

As Body-Worn Cameras Proliferate, States' Access Restrictions Defeat Their Purpose

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Beginning with the murder of Michael Brown in Ferguson, MI, the in-custody death of Freddie Gray, in Baltimore, MD, and several subsequent high-profile deaths (primarily of African American men) at the hands of police, the conduct of America's law enforcement has been the focus of intense public interest and attendant media attention.¹ In December 2014, President Obama urged Congress to provide 75 million dollars to deploy 50,000 Body Worn Cameras ("BWCs") as part of an effort to restore the public's trust. Although several police departments across the nation had earlier deployed BWCs, the political pressure caused by these events² greatly accelerated the trend toward widespread BWC adoption.

According to a January 2016 survey by the Major Cities Chiefs Association and Major County Sheriffs' Association,³ approximately half of the 70 major metropolitan police departments surveyed had begun the process of deploying police body worn cameras, but 95% are committed to do so in the future. With the rapid spread of BWC systems, generating millions of hours of video each week, questions arise about whether, and when, the public should be provided access to these recordings (as well as whether civilians captured on such recordings have reasonable expectations of privacy in those recordings and/or a right to be informed about, and to object to, their being recorded by police).⁴

Privacy Rights of Civilians Asserted as Basis to Withhold Public Access

In October, 2013, the ACLU released its White Paper, *Police Body-Mounted Cameras: With Right Policies in Place*,

a Win for All, which recommended that BWC recordings of police interactions with members of the public, in public settings (like city streets or sidewalks) be presumed confidential, in light of the civilians' purportedly reasonable expectations of privacy in such recordings.

In March 2015, the ACLU released a second, revised version of its White Paper, that still adheres to the view that members of the public have a constitutionally protected expectation of privacy with respect to being recorded by police officers without the citizens' consent, photographically or aurally, while they were located on public streets, sidewalks, or other public places.⁵ Thus, under the ACLU's proposed policy only those BWC recordings that are "flagged," because they capture controversial interactions between police and citizens, or contain evidence that a crime has been committed, are to be retained for any significant period of time and possibly made available for public inspection.⁶ All other BWC recordings are to be destroyed quickly and never made publicly available.

Notably, various task forces and other policy study groups considering BWC policies specifically cited the ACLU's White Paper as a basis for recommending limited or restricted public access to BWC recordings.⁷

Media Organizations Weigh In

As state legislatures in several states were considering bills to determine the scope of public access to police BWC recordings, a series of position papers urging a strong presumption of public access were issued by media organizations and academics. First, in April, 2015, the Radio and Television Digital News Association issued its position statement, expressly disagreeing with the ACLU's position, and declaring:

RTDNA believes there must be a general presumption of free and

open access to these videos in order to preserve the public transparency necessary to ensure their purpose is accomplished.

Legitimate concerns over privacy issues can be addressed under existing law. A court could determine if these issues require certain parts of the video be withheld or electronically altered to protect an individual's right to privacy in a particular circumstance.⁸

In May 2015, the Media Law Resource Center promulgated its Model Policy on Police Body Camera Recording Access.⁹ The MLRC's Model Policy urges policymakers and law enforcement agencies to categorize *all* BWC recordings as "public records" presumptively available for public inspection and copying, subject to existing statutory exemptions and exclusions embodied in applicable state open records laws.¹⁰

Disagreeing with the ACLU's White Paper, the MLRC's Model Policy "is grounded on a well-recognized body of law holding that individuals do *not* have a reasonable expectation of privacy with respect to their being photographed, videotaped, or recorded without their consent when they are visible to the human eye and audible to the human ear in any public place."¹¹ Also, rather than limiting the BWC recordings that are "flagged" for public inspection because of the particular activity captured on the tape, the MLRC Model Policy recognized that all conduct of peace officers discharging their official duties, while on the job, are inherently of legitimate public interest and concern.¹² Thus, the MLRC's Model Policy extends a presumption of public access to *all* police BWC footage of individuals filmed on a public street, park, sidewalk, or private business location that is readily accessible to the public.

However, BWC recordings of indi-

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viduals inside their homes, apartments, places of residence or other private property, in contrast, are not subject to that same presumption of public access, unless the conduct recorded is itself a legitimate matter of public concern. The MLRC Model Policy urges custodians of BWC recordings to redact highly personal and private information from the recordings prior to disclosing them to the public, and that members of the public should be provided an opportunity for expeditious judicial review of any governmental decision to withhold BWC recordings in whole or in part.

