



September 24, 2015

Commander Jason Viramontes
60 Civic Center Plaza
Santa Ana, CA 92701

Via email at jviramontes@santa-ana.org

Dear Commander Viramontes:

The ACLU Foundation of Southern California is cautiously optimistic about the Santa Ana Police Department's ("SAPD's") move to ultimately equip all its officers with body-worn video cameras. We appreciate the steps SAPD has taken to include community members in its discussions about the upcoming goals and the current pilot phase of body-worn video cameras. Having attended community meetings, we were pleased to see the Department present information regarding the body cameras and provide the opportunity for community feedback. We hope that SAPD continues to ask for public input even after the implementation of body worn cameras, and are excited for the positive change that effective implementation of the cameras can yield. By providing video evidence of police officers' interactions with the public, body-worn video holds the potential to deter misconduct and uses of force, to hold officers accountable when misconduct does occur and quickly exonerate officers who are wrongly accused, and to help the public understand how police use the powers we give them.

As SAPD correctly recognized in its presentation on body cameras, body-worn video is not a panacea. Video does not always capture the full story, and having video will not resolve every question about a use of force or complaint. Many questions about policing— from implicit racial bias or use of force policies, to deployment of resources and so-called "broken windows" policing, to crafting systems for oversight and transparency — require looking beyond individual incidents, and body-worn cameras will not answer all these questions. Body cameras hold real potential to improve policing, but they are not the last word in police reform, or even the only reform that is needed now.

More importantly for SAPD today, body cameras are only a tool. Depending on the policies that SAPD ultimately adopts to govern their use, they can be effective or ineffective — and can even undercut the very values they are meant to promote. We urge SAPD to take the following points into consideration as it finalizes its policies on body cameras; setting the right policy on body-worn video requires balancing a number of concerns, including:

- **Accountability** — Body cameras should be used in a way that helps assure that footage will be used to hold officers accountable when they engage in misconduct, to exonerate officers who are wrongly accused of misconduct and to deter misconduct and use of force.
- **Privacy** — Body cameras are surveillance tools. Police have the authority to enter private places and often deal with sensitive issues and people who are not at their best.

For incidents where there are privacy concerns and no allegations of misconduct, the public should not have to worry that their encounter with law enforcement will wind up on the evening news or the internet. Both civilians and police should be confident that video will not be used for “fishing expeditions” to gather information on law-abiding individuals outside an investigation, where there is no reason to believe a crime or misconduct has occurred, or formal audit.

- **Transparency and Public Access** — We give police tremendous authority, and the public has the right to know how their police use that authority, particularly in critical incidents or where there are allegations of misconduct. But the balance between the public right of access and the privacy rights of those who appear on video must be carefully balanced. The policies governing recording of, access to, and release of body-worn video should also be clearly articulated and publicly available.
- **Promoting Police-Community Trust**— Cameras should be used in a way that promotes public trust in SAPD, and does not create the impression that video will be used only to exonerate officers but not to hold them accountable.

While we applaud SAPD’s move to adopt body-worn video and its efforts to make the process public, we recommend that SAPD take into consideration when drafting their policy, and in order to address the concerns above:

- Prohibit officers from viewing video recordings prior to providing statements in use-of-force or complaint investigations
- Require officers to notify civilians when they are being recorded whenever practical
- Institute clear limits on the use, sharing, and disclosure of video
- Implement strict video retention and purging policies

I. THE SAPD SHOULD MAKE THE PROCESS FOR ADOPTING BODY-WORN VIDEO AS TRANSPARENT AS POSSIBLE

SAPD has presented to community members and has stated it is interested in receiving feedback from the public before the final policies for body-worn video are approved. Compared with the many police agencies that adopt new surveillance technology behind closed doors, this process is a positive step toward transparency. If SAPD has not already planned on doing so, we encourage the Department to submit its final policy for body-worn video to the City Council when the Council considers approving funds for the full implementation of body-worn video. We also recommend that SAPD provides City Council with an assessment of the cameras’ impact on civilian privacy and the protections that SAPD has put in place to address privacy concerns at the same time.

