

The Local Government LIABILITY BEAT



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8 TIPS FOR WRITING BIASED-BASED POLICING REPORTS

By Richard R. Johnson, Ph.D., PATC LLRMI

Biased-based policing is policing activities (such as stops, searches, arrests, use of force, etc.) that rely on stereotypes about a citizen's race or ethnicity rather than a citizen's actual behavior. Many law enforcement agencies conduct self-examinations for evidence of biased-based policing within their ranks, and present their findings to the public in a bias-based policing report. Some agencies write these reports voluntarily out of a sincere commitment to transparency and a desire to reassure their citizenry that biased-based policing is not occurring. Many do so in a sincere effort to root out biased-based policing activity within their agencies. Other agencies also issue biased-based policing reports because they are involuntarily compelled to do so by a state law, city ordinance, lawsuit settlement, or consent decree. Finally, some agencies create biased-based policing reports to comply with Standard 1.2.9 of the Commission for the Accreditation of Law Enforcement Agencies (CALEA).

Regardless of the reason behind producing such a report, what is contained in your report, and the manner in which the information is presented, can have far-reaching consequences for the future of your agency. What is contained in your report will influence public opinion about your agency. What is in your report will be

reported by the media, with quotes sometimes taken out of context. Material from the report could be used in criminal trials by defense attorneys trying to argue that their clients were unfairly targeted for police attention. Details of your report may influence the results of civil suits. Finally, for those under a lawsuit settlement or consent decree, the findings of your report might influence the future length or conditions of external oversight. Therefore, how these reports are written is critical to the reputation and operations of your agency. Great care and sufficient resources need to be devoted to these reports.

Since 2003 I have been assisting law enforcement agencies with their biased-based policing studies and reports. While pursuing my doctorate at the University of Cincinnati, I worked on a number of these projects and contracts for Dr. Robin Engel. For three years I was the project manager of a biased-based policing study commissioned by the Pennsylvania State Police. I also served as a research associate on similar studies for three other state agencies and two city departments. Since graduating from the University of Cincinnati, I have gone on to confidentially assist several law enforcement agencies with the organization and writing of their biased-based policing reports. Also, in the course of my research and teaching at the University of Toledo, I have had the opportunity to read many dozens



of other biased-based policing reports. Through these experiences I have seen 8 tips to improving biased based policing reports so that they reduce the likelihood they will be misinterpreted and used against your agency.

Tip 1. Consider Your Audience

The reality is that most citizens within your jurisdiction will have absolutely no desire to read your biased-based policing report. The persons most likely to read your report are the few individuals who are extra-sensitive to issues of race and civil liberties, and already hold a biased opinion that profiling is occurring within your agency. Other readers will be attorneys looking for a legal argument they can exploit against your agency in a criminal or civil case. Members of the media will likely also read the report, looking for any tidbit that they can sensationalize to raise their readership or viewer ratings. As a result, you need to convince these readers that your agency is sensitive to their concerns, and that you are taking efforts to protect their liberties. You need to alleviate their fears by demonstrating that bias-based policing is not occurring within your agency and, if it does occur, it will be severely punished.

Begin your report by expressing sincere concern about the potential for racial profiling and the biased treatment of citizens by officers. You need to convince the reader that this is why you are writing the report, not just because of a state law, consent decree, or CALEA accreditation requirement. Proofread the document many times for words or statements that may be considered offensive to specific constituent groups. Also remember that this is not a standard police report written for court. Rather, it should be written as a persuasive argument, like in a debate speech or campaign speech. Using facts and persuasive language, your goal is to convince your audience that your agency is concerned about this issue. Provide examples that your agency takes this issue seriously.

As evidence you can discuss the cultural diversity or biased-based policing training your officers receive, written policies prohibiting biased-based policing, and the proscribed disciplinary action when bias-

based policing is discovered. You should discuss any community relations efforts your agency has taken to bridge the rift between the police and racial or ethnic minority groups within your community. You could discuss your agency's diversity statement,

your diversity strategic hiring plan, and the current racial, ethnic, or gender diversity of your employees. (If little diversity exists, but your community also lacks diversity, point this out to the reader.) Finally, when you move into the discussion of the biased-based policing data collection and analysis, it should appear that this is just one of many steps your agency is taking to be sensitive to this issue.



Tip 2. Report Data by Beat/District

Each patrol beat or district has its own unique characteristics that affect how officers patrol. One beat may be heavily populated with public housing units, causing officers to spend the majority of their time responding to calls for service or stopping suspicious persons on foot. Another beat may consist of mostly factories, causing officers to focus more on traffic stops and preventive patrol against burglars. A third beat may be comprised of mostly shopping malls, causing officers to spend their time on order maintenance, traffic collisions, and shoplifting complaints. These different patrol orientations will produce different rates of vehicle stops, pedestrian stops, and arrests, skewing the agency-wide averages for these types of activities.

Likewise, the racial composition of the residents of each beat or district are usually very different. If one beat district a higher crime rate, and a larger proportion of non-white residents, the higher rate of stops and arrests in this single district will inflate the city's overall percentage of non-whites stopped and arrested.

