



September 8, 2020

University of Washington President Ana Mari Cauce;
University of Washington Regents;
Washington State Attorney General Bob Ferguson

RE: University of Washington Police contract provisions violate Public Records Act, statutorily mandated records retention schedules and public policies regarding disclosure of police misconduct and constitutional policing

Dear President Cauce, UW Regents and Attorney General Ferguson,

I request that the UW and Office of the Attorney General undertake an immediate public review of the recently released contract for UW Police. As documented in this letter, specific provisions of the contract scheduled to take effect in 2021 are clearly in violation of the Public Records Act and statutorily mandated records retention rules. As such, the provisions are ultra vires. An agreement between a state institution or agency and employees cannot include provisions that conflict with state law.

Fundamental public policies for openness regarding police misconduct and to tackle systemic racism and unconstitutional policing are undermined by contract provisions that call for destruction and nondisclosure of records regarding findings of police misconduct.

My review of the contract was prompted when the [UW Daily reported](#) (UW finalizes contract with police union, limiting transparency, accountability," by Claudia Yaw, Aug 18, 2020, updates Aug 23, 2020):

"Notable provisions in the new contract

- Redaction of written reprimands — The new contract says the employer (i.e. the police department) "shall remove evidence of written reprimands" after 3 years...
- If an individual requests public records "related to employee misconduct or alleged misconduct," the name of the employee will be redacted, unless the name has already been made public.
- Altered public records — If an individual requests public records "related to employee misconduct or alleged misconduct," the name of the employee will be redacted, unless the name has already been made public. The 2011 contract had the same provision."

I reviewed the contract itself, not relying on the (thorough) reporting by the UW Daily.

The contract is clearly in conflict with the Public Records Act and the applicable records retention rules.

Provisions barring disclosure of records regarding misconduct and discrimination and improperly agreeing to destroy records conflict with public policy to end institutional racism and discrimination in policing and University employment practices.

The relevant contract provisions should be renegotiated prior to the contract taking effect. I request that the Attorney General and UW review the provisions and publicly respond to these concerns.

Obviously, a contract cannot trump the Public Records Act. Nor can a contract have provisions that require destruction of records in violation of the records retention rules duly adopted pursuant to statute.

How the contract violates State law on records disclosure and records retention by requiring destruction or nondisclosure of records regarding police misconduct:

1. Section 8.1 (relevant language copied to end note)ⁱ provides for records of misconduct to be removed (removed) in three years, and even sooner if the UW agrees on request of the officer.¹

The public is entitled to full disclosure of all records that are required to be retained by an agency absent a specific exemption under the Public Records Act. Destruction of a record that is required to be retained is actually a crime. See RCW Chapter 40.16.

State law establishes retention schedules for all records. The relevant rule requires records of employee misconduct when an allegation is upheld to be kept **for 6 years** after final disposition of the case.

([See -v.6.1-\(august-2020\).pdf, page 90, 03003 "Complaints and Grievances - Upheld"](#)).²

The retention schedule explicitly states:

"Note: RCW 40.14.050 and RCW 40.14.060 vest authority to determine the retention period for public records in the State Records Committee, and not in the parties to a collective bargaining agreement"

The law is clear: records regarding a UW Police officer's misconduct, when there are findings that the misconduct occurred, must be retained for six years.

The UW had no leeway to bargain for any provision to destroy or not disclose those records for any period less than six years. On the other hand, the UW may bargain to

¹ I do want to recognize that the UW inserted an exception to the removal of records of misconduct after three years for instances of sexual misconduct. This reflects the excellent work of the UW in developing a new state statute requiring institutions of higher education to share findings of sexual misconduct with an employee's future employer upon request and to seek disclosure when the UW is hiring.

This public policy should apply to disclosure of police misconduct that involves biased policing, use of force or discrimination in addition to sexual misconduct.

² The Secretary of State (via State Archivist) has adopted a [specific records retention schedule for UW and UW Police](#) (starting page 106; Version 2.13 adopted August 2020). There are no specific provisions for personnel records that change the general records retention rules cited above (UW Police training records are required to be kept for six years, which also likely conflicts with the contract provision allowing for destruction of records in three or fewer years if the record is relevant to misconduct).

retain and disclose misconduct records for longer periods as a matter of sound public policy.

The provisions of the contract agreeing to destroy records in three years or less are ultra vires. They are void because they conflict with state law in addition to being an affront to public policies to end unconstitutional policing and for public disclosure.

The records retention schedule provides ample warning for the UW that it could not agree to destruction of records in any time less than the retention schedule via a collective bargaining agreement.

2. Sections 17.2 and 17.3 likewise provide for destruction of records relating to all internal investigations “upon request” in three years “if no similar incidents have occurred.” Pursuant to Section 17.3, this would include records of suspension. It is clear that the contract provisions are intended to provide for destruction of records regarding serious police misconduct; and to thwart both public disclosure of such serious misconduct and disclosure to future police agencies to which the disciplined UW Police officer may apply.

For the same reasons discussed in (1) above, this provision is ultra vires. It violates the statutorily mandated records retention rule requiring that the records be retained for a minimum of six years. If records of upheld investigations are requested under the PRA, this provision would result in the UW violating the PRA by withholding records that were destroyed in violation of the records retention rules.

