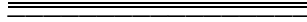


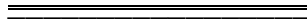
**The Bill Blackwood  
Law Enforcement Management Institute of Texas**



**Rushed Implementation of Body Worn Cameras Could Cost Citizens  
Their Right to Privacy**



**A Leadership White Paper  
Submitted in Partial Fulfillment  
Required for Graduation from the  
Leadership Command College**



**By  
Eric Jones**

**Memorial Villages Police Department  
Houston, Texas  
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## **ABSTRACT**

Technology changes the world every day. Law enforcement is consistently struggling to keep up with emerging technologies. One of the emerging technologies is portable video recorders. Video recorders are built into many different portable handheld devices making them available for most of the population. Since the Rodney King incident twenty years ago, recordings of police interactions by citizens have been steadily increasing. The Rodney King incident was the first notable recording of police officers where the video contradicted the officer's account of the incident. As video recording devices have become more common, similar unfortunate incidents have caused a steady decline in public opinion and trust for law enforcement and an increase in public pressure for reform.

The law enforcement community is getting pressure from media and community leaders to implement body worn cameras on all officers to promote transparency and accountability. There is an assumption that the body worn cameras will immediately stop any police misbehavior and restore community trust. The law enforcement community must be careful with the video recordings that they collect because they may violate the rights of those citizens that they are trying to protect.

There is a twofold solution. First and foremost, police agencies must create a policy for body worn cameras that protects the rights of those who are recorded. The long term solution is for these policies to be eventually supported by legislation and case law. The law enforcement community must work with lawmakers to treat video recordings as a new class of open records with different criteria for release than what is currently considered for "paper" reports.

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## INTRODUCTION

Police across the nation are feeling pressure to implement body worn cameras immediately or be accused of subversion in the eyes of the media and the public. “The fatal shooting of Michael Brown by a Ferguson, Missouri, policeman – and the subsequent protests and violence—will accelerate the emerging movement by law enforcement agencies to equip officers with body cams” (Tryon, 2014, para. 1). This and other police interactions that were sensationalized by the media have put police officials on the defensive and they are finding that they are assumed to be hiding something if every police encounter is not documented by video. There is a belief that “Police and civil rights advocates are counting on the cameras to add transparency and accountability while police hope to reduce unsubstantiated complaints and frivolous lawsuits” (Smith, 2014, para. 4).

Recording devices are nothing new with law enforcement as in-car video has been used for over twenty years in some jurisdictions. Body worn cameras present a new and unique set of privacy issues (Smith, 2014). This point has either been overlooked or there seems to be an assumption that video privacy issues were settled with in-car video. Body worn cameras are much more mobile and present unique considerations. Those who are pushing for fast implementation of body worn cameras need to slow down and consider that their push to quickly implement body worn cameras could lead to an unintentional violation of their right to privacy. Law enforcement leaders should be made aware that “The lack of clear guidelines on the cameras use could potentially undermine departments’ goals of creating greater accountability of officers and jeopardize the privacy of both the public and law

enforcement officers” (Alexander, 2014, para. 4). Before implementing body worn cameras, police administrators should implement specific policies for utilizing cameras and releasing videos that protect the expectation of privacy for the citizens that they serve and then rally to make sure that they are supported with legislation and case law.

## **POSITION**

The Fourth Amendment of the U.S. Constitution states, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” In the 226 years since the Bill of Rights was written there have been countless cases that have defined a person’s reasonable expectation of privacy. The courts have been clear; a person’s domicile is the most sacred private places of all.

When in-car video emerged, the courts found that there was not an expectation of privacy when stopped by a police officer and none when seated in the back of a patrol car. Body worn cameras present new problems. Cameras that are worn on an officer will have access to places that a person would have a reasonable expectation of privacy. David McGuire who is a staff attorney at the ACLU stated that “we want video held for accountability but we also do not want the data held so long that it infringes privacy” and he echoed concerns about video inside someone’s home where “there is an expectation of privacy” especially if the person is making a complaint (Smith, 2014, para. 26). If any police recordings are subject to public information requests then the police are betraying the trust of the same people who trust them. Chief Townsend of

Poulsbo, Washington P.D. points out that a video taken from a burglary investigation could be used by another burglar as a map to aid additional crimes (Wood, 2014).

Police officers never know what they are walking into. The most routine call can turn into their worst nightmare in an instant. Many departments are asking officers to turn on their cameras when they believe there will be evidence to record or to ask for consent to record. This is a backwards philosophy. Law enforcement should collect every possible encounter and set policies that protect the rights of those that are recorded. Body worn video cameras are being implemented to document relevant police interactions and show the truth when the facts of an event are disputed. No one can predict the future and police do not necessarily know what should have been recorded until after the interaction which could be weeks later.

