



## **OMBUDSMAN'S REPORT**

### **Complaint Investigation & Findings**

*OMB07/0074 - April 30, 2008*

#### ***THE SITUATION***

In the late winter and early spring of 2007, the Boise Police Department (BPD) was testing applicants for open police officer positions. One of those persons (the Applicant) was invited to and participated in an oral test. This test, an in-person interview, was administered by a panel of BPD employees and one community volunteer. Following its usual procedure, the panel presented a series of police-related scenarios to the Applicant and asked him how he would handle each scenario. The oral test for the Applicant was halted part way through the interview when the Applicant disclosed to the panel members that a BPD manager (Officer #1) had provided him with information about the scenarios in advance of the test date.

#### ***THE COMPLAINT***

The Office of the Community Ombudsman received an email from the Complainant alleging that Officer #1 had provided confidential information to an applicant for a police officer position. It was alleged that the confidential information concerned oral test questions, that this information was provided to the applicant in advance of his oral test, and that the information given in advance to the applicant was, in fact, the questions used for his oral test. If this allegation were true, it would be a violation of § 11.01.13 Confidentiality of the Boise Police Department (BPD) Policy and Procedures Manual in effect at that time (March 2005 edition).

## ***THE COMPLAINT INVESTIGATION***

In the course of this investigation I reviewed the following records:

1. Documents related to all applications for the position of Police Officer filed with BPD by the Applicant.
2. Documents related to oral test interviews given to the Applicant by BPD.
3. Documents related to past oral test questions used by BPD to interview applicants for the position of Police Officer.
4. Documents related to the participation of Officer #1 on oral boards and his access to oral test questions prior to the latest interview of the Applicant.
5. Documents related to oral test questions used by BPD to conduct so-called "Mock Oral Boards."
6. Email messages sent between the Applicant and Officer #1 prior to and after the Applicant's oral test.
7. Email messages related to this incident, which were sent to or from the involved employees.
8. Documents offered by Officer #1 as evidence that some or all of the content of the oral test questions used to interview the Applicant were publicly available through other sources.

This investigation also included interviewing all four members of the oral board that conducted the latest interview of the Applicant, a BPD employee who was present during the interview but was not a member of the oral board, three BPD managers who were informed of the allegation shortly after the Applicant's interview, and Officer #1 (who was not a member of the oral board or present at the Applicant's interview). Despite several attempts on my part, and by BPD, to contact the Applicant and schedule an interview, the Applicant did not respond. As a result, no interview was conducted with the Applicant.

### ***WHAT THE COMPLAINT INVESTIGATION FOUND***

Based on the preponderance of the evidence obtained and reviewed in the course of this investigation, I issued the following findings of fact:

1. Officer #1 has been acquainted with the Applicant through personal contacts since 2001.
2. The Applicant applied to be a police officer with BPD on three separate occasions: in 2002, 2005, and 2007.
3. The Applicant was interviewed by oral boards in connection with each of these three applications.
4. All three oral board interviews of the Applicant included one or more questions that were "scenario-based."
5. The specific details of two scenario-based questions (Question #5 and Question #6) used during the 2007 interview of the Applicant were not included in the interview questions used in 2002 and 2005 by the oral boards that interviewed the Applicant.

6. Officer #1 acted as a member of an oral board for several police officer candidates two months prior to the Applicant's interview in 2007. During these interviews, Officer #1 was exposed to and used two scenario-based questions that contained the exact same wording as two scenario-based questions used during the Applicant's 2007 interview (Question #5 and Question #6).
7. The specific details of both Question #5 and Question #6 used during the Applicant's 2007 oral board interview were not included in any of the interview questions used during the "Mock Oral Boards" conducted by BPD at Boise State University prior to the Applicant's 2007 interview.
8. Some of the details contained in Question #6 used during the Applicant's 2007 interview are similar to details included in the book "... officer down code three." by Pierce R. Brooks.
9. During his 2007 interview, the Applicant demonstrated prior knowledge of specific details contained in Question #5 and Question #6 used by the oral board.
10. Approximately three days before the Applicant's 2007 interview, Officer #1 met with the Applicant at the Applicant's residence regarding the Applicant's up-coming oral board interview. During this meeting, Officer #1 and the Applicant spoke about some or all of the content contained in Question #5 and Question #6 that were later asked by the oral board during the Applicant's interview.
11. Following the Applicant's 2007 oral board interview, that same day, the four members of the oral board, along with a BPD employee who had observed the interview, met with two BPD managers and informed them that the Applicant had