In a recent report, *Making Smart Decisions About Surveillance: A Guide for Communities*,¹ the ACLU of California has recommended a process to ensure police agencies thoroughly vet new surveillance technology, by issuing privacy impact assessments that evaluate potential risks to privacy and safeguards that could address them, clearly outline oversight mechanisms and create standards for reporting data, as well as releasing draft policies that can focus debate on key

¹ ACLU of California, *Making Smart Decisions About Surveillance: A Guide for Communities* (Nov. 2014), available at <https://www.aclusocal.org/community-making-smart-decisions-surveillance/>.

issues. We recommend that the Department use the report as a guide for the remainder of the process.

II. POLICIES MUST PROMOTE ACCOUNTABILITY

A. Officers Should Be Required To Record All Interactions With the Public, With Limited Exceptions.

The SAPD should adopt a policy that requires recording of all contacts with members of the public — or, at a minimum, all enforcement-related contacts, including consensual encounters initiated by officers for investigatory purposes. Because seemingly ordinary encounters can evolve quickly, and officers faced with a sudden fleeing or resisting suspects may not think to turn his or her body camera on, officers should be required to activate body cameras at the earliest stage of each interaction, before leaving a car or making contact with a pedestrian. While we believe that recording statements of witnesses, suspects, and victims should generally be required as an additional safeguard against misconduct, exceptions may be appropriate for sensitive situations such as minor victims of sexual assault, so long the officer obtains clear, on-camera permission of the interviewee to stop recording.

While continuous recording might best serve the goal of accountability, we recognize that constant recording may begin to intrude on officers' privacy rights. Officers are public servants, and they do not have an expectation of privacy in their interactions with members of the public.² But officers have greater privacy when on breaks or performing aspects of their work out of the public view.

Importantly, the Department must ensure any policy requiring recording is actually followed by auditing officers' compliance and imposing disciplinary consequences for failure to activate of cameras or tampering with equipment. Where an incident under investigation should have been recorded, failure to record could also result in a rebuttable inference against the officer. For example, the Los Angeles Police Department ("LAPD") faced criticism that its officers went so far as to break antennae off more than half the audio receivers for in-car video systems in order to avoid scrutiny.³ For cameras to provide accountability, officers' compliance with Department policies requiring recording cannot be voluntary.

B. Officers Must Not Be Allowed to View Recordings Before Providing a Statement in Use-of-Force or Complaint Investigations.

Body-worn video may seem like a useful resource for officers in writing reports, who could review video to ensure details for a written report are accurate. That might be acceptable for routine report writing, but not if the officer is the subject of an investigation. When an officer is involved in a critical incident like a shooting, or faces a charge of misconduct around an incident,

² See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 82–85 (1st Cir. 2011) (“[A] citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.”); *Long Beach Police Officers Assn. v. City of Long Beach*, 59 Cal. 4th 59, 74 (2014) (personal privacy interests of officers involved in shootings did not justify withholding their names).

³ Joel Rubin, *LAPD officers tampered with in-car recording equipment, records show*, LOS ANGELES TIMES (April 7, 2014), available at <http://articles.latimes.com/2014/apr/07/local/la-me-SBPD-tamper-20140408>.

that officer should not be permitted to view body-camera footage before making a statement or writing an initial report.

Simply put, allowing the target of an investigation to review potentially incriminating evidence over and over again before writing a report or making a statement is a poor investigative practice. Police do not adopt such an approach for any other type of investigation, and they should not for investigations into officers.

