

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS BEST PRACTICES COMMITTEE

USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT CONSIDERATIONS, ISSUES AND CONCERNS¹

Background

Law enforcement use-of-force events in 2014 and 2015 received, and continue to receive, intense media reporting and public scrutiny. Many of these events were recorded by law enforcement vehicle dashboard cameras, by officers' body-worn cameras or by private citizens, or a combination of these sources. There have been numerous calls at the federal, state and local level for all law enforcement agencies to implement body-worn camera programs.

The use of video recordings by law enforcement agencies is not a novel practice. For decades, Washington law enforcement agencies have used audio and/or video recordings for suspect and witness interviews. More recently, agencies have mounted cameras in patrol vehicles.² However, there are significant differences between the frequency, incidents and locations where body-worn camera recordings will occur and the recordings made by dashboard cams.³

There are law enforcement agencies in Washington State already using body-worn cameras. Some agencies are planning to implement body-worn camera programs or evaluating whether body-worn camera use should be implemented.

The Washington Privacy Act, Chapter 9.73, and the Public Records Act, RCW Chapter 42.56, present obstacles to the effective and responsible implementation of body-worn camera programs. Many agencies are waiting for the State Legislature to create a framework which addresses the significant public policy and legal considerations, issues and concerns surrounding the use of body-worn cameras and dissemination of recordings.⁴ Law enforcement agencies may then address the practical issues of implementing body-worn camera programs.

This paper is intended provide a general discussion of the considerations, issues and concerns raised by the use of body-worn cameras.

¹ Compiled by Steven M. Clem, Prosecuting Attorney, Douglas County, Washington.

² In 2000, the Washington State Legislature provided an exception for dashboard camera video and simultaneous audio recording from the restrictions of the Washington Privacy Act. RCW 9.73.090(1)(c), Session Laws 2000, Ch. 195, §1 (SHB 2903), amended by Session Law 2006, Ch. 38, §1 (SHB 2876).

³ The use of body-worn cameras is not authorized under the Washington Privacy Act, as are dashboard cameras. To the extent that a body-worn camera is incorporated within a patrol vehicle dashboard camera system, the body-worn camera recordings are subject to RCW 9.73.090(1)(c). In November 2014, the Washington Attorney General issued 2014 AGO No. 8, opining that the use of body-worn cameras by law enforcement is not prohibited or regulated under the Washington Privacy Act because conversations between members of the public and law enforcement officers performing their official duties are not a private conversations subject to the Act.

⁴ The State Legislature considered body-worn camera legislation during the 2015 session in HB 1917.

The Body-Worn Camera Debate

The debate over the use of body-worn cameras has included the recommendations and positions of media editorials, local, state and federal officials, civil liberties activists⁵ and, of course, law enforcement officials, agencies and associations. There is little research or empirical evidence supporting any particular position.⁶

Those advocating for body-worn camera use argue cameras and recordings will:

- Provide compelling evidence in criminal prosecutions
- Increase transparency and law enforcement legitimacy, and thereby enhance community relations
- Improve or “civilize” both citizen and officer behavior
- Expedite resolution of citizen complaints of officer misconduct and related lawsuits
- Provide opportunities officer training

Those opposing the use of body-worn cameras raise the following concerns:

- Large initial financial investment required, with significant, continuing expenditures for hardware, software, personnel and training
- Significant financial, technical and personnel resources are required to for managing, storing, copying and providing discovery of recordings
- There will be privacy right intrusions for persons being recorded, especially those based upon the location of recording, such as inside a home or medical facility
- There will be privacy right intrusions for officers
- Recordings will be subject to the Public Records Act, RCW Chapter 42.56
- Impacts on interviews with sensitive witnesses and informants
- Recordings of privileged information, such as medical, mental health, religious and marital communications create complex questions for officers, agencies and prosecutors
- Inadvertent recording of personal or embarrassing moments
- Public misconceptions that cameras are equal to or better than humans at capturing events
- Juror reaction when recordings are not available (the “CSI” effect), even though based on legal or technical issues

Law Enforcement Implementation Issues

When a law enforcement agency decides to implement a body-worn camera program, a

⁵ ACLU proposed Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement, issued May 21, 2015, <https://www.aclu.org/model-act-regulating-use-wearable-body-cameras-law-enforcement>.