In December 2015, The Media Freedom & Information Access Clinic of The Floyd Abrams Institute for Freedom of Expression at Yale Law School published a White Paper entitled “Police Body Cam Footage: Just Another Public Record.”¹³ As its title indicates, the White Paper states:

Issues regarding body cam footage are adequately addressed through nonexemption safeguards and new technology solutions. State legislatures should not amend their existing Freedom of Information (FOI) laws to restrict access to body cam footage. Body cam footage should be treated the same as other public records.¹⁴

State Legislatures Favor Privacy Interests Over Public Accountability

According to BillTrack50, “So far this year [(2016)], twelve states — Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, North Carolina, North Dakota, South Carolina, Texas and Utah — passed laws concerning public access to the footage.” In addition to that list, Kansas, Minnesota, Missouri, and New Hampshire also passed legislation in 2016 restricting public access to BWC recordings.¹⁵ Although the state statutes vary in some significant respects, in general, (with one notable exception — Oklahoma), state legislators gave much greater weight to the concerns of civilians’ privacy rights and to protecting ongoing criminal investigations from interference than to the transparency and public accountability benefits of providing public exposure to recordings

of official police conduct:

Connecticut’s law exempts BWC recordings of incidents involving a victim of domestic or sexual abuse; or a homicide, suicide, or fatal accident if disclosure could constitute “an unwarranted invasion of personal privacy.”¹⁶

Florida’s law declares a BWC recording exempt from disclosure if taken inside a private residence; a health care, mental health, or social services facility; or any place “that a reasonable person would expect to be private.”¹⁷ Louisiana’s law similarly allows law enforcement agencies to withhold any BWC that they believe would “violate an individual’s reasonable expectation of privacy” or is part of an ongoing investigation. Similarly, North Dakota’s statute exempts from disclosure BWC footage recorded “in a private place.”¹⁸

Several states have categorically exempted all BWC recordings from their public records laws, unless certain specified circumstances are present: For example, in South Carolina, “data recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act.”¹⁹ Disclosure is permitted at the discretion of the South Carolina Law Enforcement Division.²⁰ Similarly, in 2016, Kansas exempted all BWC recordings from mandatory disclosure under its public records law, by defining them as “criminal investigation records.”²¹ Such records may be ordered disclosed to the public if a court finds certain factors have been met.

Starting in January, 2017, New Hampshire law will prohibit the release of BWC recordings to the public unless they depict restraint or use of force by a police officer, discharge of a weapon or “an encounter that results in an arrest for a felony-level offense.”²² Minnesota’s recently passed law exempts all BWC recordings, including use of force by police, unless such force results in “substantial bodily harm”; recordings may be released if a police officer discharges her/his firearm or if the citizen subject requests it be disclosed. However, police are also given discretion to redact or withhold BWC footage if it is deemed “clearly offensive to common sensibilities.”²³

Oregon’s law exempts BWC recordings unless disclosure is “in the public interest.”²⁴ In Illinois, most body-worn camera footage is statutorily exempt from public disclosure; only footage that has been flagged because of its content may be disclosed in certain circumstances.²⁵ And in Texas, all BWC recordings are exempt from public disclosure except where used as evidence in a criminal case.²⁶ As of October 1, 2016, North Carolina’s law requires a court order before any BWC recordings (or dash cam footage) may be released to the press or the public.²⁷ Had this law been in effect in September 2016, the video recordings of the shooting death of Keith Lamont Scott at the hands of Charlotte police could not have been released without a judicial order authorizing it.

Missouri’s recently passed legislation²⁸ prohibits public release of BWC and dash cam footage during an ongoing investigation, and thereafter bars the release of BWC recordings taken in “nonpublic locations,” such as homes, schools and medical facilities, unless a court finds that such disclosure would not be “reasonably likely to bring shame or humiliation to a person of ordinary sensibilities.” Even if the court orders that BWC footage recorded in a “nonpublic location” be made available to the records requester, the statute prohibits the press or public from republishing the footage, or even summarizing its contents, without providing 10 days’ notice of such publication to all non-law-enforcement persons depicted in the video (and authorizes those notified to seek an injunction against the publication). The Missouri statute creates a private right of action for civil damages resulting from any violation of that provision. The statute also presumptively closes any BWC recording of a crime scene in which a deceased person is shown “in a state of dismemberment, decapitation, or similar mutilation, including, without limitation, where the deceased person’s genitalia are exposed.”