Showing the subject of an investigation video evidence enables lying. If an officer is inclined to lie or distort the truth to justify a shooting,⁴ showing an officer the video evidence before taking his or her statement allows the officer to lie more effectively, and in ways that the video evidence will not contradict. Video evidence can be enormously helpful, but it does not capture everything from every angle. If an officer is not sure what was and was not captured by the camera, he or she will feel a healthy pressure to tell “the whole truth and nothing but the truth” in describing an incident out of a desire not to be later caught by a discrepancy with the video. But if the officer watches the video and discovers that certain elements that put them in a poor light happened not to have been captured—or that moments when the subject is not in frame that the officer can say he reached for his waistband—then the officer can feel at liberty to shade and color his or her account of events, if not to lie outright.

Showing the subject of an investigation video can affect their memory of the event. Even for officers who are trying to tell the truth (as we hope most do), showing them the video can easily influence their memory of events and impede the search for truth. A camera worn on a police officer’s body may capture some things an officer missed and miss things an officer did see. That video provides one important piece of evidence on whether the officer acted reasonably. But the officer’s memory of what took place is also important evidence—especially since courts evaluate the legality of an officer’s use of force based on what he or she knew at the time, not on information gleaned from poring over video evidence later.⁵ Memory is highly malleable, and an officer’s initial recollections of what took place are likely to be altered by viewing the video, so that details that do not appear on video are forgotten and things captured by the video are recalled as if experienced firsthand. As the Los Angeles County Office of Independent Review found in working on the Los Angeles Sheriff’s Department’s policy:

In our review of the available research, we found ample evidence that seeing additional information than what was experienced (such as seeing the action from a different angle) can alter the memory of an event.⁶

A one-sided policy of allowing officers under investigation to view video before making a statement of an investigation undercuts the legitimacy of investigations. Because letting officers preview videos of an incident before giving a statement can allow them to lie, doing so undermines the credibility of officer statements and the integrity of investigations whether the

⁴ See Michelle Alexander, *Why Police Officers Lie Under Oath*, NEW YORK TIMES (Feb. 2, 2013), available at http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html?pagewanted=all&_r=1&gwh=B2F83E14FF0E6AAF6EE34B44906B34F9&gwt=pay&assetType=opinion.

⁵ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁶ Los Angeles County Office of Independent Review, *Eleventh Annual Report*, 36 (Dec. 2013), available at http://shq.lasdnews.net/shq/LASD_Oversight/OIR-Eleventh-Annual-Report.pdf.

officers actually lie or not. Such a policy will create an appearance of bias and therefore taint the integrity of investigations.

Some departments agree with us. The Oakland Police Department, which was one of the first police agencies to adopt body cameras in 2010, has a policy prohibiting officers from reviewing video prior to making a statement in an investigation arising out of a Level 1 use of force (the most serious, including shootings).⁷ When the Los Angeles Sheriff's Department recently installed video cameras in its jails, the department, after careful consideration, adopted a policy that requires deputies in the jails to file reports on incidents before viewing video, for many of the reasons we articulate.⁸

At the recent community meeting, community members raised their concerns regarding officers reviewing the videos. Research shows that in stressful situations like shootings, even trained observers may have trouble recalling events accurately.⁹ But they argue that since video is often the most accurate record of what occurred, letting officers review footage will help lead to the truth of the incident by helping officers to remember an incident more clearly. But none of those reasons justifies giving officers access to video *before* they've given an initial statement. Of course officers should be allowed to watch the video after giving an initial statement and offer additional information if it jogs their memory of something they left out or misremembered, or provide context if it shows something they missed entirely. That would help provide the fullest picture of what happened, including the officer's commentary on the video evidence, without tainting the officer's initial recollection or giving them a roadmap to lie without getting caught.

Officers may have an additional concern: because memories are fallible, particularly in stressful events, officers' initial accounts almost certainly are not going to match the videos exactly. Officers do not want to be disciplined because they misremembered some details such as which hand a subject used to reach for a door or wallet, or even important facts like how many shots they fired. That concern has some validity. Officers in a stressful incident like a shooting should not be disciplined for giving testimony that contradicts a video absent evidence that they intentionally misstated the facts. But every other subject of an investigation has to deal with those realities; police should not get special treatment in that regard. The right answer is to confront those misperceptions about the accuracy of eyewitness memory,¹⁰ not to fabricate a false level of accuracy by letting officers tailor their accounts to video.

