The International Municipal Lawyers Association
82nd Annual Conference
Niagara Falls, Ontario, Canada
October 14-18, 2017

Monday, October 16th

Litigation Section Meeting: Body Cameras

John Jack Ryan
Co-Director
Legal and Liability Risk Management

Body Worn Camera

Over the last decade law enforcement agencies around the United States have begun utilizing body-worn cameras as a mechanism to document law enforcement events, further accountability, and aid in the transparency of law enforcement operations. Cameras, to the extent that they are able to capture events, have helped law enforcement in many cases. Law enforcement has also learned that cameras do not necessarily provide the expected evidence, that standing by itself, will prove definitively what occurred.

Cameras of any type, including in-car cameras and body-worn cameras suffer from several weaknesses. Simply stated, the camera may not see what the officer sees, or in the alternative, the camera may see more than the officer sees. Cameras offer a two-dimensional fixed perspective that may or may not see what the officer sees with his or her eyes in three-dimensions. Because the camera is a fixed, perspective or limited view, the officer may see things that are outside the view of the camera including action occurring in the officer's peripheral vision. The camera technology may allow the camera to see things the officer does not see, as with night vision technology that sees well beyond the capability of an officer's eyes.

When a law enforcement agency decides to deploy cameras several issues emerge. First is funding. There must be a capital outlay for the equipment but this is only the beginning. There must be sufficient funding for storage of the data. And finally, there is likely a need for additional personnel to deal with the video including public record requests, redaction for privacy and confidentiality issues, and proper evidentiary storage.

Once financial issues are resolved, policy must be developed that cover a myriad of issues.

Policy must cover who in the agency will have cameras. Policy provisions that simply state, all citizens encounters will be recorded are fine if every officer on the department has a camera, however these provisions will lead to problems when undercover officers and detectives are not recording because they do not have the cameras.

Policy must cover when the cameras will be turned on. In a recent shooting in Minneapolis, one of the first criticisms of law enforcement was the fact that the officers had not activated their body-worn cameras though they were not yet out of their car on the call.

One of the policy issues that gets debated is privacy in certain areas such as when an officer is in a private home. The United States Supreme Court has made clear "**What a person knowingly exposes to the public**, **even in his own home** or **office, is** not a subject of Fourth Amendment protection.'"

California v. *Ciraolo,* 476 U.S. 207, 213, 90 L. Ed. 2d 210, 106 S. Ct. 1809 (1986) (quoting *Katz* v. *United States,* 389 U.S. 347, 351, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)); see *Florida* v. *Riley,* 488 U.S. 445, 449-450, 102 L. Ed. 2d 835, 109 S. Ct. 693 (1989); *California* v. *Greenwood,* 486 U.S. 35, 40-41, 100 L. Ed. 2d 30, 108 S. Ct. 1625 (1988); *Dow Chemical Co.* v. *United States,* 476 U.S. 227, 235-236, 90 L. Ed. 2d 226, 106 S. Ct. 1819 (1986); *Air Pollution Variance Bd. of Colo.* v. *Western Alfalfa Corp.,* 416 U.S. 861, 865, 40 L. Ed. 2d 607, 94 S. Ct. 2114 (1974)."

Thus, if an officer is lawfully present and can see what is being recorded with their eyes, the fact that the encounter is being filmed should have no impact on Fourth Amendment privacy. The more significant issue would be the broadcast of video that contains images, which would have a privacy or confidentiality component. For example, emergency medical conditions/actions that get recorded; juveniles being recorded; sexual assault victims being recorded; or any other area where a right to privacy from the broadcast of such information could be asserted. Note that this would include invasion of privacy as a Tort and not just Fourth Amendment privacy.

"Another key policy issue involves whether officers should be allowed to review video footage of an incident, especially a critical incident, before filing a report or making a statement. The Police Executive Research Forum (PERF) report notes, "The majority of law enforcement executives interviewed by PERF are in favor of allowing officers to review body-worn camera (BWC) footage prior to making a statement about an incident in which they were involved. They believe that this approach provides the best evidence of what actually took place" (PERF, 2014: 29). Some agency leaders, defense attorneys, and civil rights advocates oppose officer review of footage before making a statement, arguing that review of the video may lead the officer to alter or tailor his or her statement. The decision to allow officers to review footage (or not) before making statements should be made locally based on discussion between the agency leaders, union representatives, and other relevant stakeholders such as prosecutors and independent law enforcement review boards, if applicable.

There is also the potential for inconsistencies to exist between the written report and the video. Departments vary in how they handle this. Some agencies do not permit officers to review the video post-event before their reports are written. These agencies take the perspective that they want the "officer's perception" of the event described in the departmental report without the assistance of reviewing the video so that the department better understands how the officer perceived the event as it occurred in the field. One criticism of this approach is that evidence presented through the officer's report and the video evidence might be inconsistent with one another, which could create complications in court. Other agencies permit the officer through agency policy to review the video of the incident while writing the departmental report. This allows the officer more opportunity to ensure that the police report does not omit things that were

captured in the video. There have been no evaluations to date that have examined the strengths and weaknesses of each approach. Each agency should work with its in-house legal counsel, local prosecutors, and local defense attorney to determine which approach is best for its jurisdiction."[1]

A small group of law enforcement trainers have argued that an officer's initial statement should be made without the benefit of reviewing the video in order to capture the officer's raw perception. This position seems to ignore the well known fact in law enforcement that officer's sometimes suffer what some authors refer to as critical incident amnesia in which they do not remember aspects of the event, that they observed at the time of the event, but that do not come back to their memory until some time has passed. Ironically, some of these same trainers support the generally accepted practice that officers should not be required to give an immediate statement due to the fact that their memory may be distorted by the critical event.