Therefore, if at all possible, never report total jurisdiction-wide statistics. Total agency statistics lead to an untrue picture of your agency's work and reporting them will almost always make your officers appear to be racially profiling when they really are not. If comparing the racial composition and crime problems of one district to another is like comparing apples to oranges, then lumping them all together in your statistics is akin to making a fruit basket rather

than creating a clear picture of what is occurring on the street. If required to provide total agency statistics by state law or some other requirement, try putting them in an appendix at end of the report.

Tip 3. Report Special Units Separately

Just like patrol officers working different districts encounter different populations and proactively patrol for different problems, members of specialized units deal with different clientele and crimes. Who do gang units target for surveillance and enforcement? Obviously the answer is gang members who differ significantly from the general population in terms of race, sex, and age. Therefore, most of the stops made by gang unit officers will be of young men who are members of racial and ethnic minority groups as the vast majority of gang members have these characteristics. If the gang unit stops are lumped in with the stops made by patrol or traffic units, it will appear as though the patrol and traffic units have been racially profiling.

Tip 4. Use Proper Benchmarks

Agency activity data, such as the races of citizens in stops and arrests, are useless without a benchmark to which they can be compared. Knowing that 25% of speeders stopped were Hispanic is of no value unless we know what percentage of all speeders in that beat are Hispanic. If 2% of the speeders in the beat are Hispanic, then a 25% stop rate would suggest officers are targeting Hispanics for disproportionate numbers of stops. If, however, 26% of speeders in the beat were Hispanic, then this would suggest that officers are acting without bias toward Hispanic drivers.

It is extremely important that the benchmark selected for comparison matches as closely as possible the behavior that would likely cause an officer to take action to stop, search, arrest, or use force against the citizen. For example, when looking at traffic stops, the benchmark needs to identify the bad drivers within the beat, as these are the individuals officers are most likely to legitimately stop. Census population statistics for the beat are not useful as people use vehicles so that they can travel to locations away from where they live. The racial composition of licensed drivers within the jurisdiction is also a

poor benchmark as large numbers of drivers stopped are driving while suspended or were never licensed.

One of the best benchmark measures of poor driving behavior within a beat or district is involvement in a motor vehicle crash. If your agency adds a field in the computer-aided dispatch (CAD) system to record driver race and ethnicity on crashes, then your agency can track the racial composition of bad drivers in the beat. So, for example, if 49% of the at-fault drivers involved in crashes in a particular beat were African-American, one would anticipate that 49% of those susceptible to being legitimately stopped for a traffic violation in this beat would be African-American drivers.

Tip 5. Use of Force Data?

Should your biased-based policing report examine use of force data? My opinion is that doing so helps your agency defend against future accusations of disproportionate use of force and provides evidence to these groups that your agency is transparent and cares about equity. It gives citizens a realistic view of how infrequently use of force occurs and how often officers themselves are the recipients of violence. Finally, with the current political and media attention focused on race and use of lethal force, I suspect that a requirement to collect and publicly report race data on use of force incidents is inevitable for some regions of the country.

When reporting use of force data, there are two very important points to keep in mind. First, since use of force incidents are rare events, and small sample sizes are mathematically unstable, it is best to report data across a span of several years. For example, if your agency had one officer-involved shooting last year, and the suspect shot was African-American, then 100% of the persons shot by your agency were African-American even though it was only one shooting. Therefore, it is best to report use of force statistics across the last 5 or 10 years.

Second, it is imperative that you use a benchmark that reveals the racial makeup of those resisting and eluding the police. While some special interest groups might be skeptical of using resisting arrest charges as a benchmark, using assaults on officers (especially those in which the officer was treated



for an injury) are harder to claim are biased. Your agency could use as a use of force benchmark the racial composition of the assailants in all felonious assaults on officers resulting in officer injury that the department experienced in the last 10 years. If 27% of these assaults on officers were committed by Native-Americans, one would expect that about 27% of the time officers applied force in an arrest, the arrestee would be Native American.

Tip 6. Data Quality Matters

In order to conduct a biased-based policing self-assessment and report, your agency needs data, and this data needs specific characteristics. First, for the data to be useful they need to include the race, ethnicity, and sex of all citizen contacts. Without race and ethnicity recorded, data on officer activities (stops, searches, arrests, etc.) and data for benchmark measures (traffic crashes, gang affiliations, assaults on officers, etc.) are worthless for biased-based policing reports. Second, the data needs to be as accurate as possible. When officers fail to record the race of a driver when policy (or state law) requires them to do so, it suggests cover-up to those who already believe racial profiling occurs. When an officer misidentifies a driver's race as African-American when in fact the driver is a dark-skinned immigrant from India, it erroneously inflates the number of African-American drivers stopped by the officer. Missing and inaccurate data only hurt your agency.

Finally, the data used must be easily accessible. If your agency employs more than five officers, trying to conduct a biased-based policing evaluation with paper-only records will be a logistical nightmare. The data needs to be automated as much as possible through a CAD system, central records management system (RMS), or at the very least (for very small agencies) Excel files kept on the Chief's desktop computer.

