

INNOCENCE PROJECT

Contact: Laurie Roberts, State Policy Advocate, lroberts@innocenceproject.org

House Bill 2929-A4 (Favorable) Laurie Roberts, Innocence Project Senate Committee On Judiciary and Ballot Measure 110 Implementation May 11, 2021

The Innocence Project is a national organization dedicated to freeing the innocent and working on changes to law and policy to strengthen the criminal legal system. Since 1992, the Innocence Project and its Innocence Network partners has worked to exonerate 375 innocent men and women through DNA evidence. We strongly support the proposed -A4 amendment to bring transparency and accountability to law enforcement.

Unchecked police abuse is not only taking innocent Americans in the streets, but it is also in courtrooms through wrongful convictions. The first step in preventing these injustices is transparency. Oregon should permit public access to police disciplinary records, regardless of whether internal investigations substantiated the complaints or allegations.

Transparency Will Help Prevent Wrongful Convictions

Lifting the veil of secrecy on police disciplinary records is the first step toward holding problem officers accountable for excessive force and misconduct that leads to wrongful convictions. It is also critical for a defendant's right to a fair trial. Right now, Oregonians facing potentially life-altering criminal charges are sitting in jail completely unaware that an officer involved in their case has a history of transgressions. Oregon is one of just 9 states¹ where this information is entirely confidential, which increases the risk of wrongful conviction in two major ways. **First, there is no external oversight of how departments handle allegations of misconduct, which allows officers to continue illegal and unethical behavior.**

- For example, West Linn police wrongfully arrested Michael Fesser in 2017 as part of a conspiracy orchestrated by then-Chief Terry Timeus. After Fesser cleared his name and the charges were dropped, his lawsuit against the city revealed pervasive misconduct by Timeus and other West Linn officers that had been hidden from the public for a decade. An outside firm hired by the city also concluded that the department's internal investigation of Fesser's case was "extremely cursory," "gap-riddled," "woefully inadequate,"² and even led to a promotion for one involved officer. This case illustrates how easily an innocent person can be arrested and prosecuted based on false information supplied by untrustworthy officers. Without transparency prescribed by this amendment, there's no way to know how many other innocent people have been victimized as Fesser has.

Second, **secrecy makes it difficult for judges and juries to make accurate judgments about innocence or guilt.** It is critical for these triers of fact to know if a criminal case was built by an officer who has a history of lying, coercing witnesses and/or fabricating evidence. While discrediting information on officers is supposed to be disclosed in criminal proceedings, defense attorneys have struggled to access these records, and even prosecutors themselves may not know about or have access to an officer's misconduct history.

¹ Alaska, Delaware, Kansas, Mississippi, Nevada, Pennsylvania, South Dakota, Wyoming

² <https://www.oregonlive.com/crime/2020/12/outside-consultants-blast-west-linns-cursory-review-of-michael-fessers-wrongful-arrest-claims.html>

INNOCENCE PROJECT

Contact: Laurie Roberts, State Policy Advocate, lroberts@innocenceproject.org

- According to a groundbreaking study of the nation's first 2,400 exonerations, the National Registry of Exonerations found **more than a third (34%) of all wrongful convictions are caused by police misconduct**, such as witness tampering, misconduct in interrogations, fabricating evidence, concealing exculpatory evidence, and perjury.³
- The **impact of misconduct is greater on Black defendants**: they were slightly more likely than white defendants to be victims of official misconduct — 57 percent to 52 percent. That difference, however, is much larger for drug crimes, 47 percent to 22 percent; and for murder cases, 78 percent to 64 percent — especially those with death sentences, 87 percent to 68 percent. In 2017, the National Registry of Exonerations released a [study of the role of race in wrongful convictions](#) and found that innocent Black people were more likely to be wrongfully convicted than whites and spent more time in prison before being exonerated, among other findings.

Transparency Is Foundational to All Other Policing Reforms

The Oregon Legislature is advancing numerous policing reforms this session, and basic transparency is crucial to the success of those other policies, including:

- HB 2162, relating to **DPSST training and accreditation**: If police agencies are not properly investigating and disciplining officers, DPSST will not have the information needed to revoke or suspend an officer's certification, nor will DPSST be able to evaluate the efficacy of required bias and equity training.
- HB 2928, relating to **banning riot munitions**: record transparency is required to ensure law enforcement is respecting the prohibition on acting in concert with another agency to engage in misconduct barred by statute or court order, as required by HB 2928.
- HB 2930, relating to **standards for law enforcement conduct**: if records are kept confidential, there is no way for the public to evaluate whether officers are actually following prescribed uniform standards of conduct, nor whether arbitrators are meting out discipline properly.
- HB 2032, relating to **excessive use of physical force**: use of force policies are only effective when there are consequences for officers who violate the rules.
- HB 2936, relating to **background checks for prospective officers**: the best way to ensure DPSST and individual agencies are only hiring officers who pass a background check is to provide public access to disciplinary records, so the public can feel confident in the officers patrolling their communities.
- HB 3273, relating to **prohibiting release of mugshots**: this policy will only be effective if there are consequences for officers who violate the rules.
- HB 2986, relating to **bias crimes training**: access to disciplinary history is crucial to evaluating whether bias training is resulting in desired outcomes, particularly given the outsized impact that police misconduct has on marginalized communities.
- HB 2575, relating to **training for trauma-informed response**: the Department of Justice must be able to access disciplinary files to ensure agency grant recipients are effectively training officers, especially officers who are receiving complaints from the public.
- HB 2527, relating to **standards for licensing private security agencies**: current and former law enforcement officers make up a large portion of private security employees; access to their policing disciplinary files is crucial for compliance with the background check and licensing provisions in this legislation.

