

Legal Issues Surrounding the Use of Body Cameras

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Legal Issues Surrounding the Use of Body Cameras

I. INTRODUCTION

This outline of legal issues is intended to identify the essential legal issues relevant to and affecting the implementation of body cameras. It is not intended to be an exhaustive statement of the law; rather, it is intended to encourage caution with respect to the interaction of statutes, constitutional provisions and legal decisions interpreting the obligations of a police agency in regard to the issues raised by the use of body cameras.

II. COMPLIANCE WITH THE WASHINGTON PRIVACY ACT IN THE USE OF BODY CAMERAS TO RECORD COMMUNICATIONS

Washington's privacy act, chapter 9.73 RCW, places great value on the privacy of communications. *State v. Christensen*, 153 Wash.2d 186, 199–200, 102 P.3d 789 (2004). The act “tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant.” *Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 457, 139 P.3d 1078, 1082 (2006)

A. APPLICABILITY OF THE WASHINGTON PRIVACY ACT

Do the requirements of the Washington Privacy Act apply in all police contacts in which body cameras are used?

No. The requirements of the Washington Privacy Act only apply to “private conversations.” *City of Auburn v. Kelly*, 127 Wash. App. 54, 61, 111 P.3d 1213, 1217 (2005) rev'd sub nom. *Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 139 P.3d 1078 (2006).

Are conversations with police officers really private conversations?

That depends. Many cases have made their way to the Washington Supreme Court and the Washington Court of Appeals with specific facts that have resulted in rulings that conversations with police officers were not private. *See, e.g., Clark*, 129 Wash.2d at 226, 916 P.2d 384 (no reasonable expectation of privacy in a conversation with an undercover police officer when it “takes place at a meeting where one who attended could reveal what transpired to others.”); *State v. Bonilla*, 23 Wash.App. 869, 873, 598 P.2d 783 (1979) (“It would strain reason for Bonilla to claim he expected his conversations with the police dispatcher to remain purely between the two of them.”); *State v. Flora*, 68 Wash.App. 802, 808, 845 P.2d 1355 (1992) (“Because the exchange [between a police officer and an arrestee during an arrest] was not private, its recording [by the arrestee] could not violate RCW 9.73.030 which applies to private conversations only.”); *see also Alford v. Haner*, 333 F.3d 972, 978

(9th Cir.2003), *rev'd on other grounds, Devenpeck v. Alford*, 543 U.S. 146, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) (noting that *State v. Flora* established that a traffic stop was not a private encounter for purposes of the privacy act); *Johnson v. Hawe*, 388 F.3d 676, 682–83 (9th Cir.2004) (holding that an individual who videotaped a police officer during an arrest did not violate RCW 9.73.030 because the officer had no reasonable expectation of privacy in his communications with others over his police radio). *Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 460, 139 P.3d 1078, 1084 (2006)

What determines whether the conversation is private, invoking the Privacy Act and the advisement obligations under RCW 9.73?

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. *State v. Clark*, 129 Wash.2d 211, 225, 916 P.2d 384 (1996). 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 the reasonable expectations and intent of the parties.

Among those factors are (1) the duration and subject matter of the conversation (whether it was essentially a brief business conversation with a uniformed police officer), (2) the location of the conversation (whether it occurred in public or along a busy road), whether it occurred in the presence of a third party (such as a passenger), and (3) role of the non-consenting party and his or her relationship to the consenting party (i.e. it is not persuasive that the non-consenting parties to these conversations, the drivers, would expect the officers to keep their conversations secret, when the drivers would reasonably expect that the officers would file reports and potentially would testify at hearings about the incidents.) *Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 459, 139 P.3d 1078, 1083 (2006)

What about DUI Stops? Are they private?

No. The courts have held that the Washington Privacy Act does not apply to conversations between a police officer and a driver stopped *on a public road* for suspicion of DUI. *City of Auburn v. Kelly*, 127 Wash. App. 54, 61, 111 P.3d 1213, 1217 (2005) *rev'd sub nom. Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 139 P.3d 1078 (2006).

What about conversations at traffic stops in general? Are they considered private for purposes of the privacy act?

