluntary; WPPA attorney present
 - Officer's schooling
 - Officer's military experience
 - Officer's service as an instructor
 - Officer's activity that day
- Viewing of squad videos
- Break for lunch (officer's time to speak privately with his attorney)
- Questioning about incident



KISS (keep it *separate*, stupid)

Criminal Investigation

- Involved officer cannot be compelled to incriminate him/herself
- Let DA decide whether he/she wants interview if there are demands that go against guidelines
- Voluntary statement can be used against officer in criminal case

Internal/Personnel Investigation

- Involved officer can be compelled to fully cooperate with personnel investigation under threat of termination or other discipline PROVIDED the officer is notified of *Garrity* rights



More on Garrity

- The *Garrity* rule states that incriminating answers given during any examination of a public employee during an internal investigation of the employee's official conduct cannot be used against him in any subsequent criminal proceeding. *Garrity v. New Jersey, 385 U.S. 493 (1967)*.
- **Do not** ask for, review, or retain a copy/recording/notes of internal investigatory interview with involved officer(s).
- **Do not** be present for internal interview with involved officer(s).
- Involved agency may **not** conduct simultaneous internal interview during the investigating officer's interview for the criminal investigation



To re-iterate:

- [A] police department may, without violating the Constitution, compel a police officer to answer incriminating questions and prohibit him from invoking his Fifth Amendment right when it warns the officer that it will not use the information gained in any future criminal prosecution. The practice is unconstitutional when the police department fails to tell the officer that it will not use the information in a subsequent criminal prosecution, a mistake that the police department did not make here.”

Homoky v. Ogden, 816 F.3d 448, 454 (7th Cir. 2016).



Civil Lawsuit Against Officer and Police Department

- Wrongful death in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution, brought under 42 U.S.C. § 1983
 - Six year statute of limitations
 - Allows for claims against individuals acting under color of state law
 - Allows for policy and practice claims against municipalities



DCI Agents Subpoenaed

- No claim for “negligent investigation”
 - Rarely recognized in United States
 - No constitutional right to a death investigation
- DOJ forensic scientists subject to depositions (similar to criminal cases)
- 10 + DCI agents subject to lengthy depositions (2 – 7 hours)
 - Depositions are different than testimony in criminal cases
 - Expansive discovery statutes: any matter “relevant” to the claim or defense – it need not be admissible in court
 - Elicited investigating officer’s opinions on whether shooting was justified
 - The plaintiff has a right to subpoena the investigators and the investigators must comply



Criticisms of Investigation

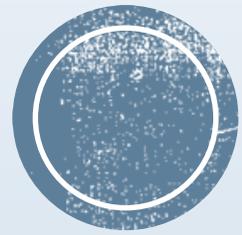
- Kenny Interview:
 - Scene walkthrough
 - Viewing of squad cameras
- Neighborhood canvassing
 - DCI agent paired with officer from involved agency
 - Allegation that target agency's officer shared information with involved officer(s) before interviews
- Investigation of the deceased
 - Contents of his apartment, computer, phone
 - Mention of prior drug use and prior criminal activity
- THEME: to the deceased's family, the investigation sought to justify the shooting



OID Guidelines

- Best practices to foster both accountability and support for law enforcement
- Addresses criticisms in lawsuits
 - Witness credibility
 - Public accountability
- Creation of hyper-objective lens
- Terminology to avoid accusation of bias
- Prosecutor's involvement





The OJD Investigator does not determine whether force was justified

The prosecutor makes that determination, based on all of the evidence presented to him or her



Public Records Release

Credibility – **Accountability** - **Transparency**

Public Interest

- Policy of State of Wisconsin that all governmental records are open to the public
 - Public oversight of police and prosecutors
- Police officer safety & public safety
 - If police are not safe, the public is not safe
- Victim's rights
 - Right to privacy
 - Right to non-public information



Records Process

- Gathering, storing, organizing
- Legal review / records custodian review
- Victim families and victim-witness contact
- Timely release



Records process - gathering

Gathering investigatory records

- Indexing system
- Cross-referencing and searchable key-words
- Key-words for scanned reports obtained by investigating agency
- System to tag confidential informants, confidential sources, witnesses in need of protection, minors
- Half the battle is creating an organizational system to keep track of records



Records process – legal review

Statutory & other law exemptions – non-exhaustive list:

- EMS/First Responder records, Wis. Stat. § 256.15(12)
- Law Enforcement Records of Juveniles, Wis. Stat. § 938.396
- Confidential informants/sources, Wis. Stat. § 19.36(8)
- Employee records, Wis. Stat. § 19.36(10)
- Records obtained directly from the DOT-DMV (Federal Driver's Privacy Protection Act, 18 U.S.C. § 2721; *New Richmond News v. City of New Richmond*, 2016 WI App 43)
- Crime Lab records, Wis. Stat. § 165.79
- Records sealed by court order



Records process – legal review

Public policy balancing test, Wis. Stat. § 19.35(1)(a)

Asks: what is better for the public: release or no release

Main considerations: (some overlap)

