

Records Management: A Means to Legal Defensibility and Cost Savings

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Abstract

As law enforcement budgets are cut and lawsuits against officers continue their upward rise, this white paper evaluates how modernizing training and compliance records management can foster greater legal defensibility while saving law enforcement organizations time and money. An in-depth look at trending legal issues, the contemporary public perception of law enforcement officers, factors inhibiting modernization of recordkeeping methods, and how the adoption of an electronic training and compliance management solution and digitizing training records can positively impact law enforcement organizations and training centers.

Introduction

The *Wall Street Journal* published an article in July 2015 about the rising costs of lawsuits filed against law enforcement organizations in the United States. Focusing on the ten cities with the largest police departments in the country¹ over a five-year period, the article was meticulously researched. Between 2010 and 2014, these cities had paid out nearly \$1.4 billion at the taxpayers'

¹The ten cities referenced, in descending order, are New York City, Chicago, Los Angeles, Philadelphia, Houston, Washington, D.C., Dallas, Phoenix, Baltimore, and Miami-Dade. (Elinson & Frosch, 2015)

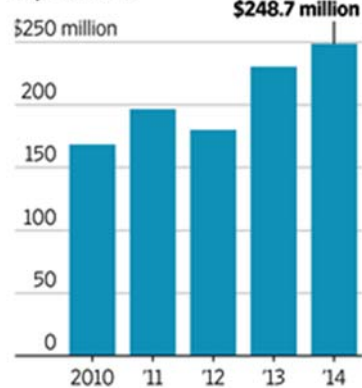
expense in cases involving law enforcement, denoting a steady year-over-year increase (Figure 1). In 2014, the payouts reached \$248 million for officer misconduct cases alone. While the cases often involved some type of officer misconduct, one-fifth of the overall payouts—roughly \$300 million—went to plaintiffs seeking damages resulting from preventable accidents and negligence (Figure 2). Even more astonishing than the financial cost of these lawsuits was the growing trend of cases being settled long before they went to trial. In exchange for avoiding the negative publicity that goes along with trials involving law enforcement, city attorneys are becoming more and more likely to pay out large settlements in hopes that details will never be made public.

In a few cases it made sense to settle early, such as the one involving San Bernardino, California sheriff's deputies who had apprehended and severely beaten a man after he had stolen a horse in an attempt to elude them. The entire event was caught on camera by a helicopter news crew that had been covering the story. Within two weeks, San Bernardino County agreed on a settlement of \$650,000 with the man. The settlement was reached before the victim had even filed suit, even though criminal charges relating to the event were pending against him.

In most cases, cities could do more to defend their sworn officers. According to the Cato Institute's National Police Misconduct Reporting Project, one in five law enforcement officers will be accused of some form of misconduct over the course of their career. Yet, less than half of all reports of officer misconduct are credible enough to support prosecution. Of those, prosecution is successful only 10% of the time.

The steady increase in civil financial awards correlates to the sharp increase in the number of lawsuits filed against law officers each year—up 48% over the same five-year period. It can also, perhaps, be more directly linked to the municipal trend of avoiding litigation of cases in light of the threat of negative public relations. Given the media's recent scrutiny of the law enforcement community, however, even the most quietly-kept settlements can damage a department or officer's reputation for what the public views as lack of transparency. Since the terms of settlements are often sealed, the public perception is that an officer accused of misconduct must be guilty or the city would have defended the officer. In most cases, it is the norm for municipalities, and hence taxpayers, to be on the hook when an officer is convicted or a settlement reached in cases concerning line-of-duty crimes. The vast majority of these cases are filed under the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983,

Figure 1
Big Expense
Misconduct payouts by the 10 U.S. cities with the largest police departments



Note: Some cities reported data for fiscal years, some for calendar years.
Source: the cities

THE WALL STREET JOURNAL.

Figure 2

The Price of Police Misconduct

The cost of resolving misconduct cases, including alleged beatings, shootings and wrongful imprisonment, has risen for many big cities.