No. The Washington Supreme Court has ruled that traffic stop conversations are not private conversations, and therefore the Washington Privacy Act does not apply. *Lewis v. State, Dept. of Licensing*, 157 Wash. 2d 446, 460, 139 P.3d 1078, 1084 (2006).

(Note, however: Lewis v. State, Dept. of Licensing addresses dashboard cameras and is governed by RCW 9.73.090(1)(c), which only pertains to dashboard cameras and not to body cameras. RCW 9.73.090(1)(c) creates a separate set of requirements for recording traffic stop conversations that police officers must follow, *regardless of whether the conversations are private*. This ruling has not thus far been extended by the courts to body cameras, as they are not subject to RCW 9.73.090(1)(c).)

Does an officer need to evaluate every conversation to determine whether it is private?

No. As long as the requirements of the Washington Privacy Act are met with regard to the advisement, each conversation can be treated as if it were private.

Is the same advisement given for every conversation?

No. The advisement is different when recording in custody conversations versus out of custody conversations.

**B. ADVISEMENT WHEN RECORDING PERSONS NOT IN CUSTODY
RCW 9.73.030**

When a defendant is not in custody at the time of the statement, the police are required to comply with the terms of RCW 9.73.030 rather than 9.73.090. State v. Rupe, 101 Wash. 2d 664, 681, 683 P.2d 571, 583 (1984)

RCW 9.73.030 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 engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded. That announcement also must be recorded. State v. Rupe, 101 Wash. 2d 664, 681, 683 P.2d 571, 583 (1984).

What advisement must an officer give to a person not in custody?

- a. Officer Must Announce that the Conversation Is About To Be Recorded.
- b. Announcement May Be In “Any Reasonably Effective Manner.”
- c. The tape must also contain the announcement that the conversation is being recorded.

What if the person says s/he doesn't want to be recorded?

The police officer still has the authority to record the communication. The law says that "*consent shall be considered obtained* whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded." RCW 9.73.030(3) Thus, it doesn't matter if a person objects to the recording.

Could the video tape be lost as evidence in a criminal case if officers fail to follow the requirements under RCW 9.73.030?

Yes, the courts have stated that in no uncertain terms. Keep in mind also that, even if your recorded conversation is with a potential witness to the crime, the defendant has standing to object to unlawfully recorded conversation even though s/he was not a participant in the unlawfully intercepted or recorded conversation. *State v. Williams*, 94 Wash.2d 531, 534, 617 P.2d 1012, 24 A.L.R.4th 1191 (1980). *State v. Johnson*, 40 Wash. App. 371, 375, 699 P.2d 221, 224-25 (1985).

What if the announcement is inadvertently left off of the tape?

The tape might still be allowed if the court can find that the consent requirement was fulfilled. RCW 9.73.030(3) provides consent may be found in the announcement in *any reasonably effective manner* that the statement is being recorded. The court will look to the circumstances surrounding the taping to determine whether the defendant knew the statements were being recorded. *State v. Johnson*, 40 Wash. App. 371, 376-77, 699 P.2d 221, 225-26 (1985)

C. ADVISEMENT FOR CUSTODIAL INTERROGATIONS RCW 9.73.090

RCW 9.73.090 governs the recording of custodial interrogations." *State v. Mazzante*, 86 Wash.App. 425, 427, 936 P.2d 1206 (1997). RCW 9.73.090 is specifically aimed at the specialized activity of police taking recorded statements from arrested persons, as distinguished from the general public. *State v. Cunningham*, 93 Wash. 2d 823, 829, 613 P.2d 1139, 1143 (1980)

What advisement must an officer give to a person prior to a custodial interrogation?

- a. The arrested person shall be informed that such recording is being made;
- b. The statement so informing him shall be included in the recording;

- c. The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
- d. At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

RCW 9.73.090(1)(b); State v. Demery, 100 Wash. App. 416, 419-20, 997 P.2d 432, 434 (2000) rev'd, 144 Wash. 2d 753, 30 P.3d 1278 (2001)

Must this advisement be given once a driver is arrested and subjected to custodial interrogation following a traffic stop?

