



## **OMBUDSMAN'S REPORT**

### **Complaint Investigation & Findings**

*OMB08/0068 - February 19, 2009*

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

In early 2008, Officer #1 and Officer #2 were working together as a two-person unit. Officer #1 observed a white, four-door SUV pull out of a gas/convenience store in northwest Boise. Officer #2, who was driving the police car, initiated a traffic stop. The SUV pulled into the parking lot of a second gas/convenience store located a few blocks away. The driver of the SUV got out of the vehicle, pointed what appeared to be a gun at Officer #1, and fled. Officer #1 and Officer #2 pursued the suspect on foot. Approximately fifty additional officers arrived to assist in setting up a perimeter and attempting to locate the suspect. The suspect was not located.

The Complainant learned the next day that he had been identified as the suspect in the above incident. He contacted the Boise Police Department (BPD) and made arrangements to meet officers in the lobby of the Public Safety Building. After speaking with officers, including Officer #1, he was placed under arrest and booked into the jail.

During the course of the investigation, another officer, Officer #3, obtained surveillance video from the first gas/convenience store, where the SUV had first been spotted. Officer #3 delivered this video tape to Officer #1. In the process of preparing for trial on the charges against the Complainant, it became clear the Officer #1 had returned the video to the business and that it was no longer available for use at trial by either the prosecution or the defense. The charges against the Complainant were then dismissed and he was released from custody.

## ***THE COMPLAINT***

The Complainant contacted the Office of the Community Ombudsman several days after being released from jail. The Complainant alleged that, by returning the video to the gas/convenience store before trial, Officer #1 failed to preserve evidence which may have served to clear the Complainant of the crime. If this allegation were proven true, Officer #1's actions may have violated § 11.03.02 of the BPD Policy and Procedures Manual.

The Complainant also alleged that, as a result of an inadequate investigation conducted by Officer #1, he had been wrongly arrested and held in jail for approximately five months. Specifically, the Complainant alleged that Officer #1 had failed to investigate a lead about a different suspect provided by another BPD officer and had ignored evidence to support the Complainant's alibi that he was elsewhere at the time the crime was committed. If this allegation were proven true, Officer #1's actions may have violated § 11.03.02 of the BPD Policy and Procedures Manual.

## ***THE COMPLAINT INVESTIGATION***

Due to the seriousness of the allegations and the complexity of the issues involved, the Ombudsman's Office undertook a lengthy investigation and detailed analysis of the incident and subsequent police investigation. The following steps were taken:

- Interviews of the Complainant.
- Interviews of the involved and investigating BPD officers.
- Examination and analysis of all related police reports, records, and related documentation.

- Examination and review of all audio recordings made by BPD officers during the incident and the subsequent investigation.
- Review of related court records, along with relevant transcripts and recordings.
- Review of pertinent email correspondence to and from Officer #1.

### ***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. Late in the evening, Officer #1 and Officer #2 observed a white SUV with its lights off pull out of a gas/convenience store.
2. Officer #1 and Officer #2 followed the SUV, activated the emergency equipment on their police car, and initiated a traffic stop on the SUV.
3. The SUV pulled into a second gas/convenience store and stopped near one of the gas pumps. Officer #1 and Officer #2 followed the SUV into the gas/convenience store parking lot.
4. Officer #1, who had been the passenger in the police vehicle, began to get out of the police car after it stopped behind the SUV. He saw the driver of the SUV begin to get out of the vehicle. The driver of the SUV then reached back inside the SUV and produced an object that appeared to be a handgun, which he pointed in the general direction of the officers. The driver of the SUV then ran from the scene. There was a female passenger in the front passenger seat of the SUV at this time.

5. Officer #1 and Officer #2 both pursued the suspect on foot.
6. The officers used their police radio to request the assistance of other officers and to describe the suspect and the clothing he was wearing, including a black "hoodie" sweatshirt.
7. A large number of police officers from BPD and surrounding agencies responded to assist in tracking the suspect, setting up a perimeter, and searching the surrounding neighborhood. The suspect was not located.
8. When officers arrived at the gas/convenience store from which the suspect had fled, the SUV and its female passenger were gone.
9. While Officer #1 and Officer #2 saw a license plate on the SUV, neither officer was able to note its number.
10. During an extensive and, at times, house-to-house search of surrounding neighborhoods, one person mentioned the Complainant's name to officers.
11. After the search was discontinued, Officer #1 and Officer #2 located a previous booking photo of the Complainant. Based on this photograph, Officer #1 identified the Complainant as the driver of the SUV and the person who had pointed a gun at him.
12. The next day, at the request of Officer #1, Officer #3 went to the first gas/convenience store and obtained the original videotape that was recorded by the store's security system at the time of the incident. Officer #3 delivered the videotape to Officer #1's internal BPD mailbox.