We cannot stress enough how central this issue is to ensuring SAPD's body camera program promotes accountability and retains public trust. To adopt a policy that allows officers to review video evidence before making statements during an investigation risks turning police body cameras from tools for police accountability into tools for police cover-up.

⁷ Departmental General Order I-15.1, "Portable Video Management System," Oakland Police Department, 4 (effective Mar. 5, 2014), available at https://www.aclu.org/sites/default/files/assets/mar_14_pdrd_policy.pdf.

⁸ Los Angeles County Office of Independent Review, *Eleventh Annual Report*, *supra* note 68, at 35.

⁹ See, e.g., Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, 29–30, 45–47, 62 (2014), available at http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf.

¹⁰ See Innocence Project, "Eyewitness Misidentification," available at <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

C. The Department Should Randomly Audit Body-Worn Video Footage to Ensure Quality of Training and Compliance with Policy and Law

Although body-worn video may help resolve complaints or use of force investigations when they arise, the vast majority of police encounters do not result in complaints or uses of force. Body-worn video should be used to identify problems with training or officer behavior before those problems result in complaints or incidents. Moreover, regular review of video will allow SAPD to identify problems with training or officer conduct that might not be captured in a complaint or other mandatory investigation. As set forth below, however, review of video should either be based on specified prior conduct or should be randomized and conducted according to accepted auditing principles to avoid and risk that some officers are unfairly targeted by supervisors for unwarranted scrutiny.

We also suggest that SAPD compile reports on the use of body camera footage. These reports would be used to track information such as the number of California Public Records Act (CPRA) requests, the number of complaints around body camera use, and the number of times body camera footage is used as evidence in (a) a complaint that exonerates an officer, (b) a complaint that is sustained, and (c) criminal prosecution of a citizen.

D. SAPD Must Handle Video Footage So As To Avoid Any Possibility of Tampering or Editing

The public can only trust video evidence if there is no doubt officers cannot edit, alter, or delete the video they record. At the community meeting held on September 11th, several residents aired their concerns regarding this issue. The devices SAPD uses must not allow any opportunity for officers to edit, alter or delete during the shift or the upload process. SAPD has stated it will likely store all videos on a cloud server. Uploaded videos should be placed on a secure cloud server with no ability for officers to edit or delete original video footage until the retention period has elapsed.

Officers may sometimes forget to turn cameras off and so may inadvertently record private, personal activity that should not be recorded. Officers should be allowed to flag those videos for heightened protection or restricted access, and to avoid release of any such videos. But any ability to edit or delete videos can be abused and will call into question the integrity of body-worn video footage.

III. POLICIES MUST PROTECT PRIVACY

A. Civilians Should Be Given Notice that Officers Are Recording.

Hidden surveillance is more invasive than open recording. Moreover, to the extent that the presence of cameras deters aggressive behavior by civilians, that deterrence is lost if civilians are not aware that they are being recorded.¹¹ Therefore, the policy should require officers, whenever

¹¹ A study conducted in Rialto, California, showed nearly a 90% decline in complaints for officers who wore cameras, where members of the public were “aware of being videotaped.” Farrar and Barak Ariel, *Self-awareness to being watched and socially-desirable behavior: A field experiment on the effect of body-worn cameras on police use-of-force* (2013), available at

possible, to notify people that they are being recorded. This could easily be accomplished by having cameras clearly marked with a plate or sticker noting that the encounter may be recorded.

B. Recording in private places

As SAPD is aware, police recordings made inside private homes are intrusive and raise privacy concerns. Officers should be required to be especially sure to provide clear notice of a camera when entering a home, except in circumstances such as an emergency or a raid. SAPD might also consider a policy under which officers ask residents whether they wish for a camera to be turned off before they enter a home in non-exigent circumstances. (Citizen requests for cameras to be turned off should themselves be recorded to document such requests.) Cameras should never be turned off in SWAT raids and similar police actions.