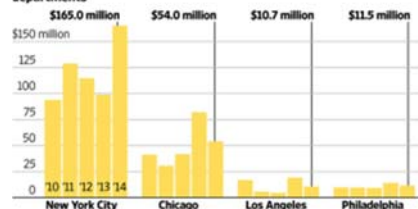
The 10 largest local police departments

City	Officers	Payouts in misconduct cases, in millions, 2010-14
New York City	34,454	\$601.3
Chicago	12,042	\$249.7
Los Angeles	9,920	\$57.1
Philadelphia	6,515	\$54.3
Houston	5,295	\$32
Washington, D.C.	3,865	\$30.5
Dallas	3,478	\$6.9
Phoenix	2,952	\$5.6
Baltimore	2,949	\$12.0
Miami-Dade	2,745	\$31

Misconduct payouts as a percentage of all police-claims payouts*

City	Percentage
New York City	72%
Chicago	89%
Los Angeles	39%
Philadelphia	72%
Houston	38%
Washington, D.C.	79%
Dallas	71%
Phoenix	30%
Baltimore	74%
Miami-Dade	33%

Misconduct payouts for the four cities with the largest police departments



*Philadelphia, Houston, Baltimore and Miami-Dade payout totals don't include employment lawsuits.
Source: the cities; Bureau of Justice Statistics (officers)

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which provides a private right of action when a state actor deprives an individual of Constitutional rights. Excessive uses of force, for example, are typically framed as violating the Fourth Amendment's freedom from unreasonable searches and seizures. While the doctrine of respondeat superior—which holds that employers may be liable for actions of their employees—does not apply in a strict sense to police departments and their officers, liability does attach if the violation can be attributed to an official policy or custom². Thus, plaintiffs will often allege that an officer's actions were caused by a department's policy of providing inadequate training. When departments are faced with these failure to train lawsuits, they must be able to demonstrate not only that they required relevant training, but that the officers actually completed it, or else liability will attach. Therefore, unless a plaintiff can overcome a claim of qualified immunity³, there is usually no direct financial risk to the officer. As the upward trend of lawsuits continues, there are calls for officers involved in these types of incidents to be held financially responsible as a deterrent against further bad behavior. Thus, the risks get higher in what is already a high-risk and high-stress profession.

While violent crimes are down in most American cities, budget cuts that have led to decreases in staffing and training have also increased the likelihood that an officer will be involved in a dangerous and high-stress situation that they are not adequately trained to handle⁴. When these situations arise, they are also more likely to be wrongfully accused of misconduct and, if so, less likely to have their personal and professional reputations defended by the cities they serve.

The purpose of this report is to discuss how modernizing the way in which training and compliance records of officers are maintained can save department's money while increasing an officer's chances of being defended and, therefore, minimizing a department's liability.

Benefits of Adopting a Digital Recordkeeping System

In this section, we will define a legally defensible electronic recordkeeping solution and cover the legal and financial benefits inherent in adopting such a system.

²*Augustin v. Enlarged City School Dist. Of Newburgh*, 616 F. Supp. 2d 422 (S.D.N.Y. 2009)

³Current Supreme Court precedent, as laid down in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) states that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

⁴Police executives representing 25 large municipal police departments, including five of the cities listed in the *Wall Street Journal* report, said budget cuts led to decreases in either departmental staffing or training, or a combination of both. (Wexler, et al, 2010)

Modern Recordkeeping Defined

When discussing an electronic recordkeeping solution, capable of fully managing a department's training and compliance records in a legally defensible⁵ manner, it is important to define the parameters of such a system. For many departments, electronic recordkeeping has not evolved further than spreadsheet software, such as Microsoft® Excel, to manage records. Despite the many benefits and functions of such software, it falls well short in its legal defense capabilities. For the purposes of this report, a modern recordkeeping solution is defined as a proven and legally defensible electronic training and compliance management system that is built specifically to handle the complex needs of law enforcement agencies. In order to be legally defensible, the system must include audit trail capabilities, and be secured against the threat of data tampering. It must also allow for the replication of an officer's training records in a court of law. If training cannot be replicated, it becomes difficult to prove it took place.