⁶ See, *Police Officer Body-Worn Cameras: Assessing the Evidence*, Office of Justice Programs, U.S. Department of Justice (2014).

number of technical and practical decisions must be made which raise policy issues regarding the creation, use, storage and dissemination of body-worn camera recordings.⁷ This paper highlights some of these issues.

What camera should be purchased?

What camera model best serves the agency's needs and financial ability?⁸ A recent market survey by the National Institute of Justice detailed 18 different camera models available to law enforcement agencies, ranging in price from \$120 to \$1,000 *per camera*.⁹ Each camera model has different weight, size, acuity, field of view, light sensitivity, battery life, editing capability, recording format, storage capacity, weather durability and other specifications and features. Docking stations are used to charge cameras and transfer/upload digital recordings to storage, and may be an additional cost. A limited number of cameras simultaneously use each docking station.

Monthly maintenance fees may also be charged *per camera*. Maintenance fees may include, or provide as an option, use of the manufacturer's proprietary off-site or "cloud" file storage and management software.¹⁰ Monthly fees vary upon price of the equipment, the scope of maintenance, and off-site file storage and management options.¹¹

What training will officers receive on use of body-worn cameras?

Officers must be trained not only on the cameras' technical aspects but on the agency's policies for use, transfer of recordings to storage, access and security, as well as documentation of camera recordings.

Will a specific camera be assigned to one officer, or are cameras shared among officers? This arrangement may impact responsibility for camera maintenance and

⁷ Video from police body cameras needs to be kept mostly private, The Washington Post, May 7, 2015, http://www.washingtonpost.com/local/dc-politics/dc-police-chief-urges-council-to-keep-most-body-camera-videos-private/2015/05/07/ae5184fa-f40a-11e4-bcc4-e8141e5eb0c9_story.html, viewed July 10, 2015.

⁸ *For the Record: Understanding the Technology Behind Body Worn Cameras*, by Todd Newcombe, September 8, 2015, Digital Communities for City and County Leaders, <http://www.govtech.com/dc/articles/For-the-Record-Understanding-the-Technology-Behind-Body-Worn-Cameras.html>, viewed October 9, 2015; Stealth mode? Built-in monitor? Not all body cameras are created equal, . <http://www.npr.org/sections/alltechconsidered/2015/10/30/453210272/stealth-mode-built-in-monitor-not-all-body-cameras-are-created-equal>, viewed December 3, 2015.

⁹ *Body-Worn Cameras: A Report for Law Enforcement*, by Antonia Merzon for the Colorado Best Practices Committee, citing *Body-Worn Cameras for Criminal Justice*, Market Survey (v. 1.0): Fairmont, WV; ManTech International Corporation for National Institute of Justice (NIJ) (2014).

¹⁰ As an example, Taser, Inc. offers file storage and management through its website www.evidence.com.

¹¹ Taser, Inc. cameras/docking stations range from \$650 to \$900 per camera, with monthly maintenance fees ranging from \$39 to \$79. Presentation by Taser, Inc. at Best Practices for Justice meeting, Phoenix, AZ, on March 3, 2015; Taser is charging stunning fees to handle police video, Bloomberg Business, June 16, 2015, <http://www.bloomberg.com/news/articles/2015-06-16/taser-is-charging-stunning-fees-to-handle-police-video>, viewed August 24, 2015; *Body Worn Camera Data Storage: The Gorilla in the Room*, by Todd Newcombe, September 9, 2015, Digital Communities for City and County Leaders, <http://www.govtech.com/dc/articles/Body-Worn-Camera-Data-Storage-The-Gorilla-in-the-Room.html>, viewed October 9, 2015.

transfer of recordings to storage.

Training in, an understanding of, and compliance with the agency's policies can be critical in admissibility of the recording as evidence in criminal prosecutions. Annual training should be required.

When is the camera turned on?

There are two general types of policies: record everything and record using discretion.

The "record everything" policy requires recording of every civilian contact and call for service, allowing the camera recording to be off only when the officer is on a break or otherwise not performing official duties. Proponents of "record everything" argue that officers cannot engage in or be accused of "selective recording."