C. Limitations on Use, Sharing and Disclosure of Video

ACLU SoCal supports the use of body worn video for police accountability and oversight. Body camera footage should be reviewed where there is reason to believe the video contains evidence of misconduct or criminal activity; where there has been use of force or other reason for mandatory internal investigation; or for auditing as part of a randomized audit or corrective plan for an officer based on specified prior conduct. But the vast majority of body-worn video footage should never need to be reviewed by the Department in its original state, and will simply be deleted when the retention period ends.

Body cameras are a surveillance technology, and there are very real concerns that they could be used as a backdoor for surveillance or tracking of the public. For example, body-worn video footage of protests against police brutality or against City officials could be reviewed to identify and build dossiers on protestors, or to scan for minor infractions that could be charged. The Department must enact strong policies limiting access to and use of body-worn video to prohibit use for surveillance of the public, especially the surreptitious gathering of intelligence information based on First Amendment protected speech, associations, or religion. The Department should bar review of any video absent specific reason to believe that video contains evidence of a crime or misconduct, and should expressly prohibit use of other surveillance tools, such as facial recognition technology, on body-worn video footage.

These concerns also apply to officers. Officers can reasonably expect that body-worn video would be consulted during an investigation into a use of force or an allegation of misconduct. As set forth above, the Department also can and should audit video to ensure quality of training and officer compliance with all policies and laws. But officers should not have to worry that supervisors who do not like them can spend the weekend reviewing their body-worn video footage looking for any violation of policy they could charge. Review of officers' video should be limited to investigations of particular incidents where there is some reason to believe

misconduct has occurred, corrective action resulting from specified prior conduct, or randomized audits.

Video should also never be shared or released for any reason other than to promote accountability or transparency — never for voyeuristic reasons, personal advantage, or financial gain. Even in circumstances where some release of recordings may be appropriate, the decisions about when and how to release the body-worn video footage should be made by the Department according to clear, standard criteria, not by the individual officers involved in the incidents recorded.

These limitations must be implemented with both sound technology and strong policies. To limit misuse of footage, the video must be securely stored and accessible only through a system that requires individualized logins, purpose-specification for access, and an impeccable auditing capabilities. Access must actually be audited to ensure the integrity of the system. Department policy should also clearly prohibit officers from duplicating or sharing video outside of a formal system for release, and should impose disciplinary consequences for any breach.

D. Retention and Purging.

SAPD should also have strict purging policies that limit the unnecessary retention of body-worn video footage. SAPD's draft policy does not specify any limits on the retention of video. SAPD should modify its policy to retain footage only until applicable statutes of limitations for officer misconduct elapse, and should implement storage systems that automatically purge videos that have reached the end of the retention period and are not part of an investigation.

IV. POLICIES MUST PROVIDE ACCESS TO BODY-WORN VIDEO FOOTAGE THAT BALANCES PRIVACY WITH THE PUBLIC'S RIGHT TO KNOW

Developing policies on when video captured by body cameras should be released will require a delicate balancing act in order to protect the privacy rights of individuals while serving the strong public interest in disclosure. As SAPD is aware, legal precedent makes clear that body camera footage is public record generally subject to disclosure under the California Public Records Act (CPRA).¹² It is equally clear that the exception for certain law enforcement records in § 6254(f) does not provide a categorical exemption for all videos of police interactions with civilians.¹³ SAPD should incorporate legal precedent into its draft policy, which requires the Department to release footage in response to CPRA requests after careful review and redaction of privileged information.

Even if § 6254(f) does allow SAPD to withhold video in certain instances, the exemption does not require the Department to do so, and we strongly urge SAPD not to assert that exemption categorically. Rather, the Department should adopt clear, standardized policies of releasing video in a manner that balances the public's right to know with privacy concerns and other legal protections.

¹² Cal. Gov't Code §§ 6252(e), (g).