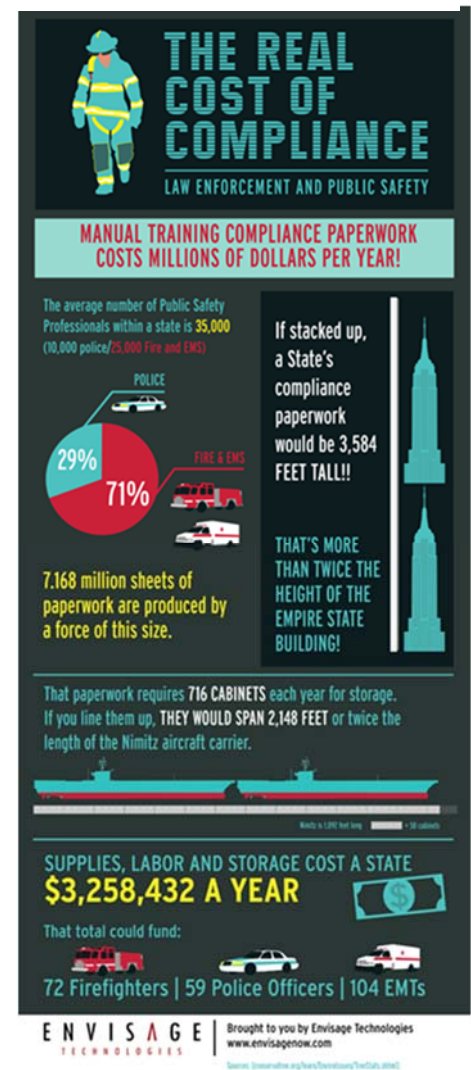
Among the many benefits of a proven electronic training and compliance management system is its ability to maintain and track an officer's complete training history; information generally requested by subpoena or discovery request in cases involving the defense of law enforcement officers. Moreover, when interfaced with a Learning Management System, as they often are, a proven solution that is legally defensible can be instrumental in providing or streamlining the path towards ongoing certification and compliance for officers.

Records maintained in a proven electronic training and compliance management system are automatically backed up and copied; thereby, protected against loss. Rather than have a master copy of a training document in a personnel file, a secondary copy at an academy, and a third copy as a backup in case the other copies are lost or destroyed, a proven solution consolidates and replicates the data. This makes training records accessible to authorized users across a wide geography without the time and money that would normally be spent on printing, paper, and postal costs.

Because digital records do not consume physical space, significant savings can be realized through the alleviation of paper costs and associated real estate needed to house paper records. A state with 35,000 public safety professionals uses approximately 7 million sheets of paper every year. Stacked one on top of the other, these individual papers would reach a height twice that of the Empire State Building and would require roughly 716 filing cabinets. It is estimated that adopting a proven, state-of-the-art electronic training and compliance management system could

⁵“A defensible solution is one that can be supported with clearly documented policies, processes and procedures that drive how and why work is performed, as well as one that has clearly documented proof of behavior patterns, proving that an organization follows such documented constraints to the best of their ability.” (Hall, 2011)

Figure 3



save states over \$3.2 million per year in paper and storage costs alone; a tidy sum that could be reinvested in training or in hiring an estimated 59 additional officers. (Figure 3)

Record flooding and other natural disasters have destroyed thousands upon thousands of paper law enforcement records in the last decade. Most notably, in 2013, flooding at a Federal Bureau of Investigation facility destroyed more than 20,000 archived law enforcement records, many of which were historically significant⁶. Securely-housed digital records are less susceptible to natural disaster, as the servers on which they reside are generally kept in facilities built specifically to withstand them⁷. In this manner, law enforcement organizations remain compliant with federal regulations governing secure recordkeeping practices⁸.

Digital records housed in a highly-secure, federally-accredited facility are protected against outside human interference or attack, yet easily accessed and shared by those with authorization to do so. By providing an audit trail, key to legal defensibility, a proven and legally defensible electronic training and compliance management system tracks what, why, when, where, and by whom training and compliance records were updated or altered, further alleviating cumbersome signing-out of records and other chain of custody issues.

Barriers to Modernizing Recordkeeping Methods

In this section, we will discuss critical human and financial factors that hinder the adoption of a comprehensive and modern recordkeeping system.

The Human Factor

Human beings are creatures of habit. Each individual has a specific way of doing things that, while not always the most efficient, are perpetuated due to their familiarity or simply because that is the way things have always been done. These tasks are generally performed by one person who over time has developed a process and tailored it to their needs and abilities⁹. Oftentimes, however, processes created in this type of atmosphere are neither efficient nor scalable. Moreover, when the person who developed the process departs an organization, the process must be reinvented, wasting valuable time and resources. When this built-in reluctance to change is applied to high stakes law enforcement training and the retention of records which form the very backbone of legal defensibility, the long term litigation risks and costs become extremely significant.