13. The day following the incident, the Complainant contacted the Boise Police Department and made arrangements to meet officers at the Public Safety Building. At this meeting, the Complainant and a friend of his told officers that the Complainant took a taxi from his mother's house to his friend's house during or shortly before the time when the incident occurred.
14. The Complainant was placed under arrest and charged with the crimes of Aggravated Assault on a Law Enforcement Officer, a felony, Idaho Code Sections 18-901(b), 905(a); and 915(b), and Resisting and Obstructing Officers, a misdemeanor, Idaho Code Section 18-705.
15. After the Complainant turned himself in, Officer #1 reviewed the videotape obtained by Officer #3 from the gas/convenience store. The videotape showed that, around the same time as the incident, a man came into the store wearing a "hoodie" sweatshirt that covered his face. The lower part of the man's face was visible; however his eyes were mostly covered. The man was not wearing an outer jacket.
16. Six days after the arrest of the Complainant, an employee of the Prosecutor's Office sent Officer #1 an email asking if Officer #1 still had the surveillance video from the gas/convenience store, or if it had been checked into the Property Division.
17. Officer #1 sent a response email three days later stating that he had the tape and had reviewed it, along with his partner. Officer #1 further stated that, since the tape did not show the suspect going into the gas/convenience store, he had not booked the tape into property because it had no evidentiary value. Officer #1 added that the store wanted the tape back. Officer #1 then asked the representative from the Prosecutor's Office to let him know if the Prosecutor did not want him to return the tape to the store.

18. Officer #1 did not receive a response to his email reply to the Prosecutor, summarized in Finding #17, above.
19. The videotape in question was subsequently returned to the store.
20. A month after the incident, the attorney representing the Complainant filed a Specific Request for Discovery in the criminal case asking for copies of any and all surveillance video.
21. A week after this filing, an employee of the Prosecutor's Office sent an email to Officer #1 asking him to send them a copy of the surveillance video from the gas/convenience store regarding the criminal case involving the Complainant.
22. Officer #1 sent a reply email the same day stating that he had already replied to this email and informed them that the video from the incident did not contain anything relative to the case. Officer #1 said that he had watched the video and was unable to see the suspect or the vehicle related to the incident. Officer #1 then stated that he had previously asked to be advised if the video was still wanted and had not received a response. Consequently, he said, the video had been returned. Officer #1 then attached a copy of his original email exchange to this reply email.

### ***OMBUDSMAN'S ANALYSIS***

This case involves two allegations of misconduct against Officer #1. The first allegation is that Officer #1 failed to handle evidence properly. The second allegation is that Officer #1 failed to conduct a thorough investigation of an alleged crime. Both allegations could potentially be violations of the Boise Police Department's policy (§ 11.03.02) Performance of Duty, which states:

*An employee shall perform his/her duties in a manner which will maintain the highest standards of efficiency in carrying out the Department's functions and objectives. Satisfactory performance and competence is demonstrated by:*

- *Adequate knowledge of the application of laws required to be enforced*
- *Willingness and ability to perform assigned tasks properly*
- *Conformance to the work standards established for the employee's rank, grade, or position*
- *Taking appropriate and timely action when a crime, disorder, or other situation requiring police action occurs*

#### **A. Preservation of the Evidence.**

The first question is whether Officer #1 violated BPD policy by failing to preserve the surveillance video obtained from the gas/convenience store. The preservation of exculpatory evidence is a legal duty imposed on police officers.

There is no doubt that Officer #1, or some other officer acting at his direction, released the videotape in question from police custody and returned it to the gas/convenience store. The Complainant believed that Officer #1 had done this of his own volition and without proper authorization from the Prosecutor in the case. The Complainant apparently drew this conclusion on the basis of certain statements made by the Prosecutor during a hearing related to this evidence.

However, the evidence shows that Officer #1 clearly communicated to the Prosecutor, via email, his intent to return the tape to the gas/convenience store if the Prosecutor had no objection. Having received no response from the Prosecutor, Officer #1 returned the video to the store. The following month, he received a second email from a different employee of the Prosecutor's Office asking him to send a copy of the surveillance video. At that point, Officer #1 replied by explaining what he had done and referring to his earlier email exchange with the Prosecutor's Office.

It is clear from documentary evidence that Officer #1 requested advice from the Prosecutor's Office concerning whether he should retain the videotape that had been collected as potential evidence in the case. The preponderance of the evidence indicates that Officer #1 advised the Prosecutor's Office of the content of the tape as he saw it from his point of view as a police officer. He also told the Prosecutor's Office that he felt it had no evidentiary value and that he planned to return the tape to the gas/convenience store unless he heard differently. The Prosecutor's Office did not respond. In light of the fact that Officer #1 had advised the Prosecutor's office of his intent to return the tape absent advice to the contrary, it was reasonable for Officer #1 to rely on the Prosecutor's lack of response as agreement to his stated intent to return the surveillance tape to the gas/convenience store. Officer #1 had no obligation to second-guess, or otherwise question, the Prosecutor's apparent response.

