

Body-Worn Cameras: Concerns and Considerations



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*The North Carolina Conference of District Attorneys, for
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INTRODUCTION

The use of body-worn cameras by law enforcement is rapidly increasing and raises many policy, legal and practical concerns. Several police departments across North Carolina are already using body-worn cameras, with other departments planning to implement their own programs in the near future.

The use of video cameras by law enforcement is not a new idea. As early as the 1980s, many police departments installed cameras inside their vehicles. These “dashboard cams” are still widely used today. But, a dashboard camera’s vantage point is limited to what can be seen through a windshield of a car, and these cameras often do not have audio recording capabilities. Body-worn cameras raise new and complex considerations.

In the past ten years, new cameras have been developed for officers to wear on their person. Typically, body-worn cameras are affixed to the chest, shoulder, or eyeglasses. Unlike dashboard cameras, these cameras record virtually all officer contact with other individuals in the field, whether on foot or in a vehicle—in both audio and video. That said, the equipment and personnel required to implement a body-worn camera program represent a major, long-term financial investment. Recent public and media scrutiny of police activity has led to many departments across the country rushing to implement programs and failing to consider the myriad issues involved.

Like all new technology, body-worn cameras create new powers and new responsibilities for the agencies and individuals using them. The goal of this paper is to outline the key areas of decision-making when an agency seeks to implement a body-worn camera program.¹

¹ Body-Worn Cameras: A Report for Law Enforcement, by Antonia Merzon for the Colorado Best Practices Committee, citing the following comprehensive written reports in development of her paper: (1) Miller, L., Toliver, J., & Police Executive Research Forum (PERF), 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. Washington, D.C.: Office of Community Oriented Policing Services (COPS); (2) White, M.D., 2014. *Police Officer Body-Worn Cameras: Assessing the Evidence*. Washington, D.C.: COPS; (3) International Association of Chiefs of Police (IACP) National Law Enforcement Policy Center, April 2014. *Body-Worn Cameras*. Alexandria, VA; (4) Stanley, J., October 2013. *Policy Body Mounted Cameras: With Right Policies in Place, a Win for All*. ACLU; (5) Force Science Institute Special Report, 2014. *10 Limitations of Body Cams You Need to Know for Your Protection*. Mankato: Force Science Institute; (6) Arvada Police Department, February 2015. *Body Worn Camera Video Technology*. Inter-Agency Version of Staff Study 14-09.

BODY-WORN CAMERAS: PROS AND CONS

There has been a great deal of discussion about the pros and cons of body-worn cameras among law enforcement agencies, local, state and federal governments, civil liberties activists and the media. Proponents of body-worn cameras argue that they will:

1. Provide compelling evidence in criminal prosecutions
2. Promote accountability and transparency about law enforcement agencies and their officers' work, thereby enhancing community relations
3. Improve both citizen and officer conduct when they know their behavior is recorded
4. Assess complaints about officer misconduct
5. Allow police departments to monitor the work of their officers, both for training purposes and personnel review

Those against the use of body-worn cameras cite the following concerns:

1. The large and on-going financial investment needed for hardware, software, personnel and training
2. The onerous task of managing, storing, copying and providing discovery of video recordings
3. Intrusions into the privacy rights of those being recorded, especially in the home
4. Intrusions into the privacy rights of the officers wearing the cameras
5. The public availability of recordings pursuant to state and federal open-records laws
6. The potential chilling effect on interviews with sensitive witnesses and informants
7. The complexities in handling encounters involving privileged information, such as medical, mental health, religious or marital communications
8. Inadvertent capturing of personal or embarrassing moments when an officer mistakenly leaves a camera on
9. Public misconceptions—potentially carried into the jury pool—that video will always be present (the “CSI” effect)
10. Public misconceptions that the cameras are equal to or better than humans at capturing events²

Due to highly publicized national events, like the Ferguson and Garner cases, there is strong public and governmental pressure to employ the cameras. They create a visual and aural evidentiary record and can help debunk frivolous claims of misconduct. But, given the number of concerns raised, agencies must take a careful approach before fully embracing this new technology.³

² Pros and Cons adapted from Body-Worn Cameras: A Report for Law Enforcement, by Antonia Merzon for the Colorado Best Practices Committee, citing the sources in footnote 1.

