



Body-Worn Camera Policy Development and Associated Issues

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“Can I have a copy of your body-worn camera policy?”

This is a common question we hear at conferences and symposia across the United States from public safety administrators and managers. “Why reinvent the wheel” is the usual follow-up “justification” after requesting the policy. Copying a body-worn camera policy, or any policy for that matter, is not a good idea as *no one size fits all*. Each public safety agency is unique and, while there may be some shared issues, each policy must be customized to that agency. There really are no shortcuts, as often seen at deposition or at trial when a policy of agency “X” is shown to the chief, officer or jury members with a highlight on the name of agency “Y” which had not been deleted prior to the policy being issued. So what exactly is *policy* and does it include *rules* and/or *procedures*?

Policy Defined

The Honorable Emory Plitt, Jr. defined *policy* as “a general statement of philosophy, principles and objectives in a given area. Policies tell what the department wants to accomplish and why. Policy provides the framework wherein more specific guidance can be provided in the form of procedures and rules.” In short, policy is general in nature and ongoing, such as “All patrol officers will carry departmentally issued body-worn cameras.” This policy is general in nature and does not contain rules and procedures which ordinarily limit officer discretion.

Continuing, the Judge and former Maryland State Police legal counsel defined *rules* as being much more specific. They leave less room for the exercise of discretion and decision making by the rank-and-file officer. Rules spell out what must be done, or not done, in specific situations. Rules are intended to mandate specific behaviors. Rules help to make the department’s response as uniform as possible to specific situations.”

“Procedures spell out a routine to be followed in handling a particular matter. They are typically more detailed than rules and are usually concerned with setting out an orderly manner in which to proceed. They set out the exact actions to be taken.”

What many people clumsily call *policy* actually incorporates *rules* and *procedures*. While there are many written “policies,” recall from Part One of this series that “unwritten ground rules” exist, too, and are often used by plaintiff counsel to show the *actual* custom, practice or policy which is oftentimes different than what was published by agency administrators. Remember: Policy is discoverable. Drafting body-worn camera guidelines is hard work and it does take time. If employees are covered by a Collective Bargaining Agreement (CBA) or a police officer’s Bill of Rights, policy writers must also consider its content.

Considerations

Issues to consider when writing “policy” include, but are not limited to, when to wear the body-worn camera; when it can be “turned off”; when the video and audio must be downloaded; when the video and/or audio file can be deleted; when video and/or audio files may, or may not, be released to the public and/or the media; when people must be told they are being recorded (e.g., two-party state without camera and/or audio exceptions); when a backup officer must download files even though the officer was only checking on the primary officer; when and how to report a body-worn camera which is lost; and when and how to report missing video and/or audio files.

The International Association of Chiefs of Police (IACP) gives several recommendations to those writing law enforcement policies. They include ensuring that policies are clearly written, simple to understand and easy to implement; that policies are consistent with the philosophy of the organization; and that the policies incorporate applicable best practices and address the legal environment and administrative requirements of the agency. Several organizations have published draft body-worn camera policies and best practices guides which can serve as a starting point for policy development. Many of those can be found on the IPICD SEER Web site at <http://ipicd.com/ceer/resources.php>. It is imperative, however, that each agency draft and implement policies which fit the agency. Policies that are appropriate for large departments with multiple divisions will not fit a small department which only deploys a small number of cameras, and policies which are legally sound in one state may result in liability if implemented in another.

Must Haves

Although it is not practical to list every possible consideration in drafting a policy, there are several key areas which body-worn camera policies must cover. Many policies do a good job of addressing operational details, such as when a camera must be activated, but do not give adequate consideration to management, logistical and training considerations. Agencies must decide which individual or workgroup will be responsible for developing and updating procedures and rules related to the body camera program, as well as who will be responsible for maintaining the equipment, conducting the training, storing the data, conducting program and policy evaluation and addressing the myriad of collateral issues raised in this article and the two preceding articles.

