

Joint Legislative Task Force on the Use of Body Worn Cameras

Committee Report and Recommendations

December 2017
Report to the Legislature

Table of Contents

Introduction	3
BACKGROUND.....	3
TASK FORCE MEMBERS AND REPRESENTED ORGANIZATIONS	4
Task Force Activities and Discussions	5
OVERVIEW OF COMMITTEE MEETINGS.....	5
I. POLICIES ADOPTED BY AGENCIES.....	6
II. RETENTION AND RETRIEVAL OF DATA.....	6
III. COST RECOVERY AND THE PUBLIC RECORDS ACT.....	7
IV. PRIVACY PROTECTIONS AND THE PUBLIC RECORDS ACT.....	8
A. Privacy Protections in General	9
B. Privacy Protections in Health Care Facilities	9
V. MODEL BODY WORN CAMERA POLICIES.....	10
A. Purpose of Body Worn Cameras	11
B. Main Concerns with Body Worn Camera Use	11
C. Main Components of Body Worn Camera Policies	12
Proposed Recommendations Considered by the Task Force	13
Report Appendices	17
Minority Reports and Member Statements	24

Introduction

Background

In 2016, the Legislature passed Engrossed House Bill (EHB) 2362, which established public disclosure and other requirements relating to body worn camera recordings under the Public Records Act (PRA) and created the Joint Legislative Task Force on Body Worn Cameras (“Task Force”). The full text of the bill and the Final Bill Report is [available online](#). Task Force meeting materials are also [available online](#).

The bill exempted body worn camera recordings from the PRA to the extent nondisclosure is essential for the protection of a person's privacy. It also created the presumption that disclosure of certain recordings is offensive to a reasonable person including: those occurring inside a medical facility or containing health care information; the interior of a person's residence; intimate images; a minor; the body of a deceased person; and location information or the identity of a victim to an incident involving domestic violence or sexual assault.

The bill further outlined required content of a request for body worn camera images and gave law enforcement agencies authorization to require a requestor to pay the costs of redacting information to comply with applicable exemptions. A person who prevails in a court action seeking the right to inspect or copy a body worn camera recording is not entitled to fees, costs, or awards unless the law enforcement agency acted in bad faith or with gross negligence.

Law enforcement or corrections agencies that deploy body worn cameras were required to establish policies regarding their use within minimum parameters. Cities or counties that had not yet deployed body worn cameras were strongly encouraged to adopt ordinances or resolutions authorizing their use and provide a forum for community input.

Finally, the bill created the Task Force to further examine the use of body worn cameras by law enforcement and corrections agencies. The Task Force was charged to specifically consider the use of body worn cameras in health care facilities subject to federal and state health care privacy laws, consulting with subject matter experts including the Washington State Hospital Association and the Washington State Medical Association.

The Task Force must report findings and recommendations on:

- model body worn camera policies;
- body worn camera policies adopted by agencies;
- use of body worn cameras in health care facilities subject to federal and state health care privacy laws;
- costs assessed to requestors;
- retention and retrieval of data; and
- use of body worn cameras for gathering evidence, surveillance, and police accountability.

The bill mandated that the Task Force submit its findings and recommendations to the Governor and the appropriate committees of the Legislature by December 1, 2017. This report is intended to fulfill this requirement. The Task Force expires on July 1, 2019.

Task Force Members and Represented Organizations

Representative Drew Hansen, Co-Chair

Washington House of Representatives

Representative Brad Klippert

Washington House of Representatives

Joanne Alcantara

Commission on Asian Pacific American Affairs

Nick Brown*

Office of the Governor

Chief Cliff Cook

Bellingham Police Department

Mayor Rebecca Erickson

City of Poulsbo

Captain Jeff Harpster

Washington State Fraternal Order of Police

Nat Jackson*

Commission on African American Affairs

Tamaso Johnson

Washington State Coalition Against Domestic Violence

Commissioner Andres Mantilla

Commission on Hispanic Affairs

Cat Elliot*****

Washington Association of Criminal Defense Lawyers

Shankar Narayan

American Civil Liberties Union

Mary Perry

Seattle Police Department

Eric Stahl

Washington Coalition for Open Government

Chief Steve Strachan

Bremerton Police Department

Officer Chris Tracy

Washington Council of Police and Sheriffs

Dawn Vyvyan

Yakama Nation

Chief Ralph Wyman

Confederated Tribes of the Chehalis Reservation

Senator Mike Padden, Co-Chair

Washington Senate

Senator Jamie Pedersen

Washington Senate

Lisa Blegen

KIRO TV News

Steve Clem

Washington Association of Prosecuting Attorneys

Sokha Danh

Commission on Asian Pacific American Affairs

Minal Ghassemieh***

API Chaya

Larry Haskell

Washington Association of Prosecuting Attorneys

Chief Gary Jenkins

Pullman Police Department

Anita Khandelwal**

Public Defender Association

James McMahan

Washington Association of Sheriffs and Police Chiefs

Commissioner Brian Moreno*****

Commission on Hispanic Affairs

Bill Ostling

Representing the Public

Jay Reitz

Axon

Deputy Sheriff Darell Stidham

Washington Council of Police and Sheriffs

Officer Kevin Stuckey

Council of Metropolitan Police and Sheriffs

Sheriff John Urquhart

King County

Reverend Harriet Walden

Commission on African American Affairs

Raul Almeida

Representing the Public (Alternate)

The Task Force elected Senator Mike Padden and Representative Drew Hansen as co-chairs. Staff support was provided by Senate Committee Services and the House Office of Program Research.

*Initial appointee stepped down and no new appointment was made.

**Lisa Daugaard, Washington Defender Association stepped down; Anita Khandelwal was appointed to fill the vacancy.

***Enoka Herat, API Chaya stepped down; Minal Ghassemieh was appointed to fill the vacancy.

****Commissioner Gloria Ochoa-Bruck, Commission on Hispanic Affairs stepped down; Commissioner Brian Moreno was appointed to fill the vacancy.

*****Amy Muth, Washington Association of Criminal Defense Lawyers, stepped down; Cat Elliot was appointed to fill the vacancy

Task Force Activities and Discussions

Overview of Committee Meetings

The Task Force was required to hold public meetings in locations that included rural and urban communities and communities in the eastern and western parts of the state. In meeting this objective, the Task Force convened five meetings over the course of the 2016 and 2017 interims:

August 3, 2016	Olympia, WA
October 7, 2016	Richland, WA
September 19, 2017	Tacoma, WA
October 16, 2017	Ellensburg, WA
November 29, 2017	SeaTac, WA

All meetings were open to the public.

The Task Force received presentations, reports, and testimony from various state entities and organizations on:

- body worn camera technology and data storage, retrieval, and redaction systems;
- cost impact of public record requests for body worn video and cost recovery mechanisms;
- use of body worn cameras in health care facilities;
- competing viewpoints regarding the use of body worn cameras for gathering evidence, surveillance, and police accountability;
- staff research and analysis on body camera policies in use around the state and body camera laws across the country; and
- competing viewpoints on the policies that should govern the implementation and use of body worn cameras.

The Task Force members formed three panels who made presentations to the committee and formulated recommendations for consideration by the body. Those panels consisted of interests and perspectives related to Government and Law Enforcement; Criminal Bar; and the Community and Public.

I. Policies Adopted by Agencies

The enabling legislation directed the Task Force to report on body worn camera policies adopted by agencies. At the October 7, 2016 meeting, the Task Force members received a report and presentation from legislative staff regarding the major components of body worn camera policies adopted by covered law enforcement jurisdictions and corrections agencies within the state.

The body worn camera policies reviewed contained the following main components addressing issues relating to implementation of a body worn camera program:

- General provisions that address: program objectives or perceived benefits; who wears body worn cameras; officer responsibilities to ensure effectiveness of the technology; training requirements; ownership of body worn camera recordings and prohibited uses; and, discipline for policy violations;
- Recording protocols that address: when recording is required; continuous recording requirements; officer discretion regarding recording or deactivation of recording; prohibited or discouraged recording; providing notice of recording and responding objections to recording; when consent to recording is or is not required; and, requirements for documenting the existence of the recording and any failure to record;
- Data storage, security, and retention provisions that address: data download and storage requirements; security measures around data storage, access, and retrieval; and data retention and deletion requirements; and
- Review and disclosure requirements that address when recordings may be reviewed by officers, supervisors, or other persons, and how public disclosure of recordings is to be handled.

The staff report on adopted body worn camera policies provides detail on the various approaches used by agencies in addressing these main components. A copy of the staff report and supporting documentation can be viewed at: [Components of Body Worn Camera Policies Adopted by Washington Agencies and Covered Jurisdictions and Policies](#).

II. Retention and Retrieval of Data

On October 7, 2016, the Task Force members received a presentation from Axon Video Solutions on body worn video technology and data storage, retrieval, and redaction systems. The presentation discussed the technology and procedures for uploading and storing body camera recordings; data management systems for tagging, accessing, searching, and retrieving footage; security features such as encryption, access control, and audit management; as well as an overview of emerging redaction technology. That presentation can be viewed at: [Body Worn Video Technology](#).

In addition, Task Force members representing law enforcement agencies and local governments provided information to the Task Force on agency practices and experiences with respect to processing, storing, and managing the large volume of body camera footage created and the significant investment of time and resources that are associated with implementation of a body worn camera program and compliance with public disclosure requirements for body worn camera recordings.

III. Cost Recovery and the Public Records Act

As provided in EHB 2362, a request for body worn camera recordings must: specifically identify a name of a person or persons involved in the incident; provide the incident or case number; provide the date, time, and location of the incident or incidents; or identify a law enforcement or corrections officer involved in the incident or incidents.

Except for certain specified persons, a law enforcement agency may require any person who requests body worn camera recordings to pay the reasonable costs of redacting, altering, distorting, pixelating, suppressing, or otherwise obscuring any portion of the body worn camera recording as necessary to comply with applicable exemptions. An agency that charges for redaction of body worn camera recordings must use redaction technology that provides for the least costly commercially available method of redacting body worn camera recordings, to the extent possible and reasonable. Redaction costs may not be charged to the following requestors:

- a person directly involved in an incident recorded by the requested body worn camera recording, or that person's attorney;
- a person who requests a body worn camera recording relevant to a criminal case involving that person or that person's attorney;
- an attorney who is representing a person regarding a potential or existing cause of action involving denial of civil rights under the federal or state constitution, or involving a violation of a United States Department of Justice settlement agreement, if the recording is relevant to the cause of action; and
- the executive directors of the Washington state commissions on African American Affairs, Asian Pacific American Affairs, and Hispanic Affairs.

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 is not entitled to fees, costs, or awards unless the law enforcement or corrections agency acted in bad faith or with gross negligence.

Most cities reported that they are not receiving a significant number of stand-alone public records requests for body worn camera footage. However, they still receive a number of requests for records such as case files that include body worn camera footage. Most requests have fallen into the category of a requestor that cannot be charged a fee for redaction. As a result, there is little data about charging for these records.

Redaction technology is improving, but is still very time consuming. Seattle has completed a cost study resulting in a charge of \$0.60 per minute to redact. Not all departments have in-house redaction capabilities. One city reported that it collected 66 videos over the course of a weekend. The footage took 6 1/2 hours to review, categorize, and link to the relevant cases. The review, categorization, and linking time did not include time for redaction or watching all of the footage.

Local governments indicated that having the ability to pass on the cost of redaction is imperative for local governments to be able to take on body worn camera programs. There is an expectation for continual increases in requests for recordings, and local governments cannot assume the risk of these costs. The Washington Coalition for Open Government indicated that some cost-shifting may be appropriate but raised concerns as to what those costs will look like, particularly since redaction technology is rapidly

evolving. It is important to maintain the requirement that agencies use the least costly method of redaction so that the costs borne by requesters are the most cost-effective.

Another point of discussion addressed whether the limitation on prevailing party attorneys' fees unless the agency acted in bad faith or with gross negligence should be eliminated so that all requests are governed by the same standard, or whether the unique nature of body worn camera footage justifies maintaining this provision.

Proposed Recommendations:

The Task Force chairs requested a small subgroup to submit proposed recommendations for possible changes to portions of the body worn camera statutes related to the PRA and privacy. Recommendations relating to cost recovery were included with those and are attached in **Appendix A**.

IV. Privacy Protections and the Public Records Act

The PRA requires state and local government agencies to make all public records available for public inspection and copying upon request, unless the records fall within certain statutory exemptions. The stated policy of the PRA favors disclosure and requires that listed exemptions be narrowly construed. If information falls under an exemption, an agency must determine whether the exempt information can be deleted so that the remaining portions of the record may be released. An agency must describe why each withheld record or redacted portion of a record is exempt from disclosure.

The PRA exempts a variety of records from public inspection and copying, including many types of personal records and personal information. Some information relating to investigations, law enforcement, and crime victims is also exempt. These exemptions include:

- specific intelligence information and investigative records compiled by investigative or law enforcement agencies, if nondisclosure is essential to effective law enforcement or for the protection of any person's right to privacy;
- information revealing the identity of persons who are witnesses to or victims of crime or who file complaints, if disclosure would endanger any person's life, physical safety, or property;
- information revealing the identity of child victims of sexual assault who are under the age of 18; and
- personally identifying information collected by law enforcement agencies pursuant to local security alarm system programs and vacation crime watch programs.

The PRA does not contain a specific privacy exemption. However, some PRA exemptions incorporate privacy as one component of the exemption. Invasion of a person's right to privacy under the PRA is defined to mean disclosure of information that would be both highly offensive to a reasonable person and not of legitimate concern to the public.