INNOCENCE PROJECT

Contact: Laurie Roberts, State Policy Advocate, lroberts@innocenceproject.org

- **SB 204/SB 621**, relating to **civilian oversight agencies**: A civilian oversight board cannot adequately investigate complaints against officers without full access to internal affairs records. For example, if a board is investigating an officer for using excessive force, it cannot see if the officer has a history of similar allegations filed internally with the police department.

Transparency Benefits Law Enforcement, Prosecutors and the Public

- Police officers who engage in proper behavior are harmed by their peers' misconduct. According to one of the largest ever studies conducted with a nationally representative sample of more than 8,000 police officers, **only 27% agree that officers who consistently do a poor job are held accountable**, while 72% disagree with this.⁴ Rooting out those who continually engage in misconduct will bolster good police officers' reputations and help them rebuild trust with the community.
- Women and officers of color frequently report being singled out and punished more harshly by Internal Affairs units. **Transparency will expose unfair disciplinary practices and foster a more equitable and diverse workplace.**
- Lack of access to all underlying complaints and disciplinary actions prevents DPSST and other agencies from **collecting and analyzing data to detect patterns and potential red flags**. Ensuring access to this data means Oregon law enforcement agencies may be able to intervene with officers *before* their behavior results in a tragedy.
- Prosecutors need access to disciplinary files to protect their cases from being undermined by officers with histories of misconduct.
- Transparency is key to establishing trust between police and the people they serve, which is the bedrock of effective community policing. 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 sweeping them under the rug.** Providing the public with accurate information means they can be confident that bad behavior is being addressed *and* they can trust in the outcomes of disciplinary investigations, even when the finding is that the complaint was unfounded.

Transparency Means Unsubstantiated Complaints Must Also Be Accessible

The benefits of transparency can only be achieved if *all* records are made publicly available, including unsustained and unsubstantiated complaints. Otherwise, this legislation will create a perverse incentive to sustain even fewer complaints in order to avoid disclosure. Concerns that access to these records could unfairly impact officers who were found not guilty of wrongdoing are unfounded because:

- Police agencies sustain few complaints that are filed. Limiting access to sustained complaints can incentivize agencies to avoid conclusions of wrongdoing.
 - 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 has no way of knowing if complaints are being thoroughly investigated.

⁴ <https://www.pewresearch.org/social-trends/2017/01/11/behind-the-badge/>

INNOCENCE PROJECT

Contact: Laurie Roberts, State Policy Advocate, lroberts@innocenceproject.org

- 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 26 (7%).⁵
- Officers can respond to unsustained complaints
 - Agencies can adopt a policy permitting officers to respond to unsustained complaints⁶; this will permit the public to see both sides of the story.
 - Hundreds of police agencies across the country practice community engagement through public platforms such as Twitter, Facebook, and Instagram. If an agency or individual police officer is concerned about its public reputation it can use traditional PR tactics, as it already does, to combat those concerns⁷.
- Access to the information can counter false claims
 - When news agencies or individual members have access to misconduct reports it can help verify the accuracy of accusations and combat misinformation.⁸ For example, after the Rodney King beating, a fatal shooting of a Black man in Florida involving two police officers came under heavy public scrutiny. Because misconduct records are public in Florida, the local news and the police were able to hold a press conference providing precise information involving the shooting. This “demonstrated an understanding that one of the most powerful weapons a police department can wield is the truth.”⁹
- There are penalties for filing false complaints
 - There are legal protections in many states that make it a criminal offense to file a false report.¹⁰
 - In Oregon, a person is guilty of violating ORS 162.375, which is a Class A Misdemeanor.

Oregon should join 13 other states including New York, Florida and Maryland in permitting public access to police disciplinary records for both unsubstantiated and substantiated claims. This transparency will allow communities to hold local departments accountable to thoroughly investigate and correct misconduct, and thereby lead to fairer and more accurate outcomes in the criminal legal system.

The Innocence Project applauds this committee for valuing the principles of transparency, disclosure, and accountability to advance the interests of justice. We believe that passage of this proposal is foundational to any authentic accountability model. We remain committed to being a resource to Oregon as it continues to pursue this work. Please do not hesitate to contact me if I can be of assistance to lawmakers at lroberts@innocenceproject.org.

⁵ https://www.oregonlive.com/police-fire/2017/12/police_brutality_and_incompetence.html

⁶ Nevada has adopted this. NEV. ST. § 289.057.

⁷ *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).

⁸ Machet, J.R. *Should Police Misconduct Files be 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)

⁹ *Id.*

¹⁰ For example, in Texas filing of a false report is punishable by a fine up to \$4,000.00 and/or up to a year of imprisonment.

<https://www.cityofcorinth.com/police/page/false-complaints>