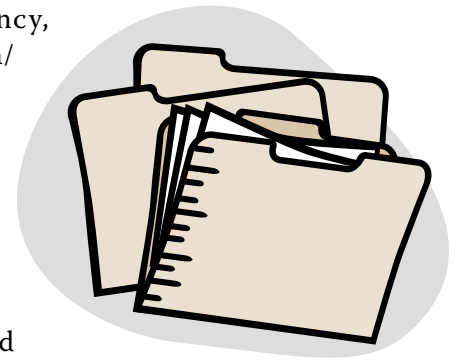
Tip 7. Consider Internal Benchmarking

Although special interest groups often disagree, this is the true way to determine if your agency has a problem with biased-based policing. Internal benchmarking compares the sex, race, and ethnic composition of stops and arrests by officers working the same shifts and beats. Internal benchmarking looks for officers who are abnormal from their peers working in the same conditions. For example, consider 5 officers that work the same beat over the

course of the quarter. What if between 23% and 30% of the traffic stops made by 4 of the officers involve female drivers, but 61% of the stops by the 5th officer were of female drivers. Clearly this would warrant further investigation by a supervisor to determine why Officer 5 is stopping more than twice as many female drivers as his or her peers working the same conditions. Some agencies have implemented an internal benchmarking system as part of their early warning system for problem officers.

Tip 8. Consult a Researcher/Statistician

Do you, or someone within your agency, have the research/statistical skills needed for such a report? Your agency has a lot at stake in this report in terms of public opinion and criticism. Whoever gathers and analyzes your



data, and writes your report, needs to have the appropriate skills to do so. An officer or analyst with a graduate degree and the proper training will likely have the proper skills in most cases. You could also consider contracting with a researcher from a local university or a law enforcement consulting firm. If your agency does utilize an outsider to assist with your report, it is best if that person understands the nature of street-level police work, has a firm background in research methods and statistics, is familiar with the methodologies used in previous biased-based policing studies, and does not have a personal agenda.

When selecting outside researchers or consultants to assist with your report, consider asking the following questions. Do they have the necessary skills? Do you trust them to treat you fairly? Can they work well with your personnel? Do they understand street-level policing operations? What services will they provide? How much will they charge? Will they keep and use copies of your data after the contract is over? Who is ultimately in charge of this study and report? What do they think of the 8 tips described here?

Conclusion

In summary, many law enforcement agencies produce biased-based policing reports. Some do so voluntarily and others do so involuntarily. These reports can significantly influence the public reputation of your agency and, if done poorly, can make it look like officers are racially profiling when they are not. The 8 tips mentioned here can help your agency produce a report that protects your agency's reputation, is difficult to misinterpret, softens the fears of those already biased against your agency, and is unlikely to

assist those seeking to use the findings against your agency in court.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

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TITLE VII RETALIATION, FLSA LAWSUITS CONTINUE TO SOAR

By John D. Bennett

According to statistical figures from the federal courts, civil litigants filed approximately 9,000 Fair Labor Standards Act ("FLSA") cases during calendar year 2015. For comparison purposes, just 4,000 FLSA cases were filed a decade ago in 2005, the first time the FLSA case load ever reached 4,000 cases in a year. The vast majority of FLSA lawsuits focus on alleged uncompensated or miscalculated overtime, uncompensated "off the clock" work, and misclassification of employees. The growth of these lawsuits continues to present challenges, particularly given the FLSA's 1930s- and 1960s-era statutory and regulatory language that is increasingly ill-suited to twenty-first century workplaces.

The number of charges filed with the U.S. Equal Employment Opportunity Commission ("EEOC") also rose during the Commission's last fiscal year. (The fiscal year runs from October 1 to September 30.) According to data released by the EEOC, approximately 90,000 charges of discrimination were received during the government's 2015 fiscal year, up from the 2014 total, which represented a near-decade low. Notably, 44.5% of all charges filed during FY 2014-15 contained an allegation of retaliation, while allegations of race and disability discrimination (up nearly 6% in 2015) were made 34.7% and 30.2% of the time, respectively.

What do these statistics mean for employers? With regard to the EEOC-related data, while employers should continue their efforts to eliminate the conditions that give rise to EEOC charges overall, it is clear that more must be done to cultivate and maintain an atmosphere and culture of non-retaliation in the workplace. Such steps would include, among other things, responding promptly to internal discrimination complaints, assuring the complainant that the matter will be taken seriously, implementing interim measures designed to reduce the likelihood of confrontations or other incidents that may be perceived as retaliatory, ensuring that the respondent and others are reminded that retaliation is strictly prohibited, and keeping lines of communication with the complainant open so that instances of perceived retaliation can be addressed promptly.

With regard to the FLSA-related data, employers should regularly audit their pay practices and update job descriptions, and consult periodically with experienced employment counsel to ensure that employees are being properly classified and compensated and that accurate records are being maintained. The new DOL rules regarding the "white collar" exemptions that are expected to take effect later this year afford an excellent opportunity for such an audit.





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3500 Parkway Lane • Suite 110
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