The position also ignores the legal analysis on use of force as an objective standard rather than a subjective standard.

The following exchange between Plaintiff's Counsel and Justice Alito in *Plumhoff v. Rickard*[2] provides an example of the lack of understanding some trainers and even attorneys have on the concept of objective reasonableness.

> MR. SMITH: If I can get back now to to the material genuine issues of fact that are in dispute, keep in mind, Officer Plumhoff, who shot those first three shots, did not do it to prevent the car from leaving again. He said the only reason that he fired those three shots was because he was standing directly in front of the path of that car and he thought he was going to be killed; and the video 100 percent shows that that is not true.
>
> JUSTICE ALITO: But I thought the reasonableness of a Fourth Amendment seizure was an objective question, not a subjective question.
>
> MR. SMITH: It is an objective question.
>
> JUSTICE ALITO: So why does it matter what reason he subjectively had?

---

[1] https://www.bja.gov/bwc/pdfs/bwc_faqs.pdf

[2] *Plumhoff v. Rickard,* 134 S. Ct. 2012 (2014) **Author was the consulting expert for Michael Mosely and Mark Hayes throughout this case.

MR. SMITH: He has to have some justification of danger under objective reasonableness to make the decision to use deadly force. And he says that it was because he was standing in the path of the car. He wasn't. That car was bumper to bumper against the Gardner car.

JUSTICE ALITO: Well, I know. But if he says I did it because I thought he was going to run me over. But an objective officer looking at the situation would say that the use of deadly force is necessary here to prevent this chase from continuing on the interstate and endangering other motorists and their passengers. So if that were the situation, wouldn't that mean that was a reasonable seizure?

MR. SMITH: I believe it would not be.

JUSTICE ALITO: Initiated by the fact by the officer who used the force had a different motive?

MR. SMITH: No. I'd respectfully submit, Justice Alito, that it would not because if that's all there was, there were other alternate methods to stop that car from leaving. It wasn't the reason that he did it; but if you assume that you can analyze it on that basis, there were several alternate ways to prevent that car from leaving.

Majority Opinion by Justice Alito (7 Justices):

> "Thus, the record conclusively disproves respondent's claim that the chase in the present case was already over when petitioners began shooting. Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road…In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in Scott, the police acted reasonably in using deadly force to end that risk."

It is noted that Officer Plumhoff's shooting was determined to be reasonable notwithstanding his stated subjective reasoning for using deadly force. The Court found that Plumhoff's three shots, fired to protect himself from a perceived

deadly threat (subjective), was objectively reasonable to protect the public from a continued high-speed pursuit.

In cases involving events that are captured by video what is most important is capturing the most accurate statement possible. It is my opinion, and that of most practitioners who actually defend agencies and officers that reviewing the video before giving a statement assists with obtaining a more accurate statement. Arguments that officers may tailor statements based on a review of the video fail to recognize that the video, to the extent it captures the event is objective evidence that will not change once in the hands of investigators.

A recent court decision related to Seattle Police Department's Consent Decree provides an example of the fact that consent decrees with the United States Department of Justice are sometimes more restrictive than the legal standard. Under the Seattle decree, when an officer uses deadly force they are not allowed to review their video, however they are allowed to review the video for lesser uses of force. It should be noted that the use of force analysis for all uses of force are the same, thus the perception argument made by some trainers again fails when looking at this type of case since, if the raw perception (without viewing the video) was the constitutional requirement, it would apply to all uses of force, not just deadly force.

Cases

A recent court decision related to Seattle Police Department's Consent Decree provides an example of the fact that consent decrees with the United States Department of Justice are sometimes more restrictive than the legal standard. Under the Seattle decree, when an officer uses deadly force they are not allowed to review their video, however they are allowed to review the video for lesser uses of force. It should be noted that the use of force analysis for all uses of force are the same, thus the perception argument made by some trainers again fails when looking at this type of case since, if the raw perception (without viewing the video) was the constitutional requirement, it would apply to all uses of force, not just deadly force.

Seattle Consent Decree-Note: Consent Decrees are often more restrictive than legal mandates.

United States v. City of Seattle, 2017 U.S. Dist. LEXIS 67794, *15-17 (W.D. Wash. May 3, 2017)

> Finally, the City, SPD, and DOJ are committed to continuing to review, analyze, and if appropriate, modify the BWV policy in the future. (*See id.* at 24; DOJ Resp. at 7 ("If such evidence [that SPD's proposed policy undermines the accuracy of reporting,

> documenting, or investigating the use of force] later came to light, the Parties and the Monitor could reconsider whether SPD's current **body-worn camera** policy is appropriate.").) Indeed, the court notes that it considered placing the same restrictions upon officer viewing of BWV footage in cases involving Type II and Type III uses of force. However, grouping Type II with Type III uses of force would increase the number of incidents that officers are prohibited from viewing BWV footage prior to reporting by more than fifteen-fold. (*See* Use of Force Annual Report (Dkt. # 362) at 7 (indicating that in 2016 there were 294 Level II uses of force and a total of 17 Level III uses of force and officer-involved shootings).) The court concludes that in the absence of any evidence that permitting officers to view BWV footage before making a statement about lower level uses of force undermines the accuracy of such reporting (*see* DOJ Resp. at 7), the administrative and operational burdens associated with this change would be too great (*see* City Resp. at 9-12). The court, however, urges the parties, the Monitor, and the CPC to focus their operational review of SPD's BWV policy on the reporting of Type II uses of force. If issues arise concerning the accuracy, documentation, or investigation of Type II uses of force, the court urges the parties, the Monitor, and the CPC to bring those issues back to the court for further review and possible modification of SPD's BWV policy.