Yes. Whether or not the communications occurring during the traffic stop were treated as private conversation, the fact of an arrest changes the rules with respect to the advisement that must be given if the communication continues to be recorded. This is true for all arrests stemming from routine traffic stops or other investigatory detentions.

What happens if these steps are not strictly followed?

Recordings of custodial interrogations that fail to comply strictly with statutory requirements are inadmissible. State v. Mazzante (1997) 86 Wash.App. 425, 936 P.2d 1206.

What if you have a signed waiver of Constitutional Rights and the recording makes reference to the written waiver? Is that enough?

No. In order to render recording of custodial interrogation admissible, recorded statement must contain full statement of defendant's *Miranda* rights; mere reference to prior written waiver is insufficient. State v. Mazzante (1997) 86 Wash.App. 425, 936 P.2d 1206.

What if the arrested person says s/he doesn't want to be recorded?

A criminally accused person can always exercise the right to remain silent and not give a statement. If a statement is given, however, strict adherence to the statutory rules for advising a person in custody will establish a record that defendant's consent was given only after being informed that the statement would be recorded, that consent and the resultant statement were given only after being fully informed of constitutional rights, including exact information imparted, and that the statement was not obtained by means of oppressively long interrogation or interrogation that occurred at unreasonable times or in unreasonable sequences. State v. Cunningham (1980) 93 Wash.2d 823, 613 P.2d 1139, on remand 27 Wash.App. 834, 620 P.2d 535, review denied.

What if there are technical errors, such noting an incorrect start or end time?

When the only procedural defect in a taped interview is the absence of a correct start time, the court may admit the tape under Privacy Act unless there is an allegation of police misconduct that makes the existence of the time announcement a matter of critical importance. West's RCWA 9.73.090(1)(b)(ii). *State v. Demery*, 100 Wash. App. 416, 997 P.2d 432 (2000) rev'd, 144 Wash. 2d 753, 30 P.3d 1278 (2001)

What if the end time is not noted on the recording at all?

If no misconduct or unauthorized editing is alleged, the court may allow the officer to testify as to contents of videotape recording, notwithstanding inadmissibility of recording itself because of failure to specify ending time, since there is substantial compliance with recording requirements of this section. *State v. Gelvin* (1986) 43 Wash.App. 691, 719 P.2d 580, review denied.

III. PRIVACY ISSUES BEYOND THE RECORDED CONVERSATION

Are there privacy concerns beyond the communication that could be raised with the implementation of body cameras?

This is a largely unexplored area. The Washington Supreme Court has said that there is no reasonable expectation of privacy in routine traffic stops, *Lewis v. State*, 157 Wn.2d 446 (2006) but body-cameras raise the potential for more privacy issues than dash-cams because of the potential for recording inside private residences or other places where individuals may have an expectation of privacy. In addition to "private affairs", Const. art. 1, § 7 explicitly protects the "home". *State v. Young*, 123 Wash. 2d 173, 184, 867 P.2d 593, 599 (1994).

What type of information would violate a person's right to privacy?

RCW 42.56.050 provides that a person's right of privacy is violated only if disclosure of information about the person would be highly offensive to a reasonable person, and is not of legitimate concern to the public. There is no guide to what information may fall into this category; what is determined to be highly offensive to a reasonable person may ultimately be a question for the fact finder.

What other situations might raise privacy concerns?

Allegations of governmental trespass and illegal searches could arise from recordings made on private property. Under the Fourth Amendment, a search

occurs if the government intrudes upon a subjective and reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 351-52, 88 S.Ct. 507, 511-12, 19 L.Ed.2d 576 (1967). The Washington constitution focuses on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Myrick*, 102 Wash.2d at 511, 688 P.2d 151.

What types of individuals might assert a violation of privacy?

The Public Records Act allows a "person in interest" to seek legal relief enjoining the release of a video. RCW 42.56.010(2) defines a "person in interest" as the person who is the subject of a record. It need not be a suspect or the subject of an investigation. In some police investigations, there may be "persons in interest" or property owned by an individual appearing in the footage of a body cam video. These persons may challenge a video's release by asserting an expectation of privacy.

