

BJA Body Worn Camera Training & Technical Assistance Jay Stanley- ACLU

Todd Maxwell: Hello again listeners. This is Todd Maxwell, member of the Bureau of Justice Assistance Body-Worn Camera Team, and today I'm speaking with Jay Stanley, Senior Policy Analyst with the American Civil Liberties Union. Jay Stanley is a senior policy analyst with ACLU's Speech, Privacy and Technology Project where he researches, writes and speaks about technology-related privacy and civil liberties issues and their future.

He is the editor of ACLU's Free Future blog, and has authored and co-authored a variety of ACLU reports on privacy and technology topics. Before joining ACLU, he was an analyst at the technology research firm Forrester. Served as American politics editor at Facts on File World News Digest, and is national newswire editor at MediaLink. He is a graduate of Williams College, and holds an M.A. in American History from the University of Virginia.

Jay, thank you for speaking with me today. And recently there's been a lot of debate about whether an officer can review BWC footage before writing a report. Some agencies allow all this footage to be reviewed by an officer, some don't allow it at all, while others allow it to be reviewed but only if there's not a use-of-force investigation. In this case, it varies whether the officer can review pre- or post-initial incident report. You even wrote a paper on the topic that was briefly covered in a video for the launch of the BWC Toolkit. Can you elaborate on the thoughts and the position of ACLU on the matter of officers reviewing footage?

Jay Stanley: Yes, sure. So to us, this is really a no-brainer. Officers should be required to give an initial version of their events before they watch the body-worn camera video. There's a couple reasons for this. Number one, letting officers view a video before they give an account enables those officers that do have something to hide to lie.

They can – they can – they can see that maybe the video swings away at one moment, and they can claim well, that's the moment where you reached for his waistband, or what have you. But, even for, hopefully, the vast majority of

officers who don't have any reason to hide anything watching a video literally changes your memory of what took place. And there are numerous studies that show this, all the studies show this.

You know, memory is a very, very fragile thing, and there are video is not an objective record of what takes place, as any first-year film student knows. It depends on lighting and camera angle, and when it's turned on and when it's turned off. And of course human memory is not an objective thing of what – a record of what took place, and so we need to capture both sets of data before allowing one to infect the other.

And so your memory – your memory of what you – of what you viewed is literally changed by viewing the video. And that can actually that can play both ways. There are some times where an officer has a has been shown a video and sees something that he didn't remember, and didn't see at the time, and finds himself struggling to explain what's on the video. So, and they ask him what took place, and he says, "Well, I could have sworn this took place, but I see on the video that it was different. So I don't know what to say."

Now, I think police officers have a concern that there's a game of "gotcha" going on here, and that not showing officers videos just a way to try and catch them up. But I think that every other member of the criminal justice system has to deal with that, and the inevitable minor differences between what is on a video and what they remember.

And police officers shouldn't be the only participants in a criminal justice system whose recollection magically matches up with a video, which gives an artificial credibility in court and skews the criminal justice system. This is not about treating officers with suspicion, it's about what is the best way to get at the truth of what happened, when there are differing memories and different versions of what happened. And I think all the science shows that you capture the person's subjective memory of the experience before you contaminate that memory by showing them the video.

Now, of course after they – after they give their first account, there's nothing wrong with then showing me a video and they can – they can, if their memory

is jogged by things in the video that they hadn't remembered, they can they can offer additional explanation and what have you.

Todd Maxwell: Great. I know when, if you recall at our expert panel we had some people from the U.K. and other countries where their officers are actually allowed to use it, and they are treated as expert witnesses, and they testify to what's on the video and such. How do you see that differing here in the U.S. Do you think it's because of perception of law enforcement?

Jay Stanley: I'm sorry, in the U.K. where – they were not allowed to view the video?

Todd Maxwell: No, they are.

Jay Stanley: They are?

Todd Maxwell: They are – they allowed – allowed to review it, and they're considered expert witnesses so they can get on the stand.