¹³ See *ACLU Foundation v. Deukmejian*, 32 Cal. 3d 440, 449 (1982); *Haynie v. Superior Court*, 26 Cal. 4th 1061, 1071 (2001).

On the spectrum of incidents likely to be captured on video, there are some circumstances in which we believe the proper path is clear. On the one hand, when the privacy interests of the subjects are great — for example, when officers enter private homes or conduct sensitive victim or witness interviews — the video should not be made public.¹⁴ Conversely, when the public interest in transparency is strongest — such as when officers are involved in shootings or other critical incidents, or accused of egregious misconduct — the very goals behind adopting body cameras demand disclosure — if not while an investigation is pending, then as soon as it is concluded.

In between these clear extremes lies murkier waters. The following two possibilities stand out as possible solutions for balancing individuals' privacy interests with the public's interest in access to information on police conduct.

First, SAPD could release video in broad categories where public interest in disclosure is highest or privacy interests lowest. As discussed above, that would include incidents where officers have engaged in reportable uses of force or have been accused of nontrivial misconduct, because of the strong public interest in knowing what happened in those individual incidents. Additionally, civilians recorded by body cameras should unquestionably have access to, and the right to make copies of, those recordings, for however long the government maintains them. That should also apply to disclosure to a third party if the subject consents, or to criminal defense lawyers seeking relevant evidence. Release to the involved party is consistent with the CPRA's requirement that police disclose certain records of incidents to "victims," and with the California Information Practices Act (CIPA), which recognizes an individual's right to access records on himself held by state agencies.¹⁵ Under this approach, because the individual would have control over whether to make the footage public, most privacy concerns would be eliminated.¹⁶

Second, SAPD could release all video, subject to prior review to determine whether particular privacy concerns arise and justify redacting or withholding part or all of the video. The police department of Oakland, California has adopted such a policy of releasing all video footage, unless it is part of an active investigation. Prior to releasing the footage, OPD staff screen every video for privacy concerns that would justify withholding it. While such an additional process would require additional department resources, such an investment in transparency and public trust may be worthwhile.

To the extent that SAPD feels its policy requires a statutory framework, the balancing test explained in § 6255 of the Government Code should provide the necessary guidance. Body

¹⁴ See *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (police violate the Fourth Amendment by bringing print reporters into home during execution of search warrant).

¹⁵ Cal. Civ. Code § 1798 *et seq.*

¹⁶ Because the CPRA makes clear that disclosures required by law do not waive the agency's right to assert exemptions to future disclosure, Cal. Gov't Code § 6254.5(b), disclosure to the video's subjects need not necessarily constitute waiver. Section 6254(f) itself contains language requiring local agencies to disclose records of incidents to "victims," which would seem to encompass at least those individuals complaining of misconduct or subjected to uses of force. Moreover, to simplify matters, SBPD could request the City Council to pass an ordinance analogous to CIPA, making it a legal requirement to disclose body-worn video on which that individual appears absent certain exceptions. The City of San Diego adopted such an ordinance in 1994, and the Santa Ana City Council could use that ordinance as a model. See Telecommunications Policy, No. 900-13, San Diego City Council, 4 (adopted Oct. 1994), available at http://docs.sandiego.gov/councilpolicies/cpd_900-13.pdf.

cameras' potential benefits to transparency and public trust are central to their usefulness and have been touted as a driving force in the push to adopt them. While some exceptions must be made to protect privacy and certain law enforcement functions, the rule must err on the side of disclosure.

If you have any questions, concerns, or comments, or would like to discuss ACLU SoCal's recommendations further, please feel free to contact me at (714) 450-3962, ext. 102 or at bescobosahelzer@aclusocal.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Belinda Escobosa Helzer". The signature is fluid and cursive, with a large initial "B" and "E".

Belinda Escobosa Helzer,
Director of the Orange County and Inland Empire Office

Cc: Chief of Police Carlos Rojas
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