Policies must address the who, what, where, when and why of both camera use and the downloading, storage and retrieval of data. Questions include who must wear the cameras and where must they be worn on the body? Consideration must be given to individual assignments, uniforms, the body camera itself and the conditions in which the employee and the camera will be operating. Under what conditions must the body camera be activated and what happens when an officer fails to activate? This can be a contentious issue between agencies, law enforcement labor organizations and public interest groups. Most policies allow for situations where an officer cannot activate the camera due to a sudden unforeseen event or other situation where activating the camera will jeopardize officer or citizen safety. Will the agency require all citizen contacts to be recorded or just certain interactions, such as traffic enforcement stops, arrests, searches, etc.? When must recording start and stop? Who must record – only the primary officer or all officers on scene? Finally, what notifications must be made and what documentation must be submitted when critical incidents are, or are not, recorded?

Legal Issues

Legal requirements regarding recording must also be considered and will often be decided by state or local law. Do officers need permission to record and under what conditions? Must they advise persons that they are being recorded and can a person demand that the recording be stopped? Are there certain persons, places or situations which, as a matter of law, cannot be recorded? Each of these questions must be researched before a comprehensive policy can be written.

The policy must address issues related to the downloading and storing of data. Once again, these policies will need to be molded to each individual agency and the system it is using. Who will be responsible for downloading body-worn camera data and at what intervals? What systems and safeguards are necessary and available to prevent tampering with, deleting or altering recordings? How long will the recordings be maintained and in what form? Often,

policies will provide for different retention periods depending on the event, the potential for future litigation and applicable records retention laws.

Access to body-worn camera data must also be addressed. Who will be able to access the data and under what circumstances? Will officers be allowed to view recordings before writing their reports? When will copies be made and to whom can they be released? As discussed in detail below, the answers to all of these questions will likely be heavily influenced by applicable public records laws.

Finally, just because an agency does not issue body cameras does not mean that it does not need a body camera policy. Most agencies which issue body cameras forbid officers from using privately owned cameras on duty. However, in some agencies, personnel purchase and deploy their own body cameras, either because the agency head has decided to allow it or because the agency head has not taken any action to forbid it. Allowing officers to use their own cameras raises several issues which can become problematic if there is a critical incident or other situation where body camera footage might be useful. Can the department order the officer to turn over the video? Who owns the video footage? How will the chain of custody be maintained? If an agency is going to allow private body-worn cameras, these issues – as well as the ones addressed above – have to be considered.

Overlooked Issues

As the race to rollout body-worn cameras following the high-profile law enforcement controversies of the past few years, many advocates neglected to consider the immediate and long-term impact of state open records statutes, record retention requirements and the evidentiary issues surrounding body-worn camera video recording.

Many school resource officers may wear a body-worn camera inside the school. Roman Roberson, the Assistant Chief of the Kilgore, Texas, police department, said such privacy concerns are unfounded. Kilgore's three school resource officers have worn body cameras for about six years, along with many of the department's other officers and, in that time, the district hasn't heard many complaints, he said. The National Association of School Resource Officers currently takes no position on their use in schools. The Police Executive Research Forum guide for body-worn cameras doesn't mention school police at all.

School resource officers should consult with school district legal counsel about preserving and protecting the video record. Records kept by school police are generally not subject to the *Family Educational Rights and Privacy Act*, a federal student privacy law which shields most student data from public disclosure, according to an opinion by the U.S. Department of Education. However, state open records laws provide varying levels of protection against sharing and disclosure of records related to crimes committed by juveniles.

Public Record

Body-worn camera video is very likely to be considered a "public record" in every state. The definition of a "public record" is fairly broad in most state open records laws. These statutes predate the widespread use of body-worn cameras, though some may have tackled the question of dash camera video. Once a record is deemed to be "public," there is certainly an expectation that it will be disclosable to the media and to the public and there may even be a legal presumption. The Constitution Project has observed that "the use of body-worn cameras worn by law enforcement agencies presents a number of potential benefits as well as risks."

Discussing whether a body-worn video recording which caught a citizen at their worst moment or in their most intimate crisis squarely places law enforcement executives in the position of being the

guardian of a citizen's most urgent privacy concern. The privacy expectations are particularly high when body-worn cameras capture events inside private homes. Advocacy groups which have consistently advocated for individual privacy protections against government intrusion now find themselves pondering the precarious balance of personal privacy interests in body-worn camera recordings and the interests of "holding police accountable through transparency" and the "public's right to know" what police are doing.

Most state records laws feature some type of a balancing test, weighing individual privacy interests against the public interest in disclosure of government activities. There are generally protections against disclosure of records during the active phase of an investigation and prosecution and, perhaps, even during civil litigation. A number of state legislatures have begun to forge new laws dealing with these issues.