Jay Stanley: Right. Well and first of all let me also add that we're talking about critical incidents here not talking about necessarily the daily routine where an officer might use video as sort of a way to jog a memory in routine petty cases. But I think that a lot of police departments here are allowing their officers to review, maybe more than are not. There are some that have what we regard as a better policy, and it works fine for them. But I think that – I think the U.K. has a more standardized national policy, whereas we have thousands and thousands of departments, many of which have come up with their own independent policy. So I think we're all over the map.

Todd Maxwell: Yes, and I think you – I think you hit it on the head is the policies around use of force is the main – the main one that's the contention point here.

Jay Stanley: Yes.

Todd Maxwell: And, so that's going to sort of lead me to my next question, is that community and arguments often arise on the video review by an officers, because victims, witnesses and suspects are not allowed to review those videos before giving

statements or testifying in court. How do – how would you guys resolve this? Or what ideas would you offer to resolve this dilemma?

Jay Stanley: Well, I think that the dilemma – it's not a dilemma unless you think that the officers should be allowed to preview the video. For us it's not a dilemma. We think that everybody should give an initial statement before their memories are contaminated by viewing a video. And then everybody's on an equal footing. And there will be cases human nature inevitably will – I mean human memory will inevitably differ from the video.

The human mind focuses with laser-like intensity on certain things in the scene, and misses sometimes very large things that are happening in the scene. But again, everybody has to deal with that, and I think that we as judges, juries, prosecutor, and the general public, we have to become sophisticated consumers of video and understand that just because something's on a video doesn't mean that it was necessarily perceived at the time by anybody, whether it's the officer or a suspect or witnesses.

And there's a lot of studies that have been done to back that up. That said, sometimes what happens in the video is very plain and very obvious, and it helps everybody to understand what took place.

Todd Maxwell: Right. A recent – so I was at a recent Victims' Advocacy Group meeting, and there was discussion around FOIA requests at police departments. And the Victim Advocacy Group thought that victims of crime should have the final say on whether video should be released to the public and media because it can further victimize them. Do you have any opinions on that matter?

Jay Stanley: Yes, we search – we first confronted and had to think about this issue when we were dealing with a case in New Hampshire, in which a mentally ill man was fatally shot by the police, and there was an investigation. The local press put in a public records request for the video. After the investigation was over the police moved to release the video, and then it was actually the survivors of the deceased man who insisted that it not be released.

And that – again that was sort of the same sort of dynamic. They were arguing that the – that their – the dignity of their – of their family member was at stake and so forth. We ultimately decided that when push comes to shove there is such a strong public interest in monitoring how a police department is using force, especially deadly force, that that public interest trumps the privacy interest of individuals who may be involved in incidents.

And there are – there are – you know, obviously video can be redacted so that individuals who are not crucial who are – who are victims can be – their dignity preserved to the greatest extent possible. But we can't allow victims to exercise a veto over the public's broader, and really crucial, right to exercise oversight over how its police force uses force.

Todd Maxwell: Yes, there's the – it's a complicated topic, so thanks for sharing your thoughts on it.

Jay Stanley: Yes, it is complicated.

Todd Maxwell: Yes. During a recent site visit to a police department, it was brought to our attention the city prosecutor told that police department that when they drafts their BWC policy, they need to consider the Fourth Amendment in using BWCs in a person's home. The prosecutor advised the department to get permission from the homeowner to film in – while they – when they enter that home.

This raises a few concerns that because if the homeowner is a suspect in alleged domestic violence crime and does not want the officer filming his physically abused spouse, then he could decline to have officers do this. What is your interpretation of the Fourth Amendment privacy rights around a person's home versus an officer's duty to investigate crime, especially one like domestic violence?

Jay Stanley: Well, I think the starting point has to be that you do have a very, very strong privacy right in the home, stronger than anywhere else in any other set of circumstances. And if you don't want the government filming inside your home, you should be able to stop the government from filming inside your home. Again, that's the baseline.