Why would the issue of privacy be raised if the recording was properly done?

Even where an officer properly records a conversation with one individual under RCW 9.73, a second individual could conceivably assert an expectation of privacy applicable as to the location related to the conversation with the first individual. This is a developing area of law with potential to change as challenges are raised.

Where there is a reasonable expectation of privacy, isn't there a possible unconstitutional search and/or seizure issue?

The potential for search and seizure issues presents the area of greatest concern with respect to the implementation of body cameras. Apart from searches pursuant to a warrant, police officers enter private residences on a regular basis in response to calls for service. They take reports, speak to witnesses, render aid and investigate crime. Video images captured from inside private homes, even if taken in the course of a matter unrelated to a crime, could reveal evidence of a crime. It is impossible to anticipate what challenges may be raised to the introduction of video recordings in a criminal or civil trial once body cameras enter private residences.

Are there Washington court rulings that indicate what constitutes a search via the use of body camera?

No; the law is unclear in this area with respect to body cameras. Questions remain regarding the application of the Fourth Amendment and the Washington Constitution's Article I section 7 to various scenarios in which body cameras affixed to police officer uniforms record information from

inside private homes.¹ The courts have not yet ruled on challenges to body cameras and whether there might be situations that require a search warrant prior to entry on account of the presence of a body camera.

Are there evidentiary issues of concern?

Yes. Among other concerns, it is debatable whether an object revealed in the footage taken by a body camera not otherwise spotted by an officer is evidence discovered in “plain view” and whether it would be admissible in a criminal proceeding. Similarly, it is unknown whether digitally enhancing a recording of items captured on video from inside a residence is considered to be a search requiring a warrant. The United States Supreme Court has consistently ruled that, where the government obtains information by physically intruding on constitutionally protected areas, a “search” within original meaning of Fourth Amendment has occurred. U.S.C.A. Const.Amend. 4. United States v. Jones, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012). This is an evolving area of law and this discussion should not be construed as providing dispositive guidance on the matter.

IV. REVIEW AND HANDLING OF VIDEO: SPECIAL ISSUES

A. VIDEOTAPE AS EVIDENCE

Are there integrity concerns that may warrant an extra layer of caution with respect to videotape evidence?

Yes. A video generated from a body camera is not merely a report; it is evidence, the integrity of which must be preserved so that it is not subject to criticism that it has been changed or altered in any manner. There will be an expectation that the videotape be handled carefully and placed on property since it may consist of evidence that exonerates the innocent or exposes malfeasance.

Is the Videotape Evidence such that it would require special handling?

A video tape is a potential exhibit at trial, and therefore potential evidence in a criminal or civil case. To avoid challenges to the authenticity of the videotape and baseless allegations that the recording has been changed or altered, there should be a set of departmental guidelines governing how the original videotape is handled and what steps must be taken to preserve the chain of custody.

¹ The Fourth Amendment provides in relevant part that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” United States v. Jones, 132 S. Ct. 945, 949, 181 L. Ed. 2d 911 (2012)

Will the department need to consider in its implementation plan the foundational requirements for admissibility of the videotapes?

Yes, SPD will need technicians who understand and can explain the operational aspects of the video cameras. In a court proceeding, the proponent of videotape evidence may be required, in foundational questions, to show the process by which the videotape was taken, i.e. the installation and operation of the camera, testing and removal of the film. The proponent of the video will need to be prepared to establish the integrity of the tape and its chain of custody.

B. VIDEOTAPE FOR ADMINISTRATIVE PURPOSES

Is a protocol needed to set forth how the videotape is handled for purposes of investigations and administrative reviews?

A video captured from a body camera recording may be the subject of an internal review by the shift supervisor and by other supervisors in an officer's chain of command, such as in an incident involving the use of force. Just like an incident report or a use of force report, a video will be the subject of scrutiny in some cases where adherence to department policy is in question or where the level of force must be reviewed. The department will need to determine whether a copy of the video accompanies a use of force report for the chain of command review.

The same video recording could be the subject of an internal affairs investigation in response to a specific complaint or subject to a criminal investigation pursuant to the SIRRT protocol. A protocol is needed to determine how video evidence flows through the department and how internal reviews occur using such video evidence. For purposes of maintaining integrity, it must be decided as a matter of policy whether the original remains on property and whether copies are made before the various reviews can occur.