Police respond to medical calls that are clearly private and often embarrassing matters for those involved. Many times what is reported to dispatch and what is actually occurring are different. It is not hard to imagine that a medical call is actually a violent domestic assault. Once the police miss recording an event, it is too late to start recording. The only way to maximize the potential for capturing relevant video is to require that officers record all interactions with the public with a few exceptions for controlled events such as information gathering from confidential informants, conversations between officers or casual conversations with citizens. This places substantial trust in the police to be proper stewards of recordings that may include people at their worst and areas that a citizen has a clear and reasonable expectation of privacy.

The public information officer for the Connecticut's Freedom of Information Commission (FOI), said that any audio and video in police possession may be new, but existing FOI law would apply to the audio/video as it would to any public record (Smith, 2014). The current interpretation of the Freedom of Information Act (FOI) holds that police recordings are held to the same standards as written reports and any other government generated paperwork. Geoffrey Morgan, a Police Captain in Branford Connecticut said, "Who are we to infringe upon their privacy in an environment where normally the public would not have access to" (Smith, 2014)? The Freedom of Information Act (FOI) was enacted to keep transparency on government during a time when only paper was produced and you could easily redact personal information. The lines become less clear when dealing with video recordings from body worn cameras.

The police in Tukwila, Washington had been using body worn video for about six months when they complied with a blanket video release based off a FOI request. One of the videos was of a man that was in a car that was pinned against a tree. The man is ordered to exit the vehicle by police. He was belligerent and failed to comply several times during the course of his arrest. He does not comply and a Taser is eventually deployed. The video makes a point that there is a difference between paper records and video; a person may not be bothered by a written description of events that they were involved in, but a video is more specific and invasive (Wood, 2014). The man who was arrested might be publically ridiculed and embarrassed if the video was shown to the public whereas a written description is less alarming.

Body worn video cameras capture more than just the person who is talking to the police and should be treated differently under the FOI Act. Imagine an encounter at a

mall. A police officer is called to investigate a person threatening shoppers. The responding officer activates his body worn video as he exits his vehicle. This is good practice because he has no idea what he may encounter and where the suspect is. As the officer is looking for the suspect, he walks past many uninvolved people, including juveniles. The officer locates the suspect and handles the call without incident. The officer would have recorded hundreds of uninvolved citizens on the call. Many of them juveniles. It is certainly a public place, but it is not ethical for the police to release a video that includes video images of juveniles or uninvolved citizens. These citizens would not have been documented in an offense report, however releasing the video would “document” their presence. It seems reasonable that anyone who is on the video or was there should have access to the video because they have already “seen it” in that they were present when it occurred.

Police departments should set strict policies on what video they will release to anyone outside of law enforcement. Duluth, NY Chief Ramsay said, “We need to figure out how to balance the need for transparency while respecting the privacy of our citizenry” (Glenza, 2015, para. 14). With that in mind, police should only release video to persons depicted on the video as they were on scene and would have viewed the scene as depicted on the video. Claremore, Ohio Chief Stan Brown is appealing a lower court’s ruling to release a driving under the influence video. The Chief’s position is that the police should be accountable to the people that they are protecting and not just those requesting videos (Morgan, 2013). If the news media has interest in obtaining a video of an incident, they should obtain a signed release or consent from everyone on the video before it is provided to them or go through the court system in



much the same way that the police do when they get a search warrant. Police must get approval from the courts in the form of a search warrant in order to encroach a person's rights. It seems appropriate for the same standard to be set for the media or any other third party requester. Any person that is not on the video and wants to get a copy of it must show probable cause to the court that there is a good reason or that the public's right to view the video is greater than the person's right to privacy. This is a decision that courts should make on a case by case basis.

### **COUNTER POSITION**

American police have become increasingly scrutinized by the media and the public. It seems like initial media reports of officer involved incidents have handpicked facts designed to cause alarm to the public. In the cases where there was video captured, the police are pressured to release the video in order to show the events as they truly occurred. Activist leaders want access to every second of police recordings and are calling for every police officer in the nation to record every second that they are on duty in the interest of accountability and make it all available to everyone in the interest of transparency. This pressure is flowing down through politicians and into law enforcement leaders across America. Many leaders have folded to the pressure to implement now and think later. It would benefit everyone if both sides would recognize that "Body cameras can provide objective evidence of misconduct, but their supporters acknowledge that cameras will not solve deeper issues of mistrust between police and communities" (Alexander, 2014, para. 43).

Flagstaff, Arizona was an early adopter of body worn video. They recently had an incident where an officer's death was captured on video. Flagstaff Chief Treadway

said "Even the model policies that we looked at didn't foresee this very specific kind of incident occurring" (Kaste, 2015, para. 9). Chief Treadway ended up releasing the video that ended when the suspect's gun becomes visible. The officer should have some expectation of privacy. It is irresponsible to publically broadcast an officers' death for his friends and family to view. The police chief or a city official should not have the right to decide what that officer's expectation of privacy is in death. The courts have been clear in the past that police officials or even city officials cannot make a decision when it comes to the rights of citizens and whether they have a reasonable expectation of privacy. That is a decision for the courts.