Now, sometimes there are police raid homes because they have a warrant – they engage in SWAT raids and so forth – and we recommend that cameras always be on during SWAT raids and other non-consensual entries. If there are exigent circumstances, then the police do have the right to enter somebody's home without a warrant. And in those circumstances, the camera should be on if there's a -- if somebody calls some over a reported noise complaint or somebody screaming and the officer shows up and it turns out that there's exigent circumstances that do justify entry into the home without a warrant, then the cameras should remain on.

Otherwise, what we recommended is a policy in which officers, before entering a home in any kind of consensual way, are required to ask permission of the homeowner if the camera should stay on. And if the homeowner requested it be turned off, then it be turned off. And that's for sort of routine entry cases.

That said, I mean there are very difficult situations, and we don't have all the answers for that. You know, a situation where an officer shows up and one person says, "I want the camera off," and the other resident says, "I want it on." I guess I don't really know what the answer is in those cases, that's a very tough situation. I do think – I do believe that the jurisprudence in terms of entry, where one roommate invites the officer in and the other roommate says, "No, I don't want the officer in the house," I believe the jurisprudence is that the roommate who has invited the officer in trumps the other interest of the other roommate. But I'm not sure whether it makes sense to apply that to body cameras.

Todd Maxwell: It's an interesting topic and that is the first time they've been brought up to me rather recently. So I'll be interested to see where this actually goes and how it affects policy.

Jay Stanley: Yes.

Todd Maxwell: In terms – when it comes to retaining BWC video, I know you'd stated your thoughts on the topic recently. But can you state what the ACLU's position of

intention for video in non-criminal case (inaudible) you might not have seen that?

Jay Stanley: Yes, so when we recommend that most video, really, be put into a lock-box and nothing be done with it, that certain video be flagged, where there's a use of force or there's been a complaint against a police officer, for example. But the vast majority of video, which is not really of any interest to the public, showing daily police work, that the privacy of the agents there are potentially very significant and that that video be stored for six months, which is long enough for somebody to come forward and file a complaint in most jurisdictions. And, then delete it. And not subject to analytics, like face recognition.

Not pored over by police management. I mean we think that an officer should have access to his or her own video, but that police management shouldn't be looking at it unless brought to the attention of management by the officer him or herself. Again, this is assuming it's not been flagged. And again, destroy after six months. And I think this is the best balance in terms of privacy, while preserving the public oversight function of the video. If video is flagged because there was a use of force or what have you, it should be – we call for it to be retained for three years. Although, of course, if it's evidence in a criminal proceeding it should be retained ...

Todd Maxwell: Right.

Jay Stanley: ... according to whatever the normal evidence-handling policies are of that jurisdiction.

Todd Maxwell: Yes, that raises an interest topic though, because a lot of agencies are starting to look at 90-day retention policies, which would go against the 6-month. But they're doing that purely because they're a large agency, and the cost of retaining that non-violent non-criminal-related case is just skyrocketing. So they're having to do that. So it will be interesting to see how you manage the cost that eventually the taxpayers are paying versus that (inaudible). Any thoughts on that?

Jay Stanley: Yes, I mean I have a lot of sympathy for police departments which are dealing with something pretty new that's not really their core or historical competency which is, sort of, data management and storage. Of course, many departments have outsourced that. But the cost can be considerable, but I think that it's important for certain – for the public to pay certain costs to ensure that its police departments are working well and it may be a different balance in some jurisdictions where there are – there are more troubled relations between the police and community, and others where there are less so.

But if somebody does come forward after four months and says that they were abused by a police officer on an – in an encounter, it – you know, it would be in the public interest for that video to still be on-hand. I don't know what the numbers are in terms of how many people come forward with (compliance) complaints in a period after 30 days or after 60 days, or what have you. But it's a balance that should be looked at, but it should not just be money that's the only consideration.

Todd Maxwell: Understood, thank you. Recently the ACLU sued a California police department over charging fees for redacting videos involving FOIA requests. Can you tell us a little bit more about that case?