Alternatively, policies may allow officer discretion. Some events will not be recorded. Proponents point to situations when an officer should decide whether recording is appropriate:

- Encounters inside a private residence (distinguishing execution of search warrants, arrest warrants, responses to exigent circumstances, or when the residence is a crime scene)
- Incidents involving nudity, such as injuries to victims, crime scenes, body searches of arrested individuals
- Incidents involving child victims and witnesses
- Interactions with emotional victims (sexual, domestic or other violent assaults)
- Interactions with informants or undercover officers
- Incidents where mental health, religious, attorney-client, medical or other privileges or privacy rights are implicated
- Community encounters with civilians where no suspicious activity, police response, call for service or investigation is involved

Allowing complete discretion can lead to accusations of "selective recording" to conceal improper conduct. An agency allowing officer discretion should include within its policy and training the specific events when recording is mandatory, those events when recording is discretionary, and those events when recording is prohibited. Officers should be required to articulate a reason for not recording before turning the camera off, or to include those reasons in the officer's incident report.

Some events when recording is mandatory could include:

- Suspect interrogations, including *Miranda* warnings
- Traffic stops
- *Terry* stops
- Vehicle and foot pursuits
- Search warrant execution
- Arrest warrant execution

- SWAT team deployments and entries

Some events, locations or situations when recording is prohibited could include:

- Undercover and confidential informant operations and interviews
- Bathrooms
- Locker rooms
- Telephone conversations (without consent of all parties)
- Conversations of others when officer is not a party to the conversation

The decisions reflected in the agency's policy will have impacts on the resources required to implement the body-worn camera program.¹² A "record everything" policy will lead to significantly more recordings and, importantly, many more recordings having no law enforcement or public value. More recordings require more battery power, transfers to storage, and storage capacity. More recordings require additional law enforcement personnel, as well as prosecutors and defense attorneys, to spend time managing, reviewing, and analyzing the recordings. More recordings increase the number of records subject to public records requests.

How and when do officers upload data? What processes are in place to ensure the integrity and the security of the recordings?

Do officers share cameras or is a camera assigned to each officer? Do officers transfer or upload the recordings at the end of each shift or at the end of an incident? Is the transfer of the recording to storage done via a mobile device (vehicle MDT, phone, iPad, etc.) or using a docking station located at the office?

It is vital to preserve both the integrity and chain of custody of the recording for later use as evidence in a criminal prosecution. Some manufacturers offer tamper-proof transfer/uploading as part of the equipment and/or maintenance package. Others offer the service at an additional cost. Agencies must develop policies and protocols for the transfer/uploading and storing of recordings that prevent editing or other manipulation.

Who is tasked with tagging recordings and what are the tagging criteria?

Recordings must be sorted or tagged prior to or at the time of transfer/uploading to enable to associate the recording with an incident or case file, and to enable effective searching and retrieval. Additional resources – hours or personnel – must be devoted to this process. Tagging/keyword criteria and formats must be established by the agency's policy. Typical tagging or keywords could include the agency's incident number, date, camera ID number, officer personnel number, event type, suspect name, etc. Some manufacturers' file management programs automatically provide limited tagging options, with additional custom fields. The agency's policy must assign responsibility for tagging recordings.

¹² Police change body camera policy, San Diego Union-Tribune, May 7, 2015, <http://www.sandiegouniontribune.com/news/2015/may/07/police-change-body-cameras-policy>, viewed July 10, 2015.

How and where are recordings stored?

The recordings are a form of digital data and must be transferred/uploaded and stored in a tamper-proof and secure manner. Options are transfer to DVD or CD-R media, uploading to secure network servers, and uploading to off-site cloud-based storage.

Who has access to the recordings?

Will the officer whose camera made the recording have viewing access? Will the officer have access prior to completing the officer's incident report? Will the officer have access prior to court proceedings to prepare the officer's testimony?

Some agency policies allow officers to review their video recordings at the end of shift to (1) properly memorialize the existence of the recording in written reports and (2) write more accurate reports. Other agency policies prevent officers from viewing recordings, believing the officer's report should reflect the officer's independent memory of the events.

Regardless of the agency's general policy on viewing recordings, officer-involved use of force events present particularly critical and sensitive questions regarding the officer's access to recordings. Use of force events may require a separate policy statement and protocol. Recordings should not be regarded as determinative evidence on issues regarding use of force.¹³

Who, besides the officer, should have access to recordings? Other on-scene officers? Detectives/officers assigned incident follow-up or investigation? Supervisors and command staff?