³ See Body-Worn Cameras: A Report for Law Enforcement, by Antonia Merzon for the Colorado Best Practices Committee, stating “The recent case of Eric Garner in Staten Island, NY, is often cited as an example in which video

POLICE PROTOCOLS

When a police department decides to implement a body-worn camera program, it must make a number of highly technical decisions, which, in turn, raise policy issues related to the creation, use and storage of body-worn camera videos. The following is a list of some of the considerations that arise:⁴

1. What type of camera to purchase?
 - A recent market survey by the National Institute of Justice detailed 18 different camera model available to law enforcement agencies, ranging in price from \$119.95 to \$1,000.00 **per camera**.⁵ Each model comes with its own specifications regarding weight, size, battery life, storage capacity and durability in weather conditions, among other features. But, cost per camera is only one piece. How will tampering with video footage will be prevented? Some cameras include built-in safeguards, but others do not. What storage system will be used? Some companies market cameras in conjunction with an offsite storage program; others sell the cameras as a stand-alone product. What types of incidents are officers required to record, and how much battery life is needed? These are all considerations besides cost in purchasing the cameras.
2. How will officers be trained in the use of body-worn cameras?
 - Officers must be trained not only on the cameras' technical aspects but on the agency's policies. Are cameras assigned to one officer or shared between officers? Who is responsible for maintenance of the camera? Training in and understanding of the policy is critical to the use of the videos in criminal prosecution. For example, an officer's written report about an incident will reflect the officer's compliance with the policy. If the officer were to testify, he or she would be cross-examined about the policy and his or her compliance with it. The more an officer's conduct deviates from the policy, the more likely the evidence will be discredited or even excluded.
3. When is the camera turned on?
 - There are two general policies in response to this question. First, record everything—have the camera on for every contact with civilians and all calls for service, turning it off only when the officer is on a break, using the restroom, or otherwise not performing official duties. Proponents of a “record everything” policy argue that officers cannot be accused of “selective recording”.

of the incident did not necessarily resolve the factual or legal dispute. In that incident, a bystander with a cellphone recorded a police officer using a chokehold to arrest Garner, resulting in Garner's death.”

⁴ Police Protocols adapted from *Body-Worn Cameras: A Report for Law Enforcement*, by Antonia Merzon for the Colorado Best Practices Committee, citing the sources in footnote 1.

⁵ *Body-Worn Cameras: A Report for Law Enforcement*, by Antonia Merzon for the Colorado Best Practices Committee, citing ManTech International Corporation (2014). *Body-Worn Cameras for Criminal Justice, Market Survey (v. 1.0)*. Fairmont, WV: ManTech International Corporation for National Institute of Justice (NIJ).

- The second policy gives officers discretion. Once discretion is allowed, it follows that some events simply will not be recorded. Those in favor of granting officers discretion point to the following examples where officers decide in the moment whether to record:
 - i. Encounters inside a private residence, although officers might use a Fourth Amendment analysis in making a decision to record (i.e., consent, execution of a search warrant, exigent circumstances, etc.)⁶
 - ii. Incidents involving nudity, such as body searches of arrested individuals
 - iii. Incidents involving juveniles
 - iv. Interactions with sensitive victims (sexual, domestic or other violent assaults)
 - v. Interactions with informants or undercover officers
 - vi. Incidents where mental health, religious, attorney-client, medical or other privileges are implicated
 - vii. Everyday encounters with civilians who have no involvement in police response, call for service or investigation
- Notably, most police departments choose to give officers some discretion. Once discretion is allowed, however, officers open themselves up to accusations of turning off the camera to hide improper conduct. Thus, agencies should create a written policy that details situations where the camera must be on and when there is discretion to turn them off. Officers may want to articulate a reason for not recording before turning the camera off.
- There are several other considerations with a discretionary policy. First, two of the primary expenditures in implementing a body-worn camera program are the cost of the equipment and the storing of the footage. The more encounters required to be recorded, the more battery power required, and more storage capacity is needed.
- Similarly, the recording of more footage requires police personnel, as well as prosecutors and defense attorneys, to spend time reviewing and sorting the recordings. This could require substantial manpower hours and even the hiring of additional personnel.
- Discretion also impacts criminal prosecutions. Body-worn camera footage could capture essential evidence of crimes, whether catching a suspect in the act, recording admissions, or documenting physical evidence. In court, officers will need to explain, through their own testimony and cross-examination, why they turned the camera on, or why they chose not to record or turned the camera off at some point during the event. Potentially, if body-worn camera footage is essential to the case, and the officer is discredited or accused of wanton, sloppy