It would seem that the Complainant's allegation in this case was based, in part, on a statement made by the Court at a hearing regarding the videotape that seemed to criticize Officer #1's decision to return the tape based on the assumption that Officer #1 had acted unilaterally in this regard. It now appears that, when the Court made this statement, it did not have all the facts available. Officer #1 had not made a unilateral determination regarding the value or lack of value of the evidence. In fact, the Prosecutor's Office made a *de facto* determination regarding the evidence when no one responded to Officer #1's first email. Officer #1 had an opinion regarding the evidence, but did not make a determination regarding the return of the evidence without first asking advice from the Prosecutor's Office. Officer #1 returned the videotape to the gas/convenience store only with the Prosecutor's apparent assent. Based on the evidence available to this investigation, the preponderance does not support a finding that Officer #1 failed in his duty to the State in its prosecution of this case when he returned the surveillance video to the gas/convenience store.

It is important to note that, at the time this incident occurred, there was no BPD policy in place regarding the documentation of evidence or the duty to disclose so-called "Brady Material." On January 1, 2009, new BPD policies went into effect regarding these issues.

Boise Police Department's policy (§ 11.03.16E) Documentation of Evidence, is a new policy section; it states:

*The Department recognizes its obligation to document all evidence, including exculpatory evidence, in its investigations. Exculpatory evidence is any evidence that may benefit the defense of any criminal case by showing facts that are favorable to the defendant or those facts which may disprove the allegations of the charges. All such evidence shall be documented and made available to prosecutors.*

This policy section places an affirmative duty on officers to be able to recognize potentially exculpatory evidence, to document that evidence, and to provide that evidence to prosecutors.

In addition to BPD Policy § 11.03.16E, BPD Policy § 12.07.00 also became effective on January 1, 2009. It governs the disclosure of Brady material. It states:

*Duty to Disclose Brady Material and/or Exculpatory Evidence. The Boise City Police Department recognizes its duty and obligation to document and provide all evidence, including potentially exculpatory evidence, to the prosecuting agencies.*

The following section, BPD Policy § 12.07.01, includes the following definitions among the five set forth:

*Brady Material: Evidence relevant to the credibility of all witnesses, including police officers [sic] which can include untruthfulness, criminal activity and bias.*

*Exculpatory Evidence: Evidence that may benefit the defense of any criminal case by showing facts that are favorable to the defendant or those facts which may disprove the allegations of the charges.*

Together with BPD Policy § 11.03.16E, these policy sections underscore the obligation of police officers to be able to recognize exculpatory evidence and Brady Material, to document that evidence, and to make it available to prosecuting entities.

These policies were not in effect at the time that the incident in question occurred. Consequently, patrol officers who had not been trained to recognize exculpatory evidence, to preserve it, and to provide it to prosecutors, did not have the obligations defined by these new policies. Based on the facts presented and the policies in place at the time the incident occurred, it is my finding that Officer #1 did not violate BPD policy when he returned the videotape to the gas/convenience store. Consequently, I have issued a finding of exonerated with respect to the allegation that Officer #1 violated BPD policy § 11.03.02 Performance of Duty by failing to handle evidence properly.

### **B. Investigation of the Crime.**

The other allegation was that Officer #1 failed to conduct an adequate investigation of the charges against the Complainant. The more serious crime of which the Complainant was accused was Aggravated Assault on a Law Enforcement Officer, which is a felony. He was also charged with a misdemeanor, Resisting and Obstructing an Officer. A detective from BPD's Criminal Investigations Division (CID) is usually, but not always, called in to investigate any felony crimes. In this case, however, Officer #1's supervisor did not call in a detective. Instead, he assigned the investigation of the case to Officer #1, even though Officer #1 was the victim of the alleged aggravated assault.

When Officer #1 was assigned to investigate the case, he did so while continuing to perform his regular patrol duties. He was not given any release time or the flexibility of overtime hours in order to pursue leads and follow up on this case. Also, due to the fact that Officer #1 was not a detective, other officers who obtained information related to the incident did not forward this information to Officer #1 as they typically would in a felony investigation being

managed by a detective. Finally, Officer #1, while trained extensively as a police officer, had no specific training related to conducting a major, felony investigation.

As part of his investigation, Officer #1 identified the Complainant, drove past the Complainant's mother's home several times, attempted to contact a witness in order to conduct a photo line-up, drove certain routes in an attempt to either refute or support the Complainant's alibi, and pursued other leads he had been given. Based on the fact that Officer #1 is not a detective, that he was not given any extra or release time in which to perform the investigative duties he had been given in this case, that BPD was short on officers during the time period following the incident, and that no one requested that he perform any type of follow-up investigation, it is my conclusion that Officer #1 performed an adequate investigation of the case given his experience, training, and assignment within BPD. For this reason, I have issued a finding of exonerated with respect to the allegation that Officer #1 violated BPD policy § 11.03.02 Performance of Duty by not adequately investigating the crimes for which the Complainant had been charged.

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

#### Allegation #1

It was alleged that Officer #1 violated BPD policy § 11.03.02 Performance of Duty by failing to secure and preserve evidence related to the case against the Complainant.

#### **Exonerated**

#### Allegation #2

It was alleged that Officer #1 violated BPD policy § 11.03.02 Performance of Duty by failing to conduct a thorough investigation into the charge against the Complainant.

#### **Exonerated**



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