Agencies must consider the type and number of supervisors, as well as command staff, who have authority to view recordings, the purposes for access and whether random viewing is allowed. Access by command staff and supervisors may involve collective bargaining considerations.

Agencies must consider approaches to handling stored recordings that provide access

¹³ It should be noted that camera recordings will record more detail and a greater field of view than available to an officer's "naked eye." Additionally, an officer's eyes may be scanning the environment for threats and visual cues, while a body-worn camera remains focused on a particular, independent field of view determined by the camera's location on the officer's body - helmet/hat, eyeglasses, chest or shoulder - and the position of the officer's head and/or torso. RCW 9A.16.040 provides those circumstances when homicide or use of deadly force by a law enforcement officer is justifiable. An officer's good belief that use of force was justifiable under RCW 9A.16.040 is a defense to criminal prosecution. RCW 9A.16.040(3). The United States Supreme Court, in *Graham v. Connor* (1989), held that an officer's use of deadly force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Body-worn camera recordings may contain details that were unclear to or not observable by the officer at the time of an incident. Recordings may be part of the evidence gathered during a use of force investigation, but will not provide definitive answers relating to the officer's decision-making and conduct.

as needed for reports, discovery, training or other legitimate purposes. Many file management systems provide auditing features for logging the details of access.

Issues under the Public Records Act, RCW Chapter 42.56, are discussed below.

How do officers document recordings in incident reports?

Officers should note the existence of body-worn camera recordings in their incident reports. Agencies should consider adding check-boxes and fields to existing report form templates to facilitate documentation of recordings.

What if an on-scene officer does not submit an incident report due to lack of any material involvement in the event, but has a body-worn camera recording of the event? The officer having responsibility for the event should document the additional recording. The lack of a body-worn camera recording, where a body-worn camera was worn by the officer, should be documented in the incident report and the reasons for not recording articulated.

If officers are allowed to view recordings prior to writing incident reports, should officers differentiate between the events personally observed during the incident and the events as recorded? How is this best done in incident reports?

How will prosecutors access recordings and assure compliance with discovery obligations?

Body-worn camera recordings are subject to disclosure as discovery in a criminal prosecution. Prosecutors must be provided all recordings relating to the incident through direct access to the file management system or by transfer to DVD or CD-R media.

Will prosecutors have direct access to file storage and management systems to view and retrieve recordings? Will law enforcement select relevant recordings and submit the recordings to prosecutors?

Procedures to assure prosecutor access to recordings will depend upon the file management systems used by the law enforcement agency. Law enforcement agencies and prosecutors must create a process for prosecutors to obtain unfettered, audited access to recordings.

The Washington Privacy Act, RCW Chapter 9.73

The Washington Privacy Act, RCW Chapter 9.73, makes it unlawful for *any* individual to record *any private conversation* without first obtaining the consent of *all* the persons engaged in the conversation. For there to be consent, the recording party is required to announce to *all* other parties, in any reasonably effective manner, that such communication or conversation is about to be recorded. That announcement also must be recorded. RCW 9.73.030.

Whether a conversation is private - intended only for the persons directly involved in the conversation regarding something confidential or private - is a question of fact. In determining whether a conversation is private, the courts look to the subjective intentions of the parties to the conversation, as well as a number of factors bearing on their reasonable expectations and intent. Among those factors considered are (1) the duration and subject matter of the conversation; (2) the location of the conversation; (3) the presence or potential presence of third parties; and (4) the role of the non-consenting party and his or her relationship to the consenting party. *State v. Kipp*, 179 Wn.2d 718, 729 (2014).

The Washington Privacy Act does not address the use of body-worn cameras, but does specifically address dashboard camera video recording at RCW 9.73.090(1)(c):

(c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device that makes a recording pursuant to this subsection (1)(c) must be operated simultaneously with the video camera when the operating system has been activated for an event. No sound recording device may be intentionally turned off by the law enforcement officer during the recording of an event. Once the event has been captured, the officer may turn off the audio recording and place the system back into "pre-event" mode.

No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency for any commercial purpose.

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

To the extent that a body-worn camera is incorporated within a patrol vehicle dashboard camera system, the body-worn camera recordings are subject to RCW 9.73.090(1)(c). See, 2014 AGO No. 8.