demonstrated prior knowledge of the details of two scenario-based questions and had disclosed to them that the source of this information was Officer #1.

12. At that meeting one of the two managers accepted responsibility for looking into the allegation made by the oral board against Officer #1. This same manager also ordered the four members of the oral board and the observer not to speak of the allegation to anyone else.
13. In connection with the manager's inquiry into the oral board's allegation against Officer #1, the manager spoke with the members of the oral board, the observer, and Officer #1. The manager did not interview the Applicant or cause anyone else to interview him regarding the allegation made against Officer #1. The matter was neither documented as a complaint nor referred for investigation to the Office of Internal Affairs (OIA).
14. The chief of police was informed of the inquiry being conducted by the manager and gave final approval to the decision to handle the matter informally and not refer it for investigation to OIA.

### ***OMBUDSMAN'S ANALYSIS AND FINDINGS***

The Boise Police Department's policy § 11.01.13 – Confidentiality<sup>1</sup> states:

*No employee shall divulge any confidential information obtained in the course of employment with the Department without proper authority.*

The preponderance of the evidence supports the conclusion that the Applicant knew a significant amount, if not all of the content for Question #5 and Question #6 prior to being

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<sup>1</sup> From the April 1, 2005, edition which was in effect in 2007 prior to October 31, 2007.

asked these questions during his 2007 interview. It has also been established that he was not asked either of these questions during his two previous BPD oral board interviews, nor was he given the information in connection with the “Mock Oral Boards” put on by BPD at BSU. In addition, the evidence clearly shows that Officer #1 was exposed to the specific content of Question #5 and Question #6 while acting as a member of an oral board just two months prior to the Applicant’s interview.

The evidence also supports the conclusion that the Applicant and Officer #1 spoke about some or all of the specifics of these two questions during their meeting three days before the Applicant’s scheduled oral board interview. The preponderance of the evidence clearly supports the conclusion that Officer #1 was the primary source of the Applicant’s knowledge of these two questions. The evidence-based facts supporting this conclusion are as follows:

- Officer #1 knew the details of the two questions before meeting with the Applicant.
- The Applicant was not exposed to the details during either of his prior BPD interviews or at the BSU “Mock Oral Boards”.
- When, during his 2007 interview, the Applicant was asked who had helped him gain his knowledge of the specific content of Question #5 and Question #6, he identified Officer #1 as that person.
- Just two days after his 2007 interview, the Applicant sent an email to Officer #1 in which he (the Applicant) wrote, “I got done answering one of the questions and one of the officers said, ‘sounds like you’ve heard this (or these) questions before.’ I thought he was just talking about the one I had just answered. I said I had – it was the one you and I went over [following this were included specific details from the question, details that have been excluded to preserve their confidentiality].”

Officer #1 strongly denies providing the Applicant with information about any specific scenario, including Question #5 and Question #6. Furthermore, he asserts that the Applicant could have been exposed to the content of these questions through any one of several different sources other than him. However, given the Applicant's statement to members of the oral board implicating Officer #1 and the statement in his email to Officer #1 two days later, it is more likely that Officer #1 was the source of the Applicant's foreknowledge of the details contained in these questions.