Jay Stanley: Sure, yes. That was a case where the National Lawyers Guild sued to get information – to get body camera video from protests where there were a number of people who were subject of pretty severe use of force by police officers. And the Hayward Police Department in Northern California charged the National Lawyers Guild \$3000 for redacting the – and turning over that video. And so the ACLU of Northern California, our affiliate there, filed a lawsuit because those kinds of exorbitant fees threaten to totally undermine the public oversight purposes of open records laws.

And so they sued under the provisions of the California open records laws and the arguments centered around whether the California law permits fees for quote-unquote extraction. Which seems to mean if the agency has to actually perform work to create new records and the argument was whether the things that the police department had to do to turn over that video count as quote-

unquote extraction, or whether it was mere redaction. And we're still awaiting the final ruling in that case.

Todd Maxwell: I think as cases like this involving digital media – or digital evidence sort of go forward, that we might see a few more of these because of how the laws and the rules are written, and they weren't really set to pertain to this type of digital evidence. You have any thoughts on that?

Jay Stanley: Yes, I think that's right. I mean, as so often happens these days, new technology renders the old laws a poor fit for the aims that the legislature was trying to carry out. And so you have to sort of re-argue things on how the existing law applies. You know, I mean, the important thing is that a journalist or a citizen who wants to see video of their encounter with police or any event of broad public interest that it be something that they can afford on average. So that the goals that the public open records laws were passed in order to reach are actually reached.

The other thing is, hopefully over time, as this kind of digital evidence and video-handling becomes routine, that technology will step in and help here and make it very fast and easy so that that the public can gain access to footage that is of public interest without not only paying exorbitant fees, but also that departments can provide it without having to use up many, many man hours doing so.

Todd Maxwell: Right. Always takes a little bit to catch up.

Jay Stanley: Yes.

Todd Maxwell: I've got a final question for you. Are there any topics – other topics the ACLU's focused on right now around body cameras that our listeners should be aware of?

Jay Stanley: You know, I think that the – that the main debates now are around public access, When the public does and does not get access to video. And that's something that we're really seeing a lot of divisions around the country where some police departments are saying they're not going to release any video unless required to in a court of law.

And others saying that they will and others being a state's – where the State law basically requires them to release video, sometimes to an excessive degree argue when it comes to privacy rights. I think that one thing I've noticed is that the smart – the smart police departments do release their video, whether or not it's actually required by law, when there's a – when there's a big public controversy.

Regardless of and they say let the chips fall where they may in terms of what the video shows. Because they understand that the whole purpose of bodycam – I mean bodycam videos – body cameras obviously serve a number of purposes at the same time, but the reason that they are spreading so quickly, and that the ACLU, that civil rights groups support body cameras in many or most cases, is their oversight role.

The reason that President Obama called for millions of dollars to be devoted to them was because of their oversight role. And so I think that the smart police departments realize that it can be a good way to improve trust between communities and police departments, regardless of how things work out in any one given case. If police departments have complete control over what's released, it will just end up being a police propaganda tool where police departments release video of heroic officers doing heroic things, which there will be many videos of, I'm sure, because there are many heroic officers out there.

But they don't release the videos where the officers don't other officers maybe don't look so good. And long-term, that's just not going to work. Because when you start – what a department starts releasing video, the public is going to demand that other videos be released as well.

Todd Maxwell: Right. Well, thank you for speaking with us today. I'm grateful you could share your knowledge on this important topic and the other topics we covered. We encourage law enforcement, justice and public safety leaders whose agents we've heard similarly more about the implementation of body-worn cameras to visit the Body-Worn Camera Toolkit at www.bja.gov/bwc.

This toolkit offers a variety of resources that agencies can use to help with the adoption and use for community engagement, policy development, data collection, officer training and educational purposes. We also encourage listeners to share and promote these resources with your colleagues and staff. Lastly, all these resources, and especially the Body-Worn Camera Toolkit, have been assigned as a national resource – your resource.

So please submit your ideas for (inaudible) through the BWC Support link at the bottom of the homepage. This is Todd Maxwell from the Bureau of Justice Assistance Body-Worn Camera Team signing off. Thank you to our listeners for joining us today.

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