Engrossed House Bill 2362 established public disclosure provisions specifically related to body worn camera recordings. Body worn camera recordings are exempt from the PRA to the extent nondisclosure is essential for the protection of any person's right to privacy under the PRA. A law enforcement or corrections agency may not disclose a body worn camera recording to the extent the recording is exempt from disclosure. Disclosure of a body worn camera recording is presumed to be highly offensive to a reasonable person to the extent it depicts:

- areas of a medical facility, counseling, or therapeutic program office where:

- a patient is registered to receive treatment, receiving or waiting for treatment, or being transported in the course of treatment; or
- health care information is shared with patients, their families, or among the care team;
- health care information protected under federal (HIPAA) or state health care privacy laws;
- the interior of a residence where a person has a reasonable expectation of privacy;
- an "intimate image" as defined in criminal laws governing disclosure of intimate images;
- a minor;
- the body of a deceased person;
- the identity of or communications from a victim or witness of an incident involving domestic violence or sexual assault. A victim's wishes regarding disclosure or nondisclosure govern if expressed at the time of recording; or
- the identifiable location information of a community-based domestic violence program or emergency shelter.

A. Privacy Protections in General

There is broad agreement among Task Force members about the importance of protecting privacy interests of individuals who may be recorded by body worn cameras, and members also acknowledged a delicate balance between the goals of accountability and transparency and the goal of protection of individual privacy interests. Body worn cameras are more invasive than dashcams and have the potential to enter homes, health care facilities, and other sensitive locations.

In addition, body worn cameras are likely to capture interactions with individuals who are experiencing a mental health or substance use related crisis. Stakeholder groups representing vulnerable communities expressed significant concern as to how footage might impact those communities and how the footage might ultimately be used. Specific concerns were that body worn cameras: may have a disproportionate impact on those with mental illness; may be used to target immigrant populations; and may put victims at risk for identification and therefore have a chilling effect on the reporting of criminal activity.

Proposed Recommendations:

The Task Force chairs requested a small subgroup to submit proposed recommendations for possible changes to portions of the body worn camera statutes related to the PRA and privacy. Those proposed recommendations are included in **Appendix A**.

Proposed recommendations regarding the PRA and privacy were also submitted from the Washington Association of Sheriffs and Police Chiefs. Those proposed recommendations are included in **Appendix B**.

B. Privacy Protections in Health Care Facilities

The Task Force specifically considered the issue of the use of body worn cameras in health care facilities. The Task Force received a presentation from representatives of the Washington State Hospital Association and the Washington State Medical Association on the use of body worn cameras in health care facilities that are subject to state and federal health care privacy laws. That presentation can be viewed at: [Law Enforcement Body Cameras, Health Care Facilities, and Privacy Laws](#)

While health care information is referenced in parts of the PRA, prior to EHB 2362 there was no protection in relation to information held by law enforcement. An explicit presumption against disclosure strongly and specifically protects patients and families and provides guidance to law enforcement and those requesting records.

There may be instances outside of a health care facility where health care information may be gathered; these scenarios do not fit neatly within the covered definitions. Situations such as when Emergency Medical Services are being provided on a crime scene should be considered.

It may be appropriate for law enforcement to turn off a body worn camera in certain settings. Consider examples from other states:

City of San Diego Police Department: "Officers will avoid, when possible, recording people who are unrelated to the police purpose. Additionally, officers will take into account HIPAA considerations when dealing with medical and psychiatric patients. Officers should normally turn their camera off when at a medical facility and when a clinician is interviewing a subject."

Examples in existing WA policies include:

Castle Rock Police Department: "Body-worn cameras shall not be used to record . . . When an officer would be recording a patient during a medical or psychological evaluation by a clinician or similar professional, or during treatment. When recording in hospitals or other medical facilities, officers shall be careful to avoid recording persons other than the suspect."

Cowlitz County Sheriff's Office: "Unless there is reasonable suspicion to believe that criminal activity is occurring or will occur, employees shall not intentionally record: Places where a heightened expectation of privacy exists, such as restrooms, jails, or hospitals, unless for a direct law enforcement purpose such as a crime in progress or the recording of the location is material to a criminal investigation."

Task Force discussion included recommendations that the PRA exemptions relating to health care facilities and protected health care information should be retained and that consideration should be given to expanding the exemption to include health information that may be gathered in settings outside of a health care facility.

V. Model Body Worn Camera Policies

Engrossed House Bill 2362 enacted a requirement that any law enforcement or corrections agency that deploys body worn cameras must adopt a policy governing the use of the cameras. The policies must, at a minimum, address:

- activation/deactivation requirements, and officer discretion in this regard;
- how to respond to a person's unwillingness to communicate with an officer who is recording the communication;
- requirements for documenting when and why a camera was deactivated prior to the conclusion of an interaction with a member of the public;
- requirements around notifying a member of the public that he or she is being recorded, including where the person is a limited or non-English speaker, or is deaf or hard of hearing;

- training requirements on body worn camera usage; and
- security rules to protect data collected and stored from body worn cameras.

The legislation also directed the Task Force to develop model policies applicable to the use of body worn cameras. The Task Force reviewed body worn camera policies from covered law enforcement and corrections agencies that had deployed body worn cameras and engaged in numerous discussions about the scope and application of a model body worn camera policy. Three panels of Task Force members representing the Community and Public, the Criminal Bar, and Government and Law Enforcement were established to provide their perspectives on body worn camera policies and other relevant issues before the Task Force. In addition, Task Force members representing the Washington Association of Sheriffs and Police Chiefs and the American Civil Liberties Union presented the Task Force with two different perspectives on the potential elements of a model body worn camera policy.

The panel presentations and Task Force discussions provided differing perspectives on: what should be the main purpose of a body worn camera program; what particular concerns does the use of body worn cameras create and how can those be addressed; and, if body worn cameras are used, what policies should be in place to govern their implementation and the use of body worn camera recordings. While there was general agreement that usage of body worn cameras should not be mandated, there were differing views as to whether a state-wide set of rules on their use should be established or whether local jurisdictions should retain flexibility to tailor body worn camera programs to their particular community and agency needs.

A. Purpose of Body Worn Cameras

Task Force members discussed a variety of viewpoints on the purposes of body worn cameras and the perceived benefits from their use.

- Accountability: Some members expressed the view that the use of body worn cameras should be limited to the main purpose of police officer accountability with a goal of reducing inappropriate instances of officer use of force. Others felt that a body worn camera program's purpose should focus on a much broader view of accountability: accountability for police officers, accountability for persons who interact with officers, and accountability for persons who have engaged in criminal activity.
- Transparency: Another main purpose set forth by Task Force members is that of transparency and how transparency can not only lead to accountability but also help build public trust and confidence in the law enforcement system.
- Evidentiary Tool: Other Task Force members noted that recordings can help with getting to the truth and are useful as an evidentiary tool in criminal prosecutions. Both prosecutor and criminal defense representatives emphasized the importance of not statutorily limiting the use of recordings in criminal proceedings, which are already governed by comprehensive evidentiary laws and rules that provide parameters on their use in criminal cases.
- Enhancement to Public Safety: Finally, some Task Force members believe that recordings help enhance officer and public safety and are useful for officer training.

B. Main Concerns with Body Worn Camera Use

Task Force members identified and discussed a number of concerns that arise with the use of body worn cameras and ways in which these concerns could be addressed through parameters around

body worn camera usage. A main concern expressed involves the potentially significant impact of body worn cameras on individual privacy interests and the need to ensure that use of body worn cameras does not enable voyeurism or commercialism. Another main concern relates to the potential that use of body worn cameras may have a chilling effect on the willingness of certain persons to engage with law enforcement, including members of vulnerable communities and crime victims, especially victims of domestic violence or sexual assault.

Other discussed concerns include: the potential use of body worn cameras for generalized surveillance and private sector policing; opportunities for data sharing with federal and other agencies that may be used to target immigrant or other communities; the potential for recordings to be used to re-victimize domestic violence and other crime victims; and, the disproportionate impact that use of body worn cameras may have on persons with mental illness.

C. Main Components of Body Worn Camera Policies

Discussion regarding the specific components that should be included in an agency's body worn camera policy focused on a number of particular issues. While there was general agreement that policies should address these issues, there were differing viewpoints on the specific rules that should be established. The main body worn camera components discussed by the Task Force included the following issues:

- when officers must activate cameras and how much discretion officers should have regarding when to activate and deactivate cameras;
- the right of persons to be notified by the officer that a recording is being made and exceptions when notice is not required;
- whether and under what circumstances crime victims, witnesses, or others have the right to consent to recording; and
- whether officers should have the ability to review body worn camera recordings prior to writing their reports of incident.

Proposed Recommendations Considered by the Task Force

All Task Force members were given an opportunity to submit recommendation proposals for consideration by the Task Force. The Task Force reviewed and voted on all proposals at its final meeting. Given a disagreement in policy as to whether final passage requires an affirmative vote from a majority of the assigned Task Force members (18 members) or a majority of the Task Force members present at the final meeting (13 members), the recorded vote for all proposed recommendations is provided.

The Task Force consists of 35 voting members. A total of 24 voting members attended the final task force meeting. Nine members were absent and 2 members had resigned with no replacement and are included in the absent category. Abstentions were determined by adding to the in favor and opposed votes to total 24. A copy of the submitted recommendations, including background and rationale for the proposals, is provided in Appendices A & B.

Recommendation Vote

Appendix A

<p>1. Removal of sunset and "covered jurisdiction" provisions</p> <p>The existing PRA pilot statute governing body worn camera recordings should be made permanent and applied to any jurisdiction that chooses to implement body-worn cameras. Accordingly, the existing statute's sunset provision and "covered jurisdiction" provision should be repealed.</p> <p><i>See 1 in Appendix A for original proposal.</i></p>	In Favor	Opposed	Abstaining	Absent
	14	3	7	11
<p>2.A. Definition of intimate image</p> <p><i>Suggested Language: (iii) an [identifiable] individual or individuals engaged in sexual activity, including sexual intercourse as defined in RCW 9A.44.010 and masturbation; or an [identifiable] person's intimate body parts, whether nude or visible through less than opaque clothing, including the genitals, pubic area, anus, or post-pubescent female nipple.</i></p> <p><i>See 2.A in Appendix A for original proposal.</i></p>	(see vote totals below for 2.A.i & 2.A.ii)			
<p>i. The definition of Intimate Image in RCW 42.56.240(14)(a)(iii) should be broadened beyond images recorded in a private setting to also include images recorded in public areas.</p>	In Favor	Opposed	Abstaining	Absent
	21	1	2	11
<p>ii. In broadening the definition of Intimate Image in RCW 42.56.240(14)(a)(iii), redaction of individuals should be limited to those who are identifiable.</p>	In Favor	Opposed	Abstaining	Absent
	4	14	6	11

<p>2.B. Definition of minor</p> <p>The definition of Minor in RCW 42.56.240(14)(a)(iv) should include the adjective “identifiable” in order to relieve agencies from having to redact every unidentified minor appearing in body worn camera footage.</p> <p><i>Suggested Language: (iv) A minor identified in the body worn recording or identifiable by referring to the incident report or other investigative records of the specific incident recorded.</i></p> <p><i>See 2.B in Appendix A for original proposal.</i></p>	<p>In Favor</p> <p>7</p>	<p>Opposed</p> <p>11</p>	<p>Abstaining</p> <p>6</p>	<p>Absent</p> <p>11</p>
<p>3. Retention requirement</p> <p>The statutory retention requirement for body worn camera recordings contained in RCW 42.56.240(14)(j) should be clarified to refer to the applicable public records retention schedules, which contain more detail on the subject (including, for example, specifying circumstances when records must be retained beyond the permitted minimum period).</p> <p><i>Suggested Language: (j) A law enforcement or corrections agency must retain body worn camera recordings for at least sixty days and thereafter may destroy the records in accordance with the applicable records retention schedule.</i></p> <p><i>See 3 in Appendix A for original proposal.</i></p>	<p>In Favor</p> <p>19</p>	<p>Opposed</p> <p>0</p>	<p>Abstaining</p> <p>5</p>	<p>Absent</p> <p>11</p>
<p>4. Good faith language</p> <p>The provision in RCW 42.56.240(14)(c) that bars a PRA requestor who prevails in litigation over body worn camera video from recovering fees and statutory penalties unless the agency acted with bad faith or gross negligence should be removed.</p> <p><i>See 4 in Appendix A for original proposal.</i></p>	<p>In Favor</p> <p>4</p>	<p>Opposed</p> <p>15</p>	<p>Abstaining</p> <p>5</p>	<p>Absent</p> <p>11</p>

Appendix B

<p>1. Exempt body worn camera footage from the Public Records Act</p> <p>RCW 42.56.240(14) should be amended to exempt all body worn camera footage from public disclosure, with three exceptions:</p> <p>a. individuals directly involved in the incident recorded on the footage (or their attorney);</p> <p>b. individuals who file a written allegation, under penalty of perjury, of misconduct by an officer (or the attorney of the person who filed a written allegation, under penalty of perjury, of misconduct by an officer), to the extent that body camera footage is relevant to the allegation; and</p> <p>c. the executive director of the state commissions on African-American Affairs, Asian Pacific American Affairs, or Hispanic Affairs.</p> <p><i>See 1 in Appendix B for original proposal.</i></p>	<p>In Favor</p> <p>4</p>	<p>Opposed</p> <p>16</p>	<p>Abstaining</p> <p>4</p>	<p>Absent</p> <p>11</p>
<p>2. Body worn camera footage and the Privacy Test</p> <p>RCW 42.56.240(14)(a) should be amended to make the “exemptions” in RCW 42.56.240(14)(a)(i)-(vii) satisfy both prongs of the privacy test in RCW 42.56.050 (highly offensive to a reasonable person and not of legitimate concern to the public).</p> <p><i>See 2 in Appendix B for original proposal.</i></p>	<p>In Favor</p> <p>11</p>	<p>Opposed</p> <p>4</p>	<p>Abstaining</p> <p>9</p>	<p>Absent</p> <p>11</p>
<p>3. Agency responsibilities for body camera footage requests under RCW 42.56.240(14)</p> <p>RCW 42.56.240(14) should be amended to specify that agencies need only produce body camera footage in response to a public records request if the public records request specifically states that the request seeks body worn camera footage.</p> <p><i>See 3 in Appendix B for original proposal.</i></p>	<p>In Favor</p> <p>4</p>	<p>Opposed</p> <p>14</p>	<p>Abstaining</p> <p>6</p>	<p>Absent</p> <p>11</p>
<p>4. Repeal all references to “covered jurisdiction” from RCW 42.56.240, and amend the definition of “body worn camera recording” in RCW 42.56.240(14)(g) to allow any agency that uses body cams to operate under the same public disclosure rules as agencies that deployed body cams before June 10, 2016.</p> <p><i>See 4 in Appendix B for original proposal.</i></p>	<p>Withdrawn as duplicative (See Proposal in Appendix A.1)</p>			