⁶Specifically, records chronicling the Civil Rights movement and the FBI's investigation of hate groups in the 1960s were among those destroyed.

⁷ANSI/BICSI 002-2011, "Data Center Design and Implementation Best Practices"

⁸National Institute of Standards and Technology compliance best practices.

⁹"Simply put, habits are extremely hard to change. They're hard to change because they're so ingrained, because they're so almost-automatic. Now, really, what would be the point of having a habit that didn't free up your mind to crunch on more pressing matters?" (Newby-Clark, 2009)

First, as law enforcement officers are increasingly held to higher training standards by accrediting and compliance organizations, paper-based records are quickly becoming a barrier to improving police professionalism. Therefore, adaptation to new technology standards, in line with the U.S. Office of Management and Budget's "Government Paperwork Elimination Act," is not only a strong suggestion for more easily reporting training and compliance information, but can also reap significant financial and operational benefits¹⁰. Second, as law enforcement training takes place in many different, or blended, formats and in many different locations, several people may be involved in the recordkeeping of many disparate training centers and systems. The introduction of additional people into any process leads to the inevitable breakdown of the "one way to do things" approach, as a new entity will naturally want to build their personal preferences and workflows into the process.

Advances in technology, such as electronic training and compliance management solutions and the digitization of records, have alleviated much of the personality conflicts in managing organizational training and compliance needs. Furthermore, the implementation of these advances can positively impact any law enforcement organization, large or small, by increasing the legal defensibility of its officers. They are easy to implement, cost-effective, yet often overlooked solutions to increased legal defensibility. By having an officer's complete training history in a single system, departments can easily overcome claims of inadequate training. Even when plaintiffs establish that the content of the training was inferior to a neighboring state, or was not tailored to the specific topic resulting in the harm, departments have been able to avoid liability completely by demonstrating that its officers received state-mandated training¹¹.

¹⁰As public awareness of electronic communications and Internet usage increases, demand for on-line interactions with the Federal agencies also increases. Moving to electronic transactions and electronic signatures can reduce transaction costs for the agency and its partner. Transactions are quicker and information access can be more easily tailored to the specific questions that need to be answered. As a result data analysis is easier. These access and data analysis benefits often have a positive spillover effect into the rest of the agency as awareness of the agency's operations is improved. In addition, reengineering the work process associated with the transaction around the new electronic format can give rise to other efficiencies. (Government Paperwork Elimination Act P. L. 105-277, Title XVII, Supplementary Information, 1998)

¹¹*Sanders-Burns v. City of Plano*, 594 F.3d 366 (5th Cir. 2010); *La v. Hayducka*, 269 F. Supp. 2d 566 (D.N.J. 2003)

Funding

Despite the in-depth reporting in the aforementioned *Wall Street Journal* article and their critical examination of many of the factors contributing to the increase in suits against law enforcement officers, they failed to strike at the heart of the issue: law enforcement organizations are being asked to do more and police better with less funding¹². Funding lost to budget cuts or due to changes in appropriations have hindered the ability to properly train officers and adequately maintain legally defensible training records. In some cases, administrators are asked to make the tough choice of either keeping a full staff of officers with inadequate training and recordkeeping or keeping a reduced staff of fully trained officers.

In other cases, the withholding of public monies earmarked for modern law enforcement training is purely political. In November 2015, the *Washington Times* reported on the dire financial straits of the Dixon, Illinois-based Northwest Illinois Criminal Justice Commission (NICJC), responsible for the recertification training and records of nearly 500 law enforcement officers in northwestern Illinois. Just months after Illinois lawmakers had mandated additional training¹³ in crisis intervention related to the mentally ill, the NICJC and other state law enforcement training centers were facing closure due to the state's ongoing budget impasse. As in many states, funding for law enforcement training in Illinois is directly tied to the hard work of officers: officers write tickets, make arrests, and the money collected in fines is funneled through the legislature to training organizations. Although fines collected had already exceeded the state's \$16 million allocation for law enforcement training by September 2015, according to the *Chicago Tribune*, no money would be distributed to training centers without a state budget in place. Despite never agreeing on a FY2016 budget, an emergency appropriations bill was passed in December 2015 which ultimately distributed the full operational funding necessary for the state's law enforcement training centers to stay open.