Washington's courts have not addressed whether body-worn camera recordings involve private conversations subject to the Washington Privacy Act, but have held some contacts between law enforcement officers and citizens are *not* private conversations subject to the Act:¹⁴

¹⁴ In November 2014, the Washington Attorney General issued 2014 AGO No. 8, opining that the use of

- *State v. Clark*, 129 Wn.2d 211, 226 (1996) (no reasonable expectation of privacy in a conversation with an undercover police officer which took place on public thoroughfare within sight and hearing of passersby or in front of third party, and not private conversation)
- *State v. Bonilla*, 23 Wn.App. 869 (1979) (conversation with police dispatcher not private conversation)
- *State v. Flora*, 68 Wn.App. 802, 808 (1992) (Arrestees recording of conversation with arresting officer not private conversation)
- *City of Auburn v. Kelly*, 127 Wn.App. 54, 61 (2005) (pre-arrest conversations between police officer and driver stopped on public road for suspicion of DUI not a private conversation) (subsequently overruled by *Lewis v. State*, in so far as RCW 9.73.090 is applicable to recording conversation)
- *Lewis v. State, Dept. of Licensing*, 157 Wn.2d 446, 466 (2006) (traffic stop conversations are not private conversations, but specific requirements imposed by RCW 9.73.090 must be met condition of recording)

Should body-worn camera recordings be treated similarly to dash cam recordings under the Washington Privacy Act, with specific authorization for use by law enforcement, restrictions on dissemination and prohibitions on use? Should body-worn camera recordings have more restrictions on dissemination, re-dissemination and/or non-law enforcement use because of inherent, heightened concerns regarding privacy?

As compared to public contacts between law enforcement officers and citizens, the Washington Privacy Act, RCW 9.73.090(1)(b), requires that any recording of custodial interrogations “conform strictly to the following:”¹⁵

- (i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;
- (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
- (iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights, and such statements informing him or her shall be included in the recording;
- (iv) The recordings shall only be used for valid police or court activities[.]

body-worn cameras by law enforcement is not prohibited or regulated under the Washington Privacy Act, because conversations between members of the public and law enforcement officers performing their official duties are not a private conversations subject to the Act.

¹⁵ In addition to the required announcements, officers typically include the officer's identity, the suspect's identity, location of the interrogation and the names of all other persons present during the interrogation.

To what extent *should* the requirements of RCW 9.73.090(1)(b) apply to a body-worn camera recording of a suspect’s custodial interrogation?

If the incident involves continuous recording, including the arrest of the suspect, what purpose is served by the required announcements, other than constitutionally mandated *Miranda* warnings?

These Washington Privacy Act issues are matters for legislative consideration and action.

Washington’s Public Records Act, RCW Chapter 42.56

Body-worn camera recordings are subject to the Public Records Act. RCW 42.56.010 defines a public record as “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” The definition of "writing" includes “every other means of recording any form of communication or representation including, but not limited to, motion picture, film and video recordings . . . [and] sound recordings.”

The dissemination of body-worn camera recordings as public records is subject to the same exemptions and disclosure prohibitions as any other public record. Frequently used exemptions and prohibitions that could likely apply to body-worn camera recordings include:

- RCW 42.56.050 Right to privacy for which disclosure would be highly offensive and there is no legitimate public concern.
- RCW 42.56.230 Personal identifying information, addresses, telephone numbers and social security numbers of specified persons
- RCW 42.56.230(5) Bank and financial account numbers
- RCW 42.56.230(7) Any record used to prove identity, age, residential address, social security number, or other personal information required to apply for a driver’s license or identicaid
- 5 USC Sec. 552(a);
• 42 USC § 405(c)(2)(C)(viii) Social security numbers
- RCW 7.69A.030(4)
• RCW 7.69A.050 Names, addresses and photographs of child victims and witnesses
- RCW 10.52.100
• RCW 10.97.130 Records identifying child victim of sexual assault