<p>5. Repeal the sunset provision for the PRA protections on body worn camera footage in RCW 42.56.240(14)(g)(i) so the existing PRA provisions no longer expire on July 1, 2019.</p> <p><i>See 5 in Appendix B for original proposal.</i></p>	<p>Withdrawn as Duplicative (See Proposal in Appendix A.1)</p>
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Withdrawn

<p>WASPC Recommended body camera model policy</p> <p>A model policy was proposed by the Washington Association of Sheriffs and Police Chiefs. WASPC withdrew the policy from consideration prior to voting and therefore the proposal is not included in this report.</p>	<p>Withdrawn</p>
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Appendices

Appendix A Submitted By:

- Eric Stahl, Washington Coalition for Open Government
- Tamaso Johnson, Washington State Coalition Against Domestic Violence
- Jennifer Ziegler, Washington State Association of Counties
- James McMahan, Washington Association of Sheriffs and Chiefs
- Mary Perry, Seattle Police Department
- Logan Bahr, Association of Washington Cities

Appendix B Submitted By:

- Washington Association of Sheriffs and Chiefs

To: Use of Body Worn Cameras Joint Legislative Task Force
From: Eric Stahl, Washington Coalition for Open Government
Tamaso Johnson, Washington State Coalition Against Domestic Violence
Jennifer Ziegler, Washington State Association of Counties
James McMahan, Washington Association of Sheriffs and Chiefs
Mary Perry, Seattle Police Department
Logan Bahr, Association of Washington Cities

Date: 11/16/2017

Subject: Recommendations to the Use of Body Worn Cameras Joint Legislative Task Force

At the request of the task force chairmen, our small group discussed possible changes to the portions of the body-worn camera (BWC) statutes related to public records and privacy. Through a series of conference calls and emails, the group ultimately agreed upon several recommendations and disagreed on some issues. This memo details the various items that were discussed. We thank the task force for allowing us the opportunity to participate in the process of refining these laws.

1. Removal of sunset and “covered jurisdiction” provisions

The group agreed that the existing pilot statute should be made permanent, and applied to any jurisdiction that chooses to implement body-worn cameras. Accordingly, we recommend repealing the existing statute’s sunset provision and “covered jurisdiction” provision.

2. Public records exemption provisions

Our group discussed the expanded privacy exemptions set out in RCW 42.56.240(14)(a). We recommend the following revisions, subject to two caveats. The Washington Coalition for Open Government believes additional or special exemptions for BWC videos are not necessary, and that the PRA’s longstanding exemption for investigative records (RCW 42.56.240(1)) strikes the right balance between privacy/law enforcement concerns and the public’s right to access these important public records. WCOG nevertheless agrees the following proposed revisions are improvements on the existing “special exemption” language in Section 240(a)(14). WASPC believes the privacy exemptions should be further strengthened, but does agree that, except as otherwise noted, these recommendations would improve upon the existing statutory protections.

A. Definition of Intimate Image in RCW 42.56.240(14)(a)(iii)

The current intimate image provision only applies to images taken in a private setting. Most of the group agreed that the definition of intimate image should be broadened to

include public areas. WASPC does not support the proposed qualifier of “identifiable” and recommends the suggested language, whether the individual(s) is/are “identifiable” or not.

Suggested Language: (iii) an identifiable individual or individuals engaged in sexual activity, including sexual intercourse as defined in RCW 9A.44.010 and masturbation; or an identifiable person's intimate body parts, whether nude or visible through less than opaque clothing, including the genitals, pubic area, anus, or post-pubescent female nipple.;

B. Definition of Minors in RCW 42.56.240(14)(a)(iv)

Most of the group agreed that the definition of minor should include the adjective “identifiable” in order to relieve agencies from having to redacting every unidentified minor appearing in BWC footage. WASPC does not support the proposed qualifier of “identifiable.” WASPC believes that the technological capability of redaction software is quickly improving, which should substantially reduce the burden of redaction, making the justification for this suggestion moot.

Suggested Language: (iv) A minor identified in the body worn recording or identifiable by referring to the incident report or other investigative records of the specific incident recorded;

3. Retention Requirement in RCW 42.56.240(14)(j)

The group agreed that the statutory retention requirement should be clarified to refer to the applicable public records retention schedules, which contain more detail on the subject (including, for example, specifying circumstances when records must be retained beyond the permitted minimum period).

Suggest Language: (j) A law enforcement or corrections agency must retain body worn camera recordings for at least sixty days and thereafter may destroy the records in accordance with the applicable records retention schedule.;

4. Good Faith Language in RCW 42.56.240(14)(c)

The group discussed, but was unable to agree, on whether to keep or remove the provision barring a PRA requestor who prevails in litigation over BWC video from recovering fees and statutory penalties unless the agency acted with bad faith or gross negligence.

Current Language: (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.;

WCOG recommends striking this provision, which treats BWC footage differently from virtually every other type of public record. The PRA's fee and penalty provisions are essential components of the statutory scheme: they promote transparency and public confidence by assuring agency compliance with the PRA and deterring officials from wrongful suppression of public information. Any justification there may have been for temporarily suspending these PRA litigation provisions during the "pilot" phase of BWCs would not warrant making this provision permanent.

AWC, WSAC, and WASPC recommend retaining this provision because of the unique nature of BWC footage. Unlike other records, BWC captures images in areas where people have an expectation of privacy. These images require redaction prior to disclosure in many cases. Redacting BWC remains challenging and labor-intensive. The current provision provides a pragmatic "good faith" protection for agencies applying a set of new and untested laws; and it ensures that agencies have the ability to adequately protect the privacy rights of victims and witnesses. Further, we believe removing this provision would cause many agencies to discontinue their BWC programs and discourage other agencies from adopting BWC programs in the future. This provision is not a temporary suspension of the PRA, it is a vital component of the law in recognition of the new and uniquely intrusive nature of BWCs.

WASPC RECOMMENDATIONS TO BWC TASK FORCE

1. Amend RCW 42.56.240(14) to exempt all body worn camera footage from public disclosure, with three exceptions:
 - a. individuals directly involved in the incident recorded on the footage (or their attorney);
 - b. individuals who file a written allegation, under penalty of perjury, of misconduct by an officer (or the attorney of the person who filed a written allegation, under penalty of perjury, of misconduct by an officer), to the extent that body camera footage is relevant to the allegation; and
 - c. the executive director of the state commissions on African-American Affairs, Asian Pacific American Affairs, or Hispanic Affairs.

BACKGROUND: RCW 42.56.240 (14)(a) establishes seven characteristics of body worn camera footage, any one of which creates a presumption that the footage is highly offensive to a reasonable person under RCW 42.56.050 (Invasion of Privacy). This presumption that the footage is highly offensive does not itself create an exemption under RCW 42.56.050. In order for body camera footage containing any of these characteristics to become exempt from public disclosure, an agency must also show that the footage “is not of legitimate concern to the public” (RCW 42.56.050).

RATIONALE: This recommendation seeks to create better privacy protections for individuals shown in body camera footage by exempting all body worn camera footage from public disclosure, with the three aforementioned exceptions. Said exemptions would allow any person directly involved in the incident shown in the footage to obtain a copy of the footage. It would also allow any person to get a copy of any body camera footage relevant to a written allegation, under penalty of perjury, of misconduct by a law enforcement officer (allowing for body camera footage to be used to sustain or refute such an allegation). Finally, this proposal would allow the Executive Director of the State Commissions on African-American Affairs, Asian Pacific American Affairs, and Hispanic Affairs to obtain body camera footage (creating a mechanism for any person who alleges misconduct by a law enforcement agency to obtain body camera footage relevant to the complaint through an independent third party, therefore alleviating potential concerns about retaliation by the law enforcement agency for having made such an allegation). This proposal would make no change to the use of body camera footage in any court proceeding, or the disclosure of body camera footage used in any court proceeding.

2. Amend RCW 42.56.240(14)(a) to make the “exemptions” in RCW 42.56.240(14)(a)(i)-(vii) satisfy both prongs of the privacy test in RCW 42.56.050. *(If recommendation #1 above is adopted, this recommendation becomes moot and is withdrawn.)*

BACKGROUND: RCW 42.56.240 (14)(a) establishes seven characteristics of body worn camera footage, any one of which creates a presumption that the footage is highly offensive to a reasonable person under RCW 42.56.050 (Invasion of Privacy). This

presumption that the footage is highly offensive does not itself create an exemption under RCW 42.56.050. In order for body camera footage containing any of these characteristics to become exempt from public disclosure, an agency must also show that the footage “is not of legitimate concern to the public.”

RATIONALE: This recommendation seeks to create better privacy protections for individuals shown in body camera footage by creating a true public records exemption for each of the seven characteristics that currently only satisfy one-half of the privacy test in the Public Records Act.

- 3. Amend RCW 42.56.240(14) to specify that agencies need only produce body camera footage in response to a public records request if the public records request specifically states that the request seeks body camera footage.**

BACKGROUND: The experience of many agencies currently using body cameras is that most public records requests where body camera footage is disclosed don’t specifically seek body camera footage. Body camera footage is responsive to these requests, however, due to the fact that the request seeks “all” records related to a particular incident.

RATIONALE: Agencies are required to spend significant time and resources reviewing, processing and redacting body camera footage in response to public records requests – often times when the requester is not seeking body camera footage. By requiring an agency to produce body camera footage only when specifically stated in the public records request, agencies can avoid unnecessarily consuming public resources processing footage that the requestor is not seeking.

- 4. Repeal all references to “covered jurisdiction” from RCW 42.56.240, and amend the definition of “body worn camera recording” in RCW 42.56.240(14)(g) to allow any agency that uses body cams to operate under the same public disclosure rules as agencies that deployed body cams before June 10, 2016.**

BACKGROUND: The current privacy protections for individuals shown in body camera footage only apply to footage from an agency that deployed body cameras prior to June 10, 2016. Individuals shown in body camera footage from an agency that deployed body cameras after June 10, 2016 enjoy none of the protections in RCW 42.56.240(14).

RATIONALE: There is no rational public policy reason for establishing different privacy protections for an individual shown on body camera footage based on the date that the agency first deployed body cameras. All individuals should have the same privacy protections regardless of when the agency first deployed body cameras. Furthermore, state law should encourage all agencies to deploy body cameras. The notion of a ‘covered jurisdiction’ specifically discourages any agency not already considered a ‘covered jurisdiction’ from deploying body cameras.

5. Repeal the sunset provision for the PRA protections on body cam footage in RCW 42.56.240(14)(g)(i) so the existing PRA no longer expire on July 1, 2019.

BACKGROUND: The current privacy protections for individuals shown in body camera footage expires on July 1, 2019.

RATIONALE: There is no rational public policy reason for establishing different privacy protections for an individual shown on body camera footage based on the date that the footage was recorded. All individuals should have the same privacy protections regardless of when the footage was recorded. Furthermore, state law should encourage all agencies to deploy body cameras. The notion that the current privacy protections will expire create a specific disincentive for agencies to continue to use body cameras beyond July 1, 2019.

Minority Reports and Member Statements

1. Catt Elliott & Anita Khandelwal, Washington Defender Association & Washington Association of Criminal Defense Lawyers
2. Eric M. Stahl, Washington Coalition for Open Government & Lisa Blegen, KIRO-TV News
3. Tamaso Johnson, Washington State Coalition Against Domestic Violence
4. ACLU-WA Minority Report
5. Joint Minority Report Submitted by:
 - Joanne Alcantara, API Chaya
 - Sokha Danh, Washington Defender Association
 - Minal Ghassemieh
 - Shankar Narayan, ACLU-WA
 - Bill Ostling
 - Rev. Harriet Walden, Mothers for Police Accountability

Use of Body Worn Cameras: WACDL/WDA Minority Report

Section II. Retention and Retrieval of Data

WACDL and WDA remain concerned that the minimum retention requirement of 60 days is insufficient to preserve necessary and potentially exculpatory data for use by individuals who have been charged with a crime.¹

This timeline is too short because many criminal cases do not reach the court system within 60 days of the incident leading to charges. Unless the State avails itself of investigative detention or “rush filing” procedure, the State is unlikely to file charges within sixty days.² Upon receiving a new case, criminal defense attorneys are routinely faced with rapidly approaching or already expired deadlines for a great deal of data that exists in the hands of the State or is preserved at the request of law enforcement. Examples include 911 recordings, in-car video, and third-party surveillance/ security footage that may capture an event. Criminal defendants frequently miss the opportunity to obtain data that is pertinent to the case; this is an opportunity to intervene early in the implementation of developing technology and to build feasible protections into the policy itself.

The rebuttal to this position during discussion was that investigative footage is already preserved beyond 60 days by other provisions of the PRA. It is dangerous to place the decision of what footage is “related” to an event solely in the hands of law enforcement without review or recourse by either the prosecuting authority or the defense attorney. Prosecutors routinely request information beyond what law enforcement originally preserved and provided. A margin of error of only 60 days is unnecessarily small, and the cost of failing to preserve constitutionally protected material may be the dismissal of serious charges – or the conviction of an innocent person.

Section V. Model Body Worn Camera Policies

Subsection C. Main Components of Body Worn Camera Policies

WACDL and WDA remain concerned that the actual and model policies discussed in session provide neither clear parameters governing circumstances where an officer has discretion not to record events as they unfold, nor sufficient oversight and enforcement if those strict rules are not followed. Any model policies promulgated on a state level must include a mandate that departments monitor compliance with their own policies.

Notes

1. While WACDL and WDA supported the proposed change to RCW 42.56.240(14)(j), intended to align that statute with other applicable retention requirements under the PRA, that support was purely in favor of a more accurate statement of existing law.
2. Data regarding average time to filing should be available from multiple jurisdictions and would be a good source for determining the appropriate retention schedule.