Any law enforcement officer must obtain a search warrant through a court that gives good reasons (probable cause) that the interests of justice, outweigh that person's right to privacy. That same logic should be applied to police video as it pertains to citizens' homes, juveniles and other officers that are recorded by police. This is clearly an issue that a judge should decide under the same paradigm as a search warrant. Both the media and law enforcement have self-serving interests and are prone to pressure that may sway their judgment. If the courts would apply the philosophy relating to a search warrant to police video release requests, it would protect the integrity of the video and the public's rights, in the same way that the 4<sup>th</sup> Amendment protects the rights of citizens from unreasonable search or seizure. Until a clear direction is given by the courts, the police cannot be hasty in implementing body worn cameras. If law enforcement does rush into implementation, the administrations should consider a policy that does not allow the release of any video that contains a citizen

other than the requestor or a juvenile, without a court order or consent of the citizens on the video.

Activists that are pushing the police to immediately implement body worn video say that police are just stalling, the courts addressed police video along time ago with the in-car video. Under these rules all police video is subject to public release under the Freedom of Information Act (FOI). The courts have ruled that the in car videos are subject to the same rules as police reports. There is a clear distinction that needs to be made loudly and clearly; Body worn cameras can access and record areas and circumstances that have been clearly defined by the United States Supreme Court as places where citizens have a clear expectation of privacy from the government and other citizens. In most cases, in car video cannot do that.

In-car videos record areas that have public access such as public roadways, the front of a house, the outside of a building or a parking lot. Generally, when an in-car video is recording, it is in connection with a traffic stop or a call for service. The perspective of the recording is stationary and it records what is in front of the police car. Unlike body worn cameras, there is very little chance of inadvertently video recording non-involved parties with in-car video. This makes a clear distinction that should be addressed with policy before body worn video is implemented. It would benefit everyone if both sides would recognize that “Body cameras can provide objective evidence of misconduct, but their supporters acknowledge that cameras will not solve deeper issues of mistrust between police and communities” (Alexander, 2014, para. 43).

## RECOMMENDATION

Law enforcement is at a crossroad where they have to make a decision about the emerging technology of body worn video which will set the stage as the technology develops.. There is pressure from media and activists for the police to immediately place cameras on all officers. This would ultimately lead to a betrayal of the public by law enforcement when their citizen's constitutionally protected privacy is betrayed by blanket requests for police video by the media or activists.

Body worn cameras have a different recording perspective than in-car video and as such, they are able to record situations and areas that are considered to have a reasonable expectation of privacy. This is a new perspective and as such should not be considered to apply to the Freedom of Information Act because the act does not authorize releasing anything that is deemed private to a citizen. In fact it has provision to redact personal and private information. It is really a simple test; if the police record an area or situation that case law has ruled has a reasonable expectation of privacy, then a video of it should not be released to a non-involved party unless the same criteria are met by the requestor that law enforcement would meet to be in the same location. Examples would be; consent, permission, exigent circumstances or a court order. If this standard was applied to police policy then a department would only release a video to a non- law enforcement person if the requestor was at the scene and already "viewed" the incident or the requestor was not on scene but got written consent from everyone with standing on the video. The video should be released in cases of sustained complaints or misconduct and by court order.

Law enforcement leaders need to band together and implement specific policies for utilizing cameras that protect the expectation of privacy for the citizens that they serve. According to their spokesman, The Hillsboro County Sheriff's Office in Florida is opposed to implementing body worn cameras until privacy concerns are cleared up. The spokesman told reporters, "We are in favor of the concept, but there's still a lot of unanswered questions with regard to public record laws" (Soloman, 2014, p. 2). Eventually these policies will be tested in court and if the courts are tasked to uphold the values of the U.S. Constitution then clearly they will continue to protect the rights of citizens to be free from unreasonable search and seizure as an unintended side effect of the emerging technology of body worn video cameras. The first step is for law enforcement officials to review and consider policies that go further in protecting citizens' rights than the NIJ recommendations that do not address when it is appropriate to release a video. These policies should maximize the potential for capturing useful and relevant video from body worn cameras without betraying the public's trust by being forced to release video recordings of areas and situations that are clearly and traditionally protected as private by the Bill of Rights, and the Supreme Court of the United States.

There is no doubt that these policies will be challenged by hordes of frustrated media and activists. They will have to learn to protect the privacy of citizens just as Law enforcement has learned through the years. By enacting these policies, we lay the ground work for where the discussion and court cases begin. If we do nothing and wait for the courts, the discussion will start with a citizen whose right to privacy was betrayed by a law enforcement agency that irresponsibly implemented a technology without

considering and protecting the rights of those they serve. This puts us in an adversarial position with the people that we serve. Instead of being bowing to political pressure for immediate and haphazard implementation of body worn video cameras, Law Enforcement should take a proactive approach and take the lead in protecting the rights of those citizens that they serve.

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