Having established that Officer #1 provided the Applicant in advance with specific details contained in two of the interview questions the Applicant was to be asked, it remains to be shown whether or not that information was, "confidential information obtained in the course of employment with the Department [and divulged to the Applicant by Officer #1] without proper authority," as stated in BPD Policy and Procedures Manual § 11.01.13 – Confidentiality.

BPD policy provides no definition or list of examples of what constitutes, "confidential information." Nonetheless, it is considered generally accepted practice in civil service and human resource settings to consider as confidential the content of oral and written questions used in employment testing. In the same fashion, the content of future test questions for professional licensing purposes (e.g., attorneys, doctors, pharmacists, etc.) is closely guarded and not revealed to applicants prior to the administration of a written test or oral examination. To be certain, many individuals and organizations coach potential test takers prior to their scheduled employment or professional licensing test, but the content used in such cases is never gleaned from test questions that are still in use or will be used in the future. As was the case with BPD's "Mock Oral Boards," the content used for pre-test coaching and preparation comes from past test questions which will not be used in the future.

While BPD's own police officer hiring process does not contain written protocols regarding the confidentiality of the questions used in oral board interviews, those involved in the

process who I interviewed clearly understood that the specific content of oral board questions are not to be shared with anyone who is not on that oral board.

In addition, Officer #1 himself acknowledged that it would be unethical and inappropriate for him to provide a job applicant with information in advance about the content of the questions to be used in the applicant's employment screening interview.

In summary, the preponderance of the evidence supports the conclusion that the specific scenario information contained in Question #5 and Question #6 and given by Officer #1 to the Applicant was confidential information obtained by Officer #1 in the course of his employment with BPD. Furthermore, the preponderance of the evidence supports the conclusion that Officer #1 divulged this confidential information to the Applicant prior to the Applicant's scheduled interview without authorization to do so from BPD.

For the reasons stated above, I find that Officer #1 violated § 11.01.13 – Confidentiality, of the BPD Policy and Procedure Manual.

Two managers were immediately made aware of the allegation that Officer #1 had given the Applicant details about some of the questions to be asked in advance of the Applicant's scheduled interview. One of the managers was Officer #1's direct supervisor and accepted responsibility for addressing the allegation raised by the members of the oral board.

The BPD Policy and Procedures Manual gives clear direction to employees and supervisors regarding the handling of allegations made against BPD employees. When an allegation is made by a supervisor or another employee, § 12.03.05E Department-Initiated (DI) Investigations states:

*A case initiated by a supervisor or by information brought to supervisory attention by an employee is classified as DI investigation, if such information*

were received from a citizen would constitute a complaint. DI investigations will include the following procedures:

- *DI cases shall be further classified and investigated as Class I or Class II investigations accordingly.*
- *The investigator shall report all Class I DI incidents by initiating an IIR and routing it to OIA through the chain-of-command.*
- *Class II DI incidents may be handled informally at the Division level and do not require reporting to OIA unless:*
  - *The issue is brought to OIA's attention directly by the reporting employee*
  - *The investigation is initiated by OIA*
  - *The Division determines a formal investigation is necessary*
- *If a DI incident is initiated by a supervisor or OIA subsequently receives a citizen complaint regarding the same incident, the DI investigation shall be reclassified as a citizen complaint and shall be handled accordingly.*

The above quoted section of the BPD Policy and Procedures Manual refers to “Class I or Class II investigations” in specifying how a DI case shall be classified and investigated. Two previous sections in the same manual (§§ 12.03.05A and 12.03.05B) provide the necessary criteria for determining whether a case is Class I or Class II. These sections of the policy manual also describe how a Class I or a Class II investigation must be conducted.