For more information, contact:

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- or -

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To: Use of Body Worn Cameras Joint Legislative Task Force
From: Eric M. Stahl, Washington Coalition for Open Government
Lisa Blegen, KIRO-TV News
Date: December 1, 2017
Subject: Open Government/News Media Minority Report on Task Force Public
Records Recommendations

As the task force appointees representing WCOG and the news media, we are concerned that several of the final task force recommendations insufficiently protect the public interest, and undermine the potential of police body worn cameras as a tool for transparency.

The requestor community generally supports the use and implementation of BWCs. The ability to record what an officer sees can provide critical evidence in investigations; protect falsely accused officers and citizens; and serve as an invaluable tool for assuring public understanding of law enforcement activity. This is only possible, however, if bodycam footage is presumptively accessible to the public upon request, just like other public records in Washington.

Conversely, imposing undue secrecy on BWC footage will foster public mistrust.

We recognize that footage recorded by BWCs will at times implicate privacy and law enforcement concerns. But the Public Records Act has always limited disclosure of police records to the extent necessary to protect individual privacy or active investigations. *See, e.g.,* RCW 42.56.050, .240(1), (2). The privacy concerns that occupied much of the recent task force discussions can best be addressed by applying these existing exemptions with full force to police video footage. Additional or special exemptions for BWC videos are simply not necessary.

We nevertheless supported the enhanced privacy provisions in EHB 2362 (RCW 42.55.240(14)(a)), as part of compromise legislation intended to encourage widespread adoption of BWCs. The final task force recommendations, however, include several proposed changes to EHB 2362 that erode that compromise and inappropriately limit public access to BWC footage.

We have the following specific concerns:

- 1. Presumption against legitimate public concern:** With little deliberation, the task force approved an eleventh-hour WASPC proposal to presume that certain types of BWC footage are “not of legitimate concern to the public.” We urge the legislature to reject this change, which would significantly hinder the public’s ability to access BWC footage without litigation.

Existing RCW 42.56.240(14)(a) already presumes that disclosure of the enumerated types of footage (depictions of minors, corpses, nudity/sexual activity, residences, medical and domestic violence facilities) is “highly offensive” and thus satisfies the first prong of the PRA’s privacy test (RCW 42.56.050). Under the current statute, footage depicting these items is subject to disclosure, unless the agency determines that disclosure is not of legitimate public concern. The task force recommendation would change the default presumption, such that footage covered by .240(14)(a) would not be disclosed unless the agency affirmatively determines there is a legitimate public concern. Given the statute’s other privacy protections (including the prohibition on releasing exempt video), this shift empowers police agencies with substantially more discretion to withhold BWC footage, and makes it more likely requestors will need to pursue litigation.

2. No need to redact individuals who are not identifiable: The task force considered and rejected two proposals that would have made it unnecessary for agencies to redact individuals who appear in BWC footage but who are not “identifiable” because they are obscured, appear only in the background, or otherwise cannot be recognized. The legislature should adopt these limitations, to avoid the unnecessary delay and expense of such redactions. Specifically, the enhanced privacy provisions for nudity/sexual activity (RCW 42.56.240(a)(iii)) and for minors (RCW 42.56.240(a)(iv)) should apply only to the extent the recording shows an identifiable individual.

3. Treating BWC footage like any other public record when requests are litigated: RCW 42.56.240(14)(c) currently states that a requestor who establishes that an agency violated the PRA by wrongfully withholding bodycam footage is not entitled to fees or a statutory penalty, unless the agency “acted in bad faith or with gross negligence.” We urge the legislature to strike this provision, which treats BWC footage differently from virtually every other type of public record. No meaningful distinction justifies this disparate treatment.

The PRA’s fee and penalty provisions are essential components of the statutory scheme: they promote transparency and public confidence by assuring agency compliance with the PRA, and by deterring officials from wrongful suppression of public information. Any justification there may have been for temporarily suspending these PRA remedies during the bodycam “pilot” phase would not warrant making this provision permanent.

Additionally, the provision fails to consider that PRA disputes over BWC footage are likely to include claims based on police incident reports and other public records, for which fees and statutory penalties are available. The existing provision offers no guidance on how a court is supposed to award the usual PRA remedies for some records, but withhold them for BWC footage in the same lawsuit.

December 13, 2017

Dear Co-Chairs Hansen and Padden, members of the task force:

On behalf of the Washington State Coalition Against Domestic Violence (WSCADV), a statewide organization working on behalf of our approximately 70 member programs providing support and housing to survivors of domestic violence and their children, I write to express our thanks to the members of the Use of Body Worn Cameras Joint Legislative Task Force and staff for creating the opportunity for us to provide input on critical issues related to the impact of body worn cameras (BWCs) on survivors of domestic violence. We value the continued attention of this body, the Co-Chairs, and the legislature as a whole, to the potential impacts of BWCs and the footage they create on survivors of domestic and sexual violence, as well as other vulnerable communities. In that spirit, we offer the following additional comments.

BWCs pose critical concerns of privacy, safety, and autonomy for victims.

Implications of the widespread use of BWCs for victims of crime, particularly survivors of domestic and sexual violence, are not well known at this time—in the Washington State or elsewhere. The video and audio evidence created by BWCs may aid prosecutors, help exonerate some defendants, and lead to more responsive policing. However, there are a number of concerns and questions about how to balance the potential public benefits of these cameras with victim rights, privacy, and safety. Advocates who work with survivors of domestic violence and sexual assault regard the privacy and confidentiality of survivor data and identifying information to be one of the most important tenets of best practice laws and policies. Confidentiality of a victim's identifying information is very often a matter of life and death. Respecting privacy allows a victim the space to heal and recover from violence. Protecting confidentiality and privacy is a key feature of federal laws such as the Violence Against Women Act (VAWA) and the Family Violence Prevention Services Act (FVPSA). The same principles are well established in numerous state statutes, including Washington's own 'domestic violence advocate' and 'sexual assault advocate' evidentiary privilege laws.¹

Victims of certain crimes, such as domestic violence and sexual assault, may have serious safety and/or privacy concerns with being recorded at all. The very act of being recorded may be inherently traumatic for some victims, particularly victims of crimes where the perpetrator used photographic or recording technology as a tool of abuse. Fear or reluctance to be filmed may create a new 'chilling effect' that dissuades victims from contacting law enforcement or reporting crimes. Additionally, general privacy concerns with BWC recordings in private residences may be heightened for victims of domestic violence since police are more likely to respond to a victim's home because of the nature of the crime.

¹ See: RCW 5.60.060(7), (8)

The expanded Public Records Act protections for BWC footage of survivors created by HB 2362 must be made permanent, and the legislature should commit to revisiting the issue of disclosure exemptions for victims of crime in the near future.

Recently the National Domestic Violence Hotline, which provides anonymous support to victims of domestic violence, surveyed victims who contacted them about their experiences with law enforcement. Almost 1/2 of the victims responding had never contacted police about domestic violence, with the desire for privacy (60%) being the most frequently stated reason they had not wished to call the police.² Given the privacy concerns being expressed by victims we continue to be deeply concerned about the chilling effects that BWC adoption and potential dissemination of footage may have to further discourage victims from seeking help.

BWC recordings are likely to contain a great deal of highly personal information captured during moments of extreme stress and trauma for victims. The potential use or viewing of BWC recordings of victims for purposes unrelated to officer accountability or the investigation or prosecution of a crime presents inherent privacy and safety concerns for victims. The potential harm to victims, both physical and mental, compounds as the number persons with access to BWC footage increases. Privacy and safety concerns for victims are even greater if footage of them is made publicly available or could be requested by abusers or even well-intentioned third parties or news outlets and broadcast widely on television or the internet. For these reasons, we believe it is essential that the legislature act to remove the sunset and “covered jurisdiction” provisions of the existing Public Records Act exemptions created by HB 2362.³

Sincerely,



Tamaso Johnson
PUBLIC POLICY DIRECTOR
Washington State Coalition Against Domestic Violence

² *Who Will Help Me?* Domestic Violence Survivors Speak Out About Law Enforcement Responses.
<http://www.thehotline.org/resources/law-enforcement-responses/>

³ See: RCW 42.56.240(14)



December 15, 2017

RE: ACLU of Washington Minority Report

Dear Co-Chairs Hansen and Padden and Members of the Joint Legislative Task Force on Use of Body Worn Cameras (Task Force):

The ACLU of Washington (ACLU-WA), as a member of the Task Force, requests that this letter be included as an official minority report in the official record of the Task Force, as provided by HB 2362. The ACLU-WA is a statewide, nonpartisan organization with over 80,000 members, dedicated to protecting civil liberties, including protecting privacy, defending against intrusive surveillance, ensuring public transparency around government operations, and ensuring racial justice and police accountability. The ACLU-WA has also signed onto a joint minority report noting concerns about the process by which the Task Force arrived at its final report. In this additional minority report, we highlight issues not covered by the joint minority report.

In particular, we want to highlight the following five issues for the Legislature: (1) the Legislature should create a statewide floor of rules around Body Worn Camera (BWC) use; (2) legislators should make their decisions based on new data around BWCs; (3) this tool's primary purpose should be police accountability; (4) any statewide scheme should minimize officer discretion; and (5) BWC manufacturers should be prohibited from using and selling BWC data for potentially unfair uses. Each of these issues is discussed in further detail below:

1. Legislators should ensure a statewide floor of rules around BWC use, rather than the current statewide patchwork, in order to promote community trust.

The impact on community trust is a critical aspect of BWC implementation, but was not adequately discussed at the Task Force. The issue also remains under-examined, particularly the question of whether trust in BWC implementation varies by demographic. If individuals are less willing to interact with law enforcement because of their reluctance to be recorded, it would undermine efforts to improve community-police relations (and reduce community-police violence). Further, public trust is critical for victims of and witnesses to crime, as well as members of vulnerable communities such as immigrants and refugees to come forward to assist law enforcement.^{i, ii} Preliminary evidence suggests that it may indeed be the case that members of some vulnerable communities—particularly non-Whites and specifically African-Americans—are less likely to believe that BWCs will actually result in transparency or accountability.^{iii, iv, v}

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In the ACLU-WA’s years of work around BWC policy at the local level, we have heard consistently that community members want transparency and consistency around how BWCs are used, particularly when moving from jurisdiction to jurisdiction. Inconsistent rules between jurisdictions often result in community members not knowing how the cameras are going to be operated and the purpose for which the data will be used.

Unfortunately, under our current temporary policy framework, created under HB 2362—which the Task Force’s final report largely wishes to make permanent—this confusing patchwork of rules around BWCs will continue, with each jurisdiction continuing to make its own rules, for its own purposes, without any statewide floor for consistency. This result is likely to undermine community trust as well as the efficacy of BWCs for police accountability purposes (see (3) below).

2. Legislators should consider new data and evidence related to BWCs before creating any statewide scheme.

The world has greatly changed in the time since HB 2362 was enacted. While one of the drivers of that bill’s framework was to create a space where the impacts of BWCs in the real world could be studied through individual agency deployments, more and more studies now exist that analyze data on the impact of body cameras on police violence, as well as the willingness of individuals to interact with police. While many of us may have intuitive ideas as to the impact of body cameras on police violence and behavior, the Task Force should recommend policy based on data and research, not unsupported intuition. In a previous letter to the Task Force Co-Chairs dated October 3, 2016 (included here as Appendix A), five organizations (including ACLU-WA) requested that the Task Force hold a session dedicated to reviewing and analyzing these emerging data—but such a session was not held.

While much more research remains to be done, existing studies point at best to a mixed impact of BWCs on violence, with some indication that BWCs, implemented without appropriate rules, could actually escalate violence. For example, affording officers broad discretion to turn cameras on and off may be associated with a rise in violent encounters between police and community members. One large-scale study by researchers Barak Ariel and Alex Sutherland found that “[p]olice use of force actually went up by an astonishing 71 percent when officers could turn their cameras on and off at will and went down ... only when they recorded nearly every interaction with the public from start to finish.”^{vi, vii, viii} In addition, Temple University researchers found that “when officers wore body cameras, civilians were 3.64 percent more likely to die,” and hypothesized that “[o]fficers, aware of their bodycams and more certain their use of deadly force would be seen as justified, were less likely to hesitate.”^{ix, x} Other studies also point to these counterintuitive impacts,^{xi, xii, xiii} and underscore that BWCs are only as effective as the rules around them.^{xiv, xv} The latest, most rigorous, and largest-scale study of BWCs to date in the US only underscores this fact, suggesting that “we should recalibrate our expectations” of cameras’ ability to make a “large-scale behavioral change in policing.”^{xvi}

As the Task Force's final report does not include this evidence, the Legislature should itself consider the evidence in the context of an articulated purpose and goals for this powerful tool (see (3) below).

3. Body Worn Cameras (BWCs) should be for the primary purpose of police accountability.

The primary purpose of BWCs should be police accountability. Yet the reality that has emerged since HB 2362 passed is that BWCs are being rolled out as a poorly regulated, all-purpose surveillance tool. There is little clarity as to the goals of the rollout and significant risks of invasion of privacy and suspicionless, warrantless government surveillance.^{xvii} The Legislature should address this by creating a new scheme for BWCs that explicitly states that accountability is the primary purpose of BWCs, and builds a scheme to achieve that purpose, including a provision to minimize officer discretion in the operation of BWCs (see below).

4. Any statewide BWC scheme should minimize officer discretion in order to improve the likelihood of accountability for police misconduct.

As noted above, preliminary indications are that BWCs will fail to achieve accountability and may even exacerbate violence if officers are given discretion to turn them on and off under lax rules. And of course, if the purpose of BWCs is accountability, this is obviously problematic. Although community-based organizations may not all agree on all parameters of BWC operation, they are largely agreed that at least one purpose of BWCs should be to hold police accountable, and for that reason, rules around BWCs should minimize officer discretion.