Perhaps the most transparency-promoting state statute to date is the law enacted in Oklahoma in 2015. Title 51 section 24A.8 subsection 10a of Okla-

homa's statutes declares that public records, subject to public inspection include "Audio and video recordings from recording equipment attached to the person of a law enforcement officer that depict . . . recordings in the public interest that may materially aid a determination of whether law enforcement officers are appropriately performing their duties as public servants."²⁹

In addition to these state statutes, numerous cities and police departments have adopted their own policies and protocols regarding public access to, and preservation of, BWC videos. The Reporters Committee for Freedom of the Press has compiled these policies, nationwide, on an extremely helpful interactive map on its website.³⁰

Two Roadblocks to the Success of BWC Programs: Secrecy and Cost

In the April 2015 *Media Law Letter*, MLRC's Executive Director (and former Forum Chair) George Freeman stated "the whole point of requiring police to wear body cameras is to have [the police] operate with the knowledge that their conduct is being watched, not only by their fellow officers, but by the public whom they've sworn to protect and serve."³¹ As the editorial board of the *Washington Post* aptly put it:

Body cameras and the policies governing release of videos are still in development, and [police] departments across the country are grappling with issues of privacy, costs and technology. What authorities need to realize is that **the cause of improving accountability, transparency and public trust is undercut when footage is not released**, sending the message that there is something to hide.³²

Notably, Chuck Wexler, the Executive Director of the Police Executive Research Forum concurs:

[W]ith certain limited exceptions . . . body-worn camera video footage should be made available to the public upon request—not only because the videos are public records but also because doing so enables police departments to demonstrate transparency and openness in their interactions with members of the community.³³

Another serious impediment to the successful implementation of BWC programs is financial cost. Not only are the camera units expensive, police departments have increasingly recognized that the financial burden of storing, retaining, cataloging, and redacting the thousands of hours of footage that BWCs generate every month, is far outstrips the initial cost of purchasing the camera themselves. Indeed, in a 2014 survey conducted by the Police Executive Research Forum, 39 percent of police departments that did not use BWCs cited cost as the primary reason for non-adoption.³⁴ For example, the police department in Cleveland, Ohio expects to spend up to \$3.3 million over five years outfitting its officers with 1,500 body cameras and storing the data those cameras record.³⁵ Recently a number of police departments across the nation have abandoned their prior use of BWCs, declaring that the costs associated with storage and processing are simply unaffordable.³⁶

Better Policies and Cheaper Storage Technology Needed for BWCs to Succeed

BWCs unquestionably are an important component of law enforcement's "tool belt" to both collect and generate evidence for use in criminal prosecutions and to hold the "men and women in blue" accountable to the public they serve. The latter objective cannot be accomplished without providing the public with access to the recordings made by BWCs. However, to date, the majority of state legislatures that have addressed the issue have greatly restricted (or outright denied) the public's ability to review the recordings. And, in those jurisdictions that have mandated public access and lengthy retention periods, some police departments have abandoned their use of BWCs because the costs of retaining the recordings is, as one police chief put it, "crippling."³⁷

Solutions to the cost problem should be sought, so that this valuable technological tool does not become merely a passing, short-lived experiment in greater transparency and accountability.

Endnotes

1. The Supreme Court has rec-

ognized that "[t]he public . . . has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny." *Waller v. Georgia*, 467 U.S. 39, 47 (1984); *see also Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir. 1984) ("The public has a vital interest in the integrity of those commissioned to enforce the law.")

2. See Damien Cave & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. Times (updated Jul. 7, 2016), <http://nyti.ms/1IMtFWL> (collecting videos of the shootings of, *inter alia*, Eric Garner, Laquan McDonald, Samuel Dubose, Sandra Bland, Freddie Gray, Philando Castile, Alton Sterling, Walter Scott, Tamir Rice, and Michael Brown)

3. Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, Governing (Jan. 26, 2016) available at <http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html>

4. See, e.g. Peter Hermann & Aaron C. Davis, *As police body cameras catch on, a debate surfaces: Who gets to watch?*, Wash. Post (Apr. 17, 2015), http://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e_story.html.