Under the Seattle Consent Decree, use of force types are classified as follows:

“Type I use of force” means the use of low-level physical force that is greater than De Minimus Force, is not reasonably expected to cause injury and does not result in anactual injury or complaint of an injury, but causes transient pain and/or disorientation during its application as a means of gaining compliance. Examples of this type of force include disorientation techniques (e.g., open or empty hand strike), weaponless pain compliance techniques while using sufficient force to cause pain (e.g., wrist lock), and “soft” take-downs (e.g., controlled placement of a subject, including on the ground or floor).

Type II use of force. Pointing a firearm at a person is reportable as a Type I use of force. Unholstering or displaying a firearm without intentionally pointing it at a person, or simply displaying any weapon, is not a reportable use of force. “Type II use of force” means a use of force which causes an injury, could reasonably be expected to cause an injury, or results in a complaint of an injury, but does not rise to the level of a Type III use of force. Examples of this type of force include: a “hard” strike, take-down, or kick; CED deployment of any type against a subject; use of an impact weapon (including batons and flashlights) to strike a subject; deployment of canine that results in an injury or complaint of injury; deployment of Oleoresin Capsicum Spray (OC Spray) at a subject; and placing a subject in a full restraint position.

"Type III use of force" means all uses of force by a SPD officer that have the likelihood of significant injuries to a subject including: (1) any use of "Lethal Force;" and (2) any use of force that results in or could reasonably be expected to result in "Great Bodily Harm" or "Substantial Bodily Harm."

Example State Statutes on Body-Worn Cameras

Illinois:

50 ILCS 707/20 Rules; officer **body-worn camera** grants.

- **(a)** The Board shall develop model rules for the use of officer body-worn cameras to be adopted by law enforcement agencies that receive grants under Section 10 of this Act [50 ILCS 707/10]. The rules shall comply with the Law Enforcement Officer-Worn Body Camera Act [50 ILCS 706/1 et seq.].
- **(b)** Each law enforcement agency receiving a grant for officer-worn body cameras under Section 10 of this Act must provide an annual report to the Board, the Governor, and the General Assembly on or before May 1 of the year following the receipt of the grant and by each May 1 thereafter during the period of the grant. The report shall include:
  - **(1)** a brief overview of the makeup of the agency, including the number of officers utilizing officer-worn body cameras;
  - **(2)** the number of officer-worn body cameras utilized by the law enforcement agency;
  - **(3)** any technical issues with the equipment and how those issues were remedied;
  - **(4)** a brief description of the review process used by supervisors within the law enforcement agency;
  - **(5)** for each recording used in prosecutions of conservation, criminal, or traffic offenses or municipal ordinance violations:
    - **(A)** the time, date, and location of the incident; and
    - **(B)** the offenses charged and the date charges were filed;
  - **(6)** for a recording used in a civil proceeding or internal affairs investigation:
    - **(A)** the number of pending civil proceedings and internal investigations;
    - **(B)** in resolved civil proceedings and pending investigations:
      - **(i)** the nature of the complaint or allegations;
      - **(ii)** the disposition, if known; and
      - **(iii)** the date, time and location of the incident; and
  - **(7)** any other information relevant to the administration of the program.
- **(c)** On or before July 30 of each year, the Board must analyze the law enforcement agency reports and provide an annual report to the General Assembly and the Governor.

50 ILCS 707/20

Michigan:

Act 85 of 2017 Law Enforcement **Body-worn Camera** Privacy Act [Effective January 8, 2018]

-
  - AN ACT to exempt from disclosure certain audio and video recordings recorded by law enforcement officers with a **body-worn camera** in certain private places; to describe certain individuals who may request disclosure of those audio and video recordings; and to prescribe the powers and duties of certain local and state law enforcement agencies.

MCLS Ch. 780, Law Enforcement Body-worn Camera Privacy Act, Act 85 Note

- Sec. 1. This act shall be known and may be cited as the "law enforcement **body-worn camera** privacy act".
- Sec. 2. As used in this act:
  - (a) "**Body-worn camera**" means a device that is worn by a law enforcement officer that electronically records audio and video of his or her activities.
  - (b) "Evidentiary audio and video recording" means an audio and video recording of an incident or encounter recorded by a **body-worn camera**, including a crime, arrest, citation, search, use of force incident, or confrontational encounter with a citizen, that may be materially useful for investigative or prosecutorial purposes, including for a criminal and internal investigation.
  - (c) "Private place" means a place where an individual may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or a substantial group of the public has access.
- Sec. 3.
  - (1) The disclosure of any audio or video recording recorded by a **body-worn camera** is subject to the protections provided for crime victims in sections 8, 19, 19a, 21, 34, 38, 48, 62, 68, and 80 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.758, 780.769, 780.769a, 780.771, 780.784, 780.788, 780.798, 780.812, 780.818, and 780.830.
  - (2) Except as otherwise provided in section 4 and subject to section 5, a recording recorded by a law enforcement officer with a **body-worn camera** that is recorded in a private place is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.
- Sec. 4. Except for an audio and video recording exempted from disclosure under section 13 of the freedom of information act, 1976 PA 442, MCL 15.243, and section 3(1) or 5, any of the following individuals may request a copy of an audio

and video recording recorded by a law enforcement officer with a **body-worn camera** in a private place:

- (a) An individual who is the subject of the audio and video recording.
- (b) An individual whose property has been seized or damaged in relation to a crime to which the audio and video recording is related.
- (c) A parent of an individual who is less than 18 years of age described in subdivision (a) or (b).
- (d) A legal guardian of an individual described in subdivision (a) or (b).
- (e) An attorney who represents an individual described in subdivision (a) or (b).