- RCW 42.56.240(5)
- RCW 42.56.240(2) Information regarding the identity of witnesses or victims disclosure of which would endanger any person’s life, physical safety or property
- 18 USC Sec. 2721 Driver’s license number
- RCW 42.56.240(1) Investigative records compiled by law enforcement agencies essential to effective law enforcement or for the protection of any person’s right to privacy
- RCW 46.52.120; Department of Licensing driving records
- RCW 46.52.130
- RCW 10.97.040, .050; Criminal history record information;
- RCW 42.56.070(1); Secondary dissemination prohibited
- RCW 43.43.834(5);
- RCW 43.43.710;
- 28 USC Sec. 534;
- 28 CFR 513.20(b)
- RCW 70.48.100(2) Jail records

Policy considerations regarding the security, privacy and dissemination of body worn camera recordings present the most significant non-technical issues facing implementation of body worn camera programs.¹⁶

The redaction of body-worn camera recordings in response to requests under the Public Records Act presents significant financial, personnel and technology resource issues for both state and local law enforcement agencies. Each video and audio track on a recording must be reviewed and separately redacted.

If an individual’s identity or image is exempt or prohibited from dissemination, then redaction of the face or other identifying features will be required for each frame, by “black out” or “pixilation.” Standard video format uses a stream of 30 still images or “frames” per second. Each minute of video recording contains 1,800 frames subject to redaction. Proprietary video formats used by manufacturers may use less than 30 frames per second, with a corresponding decrease in motion smoothness.

¹⁶ *Body Worn Cameras: How Privacy Drives Video Security*, by Todd Newcombe, September 10, 2015, Digital Communities for City and County Leaders, http://www.govtech.com/dc/articles/Body-Worn-Cameras-How-Privacy-Drives-Video-Security.html?utm_source=related&utm_medium=direct&utm_campaign=Body-Worn-Cameras-How-Privacy-Drives-Video-Security, viewed October 9, 2015; Police body cameras spark debate about privacy in Tennessee, *The Tennessean*, November 2, 2015, <http://www.tennessean.com/story/news/politics/2015/11/02/police-body-cameras-spark-debate-privacy-tennessee/74756528/>, viewed December 3, 2015.

Advances in technology may provide for “global” redaction of a recording, rather than requiring frame-by-frame redaction. Regardless of the technology, the redaction process requires substantial investment in personnel, training, hardware and software.

Audio recordings can be redacted by deletion of selected segments, leaving silence or replacing the deleted sound with a “beep” or other indication of deletion.

How does law enforcement address the issue of redaction when the person’s voice can lead to knowledge of the person’s identity (e.g. child victims and witnesses)?

The Public Records Act raises additional concerns regarding body-worn camera recordings.

Should the ability to request and receive body-worn camera recordings be prohibited in the same manner as dash cam recordings under RCW 9.73.090(1)(c) (e.g. disclosure prohibited until final disposition of any criminal or civil litigation which arises from the event)? If the recording involves a criminal investigation, then should disclosure be allowed in the same manner as law enforcement reports (as soon as a charging decision has been made)?

What criteria should be required to request an “identifiable public record” as pertains to body-worn camera recordings?¹⁷

To what extent does the unrestricted dissemination of body-worn camera recordings impact the rights of a criminal defendant?

Should the ability to request and receive body-worn camera recordings be limited to particular requestors? Should dissemination be allowed, as it is currently, to the general public and without restrictions on use or re-dissemination?¹⁸

¹⁷ Video recordings present unique search, retrieval and tagging/keyword issues. The visual and audio content of video recordings cannot be searched in the same manner as documents. One Washington county received a Public Records Act request for all “dash cam recordings during which the stopped driver asked the law enforcement officer the reason for the traffic stop.” The county faced the task of listening to approximately 17,000 dash cam recordings, containing over 2,800 hours of audio recording, to retrieve responsive recordings. The requestor abandoned the request during installment responses.

¹⁸ A small example of media reporting: Cost and logistical issues limit local police interest in body cameras, *The News Tribune*, December 7, 2014, http://www.thenewstribune.com/2014/12/07/3526070_cost-and-logistical-issues-limit.html?rh=1, viewed May 21, 2015; Seattle police may dump plans for body cams, citing records requests, *ARS Technica*, November 20, 2014, <http://arstechnica.com/tech-policy/2014/11/seattle-police-may-dump-plans-for-body-cams-citing-records-requests/>, viewed May 21, 2014; Anonymous “requestor turns police body camera programs upside down, *Government Technology*, November 25, 2014, <http://www.govtech.com/public-safety/Anonymous-Requester-Turns-Police-Body-Camera-Programs-Upside-Down.html>, viewed May 21, 2015; Washington State police overwhelmed by public requests for dash- and body-cam footage, *Homeland Security News Wire*, November 27, 2014, <http://www.homelandsecuritynewswire.com/dr20141127-washington-state-police-overwhelmed-by-public-requests-for-dash-and-bodycam-footage>, viewed May 21, 2015; State bills would limit access to officer body camera videos, *The New York Times*, March 20, 2015, http://www.nytimes.com/aponline/2015/03/20/us/ap-us-body-cameras-public-access.html?_r=0, viewed