However, under the current temporary scheme set up by HB 2362, the opposite has happened—many of the local BWC policies offer a great deal of discretion to operating officers. For example, in Seattle, a variety of rules and exceptions allow officers to justify virtually any failure to record.^{xviii} And the Task Force's approach of largely making the temporary scheme permanent will allow this approach to persist in various agencies across the state, resulting in a missed opportunity to increase the likelihood of BWCs to bring Washington closer to police accountability, as the public expects. The Legislature should address this by creating a statewide operation floor that minimizes the discretion of officers to turn cameras on or off.

5. BWC manufacturers should be prohibited from using and selling BWC data for potentially unfair purposes.

Another impact of BWCs that has accelerated since the passage of HB 2362 is the growing drive of BWC manufacturers to automate the function of policing using BWC data. A number of community-based organizations engaged in the Task Force noted this concern (as set forth in the Community and Public Panel Powerpoint, presented to the Task Force in September 2017)—that such automated functions may incorporate bias into algorithms, and that bias would in turn be reincorporated into BWC systems.^{xix} Multiple scholars have noted similar concerns with BWC data.^{xx}

The Legislature should address this critical issue by ensuring that BWC manufacturers clearly disclose the purposes for which they will use BWC data, and are prohibited from selling such data to third parties.

Conclusion: The Task Force should devise a statewide scheme around BWCs that actively solicits and incorporates feedback from the diverse Washington communities most impacted by body cameras.

Communities were underrepresented on the Task Force, and this lack of inclusion was further deepened by process issues discussed in the Joint Minority Report transmitted to the Co-Chairs via separate email. As a result, in addition to reviewing the Task Force’s final report and minority reports, the Legislature should resource and conduct a more inclusive process, and only then craft permanent legislation regarding the use of BWCs. The wide impact of BWCs on diverse communities means that it is critical to get the rules right, and to ensure an inclusive process in getting there.

Thank you for your consideration.

Sincerely,

Shankar Narayan
Technology and Liberty Project Director
ACLU of Washington

ⁱ Tyler, T. R., Goff, P. A., & MacCoun, R. J. (2015, December 3). “The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement.” *Psychological Science in the Public Interest*, 16(3), 75-109.

ⁱⁱ Tyler, T. R., & Fagan, J. (2010). “Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?” (S. K. Rice, & M. D. White, Eds.) *New York University Press*, 84-112.

ⁱⁱⁱ Sousa, W. H., Miethe, T. D., & Sakiyama, M. (2017, March 21). “Inconsistencies in Public Opinion of Body-worn Cameras on Police: Transparency, Trust, and Improved Police–Citizen Relationships.” *Policing*.

^{iv} Existing studies paint a complicated picture of this area. Some evidence indicates that “[n]on-White and younger respondents [a]re less likely to have positive views of police performance and ultimately less likely to perceive benefits of BWCs,” while those already supportive of police might see greater benefits of BWCs “not as a mechanism to correct bad police behavior, but as a tool to combat negative views of police...” See: Crow, M. S., Snyder, J. A., Crichlow, C. J., & Smykla, J. O. (April 2017). Community Perceptions of Police Body-Worn Cameras: The Impact of Views on Fairness, Fear, Performance, and Privacy. *Criminal Justice and Behavior*, 589-610.

^v Additional evidence indicates that incorporating procedural justice practices into BWC policies improves community member satisfaction significantly. See: McClure, D., La Vigne, N. G., Lynch, M., Golian, L., Lawrence, D., & Malm, A. (2017, June 21). “How Body Cameras Affect Community Members’

- Perceptions of Police.” *Urban Institute*. <http://www.urban.org/research/publication/how-body-cameras-affect-community-members-perceptions-police>
- ^{vi} Ariel, B., Sutherland, A., Henstock, D., Young, J., Drover, P., Sykes, J., . . . Henderson, R. (2016, May 16). “Wearing body cameras increases assaults against officers and does not reduce police use of force: Results from a global multi-site experiment.” *European Journal of Criminology*, 13(6), 744 - 755.
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Appendix 1: Community Letter, October 3, 2016

Representative Drew Hansen
369 John L. O'Brien Building
PO Box 40600
Olympia, WA 98504

Senator Mike Padden
106 Irv Newhouse Building
PO Box 40404
Olympia, WA 98504

October 3, 2016

Dear Co-Chairs Hansen and Padden,

We write to you today as a group of members of the Joint Legislative Task Force on Use of Body Worn Cameras who come from the diverse communities of Washington State. We are appreciative of the cordial tone of the initial meeting of the task force, as well as the broad expertise represented there. The issue of how to regulate body cameras has broad implications for our state, with the potential to fundamentally change the relationship between community members and the law enforcement officers who protect and serve them. It is therefore critical that the Task Force carry out the legislature's mandate with transparency, rigor, inclusiveness, and attention to the full range of implicated issues.

In light of that important mission, we hereby make the following requests:

1. **The Task Force must actively solicit feedback from the diverse Washington communities most impacted by body cameras.** Impacted communities are underrepresented on the Task Force, and we are acutely conscious that those of us on the Task Force should not serve as gatekeepers barring broader community participation. Diverse communities of color such as the Black Lives Matter movement, as well as communities of the mentally ill, homeless, those with substance abuse issues, the LGBTQ community, and others should have the opportunity to present their needs and concerns directly to the Task Force. This will allow the Task Force to make truly informed policy suggestions that more accurately reflect the full diversity of state residents. Given the degree of law enforcement representation on the Task Force, we are concerned that without broader and deeper public engagement, recommendations made may lack the credibility necessary to effectively fulfill our charge.
2. **Before creating appropriate regulations, the Task Force must first discuss what uses of body cameras are appropriate.** Body cameras have the potential to be used not only for police accountability purposes, but also for training, and for evidentiary purposes in court proceedings. We believe that public demand for increased use of body worn cameras has been driven by images of police violence against members of the public, that the primary purpose of body cameras should be to reduce the incidence of such violence, and that regulations around body cameras should be directed towards that purpose. We also believe that the primary purpose of the cameras should be to hold police accountable, to protect communities that are already over-policed, and to improve trust in law enforcement. It is important that Washington residents watching the Task Force conduct its business hear a full discussion of the reasoning behind these perspectives.
3. **The Task Force must consider available data on the impact of body cameras on police violence, as well as the willingness of individuals to interact with police.** While many of us may have intuitive ideas as to the impact of body cameras on police violence and behavior, the Task Force should recommend policy based on data and research, not unsupported intuition. While the issue remains understudied, 8-10 studies have been conducted, with more on the way. At the very least, the findings in these initial studies point to a more complicated picture in which body cameras may be associated with an increase some kinds of violence between police and community members. Another critical issue is the impact of the cameras on community-police trust. If individuals are less willing to interact with law enforcement because of their reluctance to be recorded, or if there are language barriers, that would

undermine the best practice of improving community-police relations, which has been proven to reduce police violence. The Task Force should hold a session dedicated to reviewing and analyzing these emerging data.

4. **The Task Force must consider and make recommendations for statewide legislation around body cameras before recommending a local model policy.** At the first task force meeting, a number of members raised the concern, which we share, that it is impossible to determine an ideal local policy in the absence of recommendations for a statewide statute. Such a statute is important for a number of reasons: (a) the statewide Public Records Act trumps local policy, and could require disclosure of footage that is invasive of privacy and irrelevant to police accountability; (b) leaving operational decisions such as when to turn cameras on and off to local departments has resulted elsewhere in local policies that undermine the public's ability to ensure accountability-relevant footage is recorded; (c) a patchwork of regulations from jurisdiction to jurisdiction undermines the public's ability to understand how body cameras are being used as they move about the state. For all these reasons, the Task Force must consider a state statute first, and then allow that discussion to drive appropriate local regulations.
5. **Both state and local statutes must minimize officer discretion.** We are united in our belief that if body cameras are to be useful in the fight for accountability, officers must be limited in their ability to turn cameras off during interactions with the public. With narrowly tailored exceptions that allow for flexibility to ensure victim safety, and privacy in particularly sensitive situations, such as domestic violence and sexual assault, witness and suspect statements, law enforcement must not be able to pick and choose when to record interactions with the public. Our concern around this issue is heightened by the many high-profile instances in which officers failed to record violent interactions on their body cameras, or did so improperly and without sanction.

Thank you for considering these requests and for your leadership on this important issue.

Signed,

Sokha Danh, Commission on Asian Pacific American Affairs Appointee

Molly Harper Haines representing API Chaya, Commission on Asian Pacific American Affairs Appointee

Enoka Herat, OneAmerica

Nat Jackson, Commission on African Americans Affairs Appointee

Shankar Narayan, American Civil Liberties Union

Appendix 2: Community and Public Panel Powerpoint,
September 18, 2017

Law Enforcement Body-Worn Cameras: Community & Public Panel

Joanne Alcantara, API Chaya

Sokaha Danh, Public Defender Association

Enoka Herat, Immigrant/Refugee Communities

Tamaso Johnson, WA State Coalition Against DV

Andres Mantilla, Comm. on Hispanic Affairs

Shankar Narayan, ACLU of Washington

Bill Ostling

Eric Stahl, WA Coalition for Open Gov't

Kevin Stuckey, Seattle Police Guild

Introduction: Process

- Subset of community groups met to discuss priorities in the BWC space
- Many are also part of the Seattle BWC community process
- Some groups wish to highlight issues specific to their advocacy
- Several groups question whether we should have BWCs at all

Overview

- Review of studies on efficacy of BWCs
- Purpose of BWCs
- Rules around BWCs
- Community trust
- Privacy
- Automation of policing functions: fairness, accountability, transparency
- Community-specific perspectives
- What questions remain?

Have BWCs Brought Us Closer to Accountability?

- Intuitive sense that officers and public will behave better when being recorded
- But mere fact of recording has failed to reliably deter violent behavior, even when all parties were aware of recording
- BWCs have failed to reliably prevent violence, whether or not they were employed according to rules around their intended use

Make Evidence-Based Policy

- More studies now exist on the impact of BWCs: decision-makers should consider this growing body of evidence
- While there are methodological limitations and further study is warranted, existing studies point at best to a mixed impact of BWCs on violence
- And at worst, they indicate that BWCs could actually escalate violence

Ariel/Sutherland, May 2016

- Affording officers broad discretion to turn cameras on and off may be associated with a rise in violent encounters
- Large-scale multi-site study found that “[p]olice use of force actually went up by an astonishing 71 percent when officers could turn their cameras on and off at will and went down ... only when they recorded nearly every interaction with the public from start to finish.”

Ariel/Sutherland, May 2016

- “Wearing body cameras increases assaults against officers and does not reduce police use of force”
- “...[T]he problem seems to arise mainly when officers are allowed to turn cameras on at times of their own choosing.” --Ariel Barak, 2017

Pang/Pavlou, 2016

- “Armed with Technology: The Impact on Fatal Shootings by the Police.” (Temple University)
- “[W]hen officers wore body cameras, civilians were 3.64 percent more likely to die”
- Hypothesis: “[o]fficers, aware of their bodycams and more certain their use of deadly force would be seen as justified, were less likely to hesitate

Ariel/Sutherland, Sept 2016

- “Report: increases in police use of force in the presence of body-worn cameras are driven by officer discretion: a protocol-based subgroup analysis of ten randomized experiments”
- Counter-intuitive impacts: Ready/Young 2015 (Impact of On-Officer Video Cameras on Police-Citizen Contacts)

Additional Studies

- “...police officers must relinquish some of their discretionary power to turn on the BWCs as they deem necessary... optimum deterrence depends on it.” -- Ariel/Sutherland 2017 (The Deterrence Spectrum: Explaining Why Police Body-Worn Cameras ‘Work’ or ‘Backfire’ in Aggressive Police–Public Encounters.)
- BWCs are only as good as the rules around them

What are BWCs For?

- Rather than asking whether BWCs are good or bad, more helpful to ask:
 - What purpose are BWCs intended to achieve?
 - What rules, if any, will make them effective in achieving that purpose?
- Rules intended to achieve police accountability different from evidence-gathering, different from automated policing tool

What are BWCs For? (cont'd)

- Consensus among some community orgs that BWCs should be primarily to improve police accountability and reduce community-police violence
- Many in the community who support BWCs do so because they would like them to become an effective tool in reducing such violence

Public Defender Concerns

- How to protect criminal defendants who may be vulnerable?
- Some footage may be exculpatory
- Footage should be available on an equal basis to prosecution and defense, if available at all

Single Statewide Regime Needed

- Important from a community perspective that a statewide floor be established for BWC rules
- If individual departments write their own rules, accountability is unlikely to improve
- Want certainty when moving through jurisdictions as to rules around BWCs

The Rules Matter

- “A technology by itself doesn’t provide accountability; the policies behind it do ... Around the country police have rushed to adopt body cameras ... with few guidelines in place.” (Joh 2017)
- Some community-based orgs have been disheartened by Seattle’s process, in which little community input appeared in the final rules

Always-On As a Baseline

- Cameras should operate with a baseline “always-on” rule, with narrow exceptions to protect DV/SA victims, immigrants
- Important to delete footage when no longer useful for accountability

Community Trust

- Key element for several community-based orgs (DV/SA, immigrant rights, police accountability)
- Question: will individuals in vulnerable communities engage with law enforcement less for fear of being recorded?

Studies on Community Trust

- Some data indicates drop in community-police interactions in the presence of BWCs (Ariel and Sutherland 2015)
- Members of some vulnerable communities—particularly non-Whites and specifically African-Americans—are less likely to believe that BWCs will actually result in transparency or accountability (Sousa and Miethe 2017)
- “[N]on-White and younger respondents [a]re less likely to have positive views of police performance and ultimately less likely to perceive benefits of BWCs,” while those already supportive of police might see greater benefits of BWCs “not as a mechanism to correct bad police behavior, but as a tool to combat negative views of police...” (Crow and Snyder 2017)

Privacy

- Also a concern for groups working with vulnerable communities
- Ongoing concern over individuals' private lives being made public
- BWCs are more invasive than dashcams, potentially entering homes, health care facilities, and other sensitive locations

The Future of Policing

- Axon and others are now public about their intent to automate the function of policing
- CEO/Co-Founder Rick Smith “expects Taser’s [BWCs] will incorporate facial recognition technology so ‘officers can query police records or social networks in real time.’” (Joh 2017)

Concerns with Private Sector Policing

- Who owns the data and what's done with it?
- The dataset of videos used to automate policing may bias the results
 - Recorded from officer perspective
 - In communities that law enforcement chooses to police
 - Under rules that law enforcement often writes

How Fair Will Policing Be?