- Sec. 5.
  - (1) An audio or video recording from a **body-worn camera**that is retained by a law enforcement agency in connection with an ongoing criminal investigation or an ongoing internal investigation is not a public record and is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, but only to the extent that disclosure as a public record would do any of the following:
    - (a) Interfere with law enforcement proceedings.
    - (b) Deprive a person of the right to a fair trial or impartial adjudication.
    - (c) Constitute an unwarranted invasion of personal privacy.
    - (d) Disclose the identity of a confidential source or, if the record is compiled by a law enforcement agency in the course of a criminal investigation, disclose confidential information furnished only by a confidential source.
    - (e) Disclose law enforcement investigative techniques or procedures.
    - (f) Endanger the life or physical safety of law enforcement personnel.
    - (g) Disclose information regarding a crime victim in violation of sections 8, 19, 19a, 21, 34, 38, 48, 62, 68, and 80 of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.758, 780.769, 780.769a, 780.771, 780.784, 780.788, 780.798, 780.812, 780.818, and 780.830.
  - (2) An audio or video recording from a **body-worn camera**that is retained by a law enforcement agency relating to a civil action in which the requesting party and the public body are parties is not a public record and is exempt from disclosure under section 13(1)(v) of the freedom of information act, 1976 PA 442, MCL 15.243.
- Sec. 6.
  - (1) Except as provided in subsections (2) and (3), a law enforcement agency shall retain an evidentiary audio and video recording recorded by a **body-worn camera** for not less than 30 days from the date the recording is made.
  - (2) A law enforcement agency shall retain audio and video recordings that are the subject of an ongoing criminal or internal investigation, or an ongoing criminal prosecution or civil action, until the completion of the ongoing investigation or legal proceeding.

    - (3) A law enforcement agency shall retain audio and video recorded by a **body-worn camera** for not less than 3 years after the date the recording is made if the recording is relevant to a formal complaint against a law enforcement officer or agency.
    - (4) If a complaint against a law enforcement officer or law enforcement agency is made after the expiration of the retention period described in subsection (1), (2), or (3) or a law enforcement agency is unable to produce an audio and video recording related to the complaint in any criminal prosecution or civil action as a result of a technical failure or human error, this act does not create a presumption that the audio and video recording would corroborate either the prosecution's or the defendant's version of events in a criminal prosecution or the plaintiff's or the defendant's version in a civil action.
- Sec. 7. A law enforcement agency may charge a fee for a copy of an audio and video recording recorded by a law enforcement officer with a **body-worn camera**. A fee charged under this section shall be calculated under and in compliance with section 4 of the freedom of information act, 1976 PA 442, MCL 15.234.
- Sec. 8. A law enforcement agency that utilizes body-worn cameras shall develop a written policy regarding the use of the body-worn cameras by its law enforcement officers and the maintenance and disclosure of audio and video recordings recorded by body-worn cameras that complies with the requirements of this act.

  Enacting section 1. This act takes effect 180 days after the date it is enacted into law.

  This act is ordered to take immediate effect.

History

ACT NO. 85

PUBLIC ACTS OF 2017

APPROVED BY THE GOVERNOR

JULY 12, 2017

Law enforcement body-worn camera privacy act, 2017 Bill Text MI H.B. 4427

Texas:

Tex. Occ. Code § 1701.651

In this subchapter:

- **(1)** "**Body worn camera**" means a recording device that is:
  - **(A)** capable of recording, or transmitting to be recorded remotely, video or audio; and
  - **(B)** worn on the person of a peace officer, which includes being attached to the officer's clothing or worn as glasses.
- **(2)** "Department" means the Department of Public Safety of the State of Texas.
- **(3)** "Private space" means a location in which a person has a reasonable expectation of privacy, including a person's home.

Sec. 1701.652. [Expires September 1, 2021] Grants for Body Worn Cameras.

- **(a)** A police department of a municipality in this state, a sheriff of a county in this state who has received the approval of the commissioners court for the purpose, or the department may apply to the office of the governor for a grant to defray the cost of implementing this subchapter and to equip peace officers with body worn cameras if that law enforcement agency employs officers who:
  - **(1)** are engaged in traffic or highway patrol or otherwise regularly detain or stop motor vehicles; or
  - **(2)** are primary responders who respond directly to calls for assistance from the public.
- **(b)** The office of the governor shall set deadlines for applications for grants under this chapter.
- **(c)** Except as provided by Subsection (d), the office of the governor shall create and implement a matching grant program under which matching funds from federal, state, local, and other funding sources may be required as a condition of the grant. A law enforcement agency that receives a grant under this section is required to match 25 percent of the grant money.
- **(d)** The department is eligible for grants under this subchapter but may not be made subject to any requirement for matching funds.
- **(e)** The governor's office may conditionally award a grant to a law enforcement agency that has not adopted and implemented the policy under Section 1701.655 or implemented the training required under Section 1701.656, but money may not be disbursed to a law enforcement agency until the agency fully complies with those sections.