As with Section 8.1, I appreciate that the UW has added language creating an exception from destruction for records relating to findings of sexual misconduct, in keeping with our new state law and the leadership that the UW provided in working to end “pass the harasser” practices.

3. Section 8.2.C of the contract provides that the UW will delete / redact the name of any officer or police employee under the agreement even if misconduct is found to have occurred (“sustained”), unless the employee’s name has already been made public.ⁱⁱ

The UW cannot agree to delete or redact any record, including the name of an officer who committed misconduct, in responding to a Public Records Act request unless a specific exemption to the PRA allows for such redaction.

In the event of police misconduct, it is hard to imagine a case where disclosure of the identity of a police officer who committed serious misconduct: 1) “would be highly offensive to a reasonable person”; or, 2) is “not of legitimate concern to the public.” These are the two elements that must be met for nondisclosure based on personal privacy pursuant to RCW 42.56.050.

Personal privacy provisions of RCW 42.56.230(3) allow an agency to withhold from disclosure records regarding a state employee who was not found to have committed misconduct. This provision does not exempt as violative of an employee’s (including police officer’s) right to privacy following a finding that they have committed misconduct, particularly if that misconduct includes discriminatory practices or use of force in violation of agency policies. RCW 42.56.250(12) provides for notice to an employee or their union of a request for records in the employee’s personnel or training file. A state agency may

not go further and agree not to disclose records in those files that do not fall within a specific exemption to the Public Records Act.

The need for disclosure in the public interest applies to an officer seeking employment with another public law enforcement agency as well as for news media or community members regarding current officers or those who may have left the force in recent years. There is a legitimate public interest in knowing if a police department imposed discipline on officers for specific violations, regardless of whether the officer moved to another department.

Community members, reporters, open government advocates and I share concerns that the UW would follow the contract to improperly destroy and withhold records of police misconduct unless challenged in court. At that point, the UW would expend considerable resources to defend nondisclosure of public records. This is not only unlikely to succeed, but the effort to prevent disclosure will have strong negative impacts on the UW's reputation for openness, the University's reputation as being committed to fighting discriminatory behavior and promoting constitutional policing, as well as negative impacts for public policy of our State.

[Decriminalize UW](#) recently wrote to the President and Provost a [letter](#) asking the UW to "Publicly commit to not hiring former police officers with disciplinary records as UW Police Officers."

This letter was signed by fifteen pages of faculty members and over 240 pages of signatories from the UW community.

The provisions of the new contract not only fail to include such a provision committing to not hire police officers with disciplinary records that involve unconstitutional policing or discrimination, but the **provisions directly undermine efforts** to ensure that UW Police – or other police departments – are aware of, and fully consider, disciplinary records of police officers to which the departments are making offers of employment.

As a State entity with a public service mission that most assuredly includes eliminating racism and racial or sexual discrimination in public employment, the UW should be setting an example ensuring disclosure of misconduct, including violence or discrimination (which includes sexual harassment) by its officers when they seek employment elsewhere.

Furthermore, the UW has a positive duty to ascertain if officers whom it seeks to hire have committed misconduct. These duties are undermined by the contract provision attempting to prohibit disclosure of disciplinary records involving such misconduct (remember, state law already provides protection and removal from personnel files of allegations which are not upheld or found credible; and, state law also provides for immunity of the UW in disclosing records with findings of misconduct to an employer conducting a reference check prior to hiring a UW police officer).

I urge you, President Cauce, the UW Regents and Attorney General Ferguson, to undertake an immediate public review of the provisions of the contract I have identified (and any others that others may identify) which conflict with the Public Records Act, record retention schedules and our State's and University's public policies to disclose and eliminate police misconduct, unconstitutional policing and institutional racism. It is widely recognized – including strong published research and the work of many UW faculty – that contract provisions regarding police discipline and nondisclosure are part of the continuing legacy of institutional racism.

I am, of course, available to meet (socially distant in keeping with sound public health practices) to discuss this and how to ensure an appropriate public review and appropriate changes. Thank you for your urgent attention to this matter of serious public policy.

Sincerely,



Representative Gerry Pollet, J.D. (UW)

Gerry.pollet@leg.wa.gov

End Notes:

ⁱ Contract Section 8.1 regarding removal of records of misconduct in three years or earlier:

The Employer shall remove evidence of Written Reprimands from the UW and all department files after three (3) years, upon officer request, provided no similar violations have occurred within the thirty-six (36) months from the date of the Reprimand **except those in which the employee was the subject of an investigation, allegation, or findings of sexual misconduct**. Once removed, the evidence of the Written Reprimand may not be used for further discipline nor introduced into arbitration by the Employer as evidence against the employee. Records of Suspensions will be removed from an employee's official and department personnel file after five (5) years if:

- A. Circumstances do not warrant a longer retention period;
- B. There has been no subsequent discipline; and
- C. The employee submits a written request for removal.

Nothing in this Section will prevent the Employer from agreeing to an earlier removal date, unless to do so would violate prevailing Washington State law.

ⁱⁱ Section 8.2.C of the contract provides:

Adverse material related to employee misconduct or alleged misconduct which is sustained may be released if required under a Public Records Act (PRA) request or as otherwise required by law. If released, the name of the employee will be deleted from the document, unless the name of the officer has already been made public or if disclosure is otherwise required by law.