- Private sector policing as conflict of interest
- Incorporation of facial recognition, threat scoring, data sharing with federal, state, and local agencies could result in impacts on communities that already fear law enforcement contact
- Transparency of algorithms is concern: incorporation of predictive policing

WSCADV: Unintended consequences of BWCs for survivors of domestic violence?

- Community Perception of BWCs: ‘Chilling’ of reporting?
- Unintended harms of footage to survivors?
 - Public Records Act access
 - Loss of autonomy in criminal process
 - Vulnerable & marginalized survivors
- Privacy, safety, autonomy

API Chaya

- Should we have BWCs at all?
- Privacy
- Language access and interpreters
- Educate the public and communities on how BWCs will be used
- Ownership of footage

Refugee/Immigrant Communities

- Should we have BWCs at all?
- This federal administration has upped immigration enforcement by 40%
- Concern that BWCs will become the front-end data collection mechanism that feeds into federal databases used for deportation
- May be used to target immigrants

Commission on Hispanic Affairs

- Accountability vs surveillance uses
- Predictive policing and transparency
- Information sharing in ways that may facilitate the targeting of immigrant communities

Bill Ostling

- BWCs may have a disproportionate impact on those with mental illness
- How can a person with mental illness even understand an officer's instructions? Or consent to BWC usage?
- BWCs shouldn't be used for preparing officer reports
- Transparency is an important element

Washington Coalition for Open Government

- Making BWCs workable under existing PRA
- Importance of openness from accountability perspective

Outstanding Questions

- Can the legislature request data collection from all agencies using BWCs?
 - How often do cameras fail to record?
 - How often is footage used for prosecution purposes?
 - Who is prosecuted? Officers or the public?

Questions?

December 15, 2017

RE: Joint Minority Report

Dear Co-Chairs Hansen and Padden and Members of the Joint Legislative Task Force on Use of Body Worn Cameras (Task Force):

We, the undersigned members of the Task Force representing community-based organizations and interests, write to you to ensure that our perspectives are included as part of the official record of the Task Force. Please consider this letter our joint minority report.

We write to point out the many challenges in the Task Force's process, as well as in its final report, that in our view prevent that report from being truly representative of the community perspectives with which we are concerned. We also write to ensure that at least some of the community-based organizations' perspectives and work product are included as part of the Task Force's official record. Our conclusion, based on the challenges noted below, is that the Task Force's final report should not be used as a basis for legislation moving forward. Instead, the legislature should conduct truly inclusive outreach, particularly to community-based organizations; consider new data and research that is emerging around Body Worn Cameras (BWCs); and only then craft the outlines of new legislation around BWCs.

Our concerns around the operations and product of the Task Force fall into the following broad categories:

Task Force Composition and Accessibility

Several of us have noted an imbalance in the ability of members to participate in the Task Force itself. While there are many members representing law enforcement perspectives on the Task Force, many of whom have been able to consistently attend the meetings, similarly consistent participation of community members on the Task Force—a smaller number to begin with—has been difficult to achieve.

We believe some reasons for this include:

- The Task Force meetings are usually scheduled in the daytime, in different parts of the state, making it difficult for community members—many of whom have unrelated full-time jobs—to attend consistently.
- In at least one meeting, participation by those on the phone was cut off prior to the meeting's conclusion, and in others, technical difficulties meant that those on the phone were unable to understand what was being said in the room. These difficulties included low volume and significant lag-time.
- In the final, crucial meeting—in which the Task Force members were to vote—no phone participation was allowed at all.

- This lack of access for designated Task Force members was compounded by the lack of proactive, resourced outreach by the Task Force to bring in members of local communities for public comment during Task Force meetings.
- Such public comment time was also not consistently provided.

Engagement with vulnerable communities is an ongoing exercise in trust building that requires a deliberate strategy and resources. These were not in evidence in the conduct of the Task Force. This lack of accessibility meant that several designated community participants were unable to attend at all, attended only a single meeting, or stepped down.

These avoidable barriers to participation mean that the final report should not be considered an accurate reflection of the perspective of the broad range of community members whose lives will be impacted by BWCs.

Task Force Process

All of us noted inconsistency and lack of clarity about the process by which the Task Force operated. This list is not exhaustive, but some specific ways in which that happened include:

- The process of agenda setting happened without input by community members.
- Time allocation on agendas failed to allow sufficient time to express even the community perspectives that were represented on the task force—while at the same time allowing law enforcement and others a great deal of time to express their viewpoints. For example, an entire presentation was given over to the single perspective of Axon (the largest BWC manufacturer, which is a vendor catering to law enforcement organizations), and another to the perspective of the Washington State Hospital Association regarding privacy. Extensive time was given over to discussion of issues relating to cost recovery for local governments, the Public Records Act, and law enforcement experiences thus far in their implementation of BWCs (as documented in the draft final Task Force report). Yet the only place to discuss the many and diverse perspectives of community-based organizations was part of a single presentation at a single task force meeting, for which 30-45 minutes was allocated, according to Task Force staff. Given that communities are not a monolith and will have differing perspectives—and will be directly impacted by the rollout of BWCs—we believe this amount of time was inadequate.
- Efforts to raise or continue important discussions on community perspectives were not afforded adequate time even when raised. Set agendas without input (see first point above) and rigid adherence to those agendas meant that the space to address concerns was not provided. For example, at the final meeting, a Task Force member attempted to echo the concerns of the community groups, but no discussion was allowed of the points raised.

- There was an overall lack of clarity about process as well. For example, the roadmap via which the Task Force would reach its conclusions, what we would vote on, how that agenda would be set, and how Task Force members could participate was not clear to us. It was also not clear how the final report would be produced and approved. Most importantly, it was never stated that the entire agenda of the final meeting would be to look at pre-submitted recommendations, rather than devoted to discussing the merits of the final report itself.
- The final Task Force report was not discussed at the final meeting. This was a departure from our expectations—we all believed the report would be discussed at that meeting and then voted on. Instead, the entire meeting was devoted to walking through law enforcement and public disclosure recommendations that would be included in appendices to the document, and voting on each piece of them individually. Our organizations believed we would have the opportunity to discuss the final report itself. Although groups attempted to raise concerns about this process at the meeting, the response was that those groups should have made recommendations prior to the meeting, and the concerns went unaddressed. Community-based Task Force members reported feeling “dazed” and “caught cold” by the way in which the meeting was conducted.

All of the foregoing challenges also call into question the conclusions of the final Task Force report.

Final Report Omissions

The composition, accessibility, and process challenges detailed above mean that the Task Force’s final report devotes ample space to some issues but hardly addresses community concerns at all. The conversations had around the purpose of BWCs, as well as concerns with their use, are mentioned in less than one page. On the other hand, cost recovery, the PRA, privacy protections, and various other topics occupy multiple pages of the report.

The task force’s charge, as detailed in HB 2362 (the statute that created the Task Force), is as follows:

- The report must include, but is not limited to, findings and recommendations regarding costs assessed to requesters, policies adopted by agencies, retention and retrieval of data, model policies regarding body worn cameras that at a minimum address the issues identified in section 5 of this act, and the use of body worn cameras for gathering evidence, surveillance, and police accountability. (HB 2362, Section 7)

The charge to the Task Force from the Legislature is clear—we must at a minimum address the issues above, but are not limited to this list of topics. Therefore, more space could have been built in to address the concerns raised in the initial community presentation.

We note that although we do not all agree on every aspect of regulation of BWCs, our common concern is that the breadth of community concerns is not reflected in the Task Force final report. We would like to add the following documents—included here as appendices—to the record via this joint minority report:

- Appendix 1: Community Letter, October 3, 2016
- Appendix 2: SPD/ACLU Joint Letter regarding the Public Records Act, May 4, 2017
- Appendix 3: Community and Public Panel Powerpoint, September 18, 2017
- Appendix 4: WASPC/ACLU Comparison Chart of Local BWC Policy Elements, October 15, 2017

Recommendations for Next Steps

Because of all the foregoing, we believe the Legislature cannot rely on the Task Force main report to reflect the full range of community concerns. The Legislature should make a broad, resourced effort to include those voices in a statewide conversation, and only then move to make permanent rules around BWCs.

Substantively, we all agree that the Legislature should ensure the following:

- Adopt a statewide floor with a minimum set of elements, in order to offer clarity for community members as to how BWCs are used.
- One of those elements must be to minimize officer discretion, which data have shown to be an important factor in achieving police accountability. We believe this is an essential purpose of BWCs.
- Officers must be trained on policy, and failure to follow policy must be subject to consequences.

Thank you for your consideration of these important concerns.

Sincerely,

Joanne Alcantara
API Chaya
Appointed by the Commission on Asian American Affairs

Sokha Danh
Washington Defender Association

Minal Kode Ghassemieh
OneAmerica

Shankar Narayan
ACLU of Washington

Bill Ostling
Member of the Public

Rev. Harriet Walden
Mothers for Police Accountability

Appendix 1: Community Letter, October 3, 2016

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Thank you for considering these requests and for your leadership on this important issue.

Signed,

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Shankar Narayan, American Civil Liberties Union

Appendix 2: SPD/ACLU Joint Letter regarding the
Public Records Act, May 4, 2017



May 4, 2017

Dear Co-Chairs of the Statewide Body Worn Camera Task Force:

At the Task Force's previous meeting in Richland, the three of us (Shankar Narayan, Mary Perry, and Chris Tracy) were tasked with providing the Task Force with an overview of the interactions between use of body worn cameras and the Privacy Act, Chapter 9.73 RCW. We have analyzed the text of the Act, relevant case law, and the Attorney General opinion on the subject, AGO 2014 No. 8.

Although there are certainly many situations in which audio recordings made by body worn cameras will not violate the Act, due to a lack of statutory guidance there are other situations where a court may not come to the same conclusion. Accordingly, without clearer guidance potential liability exists today for both individual officers wearing cameras and the agencies that employ them. A full analysis of potential issues in the Privacy Act is below. After discussion of our research, we unanimously agree upon and commend to the Task Force the following points. Because Washington Attorney General opinions are not binding, the conclusions below should be treated as informative, and not dispositive on the issue.

- The Legislature adopted RCW 9.73.090(1)(c) in 2000 to address issues related to then-emerging in-car video (ICV) technology. Since then, at least fifty Washington law enforcement agencies have deployed body worn cameras at some point prior to June 9, 2016. The Privacy Act contains no provision similar to RCW 9.73.090(1)(c) for body worn video recordings.

RCW 9.73.090(1)(c) applies to any audio recording made by ICV whether or not the recorded conversation is private. It requires all officers employing ICV to be in uniform, inform any person being recorded that a sound recording is being made and capture audio notification of the recording. RCW 9.73.090(1)(c) further provides that an officer need not inform a person being recorded if exigent circumstances exist. An in-car video recorded in compliance with RCW 9.73.090(1)(c) is not subject the section of the Privacy Act making it a gross misdemeanor to intercept or record a private conversation in violation of the Act (RCW 9.73.080), nor to the section providing for civil liability for violations, including damages for injury to a person's business or reputation (RCW

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9.73.060). However, officers using body worn cameras risk criminal and civil liability under RCW 9.73.060 and .080 if they record private conversations in exigent circumstances or inadvertently.

- It is a violation of the Privacy Act to record a private conversation. The Attorney General noted in AGO 2014 No. 8 that conversations with police officers are categorically not private (*citing Kipp*, 179 Wn.2d at 732; *Lewis*, 157 Wn.2d at 460), although this conclusion is contradicted by other Supreme Court jurisprudence applying a totality of the circumstances, multi-factor test to determine whether a conversation—even with a law enforcement officer—should be considered private. According to the AG’s opinion, for this reason, recordings made by police body worn cameras, whether in public or in a private location, should not violate the Act. The AG’s conclusion has not been tested by a court so it is unclear whether it universally applies. There may be situations where an officer may violate the Act, such as unintentional recording of a third party, recording by an officer that is not in uniform, or other conceivable scenarios. Because this is an untested area of law, the Privacy Act should be amended to clarify these scenarios for the benefit of law enforcement, agencies, and the public at large.
- Based on these concerns, the Privacy Act must be amended to create a regime specifically addressing body worn cameras, that will make acceptable uses clear and eliminate liability when those cameras are properly used.
- Changes to the Privacy Act cannot be made in isolation, but instead must be part of a comprehensive solution addressing all aspects of body worn cameras—each piece of the puzzle is intertwined with other pieces. For example, determination of which situations are private for purposes of the Privacy Act is closely related to determination of which situations are private for purposes of the Public Records Act. So any change to the Privacy Act should be part of legislation that addresses policies on recording, retention/deletion, acceptable use, and public disclosure for body worn camera footage.
- Without comprehensive legislation, line officers may be concerned about the impact of wearing body worn cameras, if good faith errors could result in criminal or civil liability or if recording certain conversations would undermine trust with community members upon which such officers depend to do their jobs effectively. Similarly, communities of color who have witnessed the impacts of past disproportionate surveillance may also be wary about these new surveillance tools. As with other aspects of body worn cameras, these issues are also intertwined. Communities may not trust officers wearing cameras if they believe their privacy is being invaded by being recorded, and officers may not embrace body worn cameras if they believe community members will seek disclosure of recordings to infringe on officer or community members’ privacy. The task force should take affirmative steps to ensure a full and thorough discussion that includes these diverse voices. Such comprehensive legislation

must take into account the voices of a diverse set of stakeholders; some of whom may not currently be represented on the Task Force.

We hope these areas of agreement among diverse stakeholders will assist the task force as it continues its work.