Sec. 1701.653. [Expires September 1, 2021] Reporting.

- **(a)** As a condition of receiving a grant under this subchapter, a law enforcement agency annually shall report to the commission regarding the costs of implementing a **body worn camera** program, including all known equipment costs and costs for data storage.
- **(b)** The commission shall compile the information submitted under Subsection (a) into a report and submit the report to the office of the governor and the legislature not later than December 1 of each year.

Sec. 1701.654. [Expires September 1, 2021] Interagency or Interlocal Contracts.

- A law enforcement agency in this state may enter into an interagency or interlocal contract to receive **body worn camera** services and have the identified operations performed through a program established by the Department of Information Resources.

Sec. 1701.655. [Expires September 1, 2021] **Body Worn Camera** Policy.

- **(a)** A law enforcement agency that receives a grant to provide body worn cameras to its peace officers or that otherwise operates a **body worn camera** program shall adopt a policy for the use of body worn cameras.
- **(b)** A policy described by Subsection (a) must ensure that a **body worn camera** is activated only for a law enforcement purpose and must include:
  - **(1)** guidelines for when a peace officer should activate a camera or discontinue a recording currently in progress, considering the need for privacy in certain situations and at certain locations;
  - **(2)** provisions relating to data retention, including a provision requiring the retention of video for a minimum period of 90 days;
  - **(3)** provisions relating to storage of video and audio, creation of backup copies of the video and audio, and maintenance of data security;
  - **(4)** guidelines for public access, through open records requests, to recordings that are public information;
  - **(5)** provisions entitling an officer to access any recording of an incident involving the officer before the officer is required to make a statement about the incident;
  - **(6)** procedures for supervisory or internal review; and
  - **(7)** the handling and documenting of equipment and malfunctions of equipment.
- **(c)** A policy described by Subsection (a) may not require a peace officer to keep a **body worn camera** activated for the entire period of the officer's shift.
- **(d)** A policy adopted under this section must be consistent with the Federal Rules of Evidence and Texas Rules of Evidence.

Sec. 1701.656. [Expires September 1, 2021] Training.

- **(a)** Before a law enforcement agency may operate a **body worn camera**program, the agency must provide training to:
  - **(1)** peace officers who will wear the body worn cameras; and
  - **(2)** any other personnel who will come into contact with video and audio data obtained from the use of body worn cameras.
- **(b)** The commission, in consultation with the department, the Bill Blackwood Law Enforcement Management Institute of Texas, the W. W. Caruth Jr. Police Institute at Dallas, and the Texas Police Chiefs Association, shall develop or approve a curriculum for a training program under this section.

Sec. 1701.657. [Expires September 1, 2021] Recording Interactions with the Public.

- **(a)** A peace officer equipped with a **body worn camera** shall act in a manner that is consistent with the policy of the law enforcement agency that employs the officer with respect to when and under what circumstances a **body worn camera** must be activated.
- **(b)** A peace officer equipped with a **body worn camera** may choose not to activate a camera or may choose to discontinue a recording currently in progress for any nonconfrontational encounter with a person, including an interview of a witness or victim.
- **(c)** A peace officer who does not activate a **body worn camera** in response to a call for assistance must include in the officer's incident report or otherwise note in the case file or record the reason for not activating the camera.
- **(d)** Any justification for failing to activate the **body worn camera** because it is unsafe, unrealistic, or impracticable is based on whether a reasonable officer under the same or similar circumstances would have made the same decision.

Sec. 1701.658. Use of Personal Equipment.

- **(a)** If a law enforcement agency receives a grant under this subchapter, a peace officer who is employed by the agency and who is on duty may only use a **body worn camera** that is issued and maintained by that agency.
- **(b)** Notwithstanding any previous policies, an agency may not allow its peace officers to use privately owned body worn cameras after receiving a grant under this subchapter.
- **(c)** A peace officer who is employed by a law enforcement agency that has not received a grant or who has not otherwise been provided with a **body worn camera** by the agency that employs the officer may operate a **body worn camera** that is privately owned only if permitted by the employing agency.
- **(d)** An agency that authorizes the use of privately owned body worn cameras under Subsection (c) must make provisions for the security and compatibility of the recordings made by those cameras.

Sec. 1701.659. [Expires September 1, 2021] Offense.

- **(a)** A peace officer or other employee of a law enforcement agency commits an offense if the officer or employee releases a recording created with a **body worn camera** under this subchapter without permission of the applicable law enforcement agency.
- **(b)** An offense under this section is a Class A misdemeanor.

Sec. 1701.660. [Expires September 1, 2021] Recordings As Evidence.

- **(a)** Except as provided by Subsection (b), a recording created with a **body worn camera** and documenting an incident that involves the use of deadly force by a peace officer or that is otherwise related to an administrative or criminal investigation of an officer may not be deleted, destroyed, or released to the public until all criminal matters have been finally adjudicated and all related administrative investigations have concluded.
- **(b)** A law enforcement agency may release to the public a recording described by Subsection (a) if the law enforcement agency determines that the release furthers a law enforcement purpose.
- **(c)** This section does not affect the authority of a law enforcement agency to withhold under Section 552.108, Government Code, information related to a closed criminal investigation that did not result in a conviction or a grant of deferred adjudication community supervision.