5. Subsequently, the ACLU promulgated a Model Act Regulating Use of Wearable Body Cameras by Law Enforcement, available at <https://www.aclu.org/model-act-regulating-use-wearable-body-cameras-law-enforcement>. It is derived from an earlier Model Act promulgated by the International Municipal Lawyers Association, available at <http://www.aeal.org/imla-bwc.pdf>.

6. The ACLU's White Paper states, "The use of recordings should be allowed only in internal and external investigations of misconduct, and where the police have reasonable suspicion that a recording contains evidence of a crime," and it asserts that "[u]nredacted, unflagged recordings should not be disclosed without the consent of the subject [because t]hese are recordings where there is no indication of police

misconduct or evidence of a crime, so the public oversight value is low.”

7. See, e.g. Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, U.S. Dep’t of Justice Office of Community Oriented Policing Programs (2014), <http://1.usa.gov/1s7UIxI>; Leadership Conference on Civil and Human Rights, *Civil Rights Principles on Body Worn Cameras* (May 2015), <http://www.civilrights.org/press/2015/body-camera-principles.html>; Marc Jonathan Blitz, *Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats*, (Am. Const. Soc’y May 13, 2015), <https://www.acslaw.org/sites/default/files/Blitz - On-Body Cameras - Issue Brief.pdf>.

8. Mike Cavender, *Police body cams: The new FOIA fight*, Radio Television Digital News Ass’n (Apr. 22, 2015), http://www.rtdna.org/article/police_body_cams_the_new_foia_fight#.VT25mLLnYZ4

9. <https://www.doj.state.wi.us/sites/default/files/policebwcrecordings.pdf>

10. The MLRC’s Model Policy presumes that the vast majority of state records statutes create a presumption of public access to *all* records that memorialize or document the official conduct of public agency activities, with narrowly-crafted exemptions. Thus, the MLRC’s Model Policy was not intended to endorse those states’ statutes that exempt all police “investigative records” from public inspection. See, e.g., Cal. Gov. Code § 6524(f).

11. See, e.g., *Mark v. Seattle Times*, 635 P.2d 1081, 1094 (Wash. 1981) (“On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. *Neither is it such an invasion to take his photograph in such a place*” (emphasis added) (internal marks and citation omitted)); *Dempsey v. Nat'l Enquirer*, 702 F. Supp. 927, 931 (D. Me. 1988) (“[T]aking a photograph of the plaintiff in a public place cannot constitute an invasion of privacy based on intrusion upon the seclusion of another”); *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 13-14 (S.D. Ohio 1983) (dismissing claim

based on photographs taken of plaintiff on public sidewalk); *Restatement* (Second) of Torts § 652B cmt. c (1977) (“[T]here is no liability [for invasion of privacy] . . . for observing [a person] or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.”).

Of course, “[e]ven in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.” *Restatement* (Second) of Torts § 652B cmt. c.

12. See, e.g., *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997) (“Performance of police duties and investigations of their performance is a matter of great public importance.”); *Cassidy v. American Broad. Cos.*, 377 N.E.2d 126, 132 (Ill. Ct. App. 1978) (“the conduct of a policeman on duty is legitimately and necessarily an area upon which public interest may and should be focused”); *City of Loveland v. Loveland Pub. Corp.*, No. 03CV513, 2003 WL 23741694, *2 (Larimer Cty. Dist. Ct. June 16, 2003) (recognizing the public’s “legitimate and compelling interest in ensuring that its police officers properly perform their official duties”).

13. The White Paper is available at http://isp.yale.edu/sites/default/files/publications/police_body_camera_footage- just_another_public_record.pdf

14. *Id.* at 5.

15. See Sophie Murguia, *More states set privacy restrictions on body-cam video* (RCFP, June 29, 2016), available at <https://www.rcfp.org/browse-media-law-resources/news/more-states-set-privacy-restrictions-bodycam-video>

16. Conn. Gen. Stat. Ann. § 29-6d(g).

17. Fla. Stat. § 119.071(2)(l).

18. N.D. Cent. Code § 44-04-18.7(9).

19. S.C. Gen. Stat. § 23-1-240(G)(1).

20. S.C. Gen. Stat. § 23-1-240(G)

(2)-(5).