#### *12.03.05A Class I Complaints*

*Class I complaints are complaints that allege needless or excessive force, brutality, violations of criminal law (excluding minor traffic misdemeanors), corruption, breach of civil rights, abuse of authority, false arrest, bias policing, patterns of similar Class II complaints, and others as designated by the Chief. A sustained finding could result in discipline up to and including termination. A Class I investigation shall include the following procedures:*

- *Completion of the IIR, documenting the complaint, and appropriate supplements.*
- *A full investigation by an investigator of OIA. In some cases, this investigation may be directed to the Division for investigation. The Division Commander may assign the investigation to a supervisor (not including acting supervisors) for completion.*
- *Audio recording of interviews of involved parties with direct knowledge involving the allegation.*

- *Written or verbal notice regarding the receipt of the complaint to the employee prior to that employee's interview.*
- *Legal notification or review due to civil and/or criminal liability (if needed).*
- *Advise an employee under investigation of Garrity privileges using the Administrative Privileges form prior to the interview.*
- *Manage and track the investigation through OIA with an assigned control number.*
- *If practical, the complainant can be asked to complete a Verified Citizen's Complaint Form. A complaint will not be rejected because of the complainant's refusal to complete this form, but this factor may be considered in the complaint's overall investigation.*
- *If there are any claims of injury, the complainant will be asked to sign a Medical Release Form so the treatment records may be obtained.*
- *A written response from the Chief to the complainant upon final disposition of the case, unless waived by the complainant, as well as a written response from the Chief to the involved employee, notifying him/her of the investigation's outcome.*

#### *12.03.05B Class II Complaints*

*Class II complaints are complaints that allege inadequate services, discourtesy, minor performance issues, improper procedure, or other less serious and non-criminal conduct. Typically, Class II complaints will be investigated by personnel assigned to the employee's Division, but may be assigned to other Divisions or OIA. A Class II investigation shall include the following procedures:*

- *Completion of the IIR, documenting the complaint, and appropriate supplements. The original IIR will stay with the assigned investigator until the investigation's completion. Class II investigations assigned to a Division may be completed by any employee of supervisory rank. Class II complaints received by Division personnel will normally be investigated by the accused employee's supervisor.*
- *Audio recording of interviews of involved parties with direct knowledge involving the allegation.*
- *Written or verbal notice regarding the receipt of the complaint to the employee prior to that employee's interview.*
- *An investigation sufficient to determine the complaint's merits and disposition. The investigation should be completed within 10 days of receiving the complaint.*
- *Legal notification or review due to civil and/or criminal liability (if needed).*

- *A written or verbal notice shall be given to the employee and complainant regarding the final disposition of the complaint. Verbal notices shall be noted in the investigation.*

The allegation made by the Complainant and the other members of the oral board was that Officer #1 compromised the fairness of BPD's police officer hiring process by giving the Applicant confidential information not available to the other candidates. While this alleged act of misconduct is not specifically mentioned in the definitions of either a Class I or a Class II complaint, it seems something of an understatement to describe it as, "less serious and non-criminal conduct," similar to the other alleged acts of misconduct specifically mentioned in the definition of a Class II, i.e., "inadequate services, discourtesy, minor performance issues, [or] improper procedure" (12.03.05B Class II Complaints). In addition, it is reasonable to assume that the conduct alleged by the members of the oral board, if found to be true would, "result in discipline up to and including termination" (12.03.05B Class I Complaints).

Officer #1 had been on police officer selection oral boards in the past. As such, he knew how much importance BPD put on the oral board process in assessing the suitability of candidates for the job of police officer. To potentially compromise this hiring process by providing an applicant with the details of the specific scenario-based questions to be used in an upcoming interview would be a serious act of misconduct. It would be a violation of the trust placed in Officer #1 and an act of favoritism that would be unfair to all the other applicants for the job who did not know the details of the scenarios before their interviews.