Redaction

Public disclosure advocates argue that body-worn video recordings may be easily redacted. That is likely to be true in the future, but simple and easy redaction just isn't a reality. The public frequently sees pixilated or fuzzy pictures of suspects' faces on the evening news and assumes that sort of redaction to be an easy task. Police departments don't have the same video editing software, experience and skills as a major television studio. Moreover, the local network affiliate may only need to redact a short video clip once every few days, while a police agency is dealing with a constant stream of newly created video. The Seattle Police Department took an interesting route to redaction by blurring all of the body-worn video it released for Web broadcast. Whether that route would forestall a possible public records disclosure order in other states is doubtful.

The redaction discussion should help shape the agency's policy on when to record. Understand that a policy which requires recording the entire shift generates some unwieldy numbers. A shift of ten officers working an eight hour shift creates 80 hours of video; three shifts of equal numbers generate 240 hours per week, 12,480 hours per year. A records request for all video for two years (the retention period in a some states) means reviewing and redacting 24,960 hours, a task which would require 104 FTEs working eight hours a day for 30 days (the general time for a public records request response).

Body-worn camera video evidence can prove to be very useful in court. Eyewitness misidentification is something we believe the "other guy" might do, but not us. We tend to rate our memories as very reliable. An article published in *Scientific American* reported 63% of adults believe that memory is about as good as a video camera. A video record can help avoid misidentification.

Unrealistic Expectations

The "CSI Effect" is a particular concern with body-worn camera video. The CSI Effect suggests that crimes are solved in 42 minutes (one hour minus the time for commercials), always using DNA evidence and generally with the crime captured in Panavision. We've already seen juries unwilling to believe live witnesses because the witness testimony was not supported by high-definition video evidence or the video evidence was interpreted differently by the jurors. As video evidence becomes more common, there is a very real danger that jurors will unduly discount competent witness testimony where there is no corroborating video recording.

Police, citizens and legal professionals must be very cautious about overreliance on video evidence. Remember, cameras record, but people process. Courts should expect that an officer's testimony will vary from the video recording. A camera equipped with infrared technology may well "see" in the dark when an officer cannot. Remember, too, that a point of aim camera may not reach

peripheral vision; may not quickly transition from light to dark and vice versa; and may not capture images at the same speed as the human eye. What the camera "sees" is merely a piece of evidence.

On the Horizon

Will body-worn camera video evidence lead to another type of expert witness? Will experts be allowed to testify about the limitations of body-worn cameras? Will other experts discuss the bias in interpretation?

Referring to the decision in *Scott v. Harris*, in which the Supreme Court – for the first time ever – considered video evidence as part of its deliberations, one scholar observes, "the Court fell sway to the myth of video evidence as able to speak for itself, as an objective, unambiguous and singularly accurate depiction of real-world events, not subject to any interpretation or subjective analysis. For the majority, there was no need for a fact finder to review the video or to compare the video with the competing testimony of eyewitnesses, because what the majority saw in the video was true. The reality, however, is that video evidence is not so singularly objective or definitive in its meaning and message; instead, video presents one perspective on events and is subject to the interpretation and close analysis reserved for the jury at trial."

Attorneys will undoubtedly endeavor to play a favorable video recording over and over for a jury, or ask the court to exclude the recording if on the other side. There are rules and precedent to guide courts weighing the authenticity, admissibility and relevance of evidence. Courts also have existing frameworks for addressing potential evidentiary privilege issues, questions of unintentional capture and similar evidentiary rule questions. Body-worn camera video evidence offers fertile ground for conflicts in the area of discovery mechanics, preservation or spoliation of evidence, application of protective agreements and orders, authentication, foundation and chain of custody issues.

A Group Effort

Agencies purchasing body-worn camera systems should think about the prosecutor's needs and involve the prosecutor and civil counsel in policy formation and review. If video evidence does not favor the defense, the defense will attack the technology (remember the O.J. Simpson trial?). The vendor's system must have an unassailable security suite which ensures confidence in the chain of custody, security and integrity of the evidence. Question potential vendors about the support software available for the criminal discovery process. Also ask about tools which will ease the burden of accommodating public records disclosure requests. **P&SN**

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