What happens to the video if it is determined that it contains evidence of a policy violation?

A decision will need to be made whether a video containing evidence of misconduct or a policy violation is Brady/Giglio material, whether it should become part of the internal affairs file, whether the video, like other internal affairs investigations, is posted for public inspection and the manner in which such video gets turned over to the county prosecutor if determined to contain

exculpatory evidence. There may be contractual issues at play in these matters, and the rights of individual officers will need to be considered.

Are videotapes discoverable in civil and criminal cases?

It can be anticipated that, just as police reports are discoverable in civil and criminal cases, that video evidence depicting an incident will be subject to the discovery rules in civil and criminal cases where the incident is relevant and material to the case or where it serves as proper impeachment material.

Will videotapes be available for parallel investigations?

In critical incidents, the SIRRT team must determine whether body camera videos must remain with criminal investigators or whether the IA investigators can also access a copy of the video immediately. It should also be decided how the existence of a video will be incorporated into the SIRRT protocol.

V. RETENTION OF BODY CAMERA VIDEOS

How long must a body camera video be retained by the Spokane Police Department?

Body camera videos must be retained for the same length of time as any other record related to a particular investigation. Recordings of incidents that are not expected to result in litigation or criminal prosecution may be destroyed after 90 days.

The retention of body cam videos will be based on the retention schedule of the Spokane Police Department. Law enforcement agencies follow Washington Law Enforcement Records Retention Schedule Version 6.0 (July 2010), which divides "Recordings from Mobile Units" into two categories, "Incident Identified" and "Incident Not Identified." The retention schedule doesn't contain a specific provision for body-cam videos, but one can anticipate that they will be similar.

"Incident Identified" are "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." The retention period for a particular recording is the same as any other record related to a particular investigation.

"Incident Not Identified" are "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." These recordings may be destroyed after 90 days. Note that a video is properly retained when it is

copied and retained in a file for the retention period appropriate to that file. (RCW 40.14.060).

VI. RELEASE OF BODY CAMERA VIDEOS UNDER THE PUBLIC RECORDS ACT

Are the videos from body cameras subject to disclosure?

Yes. RCW 42.56.010 defines "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. "Writing" includes every means of recording any form of communication or representation including video recordings.

Do body camera videos need to be redacted?

Yes. Under RCW 42.56, the same rules would apply to the video footage that apply to any other public record; therefore, some information contained within a video generated by a body camera could be subject to one or more statutory exemptions.

Redaction would need to occur for information exempt under RCW 42.56 including, but not limited to the following:

- **Personal Identifiers:** RCW 42.56.230 would exempt anything generated on video footage from a body camera that would disclose personal information, including but not limited to, addresses, telephone numbers and social security numbers.
- **Crime victim or witness information:** RCW 42.56.240 exempts information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement, or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety, or property or, if at the time a complaint is filed the complainant, victim, or witness indicates a desire for disclosure or nondisclosure.
- **Child Victims of Sexual Assault** RCW 42.56.240 also exempts information revealing the identity of child victims of sexual assault who are under age eighteen. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.

- **Information essential to effective law enforcement** RCW 42.56.240 exempts information “the nondisclosure of which is essential to effective law enforcement.” *Cowles Pub. Co. v. State Patrol*, 109 Wash.2d 712 (1988).

Are there implementation issues associated with the redaction of body camera videos?

Yes. Processing and altering video to remove portions of exempt information is labor-intensive and costly because it requires trained staff with technical expertise to take on the additional workload of reviewing videos prior to release and redacting any portions that are exempt from disclosure for privacy or other reasons. This will not be possible without additional staffing.

How quickly must a body camera video be turned over pursuant to a request under the Public Records Act?

Five days unless more time is needed or an exemption exists. RCW 42.56.520 requires the SPD to provide a response to the request within five business days and to either (1) provide the video, (2) provide an internet address and link on the agency's web site to the video, if it posted, (3) provide a copy of the video or (4) allow the requester to view the video using an agency computer. If the video cannot be provided within five days, SPD within five business days must provide a reasonable estimate of time required to respond to the request. If there is a statutory basis for the denial of the video, SPD must indicate the basis for such denial.