21. Kan. Stat. Ann. § 45-221(a) (10)(A)-(F).

22. HB 1548.

23. S.F. No. 498.

24. Or. Rev. Stat. § 192.501(40).

25. 50 ILCS 706/10-20(b).

26. Tex. Occ. Code § 1701.661(c)-(d).

27. House Bill 972.

28. SB 732.

29. Okla. Stat. Title 51 §

24.A.8(A)(10) (2016).

30. <http://www.rcfp.org/bodycams>.

Other helpful compendia of state and local policies have been produced by the D.C. Coalition for Open Government, <http://dcocg.github.io/bwc/browse/>; the Urban Institute, <http://apps.urban.org/features/body-camera/>; and the Brennan Center for Justice at New York University’s School of Law, <https://www.brennancenter.org/body-cam-city-map>. In addition, Americans for Effective Law Enforcement has assembled an impressive compendium of policies, research studies, and articles concerning BWCs, available at <http://www.aele.org/bwc-info.html>.

31. See also Kelly Freund, Note, *When Cameras Are Rolling: Privacy Implications of Body-Mounted Cameras on Police*, Colum. J. L. & Soc. Probs. 91 (2015) (advocating for citizen-initiated access to BWC footage to promote public trust in law enforcement), available at <http://www.columbia.edu/cu/jlsp/pdf/Dec2015/Freund.pdf>; Bryce Clayton Newell, *Collateral Visibility: A Socio-Legal Study of Police Body Camera Adoption, Privacy, and Public Disclosure in Washington State*, Indiana J. J. [forthcoming] (July 18, 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2740377##.

32. After A Fatal Shooting, D.C. Police Choose Accountability In Releasing Body-Cam Video, Wash. Post (July 15, 2016); see also S. Zansberg, *Why We Shouldn’t Hide What Police Body Cameras Show*, Governing (Aug. 29, 2016), (*emphasis added*) <http://www.governing.com/gov-institute/voices/col-police-body-camera-recordings-transparency.html>

33. Police Executives Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, U.S. Dep’t of Justice at vi (2014), available at <http://11>.

[usa.gov/1s7UIxl](http://1.usa.gov/1s7UIxl). See also S. Zansberg, *Why We Shouldn't Hide What Police Body Cameras Show*, Governing (Aug. 29, 2016), <http://www.governing.com/gov-institute/voices/col-police-body-camera-recordings-transparency.html>

34. Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, at 31 (2014), <http://1.usa.gov/1s7UIxl>.

35. Associated Press, *Cost for Cleveland Body Camera Program Could Rise to \$3.3 Million over 5 Years, Contract Shows*, May 7, 2015, [http://www.foxnews.com/us/2015/05/07/cost-for-cleveland-body-camera-program-could-](http://www.foxnews.com/us/2015/05/07/cost-for-cleveland-body-camera-program-could-rise-to-$3.3-million-over-5-years-contract-shows)

[rise-to-33-million-over-5-years/](http://1.usa.gov/1s7UIxl).

36. See, e.g., Rick Callahan, *Some Police Departments Shelve Body Cameras, Cite Data Costs*, Assoc. Press Sept. 10, 2016, <http://www.wtsp.com/news/some-police-departments-shelve-body-cameras-cite-data-costs/316448042>; Eric D. Lawrence and Christina Hall, *Costs of Police Body Cameras Raise Concern*, Detroit Free Press (June 7, 2016), <http://www.freep.com/story/news/local/michigan/2016/06/06/police-body-cameras-high-costs/85356518/>; Lucas Mearian, *As Police Move to Adopt Body Cams, Storage Costs Set to Skyrocket*, Computerworld (Sept. 3, 2015), <http://www.computerworld.com/article/2979627/cloud-storage/>

[as-police-move-to-adopt-body-cams-storage-costs-set-to-skyrocket.html](http://1.usa.gov/1s7UIxl); see also *Police body cameras: Compromise on storing data*, Waterbury Republican American (Sept. 13, 2016), <http://www.rep-am.com/opinion/editorials/2016/09/13/police-body-cameras/> (“The history of data storage and miniaturization practically guarantees that it eventually will be possible to preserve practically all data for long periods.”).

37. Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, at 32 (quoting Chief Aden of the Greenville, N.C. police), <http://1.usa.gov/1s7UIxl>.