Sincerely,

Shankar Narayan
ACLU of Washington

Mary Perry
Seattle Police Department

Chris Tracy
Washington Council of Police & Sheriffs (WACOPS)

Legal Analysis of the Privacy Act

Some Conversations Between Civilians and Police Officers May Be Private

The Privacy Act generally prohibits the recording of a “private conversation.” RCW 9.73.030(1)(b). It does not define the term “private,” but courts will “generally presume that conversations between two parties are intended to be private.” *State v. Modica*, 164 Wn.2d 83, 89, 186 P.3d 1062 (2008).

Nonetheless, although the scope of the Privacy Act is broad, it is not unlimited. In some cases, it can be objectively determined that the participants do not intend the conversation to be limited to themselves. Our Supreme Court has listed several factors to be considered when evaluating whether the parties intended a conversation to be private. *See State v. Clark*, 129 Wn.2d 211, 225-27, 916 P.2d 384 (1996); *see also State v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029 (2014).

The first factor is the duration and subject matter of the conversation. *See Clark*, 129 Wn.2d at 225. As recently clarified, this factor is probably limited to indicating that conversations may not be private if they are both brief and inconsequential or routine. *See Kipp*, 179 Wn.2d at 730-31; *see also Kadoranian v. Bellingham Police Dep’t*, 119 Wn.2d 178, 829 P.2d 1061 (1992) (finding a brief telephone call not private when it consisted entirely of the recipient telling the caller that the intended recipient wasn’t home).

Second, courts consider the location of the conversation and the presence of a third party. *See Clark*, 129 Wn.2d at 225-26. This was also recently clarified to indicate that the potential presence of a third party is much less relevant than the actual presence or lack thereof. *See Kipp*, 179 Wn.2d at 732. The situations most likely to be considered non-private under this factor are conversations on a public street when passersby are present. *See, e.g., Clark* (finding short street-level drug transactions were not private); *State v. Flora*, 68 Wn. App. 802, 845 P.2d 1355 (1992) (finding encounter between police and civilians, leading to arrests, on a public street was not a private conversation).

The final factor is the relationship between the parties. *See Clark*, 129 Wn.2d at 226-27. The most significant situation is if the parties are strangers to another; that indicates the conversation is unlikely to be private. *See, e.g., Kadoranian; State v. Goucher*, 124 Wn.2d 778, 881 P.2d 210 (1994) (both finding brief telephone conversations between strangers not private).

Application of these factors to any given situation is very fact dependent, and even then reasonable minds may well differ on the outcome. A good example of this is the situation in *Kipp*. Although the material facts were undisputed, and all judges agreed that the *Clark* factors should be used, various judges nonetheless reached strikingly different results. The Superior Court trial judge and two out of three Court of Appeals judges determined that the conversation at issue was not private. In contrast, the nine Supreme Court justices unanimously agreed that the conversation was, in fact, private.

It is uncertain how courts will apply the *Clark* factors to the use of police body-worn cameras. On the one hand, as the Attorney General points out, “Washington state courts and the Ninth Circuit have consistently held that conversations between police officers and members of the public, when the officers are performing their official duties and are known to the other speakers to be performing their official duties, are not private conversations.” AGO 2014 No. 8 at 6 (citations omitted). Our Supreme Court has “repeatedly held that conversations with police officers are not protected under the act.” *Kipp*, 179 Wn.2d at 732. Those holdings, however, have come primarily in

the context of adversarial encounters on public streets. *See, e.g., Flora* (investigation of neighbor dispute on public street); *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 139 P.3d 1078 (2006) (traffic stops). It is far from clear that the same conclusion would result from applying the *Clark* factors to other situations. For example, consider an officer replying to a burglary report, and talking with the victim inside his or her home, with nobody else present. In such a situation, at least two of the *Clark* factors would indicate the conversation is private; it's not a brief and inconsequential discussion, and the location is private. Most homeowners would not expect to be recorded in such a situation without their consent. It is unclear what will happen when the *Clark* factors weigh in favor of determining a conversation is "private" during a conversation with a police officer, which the AG has concluded cannot engage in a private conversation while performing official duties, like in this example. Only a court test can be determinative on this matter without clearer guidelines from the legislature.

Perhaps the best way to evaluate situations is to imagine a third party recording the conversation, without the knowledge of either the police officer(s) or the civilian(s) being recording. If we believe the conversations are not "private," that means that such recordings are allowed under the law. Conversely, if we believe that such recordings are prohibited, it means the conversation must be "private."

Using this approach, it is likely that conversations with police officers in public, such as traffic stops, are not "private," and may be recorded by third parties. *See, e.g., Fordyce v. City of Seattle*, 907 F.Supp. 1446 (W.D. Wash. 1995) (OK to record public demonstration, including police conduct). But other situations are much less obvious, and may well be "private." For example, it is doubtful that a court would approve of a suspected abuser surreptitiously recording a conversation between a police officer and a domestic violence victim; or a suspected criminal surreptitiously recording a conversation between a witness and an officer, especially if the witness is asking for confidentiality; or any third party surreptitiously recording conversations between officers, medical personnel, and a mentally ill person or overdose victim being assisted in his or her private home. The logical conclusion is that those conversations are "private" and fall within the scope of the Privacy Act—a conclusion also to be expected from the application of the *Clark* factors to those situations.

In summary, one line of dicta in *Kipp* does not give much clarity to any police department considering the use of police body-worn cameras in contexts beyond traffic stops. A variety of other contexts could be determined to involve private conversations, and create liability for an agency that records those conversations. There is simply too much uncertainty in the law and the facts of particular situations to presume that no conversations captured by body worn cameras will be "private," insulating recording of those conversations from strictures of the Privacy Act.

Notice of Recording May Not Be Sufficient to Allow Recording

If conversations are "private," the Privacy Act nonetheless allows recording if "all the persons engaged in the conversation" consent. RCW 9.73.030(1)(b). The Privacy Act does not define "consent," nor does it generally specify a manner in which consent must be obtained or documented. It does provide, however, that "consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded." RCW 9.73.030(3). On its face, therefore, recordings made by body worn cameras are permitted if the officer announces the fact of recording to the people being recorded.

There are a number of potential problems with reliance on notice, however. First, as a practical matter, the technology used by some body worn cameras *always* records, whether or not the camera is “activated.” It simply overwrites the recording buffer, typically every 30 seconds. The touted advantage of this technology is that it is able to provide 30 additional seconds of recording prior to activation, which may be critical in understanding a fast-moving police encounter where the officer is unable to immediately activate the camera. The disadvantage, however, is that the technology undercuts meaningful notification by an officer, since recording will effectively begin at least 30 seconds prior to such notification. Any private conversation recorded within that (short) timeframe will therefore not be insulated by the implied consent provision of RCW 9.73.030(3).

Second, it is unclear whether the notice provision is really applicable to all encounters with police officers. The implicit assumption of RCW 9.73.030(3) is that parties are voluntarily engaged in the conversation, and are free to stop if they do not wish to be recorded. That assumption may not be true for police encounters, in either a practical or legal sense. There is very little case law interpreting the scope of RCW 9.73.030(3), so we cannot predict whether or not courts will apply it to nonconsensual police encounters.

Third, it is unclear whether officers must stop recording upon the request of the person being recorded—although a court might find that the answer is yes. A bedrock principle of voluntary consent is that it must be possible to revoke that consent. In an analogous situation, our Court has said, “Consent, once voluntarily given, may be withdrawn. A person consenting to a search has the right to restrict or revoke that consent at any time.” *State v. Ruem*, 179 Wn.2d 195, 313 P.3d 1156, 1164 (2013). A court may find that the rules regarding consent to recording do not differ from those regarding consent to search. Although RCW 9.73.030(3) allows one to presume consent under some circumstances, logically that presumption should not override the actual expressed intent of the individual. Regardless of the legal answer, this is a policy matter that needs to be addressed.

Fourth, notice may not always be practical, particularly in situations requiring immediate police action. RCW 9.73.090(1)(c) provides an exception to notice for recording in exigent circumstances, but that provision applies only to cameras mounted in police vehicles, not body worn cameras. As a policy matter, it is undisputed that there will be situations where body worn cameras should record conversations even when notice is impractical, but the current language of the Privacy Act does not provide for that.

Finally, the U.S. Supreme Court has held that “it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.” *Wilson v. Layne*, 526 U.S. 603, 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). In *Layne*, the mere presence of the media during execution of the search warrant was a Fourth Amendment violation because police actions in execution of a warrant must be related to the objectives of the authorized intrusion, and the presence of reporters inside the home was not related to the objectives of the authorized intrusion. While there is a strong argument that an officer’s body worn camera aids in execution of the warrant, the Privacy Act does not explicitly address this concern.

Additional Concerns

Different rules apply to both in-car and body-worn recordings after a police officer has arrested a person. RCW 9.73.090(1)(b) contains specific requirements for recording suspects who have been

arrested. Recordings of conversations with arrested persons must include on the recording: (1) a statement that a recording is being made, (2) the beginning and end time of the recording, (3) a statement to the arrested person informing him of his constitutional rights. RCW 9.73.090(1)(b). Such recordings may only be used for valid police or court activities. An agency's in-car and body-worn policy should reflect the requirements of RCW 9.73.090(1)(b).

Conclusion

Our overall conclusion is that the lack of clarity under the Privacy Act as it currently exists means that the Legislature will need to create a new Privacy Act regime specifically around police body worn cameras, as part of comprehensive body worn camera legislation that addresses policies on recording, retention/deletion, acceptable use, and public disclosure for body worn camera footage.

Appendix 3: Community and Public Panel Powerpoint,
September 18, 2017

Law Enforcement Body-Worn Cameras: Community & Public Panel

Joanne Alcantara, API Chaya

Sokaha Danh, Public Defender Association

Enoka Herat, Immigrant/ Refugee Communities

Tamaso Johnson, WA State Coalition Against DV

Andres Mantilla, Comm. on Hispanic Affairs

Shankar Narayan, ACLU of Washington

Bill Ostling

Eric Stahl, WA Coalition for Open Gov't

Kevin Stuckey, Seattle Police Guild

Introduction: Process

- Subset of community groups met to discuss priorities in the BWC space
- Many are also part of the Seattle BWC community process
- Some groups wish to highlight issues specific to their advocacy
- Several groups question whether we should have BWCs at all

Overview

- Review of studies on efficacy of BWCs
- Purpose of BWCs
- Rules around BWCs
- Community trust
- Privacy
- Automation of policing functions: fairness, accountability, transparency
- Community-specific perspectives
- What questions remain?

Have BWCs Brought Us Closer to Accountability?

- Intuitive sense that officers and public will behave better when being recorded
- But mere fact of recording has failed to reliably deter violent behavior, even when all parties were aware of recording
- BWCs have failed to reliably prevent violence, whether or not they were employed according to rules around their intended use

Make Evidence-Based Policy

- More studies now exist on the impact of BWCs: decision-makers should consider this growing body of evidence
- While there are methodological limitations and further study is warranted, existing studies point at best to a mixed impact of BWCs on violence
- And at worst, they indicate that BWCs could actually escalate violence

Ariel/Sutherland, May 20 16

- Affording officers broad discretion to turn cameras on and off may be associated with a rise in violent encounters
- Large-scale multi-site study found that "[p]olice use of force actually went up by an astonishing 71 percent when officers could turn their cameras on and off at will and went down ... only when they recorded nearly every interaction with the public from start to finish."

Ariel/Sutherland, May 20 16

- "Wearing body cameras increases assaults against officers and does not reduce police use of force"
- "...[T]he problem seems to arise mainly when officers are allowed to turn cameras on at times of their own choosing." --Ariel Barak, 2017

Pang/Pavlou, 2016

- 'Armed with Technology: The Impact on Fatal Shootings by the Police.' (Temple University)
- "[W]hen officers wore body cameras, civilians were 3.64 percent more likely to die"
- Hypothesis: "[o]fficers, aware of their bodycams and more certain their use of deadly force would be seen as justified, were less likely to hesitate

Ariel/Sutherland, Sept 20 16

- "Report: increases in police use of force in the presence of body-worn cameras are driven by officer discretion: a protocol-based subgroup analysis of ten randomized experiments"
- Counter-intuitive impacts: Ready/Young 2015 (Impact of On-Officer Video Cameras on Police-Citizen Contacts)

Additional Studies

- "...police officers must relinquish some of their discretionary power to turn on the BWCs as they deem necessary... optimum deterrence depends on it."-- Ariel/Sutherland 2017 (The Deterrence Spectrum: Explaining Why Police Body-Worn Cameras 'Work' or 'Backfire' in Aggressive Police-Public Encounters.)
- BWCs are only as good as the rules around them

What are BWCs For?

- Rather than asking whether BWCs are good or bad, more helpful to ask:
 - What purpose are BWCs intended to achieve?
 - What rules, if any, will make them effective in achieving that purpose?
- Rules intended to achieve police accountability different from evidence-gathering, different from automated policing tool

What are BWCs For? (cont'd)

- Consensus among some community orgs that BWCs should be primarily to improve police accountability and reduce community-police violence
- Many in the community who support BWCs do so because they would like them to become an effective tool in reducing such violence

Public Defender Concerns

- How to protect criminal defendants who may be vulnerable?
- Some footage may be exculpatory
- Footage should be available on an equal basis to prosecution and defense, if available at all

Single Statewide Regime Needed

- Important from a community perspective that a statewide floor be established for BWC rules
- If individual departments write their own rules, accountability is unlikely to improve
- Want certainty when moving through jurisdictions as to rules around BWCs

The Rules Matter

- "A technology by itself doesn't provide accountability; the policies behind it do ... Around the country police have rushed to adopt body cameras ... with few guidelines in place." (CJ oh 2017)
- Some community-based orgs have been disheartened by Seattle's process, in which little community input appeared in the final rules

Always-On As a Baseline

- Cameras should operate with a baseline "always-on" rule, with narrow exceptions to protect DV/SA victims, immigrants
- Important to delete footage when no longer useful for accountability

Community Trust

- Key element for several community-based orgs (DV/SA, immigrant rights, police accountability)
- Question: will individuals in vulnerable communities engage with law enforcement less for fear of being recorded?