Sec. 1701.661. [Expires September 1, 2021] Release of Information Recorded by **Body Worn Camera**.

- **(a)** A member of the public is required to provide the following information when submitting a written request to a law enforcement agency for information recorded by a **body worn camera**:
  - **(1)** the date and approximate time of the recording;
  - **(2)** the specific location where the recording occurred; and
  - **(3)** the name of one or more persons known to be a subject of the recording.
- **(b)** A failure to provide all of the information required by Subsection (a) to be part of a request for recorded information does not preclude the requestor from making a future request for the same recorded information.
- **(c)** Except as provided by Subsection (d), information recorded by a **body worn camera** and held by a law enforcement agency under this subchapter is not subject to the requirements of Section 552.021, Government Code.
- **(d)** Information that is or could be used as evidence in a criminal prosecution is subject to the requirements of Section 552.021, Government Code.
- **(e)** A law enforcement agency may:
  - **(1)** seek to withhold information subject to Subsection (d) in accordance with procedures provided by Section 552.301, Government Code;
  - **(2)** assert any exceptions to disclosure in Chapter 552, Government Code, or other law; or

- **(3)** release information requested in accordance with Subsection (a) after the agency redacts any information made confidential under Chapter 552, Government Code, or other law.

- **(f)** A law enforcement agency may not release any portion of a recording made in a private space, or of a recording involving the investigation of conduct that constitutes a misdemeanor punishable by fine only and does not result in arrest, without written authorization from the person who is the subject of that portion of the recording or, if the person is deceased, from the person's authorized representative.
- **(g)** The attorney general shall set a proposed fee to be charged to members of the public who seek to obtain a copy of a recording under this section. The fee amount must be sufficient to cover the cost of reviewing and making the recording. A law enforcement agency may provide a copy without charge or at a reduced charge if the agency determines that waiver or reduction of the charge is in the public interest.
- **(h)** A recording is confidential and excepted from the requirements of Chapter 552, Government Code, if the recording:
  - **(1)** was not required to be made under this subchapter or another law or under a policy adopted by the appropriate law enforcement agency; and
  - **(2)** does not relate to a law enforcement purpose.

Sec. 1701.662. [Expires September 1, 2021] **Body Worn Camera** Recordings; Request for Attorney General Decision.

- **(a)** Notwithstanding Section 552.301(b), Government Code, a governmental body's request for a decision from the attorney general about whether a requested **body worn camera** recording falls within an exception to public disclosure is considered timely if made not later than the 20th business day after the date of receipt of the written request.
- **(b)** Notwithstanding Section 552.301(d), Government Code, a governmental body's response to a requestor regarding a requested **body worn camera** recording is considered timely if made not later than the 20th business day after the date of receipt of the written request.
- **(c)** Notwithstanding Section 552.301(e), Government Code, a governmental body's submission to the attorney general of the information required by that subsection regarding a requested **body worn camera** recording is considered timely if made not later than the 25th business day after the date of receipt of the written request.
- **(d)** Notwithstanding Section 552.301(e-1), Government Code, a governmental body's submission to a requestor of the information required by that subsection regarding a requested **body worn camera** recording is considered timely if made not later than the 25th business day after the date of receipt of the written request.

Sec. 1701.663. [Expires September 1, 2021] Production of **Body Worn Camera** Recording in Response to Voluminous Public Information Requests.

- **(a)** Notwithstanding Section 552.221(d), Government Code, an officer for public information who is employed by a governmental body and who receives a voluminous request in accordance with Section 1701.661(a) is considered to have promptly produced the information for purposes of Section 552.221, Government Code, if the officer takes the actions required under Section 552.221 before the 21st business day after the date of receipt of the written request.
- **(b)** For purposes of this section, "voluminous request" includes:
  - **(1)** a request for **body worn camera** recordings from more than five separate incidents;
  - **(2)** more than five separate requests for **body worn camera** recordings from the same person in a 24-hour period, regardless of the number of incidents included in each request; or
  - **(3)** a request or multiple requests from the same person in a 24-hour period for **body worn camera** recordings that, taken together, constitute more than five total hours of video footage.

Maryland

Md. PUBLIC SAFETY Code Ann. § 3-511

§ 3-511. Development and publication of policy for issuance and use of **body-worn camera** by law enforcement officer.

- On or before January 1, 2016, the Maryland Police Training Commission shall develop and publish online a policy for the issuance and use of a **body-worn camera** by a law enforcement officer that addresses:
  - **(1)** the testing of body-worn cameras to ensure adequate functioning;
  - **(2)** the procedure for the law enforcement officer to follow if the camera fails to properly operate at the beginning of or during the law enforcement officer's shift;
  - **(3)** when recording is mandatory;
  - **(4)** when recording is prohibited;
  - **(5)** when recording is discretionary;
  - **(6)** when recording may require consent of a subject being recorded;
  - **(7)** when a recording may be ended;
  - **(8)** providing notice of recording;
  - **(9)** access to and confidentiality of recordings;
  - **(10)** the secure storage of data from a **body-worn camera**;
  - **(11)** review and use of recordings;
  - **(12)** retention of recordings;
  - **(13)** dissemination and release of recordings;
  - **(14)** consequences for violations of the agency's **body-worn camera**policy;

- **(15)** notification requirements when another individual becomes a party to the communication following the initial notification;
- **(16)** specific protections for individuals when there is an expectation of privacy in private or public places; and
- **(17)** any additional issues determined to be relevant in the implementation and use of body-worn cameras by law enforcement officers.