The manner in which law enforcement officers are trained has not always kept pace with advances in technology. Because of this, a transparent budget with guaranteed funds is essential for any law enforcement organization to strategically plan for purchasing and implementing new technology. The world, on par, is still very much in a transitional phase between an older generation of officers trained in the traditional methods of classroom instruction and paper recordkeeping, and a younger generation for whom computer-generated learning, training, and record retention has been the norm since birth. An adequate

¹²“We’ve been cut about \$40 million over the last two years. I started with nearly 2,200 officers when I came in at the beginning of 2009, and we project we’ll be at about 1,750 at the end of the next fiscal year. So we’re going to lose more than 20 percent of our operational sworn force to retirements without the cadet classes to replace them,” said then-director of the Illinois State Police, Jonathon Monken, decrying the trend of budget cuts to law enforcement agencies and training centers. (Wexler, et al, 2010)

¹³Illinois HB 4112/PA 99-0261 provides that the Illinois Law Enforcement Training and Standards Board shall create a standard curriculum for a certified training program in crisis intervention addressing specialized policing responses to people with mental illnesses.

budget set aside for training and implementation of a proven electronic training and compliance management solution, specific to law enforcement, is essential to ensuring that the transition is smooth regardless of the end user's technological comfort level.

Conclusion

In conclusion, it is likely that the true benefits of a proven, legally defensible electronic training and compliance management solution may not be evident until an administrator needs to access training records in the event of a lawsuit. As the data suggests, for 20% of the law enforcement community this is not a matter of if, but when. Along with the significant cost, operational, and physical space savings, by digitizing training records and adopting a legally defensible training and compliance management solution, law enforcement agencies can feel secure that the records they are providing to attorneys involved in an officer's defense are complete, accurate, accessible, and most importantly, defensible.

Lawsuits against officers will never completely cease. That is one of the many hazards of the job. By modernizing recordkeeping methodology, however, great strides can be made towards reversing current trends and minimizing future litigation risks, and that is something that should be a high priority for any law enforcement agency.

References

1. Elinson, Zusha and Dan Frosch. "Cost of Police-Misconduct Cases Soars in Big U.S. Cities." *Wall Street Journal*. July 15, 2015.
2. Rocha, Veronica, Richard Winton and Paloma Esquivel. "San Bernardino County to pay \$650,000 after deputies beat horse pursuit suspect." *Los Angeles Times*. April 21, 2015.
3. "Budget impasse puts law enforcement training in crunch." *Washington Times*. November 13, 2015.
4. *National Police Misconduct Reporting Project*. The Cato Institute. "2010 Annual Report." Web. 2011.
5. Ehrenfreund, Max. "Charted: The 20 deadliest jobs in America." *Washington Post*. January 28, 2015.
6. *Augustin v. Enlarged City School Dist. Of Newburgh*, 616 F. Supp. 2d 422 (S.D.N.Y. 2009)
7. "Police training canceled because of Illinois budget crisis." *Chicago Tribune*. September 27, 2015.
8. Griffey, Trevor. "Archival Neglect: Flooding of FBI Archives Destroyed Hundreds of Thousands of Pages of Files Related to Civil Rights Movement History." *The National Security Archive*. Web. September 16, 2014.
9. "Data Center Design and Implementation Best Practices." *ANSI/BICSI 002-2011*. March 2011
10. "Generally Accepted Principles and Practices for Securing Information Technology Systems." *NIST Special Publication 800-14*. September 1996.
11. Wexler, Chuck, et al. "Is the Economic Downturn Fundamentally Changing How We Police?" *Police Executive Research Forum*. December 2010.
12. Newby-Clark, Ian. "Creatures of Habit: Effective Advice for Lasting Habit Change." *Psychology Today*. July 2009.
13. *Sanders-Burns v. City of Plano*, 594 F.3d 366 (5th Cir. 2010);
14. *La v. Hayducka*, 269 F. Supp. 2d 566 (D.N.J. 2003)
15. *Implementation of the Government Paperwork Elimination Act*. United States Office of Management and Budget. Web. 2003.

16. Hale, Judith (December 2011). *Performance-Based Certification: How to Design a Valid, Defensible, Cost-Effective Program.* John Wiley & Sons, Inc. ISBN 978-1-118-02724-0.
17. *Illinois House Bill 4112/PA 99-0261.* Illinois General Assembly. Web. 2016.
18. "List of new Illinois laws for 2016." *Effingham News*. January 3, 2016

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