- Statutory policy where statutes do not directly apply
- Victim's rights (Wisconsin Constitution & Statutes)
- Law enforcement sharing agreements requiring confidentiality
- Confidential law enforcement investigative technology and techniques
- Other common balancing test considerations
- Audio/Visual – special considerations



Balancing Test

Statutory policy where statutes do not directly apply

- Federal HIPAA / Wis. Stat. § 146.82 – medical records
- Federal FERPA / Wis. Stat. § 118.125(2) - student records
- 26 U.S.C. § 6103 / Wis. Stat. § 71.78 - tax returns
- Wis. Stat. § 19.36(13) / Wis. Stat. § 767.127(3)(a) – personal financial information
- See also Open Meetings Law exceptions for legislative policy



Balancing Test

Victim's rights

- Wisconsin Const. art. I. § 9
 - Victims to be treated with fairness, dignity, and respect for their privacy
- Wis. Stat. § 950.01 - Victims and the families of victims
- U.S. Supreme Court recognizes privacy rights of deceased person's surviving family. *National Archives and Records Admin. V. Favish*, 541 U.S. 157 (2004) (FOIA request for death scene photos denied)
- Wisconsin Supreme court recognizes re-victimization by records release. *Democratic Party of Wisconsin v. Wisconsin Dep't of Justice*, 2016 WI 100 (Wis. Public records request for DA's presentation to prosecutors about teenage sex exploitation case denied)



Balancing Test

Law enforcement sharing agreements requiring confidentiality

- Medical examiner records
- TIME System records
- NCIC/NJIS records
- FBI records
- ATF records



Balancing Test

Confidential law enforcement investigative technology and techniques

- Investigative techniques
- Undisclosed special equipment/monitoring devices
- SWAT team members
- Tactical equipment previously undisclosed
- Location of Surveillance Cameras
- Routine officer shift hours (officer safety)



Balancing test

Other common balancing test considerations

- Names/ages/addresses of witnesses
 - Case by case
 - Preserve investigator's ability to obtain voluntary witness statements
 - Witnesses in need of protection / confidentiality requests
- Other identifying information: DOB, signatures, home addresses, employment information, personal telephone & email, vehicle information, DL #, SSN
- Personal family information that is unrelated to incident
- Financial / banking information



Audio/Visual – special considerations

- 911 calls
- Officer body cameras (potential pending legislation)
- Officer dash board cameras and squad audio
- Surveillance footage from private companies
- Cell phone AV from bystanders or victims
- Graphic photographs of deceased
- Excessive records of no investigatory value



Notice to records subjects

Wis. Stat. § 19.356 notice

Pre-release notice with an opportunity to enjoin release of records must be provided to “records subjects” for three categories of records

1. Employee disciplinary records of investigating agency (not likely to arise with OIDs)
2. A record obtained through a subpoena or search warrant
3. Employment records prepared by the records subject’s employer



Notice to records subjects

- Written notice, served by certified mail or personal service
- On any record subject to whom the record pertains,
- The notice shall briefly describe the requested record and include a description of the rights of the record subject:
 - 19.356(3): records subject may, within 5 days of receipt of notice, provide written notification to the authority of his/her intent to seek a court order enjoining release
 - 19.356(4): within 10 days of receiving notice, a record subject may file a court action
- 19.356(5): The authority may not release records until 12 days after sending notice to a record subject. If the records subject seeks a court order enjoining release of records, the authority may not release the records sought to be enjoined



Pre-release considerations

Victim / family copies

- Wis. Stat. § 19.35(1)(am) – personally identifiable information of deceased
- Gather information applicable to balancing test
- Plant the seeds early and gradually
 - What happened
 - What evidence exists
 - What Audio/Visual evidence exists
- Enlist victim-witness coordinators early
- See also Wis. Stat. §§ 950.04 (victim bill of rights); 950.08(2g) (info to be provided by L.E.A. to victims)



Pre-release considerations

Involved law enforcement agencies

- Officers and officers families may also be victims
- Learn if any involved officers have special confidentiality concerns
- Learn if any investigatory information obtained is confidential LE techniques or technology
- Communicate with involved-LE agency's chief/sheriff re: confidentiality of types of weapons and equipment, assignment of officers (SWAT, sniper, etc)
- The investigating agency is the final authority on what records to release – obtaining information from involved agency is part of the balancing test



Pre-release considerations

24-hour count-down check-list

- Be in contact with prosecutor re: timing
- Determine whether families, victims, and involved LE agency needs 24 hour notice of public release
- Are there community safety concerns related to release?
- Contact local community leaders, governments, legislators prior to release?



Records release: mechanics

- Press conference, press release, or quiet media notification?
- Document delivery: Web-release, CD, Thumb drive?
- Plan early for technical considerations
- Letter explaining redactions and withholdings



DOJ Resources

DOJ Officer Involved Critical Incidents

<https://www.doj.state.wi.us/dci/officer-involved-critical-incident>

DOJ Public Records Compliance Guide

<https://www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf>

OID Public Records questions, AAG Anne Bensky, 608-264-9451

General Public Records Questions, Office of Open Government, 608-267-2220

AV & tech questions: Spencer Gustafson, DCI 608-261-8108