Studies on Community Trust

- Some data indicates drop in community-police interactions in the presence of BWCs (Ariel and Sutherland 2015)
- Members of some vulnerable communities-particularly non-Whites and specifically African-Americans-are less likely to believe that BWCs will actually result in transparency or accountability (Sousa and Miethe 2017)
- "[N]on-White and younger respondents [a]re less likely to have positive views of police performance and ultimately less likely to perceive benefits of BWCs," while those already supportive of police might see greater benefits of BWCs "not as a mechanism to correct bad police behavior, but as a tool to combat negative views of police ..." (Crow and Snyder 2017)

Privacy

- Also a concern for groups working with vulnerable communities
- Ongoing concern over individuals' private lives being made public
- BWCs are more invasive than dashcams, potentially entering homes, health care facilities, and other sensitive locations

The Future of Policing

- Axon and others are now public about their intent to automate the function of policing
- CEO/Co-Founder Rick Smith "expects Taser's [BWCs] will incorporate facial recognition technology so 'officers can query police records or social networks in real time.'" (Joh 2017)

Concerns with Private Sector Policing

- Who owns the data and what's done with it?
- The dataset of videos used to automate policing may bias the results
 - Recorded from officer perspective
 - In communities that law enforcement chooses to police
 - Under rules that law enforcement often writes

How Fair Will Policing Be?

- Private sector policing as conflict of interest
- Incorporation of facial recognition, threat scoring, data sharing with federal, state, and local agencies could result in impacts on communities that already fear law enforcement contact
- Transparency of algorithms is concern: incorporation of predictive policing

WSCADV: Unintended consequences of BWCs for survivors of domestic violence?

- Community Perception of BWCs: 'Chilling' of reporting?
- Unintended harms of footage to survivors?
 - Public Records Act access
 - Loss of autonomy in criminal process
 - Vulnerable & marginalized survivors
- Privacy, safety, autonomy

API Chaya

- Should we have BWCs at all?
- Privacy
- Language access and interpreters
- Educate the public and communities on how BWCs will be used
- Ownership of footage

Refugee/Immigrant Communities

- Should we have BWCs at all?
- This federal administration has upped immigration enforcement by 40%
- Concern that BWCs will become the front-end data collection mechanism that feeds into federal databases used for deportation
- May be used to target immigrants

Commission on Hispanic Affairs

- Accountability vs surveillance uses
- Predictive policing and transparency
- Information sharing in ways that may facilitate the targeting of immigrant communities

Bill Ostling

- BWCs may have a disproportionate impact on those with mental illness
- How can a person with mental illness even understand an officer's instructions? Or consent to BWC usage?
- BWCs shouldn't be used for preparing officer reports
- Transparency is an important element

Washington Coalition for Open Government

- Making BWCs workable under existing PRA
- Importance of openness from accountability perspective

Outstanding Questions

- Can the legislature request data collection from all agencies using BWCs?
 - How often do cameras fail to record?
 - How often is footage used for prosecution purposes?
 - Who is prosecuted? Officers or the public?

Questions?



Appendix 4: WASPC/ACLU Comparison Chart of
Local BWC Policy Elements, October 15, 2017

BODY-WORN CAMERA (BWC) MODEL POLICY

ACLU Preface: The ACLU of Washington is neutral on whether or not BWCs should be adopted—we note significant studies (as discussed at the Tacoma Task Force meeting) suggesting that BWCs implemented with rules not geared towards accountability might actually worsen, rather than alleviate, violent incidents between police and community members.

We believe BWCs should be implemented for the purpose of police accountability. Any scheme regulating BWCs should begin with statewide legislation that clearly articulates that the purpose of police body-worn cameras is such accountability, not surveillance or increased prosecutions. Such legislation would explicitly adopt that premise and build a statewide floor around it, eliminating our current confusing jurisdiction-by-jurisdiction patchwork of policies. The statewide floor would ideally incorporate the following basic elements:

- Officer discretion to turn cameras on and off is minimized—all interactions with the public, with limited exceptions, are recorded, unless an individual explicitly requests on-camera that the camera be turned off.
- Footage is quickly deleted unless it pertains to accountability—in other words, it is relevant to an investigation of an incident of community-police violence or other police misconduct.
- Footage flagged as having accountability value is publicly disclosable, with appropriate redaction, and can be used only for accountability purposes.

Such a statewide floor would contain commensurate amendments to the PRA. Police departments could then adopt additional BWC regulations, as long as they were consistent with the statewide floor adopted by the legislature. Because every element of a BWC scheme interacts with every other element, the ACLU-WA believes the scheme detailed above should be adopted in its entirety, rather than piecemeal. A deep and sustained engagement with communities whose trust in police will be most impacted by BWCs is also critical, and we encourage the Legislature to continue that process.

Because we believe it is impossible to write a successful model BWC before the Legislature acts to amend the PRA and establish a common floor for BWC usage as described above, we do not present a model policy here. Instead, the chart below describes broadly what some elements of a model policy might look like *after* the Legislature has taken such action. We do this to provide illustrative input to the Task Force, rather than to endorse of any policy in the absence of action by the Legislature.

Policy Objectives

WASPC	ACLU	Policy
✓		Body-worn cameras (BWC) provide accurate documentation of an event;
✓		BWC allow review to prepare reports and statements;
✓		BWC assist evidence gathering for arrest and prosecution;
✓	✓	BWC assist in officer training;
	✓	BWCs are for the purpose of police accountability—in other words, to reduce the incidence of violent encounters between law enforcement and community members, as well as other kinds of police misconduct.
	✓	Use of BWC as a generalized surveillance tool geared towards evidence gathering and/or real-time threat scoring should be explicitly proscribed; such surveillance is likely to fall disproportionately on communities of color.
	✓	BWCs are only as good as the rules around them; without a carefully considered statewide floor geared towards accountability, BWCs may fail in the purpose of police accountability, or even exacerbate the problem.
	✓	Like all technologies, BWCs are neither inherently good nor bad, and their implementation, in whatever form, is not “neutral,” but instead reflects the value choices inherent in the scheme around them. The narrative they present, and their value, will be different depending on the values lawmakers choose to be part of that scheme.

Training

WASPC	ACLU	Policy
✓	✓	Adopted policies require BWC training prior to initial uses and annually as required.
✓	✓	Training should minimally consist of operation, retention, storage requirements, and policy and legal standards.
	✓	Training should ensure that at least some law enforcement fully understand the working “back end” of the technology, for purposes of public transparency.

Operation

WASPC	ACLU	Policy
✓	✓	Officers who have been assigned a BWC are required to wear and use their assigned BWC while on duty, unless specifically otherwise stated by a superior.
✓	✓	Officers are prohibited from using any recording [device] other than that assigned to them by the agency while on duty.
✓	✓	Officers equipped with BWC must test the BWC prior to each shift and immediately report any problems with the equipment to a supervisor.
✓	✓	If the BWC malfunctions at any point during an officer’s shift, the officer must report the malfunction to a supervisor as soon as practicable.
✓		BWC are generally worn by uniformed officers.
✓		The BWC shall be worn at or above the midline of the torso to produce an effective recording.
✓		If any incident is recorded with BWC where law enforcement action is taken, the existence of the recording must be documented in the officer’s report and/or citation.

	✓	If an officer fails to record any interaction or incident, reasons for such lack of recording must be documented in the officer's report, in addition to, where required, documentation via BWC recording (for example, of individual requesting not to be recorded).
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Activation & Notice

<u>WASPC</u>	<u>ACLU</u>	<u>Policy</u>
✓		Activation should record all contacts with citizens in the performance of official duties that may involve actual or potential criminal conduct including traffic stops, accidents, complaints, and confrontations that are adversarial.
✓	✓	Officers should inform individuals they are being recorded.
✓	✓	Officers shall make reasonable attempts to ensure that non-English speaking persons, those with limited English proficiency, or persons hearing impaired understand that they are being recorded. If the agency has a Limited English Proficiency policy or directive, it should be followed in these circumstances.
	✓	Officer discretion to turn cameras on and off is minimized, and footage is instead protected via deletion of non-accountability-related footage at a later time. All interactions with the public shall be recorded, unless an individual requests on camera that the BWC be turned off.

Deactivation upon request

<u>WASPC</u>	<u>ACLU</u>	<u>Policy</u>
✓		Officers are under no obligation to stop recording in response to a citizen's request.
✓		Officers should evaluate the situation and may deactivate the BWC if a privacy interest outweighs a law enforcement interest, or where a witness or victim is reluctant to provide information necessary to law enforcement.
	✓	Where an individual requests on camera that the BWC be deactivated, the officer will stop recording. Recording will resume as soon as possible after such individual is no longer subject to recording.

Deactivation in general

<u>WASPC</u>	<u>ACLU</u>	<u>Policy</u>
✓		Deactivation is upon the conclusion of an event or contact, or when all persons stopped have been released, or when an arrestee has been transported to a detention facility.
✓		If deactivation occurs prior to the conclusion of an event, the reason for the deactivation should be documented.
	✓	All interactions with the public shall be recorded, unless an individual requests on camera that the BWC be turned off. Reasons for such deactivations must be documented.

Review

WASPC	ACLU	Policy
✓		Officers may review recordings of their BWC to ensure accuracy and consistency prior to preparing reports.
✓		The officer may review recordings with an attorney or labor representative.
✓		Supervisors may review recordings for administrative purposes, training purposes, internal investigations, and to ensure compliance with agency policy and directives.
	✓	Officers shall not review BWC footage prior to preparing reports.

Prohibited recordings

WASPC	ACLU	Policy
✓		Communications with other police personnel when exchanging information with other officers or when engaged in an operational or tactical discussion with other officers, in which case the officer shall state the reason BWC is being turned off and the officer should promptly re-activate the BWC before resuming duties related to the incident;
✓		encounters with undercover officers or informants;
✓	✓	personal activities and breaks;
✓		locations where individuals have a reasonable expectation of privacy (such as a restroom), except in circumstances where an officer has reason to believe that a confrontation is likely;
✓		a medical evaluation or facility, except in circumstances where an officer has reason to believe that a confrontation is likely;
	✓	When on duty, officers will record all interactions with the public with the exceptions noted above; breaks and using the restroom are not considered to be on-duty time for this purpose

Storage, retention, dissemination, ownership, destruction

WASPC	ACLU	Policy
✓		Recorded files should be uploaded no later than the end of the officer's shift, and should be securely stored in accordance with state retention laws for a minimum of 60 days, except where state retention laws require longer storage.
✓		BWC footage may be destroyed after 60 days but may be retained longer where necessary for a proceeding such as an investigation, prosecution anticipated litigation, or for training purposes.
	✓	Storage, retention, and deletion will be according to the legislatively adopted scheme detailed in the ACLU preface; footage with accountability value will be retained, while all other footage will be deleted on a short timeline.
	✓	Footage will be securely stored according to industry-standard best practices.
	✓	Footage will not be disseminated to any third party, nor will it be used by vendor or any other party for purposes not related to police accountability. Each agency will have publicly reviewable contracts with BWC vendors detailing adherence to the foregoing.

WASPC-Proposed BWC Model Policy

NOTE: This proposal does not constitute a WASPC Model Policy. It is authored by WASPC at the request of the Legislative Task Force on the Use of Body Worn Cameras to assist the Task Force in developing a model policy as proposed by the Task Force.

Policy Objectives

Body-worn cameras (BWC) provide accurate documentation of an event; allow review to prepare reports and statements; assist evidence gathering for arrest and prosecution; and officer training.

Training

Adopted policies require BWC training prior to initial uses and annually as required. Training should minimally consist of operation, retention, storage requirements, and policy and legal standards.

Operation

Officers who have been assigned a BWC are required to wear and use their assigned BWC while on duty, unless specifically otherwise stated by a superior. Officers are prohibited from using any recording other than that assigned to them by the agency while on duty. Officers equipped with BWC must test the BWC prior to each shift and immediately report any problems with the equipment to a supervisor. If the BWC malfunctions at any point during an officer's shift, the officer must report the malfunction to a supervisor as soon as practicable. BWC are generally worn by uniformed officers. The BWC shall be worn at or above the midline of the torso to produce an effective recording. If any incident is recorded with BWC where law enforcement action is taken, the existence of the recording must be documented in the officer's report and/or citation.

Activation & Notice

Activation should record all contacts with citizens in the performance of official duties that may involve actual or potential criminal conduct including traffic stops, accidents, complaints, and confrontations that are adversarial. Officers should inform individuals they are being recorded. Officers shall make reasonable attempts to ensure that non-English speaking persons, those with limited English proficiency, or persons hearing impaired understand that they are being recorded. If the agency has a Limited English Proficiency policy or directive, it should be followed in these circumstances.

Deactivation upon request

Officers are under no obligation to stop recording in response to a citizen's request. Officers should evaluate the situation and may deactivate the BWC if a privacy interest outweighs a law enforcement interest, or where a witness or victim is reluctant to provide information necessary to law enforcement.

Deactivation in general

Deactivation is upon the conclusion of an event or contact, or when all persons stopped have been released, or when an arrestee has been transported to a detention facility. If deactivation occurs prior to the conclusion of an event, the reason for the deactivation should be documented.

Review

Officers may review recordings of their BWC to ensure accuracy and consistency prior to preparing reports. The officer may review recordings with an attorney or labor representative. Supervisors may

review recordings for administrative purposes, training purposes, internal investigations, and to ensure compliance with agency policy and directives.

Prohibited recordings

Communications with other police personnel when exchanging information with other officers or when engaged in an operational or tactical discussion with other officers, in which case the officer shall state the reason BWC is being turned off and the officer should promptly re-activate the BWC before resuming duties related to the incident; encounters with undercover officers or informants; personal activities and breaks; locations where individuals have a reasonable expectation of privacy (such as a restroom), except in circumstances where an officer has reason to believe that a confrontation is likely; a medical evaluation or facility, except in circumstances where an officer has reason to believe that a confrontation is likely.

Storage, retention, and destruction

Recorded files should be uploaded no later than the end of the officer's shift, and should be securely stored in accordance with state retention laws for a minimum of 60 days, except where state retention laws require longer storage. BWC footage may be destroyed after 60 days but may be retained longer where necessary for a proceeding such as an investigation, prosecution anticipated litigation, or for training purposes.