Nebraska

§ 81-1452. Body-worn cameras; terms, defined.

- For purposes of sections 81-1452 to 81-1454, unless the context otherwise requires:
  - **(1)** Body-worn camera means a device worn by a peace officer in uniform which has the capability to record both audio and video of an interaction between a peace officer and a member of the public but does not include any device used by a plain clothes officer;
  - **(2)** Commission means the Nebraska Commission on Law Enforcement and Criminal Justice;
  - **(3)** Law enforcement agency means an agency or department of this state or of any political subdivision of this state which is responsible for the prevention and detection of crime, the enforcement of the penal, traffic, or highway laws of this state or any political subdivision of this state, and the enforcement of arrest warrants. Law enforcement agency includes a police department, an office of a town marshal, an office of a county sheriff, the Nebraska State Patrol, and any department to which a deputy state sheriff is assigned as provided in section 84-106; and
  - **(4)** Peace officer means any officer or employee of a law enforcement agency authorized by law to make arrests.

R.R.S. Neb. § 81-1452

§ 81-1453. Body-worn cameras; model policy; development and distribution; contents; law enforcement agency; duties.

- **(1)** On or before December 1, 2016, the commission shall develop and distribute a model body-worn camera policy that includes the procedures and provisions required by section 81-1454. Any law enforcement agency required to adopt a policy under this section that does not develop and adopt its own policy shall adopt the model body-worn camera policy developed by the commission.
- **(2)**
  - **(a)** Any law enforcement agency which uses body-worn cameras as of July 21, 2016, shall, on or before January 1, 2017, adopt a written body-worn camera policy. Such policy shall include procedures and provisions in

conformance with the minimum standards set forth in the model body-worn camera policy developed by the commission and may include any other procedures and provisions the law enforcement agency deems appropriate.
    - **(b)** Beginning January 1, 2017, any law enforcement agency which uses body-worn cameras shall, prior to commencing such use, adopt a written body-worn camera policy. Such policy shall include procedures and provisions in conformance with the minimum standards set forth in the model body-worn camera policy developed by the commission and may include any other procedures and provisions the law enforcement agency deems appropriate.
- **(3)** The head of a law enforcement agency required to adopt a policy under this section shall provide a copy of such policy to the commission within three months of such policy's adoption.
- **(4)** On or before January 1, 2018, and each January 1 thereafter, when any law enforcement agency required to adopt a policy under this section has made any change to its policy in the preceding year, the head of such agency shall provide an updated copy of such policy to the commission.

R.R.S. Neb. § 81-1453

§ 81-1454. **Body-worn camera** policy; contents.

- A **body-worn camera** policy required by section 81-1453 shall include provisions which govern the use of body-worn cameras by peace officers and the retention and disposition of recordings created with such cameras by law enforcement agencies. Such **body-worn camera** policy shall include, but not be limited to:
    - **(1)** A requirement that training be provided to any peace officer who will use a **body-worn camera** and to any other employee who will come into contact with video or audio data recorded by a **body-worn camera**;
    - **(2)** A requirement that recordings created by body-worn cameras shall be retained for a minimum period of ninety days from the date of recording. Such recordings shall be retained for more than ninety days if required by the following circumstances:
        - **(a)** Upon notice to the law enforcement agency of a criminal or civil court proceeding in which the recording may have evidentiary value or in which the recording is otherwise involved, the recording shall be retained until final judgment has been entered in the proceeding;
        - **(b)** Upon notice to the law enforcement agency of a disciplinary proceeding against an employee of the agency in which the recording may have evidentiary value or in which the recording is otherwise involved, the recording shall be retained until a final determination has been made in such proceeding; and

        - **(c)** If the recording is part of a criminal investigation that has not resulted in an arrest or prosecution, the recording shall be retained until the investigation is officially closed or suspended; and
    - **(3)** A procedure governing the destruction of recordings after the retention period described in subdivision (2) of this section has elapsed.

Utah

Utah Code Ann. § 63G-2-302

Not Public Record if properly classified by Government Entity:

§ 63G-2-302 (2)

(g) audio and video recordings created by a body-worn camera, as defined in Section 77-7a-103, that record sound or images inside a home or residence except for recordings that:
(i) depict the commission of an alleged crime;
(ii) record any encounter between a law enforcement officer and a person that results in death or bodily injury, or includes an instance when an officer fires a weapon;
(iii) record any encounter that is the subject of a complaint or a legal proceeding against a law enforcement officer or law enforcement agency;
(iv) contain an officer involved critical incident as defined in Section 76-2-408(1)(d); or
(v) have been requested for reclassification as a public record by a subject or authorized agent of a subject featured in the recording.

Washington State

Rev. Code Wash. (ARCW) § 42.56.240

(14) Body worn camera recordings to the extent nondisclosure is essential for the protection of any person's right to privacy as described in RCW 42.56.050, including, but not limited to, the circumstances enumerated in (a) of this subsection. A law enforcement or corrections agency shall not disclose a **body worn camera** recording to the extent the recording is exempt under this subsection.