Once disclosed under the Public Records Act, should re-dissemination of the recordings, e.g. through social media, be limited in any manner?¹⁹

If a body-worn camera is unlawfully disseminated or used under new legislation, will law enforcement and prosecutors be provided enforcement tools to stop unlawful re-dissemination?

The pervasive, unregulated use of social media has caused civil liberties organizations to express strong concerns regarding the intrusion upon privacy rights of individuals. Recordings will depict persons who have not been the subject of an investigation, arrested or charged with a crime. Even if the intrusion by law enforcement is warranted, dissemination under the Public Records Act will currently allow use of the recordings by others for non-law enforcement purposes.

These Public Records Act issues are matters for legislative consideration and action.²⁰

Agency Retention of Body-Worn Camera Recordings

The Secretary of State, Washington State Archives, Law Enforcement Records Retention Schedule, Version 6.1 (January 2013), provides:

LE09-01-08 Rev. 1 - Recordings from Mobile Units – Incident Identified

Recordings created by mobile units which have captured a unique or unusual action from which litigation or criminal prosecution is expected or likely to result. Retain until matter resolved and until exhaustion of appeals process then Destroy.

LE09-01-09 Rev. 1 - Recordings from Mobile Units – Incident Not Identified

Recordings created by mobile units that have not captured a unique or unusual incident or action from which litigation or criminal prosecution is expected or likely to result. Retain for 90 days after date of recording then Destroy.

The law enforcement agency must determine at the time of transfer/uploading and tagging whether a body-worn camera recording is “incident identified” (evidentiary) or is “incident not identified” (non-evidentiary). Appropriate agency policies to assist in these determinations will be required. Neglect of retention and destruction schedules by a law enforcement agency will result in storage and file management issues, as well as increase the resources needed to respond to requests for body-worn camera recordings unnecessarily retained.

May 27, 2105; Police cameras bring problems of their own, The Wall Street Journal, April 9, 2015, <http://www.wsj.com/articles/police-cameras-bring-problems-of-their-own-1428612804>, viewed June 3, 2015..

¹⁹ Downside of police body cameras: your arrest hits YouTube, The New York Times, April 26, 2015, <http://www.nytimes.com/2015/04/27/us/downside-of-police-body-cameras-your-arrest-hits-youtube.html>, viewed May 21, 2015.

²⁰ South Carolina has adopted legislation to mandate state-wide use of police body-worn cameras, but has exempted the audio and video recordings from disclosure under the state’s Freedom of Information Act. http://www.scstatehouse.gov/sess121_2015-2016/bills/47.htm

Conclusion

The use of body-worn cameras by law enforcement raises significant public policy, legal and practical issues and concerns and the debate is ongoing. Although there is little empirical research regarding the actual benefits and impacts of using body-worn cameras, the considerations and issues raised by both proponents and opponents express genuine concerns.

The implementation of body-worn camera programs is expensive, requiring significant investments in equipment, ongoing maintenance expenditures and increased resources devoted to personnel, training, and technology. The decision to implement programs is made more difficult by increasingly scarce criminal justice funding.

Law enforcement agencies choosing to fund and implement body-worn camera programs must be prepared to develop policies and protocols addressing numerous personnel, equipment, technology, privacy, public records issues, as well as partner with local prosecutors to assure compliance with discovery obligations. However, the Legislature must first provide the framework in which these programs may be implemented, addressing several issues under the Washington Privacy Act, RCW Chapter 9.73, and Washington's Public Records Act, RCW Chapter 42.56.

The Washington Association of Prosecuting Attorneys looks forward to working with the Legislature and our criminal justice partners to address these considerations raised in this paper and to bring the best possible public policies and law enforcement practices to the people of Washington.

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