⁶ Body-Worn Cameras: A Report for Law Enforcement, by Antonia Merzon for the Colorado Best Practices Committee, citing IACP, PERF, White and ACLU reports listed in footnote 1.

or rogue conduct, the video could be seriously undermined or even excluded. The more an officer can point to an agency policy, the easier it is to explain his or her decisions.

4. Do officers notify video subjects that they are being recorded?
 - North Carolina is a one-party consent state, so notification of recording is not required. Some policies suggest that an officer with a body-worn camera should notify video subjects that they are being recorded as close to the inception of the encounter as reasonably possible. Once activated, the camera should remain in recording mode until the conclusion of the incident/encounter.
5. How and when do officers upload data? What processes are in place to ensure the integrity and the security of the recordings?
 - Do officers upload the recordings at the end of their shift? Or at the end of an incident? Can they do so via a mobile device (phone, iPad, etc.) or do they need to return to the station and use a docking station? It is vital to preserve both the chain of custody and the integrity of the footage, should the video later be used as courtroom evidence. Some camera companies offer tamper-proof uploading as part of their package of equipment. Other agencies have developed policies and protocols for the uploading and storing of the videos in a manner that does not allow for manipulation.
6. Who is tasked with tagging the videos and what are the criteria?
 - Once officers begin recording footage, it needs to be sorted or tagged in some manner so that recordings relevant to investigations, arrests, or other police matters may be made part of the case file.
7. How and where is footage stored?
 - The recordings are a form of digital data and must be uploaded and stored in a tamper-proof and secure manner. Smaller agencies may choose to create a system involving copying the videos onto DVDs or CD-ROMs and storing them in a secure location. Larger departments face greater storage challenges. They may choose to contract with a private company to use cloud-based storage, such as Taser International's "evidence.com", or to use an internal server. Agencies must also consider whether "evidentiary" and "non-evidentiary" footage (see #10 below) are stored in the same manner.
 - To be sure, storage is costly. For example, the cost of evidence.com typically ranges from \$45 per user license/month to \$99 per user license/month depending on the type of access available to the user and the amount of cloud storage supplied. The Taser system requires a separate user license for **every**

camera.⁷ Storage costs are an on-going expense that could cost larger agencies hundreds of thousands of dollars each year.

8. Who has access to the recordings?

- Will the officer who made the recording have viewing access? Some agencies have adopted the policy that officers should regularly review their video recordings at the end of their shift to (1) properly memorialize the existence of the recording in written reports and (2) write more accurate reports. Other agencies have determined that the officers should not view the videos, but instead, the report should reflect the officer's memory of the events, as the position of the camera on the chest, shoulder, or eyeglasses will not have the same perspective as the officer. No matter the policy, when it comes to critical events, like officer-involved shootings, the consensus is that the officer should not review the footage as a matter of course, but the agency should determine if and when an officer can view it during the investigation.
- Who else in the agency should have access? Agencies must consider approaches to handling stored recordings that provide access as needed for reports, discovery, training or other legitimate purposes. Many camera and data storage systems offer auditing features for logging the details of any access to a video file. Moreover, agencies must consider the type and number of supervisors who have authority to view the videos and whether random audits should be conducted.

9. For how long is the recorded footage stored?

- The answer depends on whether the footage is "evidentiary" or "non-evidentiary".
 - i. Evidentiary recordings, i.e., footage concerning an investigation, arrest, traffic infraction or other official matter should be retained for at least several years. Some policies require videos to be stored for twenty years after disposition in a felony case.
 - ii. Non-evidentiary recordings, i.e., an officer providing directions, do not need to be retained for long. Most agencies have set a short, fixed amount of time for retention, anywhere from seven to ninety days.