- **(a)** Disclosure of a **body worn camera** recording is presumed to be highly offensive to a reasonable person under RCW 42.56.050 to the extent it depicts:
    - **(i)**
        - **(A)** Any areas of a medical facility, counseling, or therapeutic program office where:
            - **(I)** A patient is registered to receive treatment, receiving treatment, waiting for treatment, or being transported in the course of treatment; or
            - **(II)** Health care information is shared with patients, their families, or among the care team; or

        - **(B)** Information that meets the definition of protected health information for purposes of the health insurance portability and accountability act of 1996 or health care information for purposes of chapter 70.02 RCW;
    - **(ii)** The interior of a place of residence where a person has a reasonable expectation of privacy;
    - **(iii)** An intimate image as defined in RCW 9A.86.010;
    - **(iv)** A minor;
    - **(v)** The body of a deceased person;
    - **(vi)** The identity of or communications from a victim or witness of an incident involving domestic violence as defined in RCW 10.99.020 or sexual assault as defined in RCW 70.125.030, or disclosure of intimate images as defined in RCW 9A.86.010. If at the time of recording the victim or witness indicates a desire for disclosure or nondisclosure of the recorded identity or communications, such desire shall govern; or
    - **(vii)** The identifiable location information of a community-based domestic violence program as defined in RCW 70.123.020, or emergency shelter as defined in RCW 70.123.020.
- **(b)** The presumptions set out in (a) of this subsection may be rebutted by specific evidence in individual cases.
- **(c)** In a court action seeking the right to inspect or copy a **body worn camera** recording, a person who prevails against a law enforcement or corrections agency that withholds or discloses all or part of a **body worn camera** recording pursuant to (a) of this subsection is not entitled to fees, costs, or awards pursuant to RCW 42.56.550 unless it is shown that the law enforcement or corrections agency acted in bad faith or with gross negligence.
- **(d)** A request for **body worn camera** recordings must:
    - **(i)** Specifically identify a name of a person or persons involved in the incident;
    - **(ii)** Provide the incident or case number;
    - **(iii)** Provide the date, time, and location of the incident or incidents; or
    - **(iv)** Identify a law enforcement or corrections officer involved in the incident or incidents.
- **(e)**
    - **(i)** A person directly involved in an incident recorded by the requested **body worn camera** recording, an attorney representing a person directly involved in an incident recorded by the requested **body worn camera**recording, a person or his or her attorney who requests a **body worn camera** recording relevant to a criminal case involving that person, or the executive director from either the Washington state commission on African-American affairs, Asian Pacific American affairs, or Hispanic affairs, has the right to obtain the **body worn camera** recording, subject to any exemption under this chapter or any applicable law. In addition, an attorney who represents a person regarding a potential or existing civil cause of action involving the denial of civil rights under the federal or state Constitution, or a violation of a United States department of justice settlement agreement, has the right to obtain the **body worn camera**recording if relevant to the cause of action,

subject to any exemption under this chapter or any applicable law. The attorney must explain the relevancy of the requested **body worn camera** recording to the cause of action and specify that he or she is seeking relief from redaction costs under this subsection (14)(e).
    - **(ii)** A law enforcement or corrections agency responding to requests under this subsection (14)(e) may not require the requesting individual to pay costs of any redacting, altering, distorting, pixelating, suppressing, or otherwise obscuring any portion of a **body worn camera** recording.
    - **(iii)** A law enforcement or corrections agency may require any person requesting a **body worn camera** recording pursuant to this subsection (14)(e) to identify himself or herself to ensure he or she is a person entitled to obtain the **body worn camera** recording under this subsection (14)(e).
- **(f)**
    - **(i)** A law enforcement or corrections agency responding to a request to disclose **body worn camera** recordings may require any requester not listed in (e) of this subsection to pay the reasonable costs of redacting, altering, distorting, pixelating, suppressing, or otherwise obscuring any portion of the **body worn camera** recording prior to disclosure only to the extent necessary to comply with the exemptions in this chapter or any applicable law.
    - **(ii)** An agency that charges redaction costs under this subsection (14)(f) must use redaction technology that provides the least costly commercially available method of redacting **body worn camera**recordings, to the extent possible and reasonable.
    - **(iii)** In any case where an agency charges a requestor for the costs of redacting a **body worn camera** recording under this subsection (14)(f), the time spent on redaction of the recording shall not count towards the agency's allocation of, or limitation on, time or costs spent responding to public records requests under this chapter, as established pursuant to local ordinance, policy, procedure, or state law.
- **(g)** For purposes of this subsection (14):
    - **(i)** "**Body worn camera** recording" means a video and/or sound recording that is made by a **body worn camera** attached to the uniform or eyewear of a law enforcement or corrections officer from a covered jurisdiction while in the course of his or her official duties and that is made on or after June 9, 2016, and prior to July 1, 2019; and
    - **(ii)** "Covered jurisdiction" means any jurisdiction that has deployed body worn cameras as of June 9, 2016, regardless of whether or not body worn cameras are being deployed in the jurisdiction on June 9, 2016, including, but not limited to, jurisdictions that have deployed body worn cameras on a pilot basis.
- **(h)** Nothing in this subsection shall be construed to restrict access to **body worn camera** recordings as otherwise permitted by law for official or recognized civilian and accountability bodies or pursuant to any court order.
- **(i)** Nothing in this section is intended to modify the obligations of prosecuting attorneys and law enforcement under Brady v. Maryland, 373 U.S. 83, 83 S. Ct.

1194, 10 L. Ed. 2d 215 (1963), Kyles v. Whitley , 541 U.S. 419, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995), and the relevant Washington court criminal rules and statutes.

- **(j)** A law enforcement or corrections agency must retain **body worn camera**recordings for at least sixty days and thereafter may destroy the records;