The Ethics section of the BPD Policy and Procedures Manual incorporates by reference the Law Enforcement Code of Ethics and Code of Conduct, stating, "While on- and off-duty, an officer will conduct himself/herself in accordance with the Law Enforcement Code of Ethics and Code of Conduct" (§ 11.02.01). The Law Enforcement Code of Ethics states, in relevant part:

*Whatever I see or hear in a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty. I will never act officiously or permit personal feelings, prejudices, political beliefs, aspirations, animosities, or friendships to influence my decisions.*

Similarly, the Law Enforcement Code of Conduct states, in relevant part:

*While on- and off-duty, an officer will conduct himself/herself in accordance with the Law Enforcement Code of Ethics and Code of Conduct.*

Given all of the above, it is reasonable to conclude that the allegation against Officer #1 made by the oral board to the two managers called for a Class I investigation as described in §§ 12.03.05A and 12.03.05E of the BPD Policy and Procedures Manual. However, even if one were to accept the conclusion that this was, a Class II allegation, the complaint clearly questioned the ethics of a senior department manager. In such a case, the most prudent course would be to document the allegation and conduct a formal OIA investigation.

However, the manager who accepted responsibility for handling the matter did not refer the matter to OIA, nor were the steps for a Class I investigation followed. Instead, this manager assumed responsibility for all follow-up actions related to the allegation.

The manager's first step was to speak with Officer #1. The manager also notified the chief of police about the concerns raised by the Complainant, as well as the results of his interview with Officer #1. The manager concluded that the Applicant's performance during the interview was a result of being well coached by Officer #1, not of having been given the specific details of any of the interview questions ahead of time. As a result, the chief authorized the manager to handle the matter informally. No record of the allegation was made, OIA was not notified, and no DI investigation was conducted.

Handling this matter informally meant that no attempt was made to question the Applicant and find out from him exactly how Officer #1 helped him prepare for the oral board. While it is possible that the Applicant might have declined an invitation to speak with an OIA investigator, it is also possible that he would have acquiesced to such a request if it was made shortly after the incident while he still had hopes of being invited back for a make-up oral board interview. In addition, it would have been valuable to obtain recorded statements from Officer #1 and the members of the oral board within a week or two of the incident, not to mention gathering evidence from Officer #1's email account sooner rather than later.

The final decision to handle this allegation informally was made by the chief of police, based on a recommendation from the manager. This decision was well within the chief's authority to make, since he has final say over policy and discipline within BPD. Nevertheless, keeping the response informal prevented him and the manager from seeing all the relevant facts and evidence associated with this incident and taking appropriate disciplinary action on a timelier basis. It also had the potential to create the perception within BPD that the agency was unwilling to deal openly and objectively with allegations made against senior managers.

### ***OMBUDSMAN'S FINDINGS***

Officer #1:

P.M. § 11.01.13 – Confidentiality

SUSTAINED

### ***OMBUDSMAN'S POLICY RECOMMENDATIONS***

In order to contribute to the prevention of similar unethical behavior in the future and to put on notice all those involved in BPD's selection process, I recommend the following:

1. That the BPD redesign its process for the development and security of oral board test questions so that specific questions are not repeated from one cadre of applicants to another.
2. That any person who is given access to questions to be used in any BPD hiring and/or selection test be required to sign a confidentiality agreement clearly stating that all test materials and content are not to be disclosed to any person outside of the actual administration of the test itself.



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Date: May 6, 2008

To: Pierce Murphy, Community Ombudsman

From: Chief Michael F. Masterson

MEMORANDUM

RE: OMB 07/0074

I have read and reviewed your report OMB 07/0074. In regard to your recommendation for board members to sign a confidentiality agreement, I am going to maintain our current policies as I believe this was an aberration. Current policy does address confidentiality issues and a large majority of the information our employees deal with is of a confidential nature and therefore, I do not feel it appropriate to break this particular information area out. We will, however make a special announcement regarding a confidentiality requirement to members of all hiring, promotional and specialty assignment selections processes.

In reference to your recommendation as to creating a system of random questions, I agree there is merit in this suggestion. I have directed staff to create a system in which a different combination of questions is chosen for each interview process.

Should you wish to discuss further or have additional recommendations, please contact me.

*Boise Police Department*