10. How do officers document the existence of body-worn camera footage in written reports?

- Most agencies require officers to note the existence of the footage in their written reports. Agencies might consider adding check-boxes to existing forms to facilitate the notation and description of the recordings.

⁷ Body-Worn Cameras: A Report for Law Enforcement, by Antonia Merzon for the Colorado Best Practices Committee, citing Body Worn Camera Video Technology (Feb. 2015). Arvada Police Department. Inter-Agency Version of Staff Study 14-09.

11. How will prosecutors access the recordings and ensure that they are complying with discovery, *Brady* and *Giglio*?

- Body-worn camera footage is potentially evidence and thus subject to discovery. Police agencies, therefore, should consult with their local prosecutors and create a comprehensive and streamlined system for prosecutors to obtain access and copies.

PRIVACY CONCERNS AND PUBLIC RECORDS REQUESTS

If the body-worn camera footage is evidentiary in nature, i.e. involves a criminal, traffic, or other investigation, it needs to be preserved, secured, and otherwise treated as any other evidence in the case. However, when the recordings do not involve enforcement of a law or other regulation, difficult policy questions arise, such as:

1. Will the agency retain footage that is not potential evidence? If so, for how long?
2. Does someone recorded by a body-worn camera have the right to a copy of the footage? If so, how does he/she request it?
3. How will the agency handle requests for copies of recordings under the Public Records Law? Who will redact the footage as necessary?
4. Can prosecutors move to prevent dissemination of recordings to protect witnesses? Can prosecutors get recordings removed from YouTube, Facebook, etc.?

Organizations like the ACLU emphasize the potential problem of a government agency recording private individuals. In general, private residences should not be treated any differently than other property: if the officer has legal justification to be there, the camera should be activated. Moreover, the videos may depict individuals who are not charged with crimes, but are not portrayed in the best light. But, those issues are compounded by public records laws and the prevalence of social media. Members of the public may begin requesting copies of the footage and indiscriminately sharing it online. This could potentially prejudice a prosecutor's case, or a defendant's. Beyond that, in Washington State, an individual sent and continues to send open records requests to numerous state and local agencies requesting every minute of their body-worn camera footage. He then posts the videos on YouTube. Conceivably, it could take years for some agencies to comply with his requests. In Seattle, the department removed the sound and blurred everything on the videos prior to disclosing them because redaction would have been too costly.⁸

Given the heightened interest in police activity and police scrutiny, this situation is likely not an isolated one and raises even more questions:

1. Who will handle public records requests when they come in?
2. What will be the agency's policy for releasing recordings? Will it vary depending on whether the recordings are evidentiary? What if the case is closed?
3. Will the agency redact the footage, and if so, who will redact it?
4. On what grounds will a request be denied?
5. Will the DA's office be alerted to a request concerning an open matter?
6. Will the recording officer be notified of a request for video he/she recorded?

⁸ Body-Worn Cameras: A Report for Law Enforcement, by Antonia Merzon for the Colorado Best Practices Committee, citing as an example *Washington State Police Overwhelmed by Public Requests for Dash- and Body-Cam Footage*. November 27, 2014. Homeland Security News Wire.

While the Public Records Law provides some guidance, agencies will need to make decisions based on their technical capabilities and the policy goals of their program.

CONCLUSIONS

Body-worn camera programs are expensive and raise many difficult policy questions. From how to spend limited budget dollars on the best configuration of cameras, data management, software and personnel, to determining what recording policy best serves the goals of the agency, law enforcement agencies face many difficult decisions. On top of all that, the variety of privacy issues complicated by open records requests make the analysis even more challenging.

Body-worn camera technology is a national trend, and North Carolina agencies have and continue to implement their own programs. The more officers are prepared and educated, and the more the policies are crafted with care and deliberation, the more effective the cameras will be as a policing tool, a means of improving community relations and as a potentially critical form of evidence.

The Best Practices Committee looks forward to continue working with our legislature and law enforcement agencies to sort through these considerations and bring the best possible policies and practices to the people of North Carolina.

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