What if the body camera video is part of an investigation?

If the body camera video is part of an investigative file subject to an ongoing criminal or administrative investigation, it is exempt from disclosure. RCW 42.56.240. The “investigative records” exception to the public disclosure act categorically exempts from disclosure all police investigative records in an unsolved, open investigation. *Newman v. King County*, 133 Wash.2d 565, 947 P.2d 712 (1997).

At what point can the video be released?

Once the investigation is complete, the body camera video may be released.

Can body camera videos be released at Police Chief's discretion?

Yes. Discretionary disclosures of body camera videos, unlike the disclosure of video footage from dash cameras, are not prohibited by state law. The Chief of Police, in consultation with the prosecuting authority, may elect to disclose

video footage (i.e. to the media) after giving consideration to preserving the integrity of any ongoing criminal investigation.

VII. USE OF BODY CAMERAS AS TOOL TO MONITOR CONSTITUTIONAL POLICING

Can police leadership utilize body cameras to better monitor an officer's use of force?

Yes. Body cameras can be used as an effective tool to ensure that individual officers are following their training, using appropriate amount of force and otherwise following department policy. While this is important in overall police accountability, it can also serve to dispel the notion that an officer committed an act of misconduct or used excessive force.

Use of Force

Currently, all incidents meeting a threshold set of criteria which involve an officer's use of force are subject to a use of force review. In many cases, the department could more effectively and objectively determine the reasonableness of the force used by reviewing a video recording of the incident.²

Because the "reasonableness" inquiry in an excessive force case is an objective one, the question for command staff is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Additionally, the body cameras will be an additional tool to be used to gauge the effectiveness of training on the application of force by officers within the department and to monitor specific use of force incidents for violations of law and policy.

Does the department have any other purpose in monitoring incidents involving the use of force?

Yes. All policies and practices within the department come under scrutiny when Use of Force incidents are called into question. In terms of assigning

² The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. See *Terry v. Ohio*, *supra*, 392 U.S., at 20–22, 88 S.Ct., at 1879–1881. As in other Fourth Amendment contexts, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott v. United States*, 436 U.S. 128, 137–139, 98 S.Ct. 1717, 1723–1724, 56 L.Ed.2d 168 (1978). See *Scott v. United States*, *supra*, 436 U.S., at 138, 98 S.Ct., at 1723, citing *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). *Graham v. Connor*, 490 U.S. 386, 396–97, 109 S. Ct. 1865, 1872, 104 L. Ed. 2d 443 (U.S.N.C. 1989)

liability, potential plaintiffs will inquire into whether there is a causal connection between department policies and an alleged constitutional deprivation. The police department must continually monitor the legality and effectiveness of its policies both written as well as in practice. The purpose of self-monitoring is to ensure compliance with constitutional policing and minimize harm to the public. It is also done with the purpose of limiting liability to the department and ensuring that training of all officers is accurate and effective. This level of review and internal scrutiny will be critical to limiting liability and reducing sec. 1983 claims against the department and against the City.

Municipalities are “persons” subject to damages under §1983, but “a municipality cannot be held liable *solely* because it employs a tortfeasor-or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.” *Monell v. Department of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).³

In order to establish a § 1983 claim against a municipality, a plaintiff must:

- (1) identify a specific policy or custom;
- (2) demonstrate that the policy was sanctioned by the official or officials responsible for making policy in that area of the city's business;
- (3) demonstrate a constitutional deprivation; and
- (4) establish a causal connection between the custom or policy and the constitutional deprivation.

Pembaur v. Cincinnati, 475 U.S. 469, 481-84, 106 S.Ct. 1292, 1299-301, 89 L.Ed.2d 452 (1986); *Oklahoma City v. Tuttle*, 471 U.S. 808, 822-24, 105 S.Ct. 2427, 2435-37, 85 L.Ed.2d 791 (1985) (plurality); *Tuttle*, 471 U.S. at 828-30, 105 S.Ct. at 2438-40 (Brennan, J., concurring). Lack of proof on any of the above elements would require dismissal of the action. *Phennah v. Whalen*, *supra*. *Baldwin v. City of Seattle*, 55 Wash. App. 241, 248, 776 P.2d 1377, 1381 (1989)

³ 42 U.S.C. § 1983, provides: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.... *Baldwin v. City of Seattle*, 55 Wash. App. 241, 247-48, 776 P.2d 1377, 1380 (1989)

VIII. LABOR CONSIDERATIONS

Does the use of body cameras require negotiation?

Yes, but as to impact only. Management is not required to seek the permission of a union before instituting a camera system; this is a management right. What requires negotiation is *the impact* of body cameras on working conditions.

Trends show that body and dashboard camera systems are heavily favored by many police unions. They have great potential to protect officers because they can provide an objective view of the reasonableness of an officer's interactions with members of the public and use of force activity. That said, body cameras will require changes to department policy and will require training on new procedures. Compliance with departmental policy is directly related to police discipline, so there may be an impact to some officers. It is important for police management to sit down and discuss these impacts with the union so that both sides are able to move toward successful implementation and gain a full understanding of the body camera program.

IX. COMMUNITY CONCERNS

Should the community be involved in a discussion about the implementation of body cameras?

Involving the community in a discussion about body cameras is a decision for police leadership, but it may be helpful in both educating the public on implementation issues as well as eliciting the citizen's perspective. With regard to the subject of body cameras, there has already been a strong showing of public support for the concept. What the public may not be aware of is peripheral issues concerning privacy and disclosure.

Some citizen advocates have expressed concerns about body-cameras. While body cameras are often discussed as a means to monitor police behavior, the subjects captured on video will, for the most part, be civilians. In many cases, civilians will be engaged in situations or behavior they would not wish to have recorded, and potentially, released and distributed under public disclosure laws. A public discussion about the issues and challenges surrounding body camera implementation may be useful.

X. BUDGET CONSIDERATIONS.

Is there a fiscal impact to the implementation of body cameras beyond the purchase of the cameras?

Yes. There are substantial back-end costs related to body-camera systems which, if unanticipated, could be overlooked by the authorizing and funding authority and which could expose the police department to significant civil liability.

Why is this any more expensive than implementing dashboard cameras?

There are many more officers than vehicles, so the cost of a body-cam system is higher than for dash cams. Before implementing a body camera program the agency should consider and budget for the cost of cameras, as well as the equipment.

Are there other costs to consider?

Yes. There are significant workload increases that will occur as the result of body camera implementation. These work load increases will require more civilian personnel to store, catalog and manage large amounts of video data, and to retrieve and process individual segments of video on request. The department will need to hire more people.

Are there operational impacts as the result of these additional costs?

The department will have to decide if the tasks of storage and retention will be the responsibility of the Records Division or another division. The department will have to consider the fact that, either way, more staff and more resources will be needed to do this job. Currently, the Police Records Division serves the function of fulfilling requests made under the Public records Act, but logistically the unit cannot handle this additional workload with its current staffing. The department should consider exploring technological options to assist in performing these tasks.

Additionally, processing video is labor-intensive and costly because it requires staff to review videos prior to release and to redact any portions that are exempt from disclosure for privacy or other reasons. Processing a single video can take hours. The department will need to allow ample time for training in this regard.

Does the presence of exempt material on a video provide us a legal reason to deny disclosure?

No. An agency can't simply deny access to an entire video if it contains exempt information; it must redact the exempt portions and produce the non-exempt portions.

What if the public records request requires us to turn over every video in our possession?

We would have to comply. An agency can't deny an "overbroad" request. By law we cannot inquire into why so many videos are requested. A requester can ask for thousands of videos or even every video in SPD's possession and we would have to make these available for inspection or copying.

XI. CONCLUSION

The legal issues set out in this discussion should be approached with caution as they are subject to continued interpretation by Washington and federal courts. The costs of camera implementation, including the cost to retain, store, redact and disseminate the videos, should be discussed with city budget leaders and policymakers toward an understanding of the comprehensive costs.