



August 24, 2015

Commissioner Steve Soboroff, President
Commissioner Paula Madison, Vice President
Commissioner Sandra Figueroa-Villa
Commissioner Kathleen Kim
Commissioner Robert M. Saltzman
Los Angeles Board of Police Commissioners
100 West First Street, Suite 134
Los Angeles, CA 90012

Dear Board of Police Commissioners:

The ACLU Foundation of Southern California (“ACLU SoCal”) remains opposed to the LAPD’s use of body worn video (“BWV”) under the policies put forth by the Department and approved by this Commission in April of this year. As described in our prior letters, these policies suffer from serious flaws that undermine the goals of transparency and accountability that the body camera program should serve and undercut public trust that the cameras should be building.

In particular, the current policy fails entirely to address when body-worn camera videos will be released to the public, thus providing for neither the public interest in transparency when serious use of force or misconduct is at issue nor privacy concerns where sensitive matters are recorded and there is no strong public interest in video. It also provides no clear limitation against use of body camera footage as general surveillance of the public, such that the Department remains free to retain and examine footage of law-abiding citizens without reason to believe it holds any evidentiary value and to use facial recognition technology and other invasive tools in conjunction with body-worn video. Finally, the policy allows officers under investigation for serious uses of force and misconduct to view footage from their own body cameras and other officers’ before making even an initial statement to investigators, thus tainting the investigative process. The ACLU SoCal has discussed these concerns in depth in previous letters and will not repeat that discussion here.¹

But we have also expressed concern with the one-sided process by which the BWV policy was submitted to this Commission and approved, under which the Department presented its proposed policy without any meaningful discussion of its drawbacks, controversies or alternatives. We have requested that this Commission hold a meaningful hearing on this important issue by directing the Inspector General to provide independent analysis of these controversial provisions and inviting community input on the proposed policy. For such an important issue, the Commission should also invite experts with different viewpoints to make presentations and hear from representatives of policy agencies that have adopted different policies that address the above concerns, or take other

¹ Copies of our letters of January 16, 2015, and April 28, 2015 are attached for the Board’s convenience.

steps to consider facts beyond those presented by the Department in support of its own policy proposal.

But in the absence of any such hearing, we have endeavored to compile some factual materials for the Board's review, submitted as attachments here, which we believe illustrate the serious flaws in the Department's body camera policy. These include media articles demonstrating public concern regarding transparency and access to body-worn camera video; pieces highlighting concerns that body-worn cameras may be used as tools for suspicionless surveillance or monitoring of First Amendment-protected activity; reports and studies emphasizing the critical need for officers under investigation to provide statements before viewing video of the incident; and policies adopted by other law enforcement agencies that model alternative policies that address these issues. We hope that these materials at least convince the Board of the need for a fuller hearing on these issues, if not of the need for revisions to the BWV policy on these points.

LAPD's BWV Policy Should Provide For the Public Release of Video In Critical Incidents, In Cases of Misconduct, and When Requested by the Subjects of the Encounter

It is deeply problematic that the policy's only reference to public access to body-worn camera video characterizes all videos as confidential records. In addition to suggesting that all such videos would be categorically exempt from the disclosure requirements of the Public Records Act—a conclusion we dispute—the failure to publicly articulate a policy on when LAPD will release video runs contrary to the goals of public accountability and community trust that have been central to the public's support for body-worn cameras. As the attached media articles demonstrate,² withholding all video—or permitting broad latitude on when video will be released—amounts to the same widely criticized “just trust us” approach that body-worn cameras were intended, in part, to address. And as the Police Executive Research Forum explained in its report of recommendations for body-worn camera programs,

A police department that deploys body-worn cameras is making a statement that it believes the actions of its officers are a matter of public record. By facing the challenges and expense of purchasing and implementing a body-worn camera system, developing policies, and training its officers in how to use the cameras, a department creates a reasonable expectation that members of the public and the news media will want to review the actions of officers. And with certain limited exceptions . . . , body-worn camera video footage should be made available to the public upon request—not only because the videos are public records but also because doing so

² See Henry Gass, *Body camera video is coming, but who gets to watch it?*, CHRISTIAN SCIENCE MONITOR (July 16, 2015); Peter Hermann and Aaron C. Davis, *As police body cameras catch on, a debate surfaces: who gets to watch?*, THE WASHINGTON POST (April 17, 2015); Kate Mather, *Battle over access to lapd body cam videos is shaping up*, LOS ANGELES TIMES (Feb. 5, 2015).



enables police departments to demonstrate transparency and openness in their interactions with members of the community.³

LAPD's BWV Policy Should Guard Against Use of Footage as Surveillance of the Public

The current policy is silent on the possibility that body-worn camera videos may be used for surveillance purposes or in ways that may chill First Amendment-protected activity. The fast pace of technological advances, and more specifically the use of technology by law enforcement, has the potential to dramatically alter the nature of everyday interactions between officers and civilians. For example, the prospect that facial recognition technology could be used in conjunction with body-worn camera videos to amass massive amount of information on individuals—in many cases without suspicion—is acutely disturbing to many.⁴ Rather than assuaging these concerns, the policy's stated objective of using cameras to “[c]ollect evidence for use in criminal investigations and prosecutions,” without articulated limits, leaves room to fear how LAPD's body-worn camera videos may be put to use. The Burlington Police Department's policy provides an example of such a limitation.⁵ Whatever the law enforcement advantages of new technological possibilities, it is vital for public trust and community-police relations that decisions regarding use of body-worn camera video be made pursuant to a clear and public policy, adopted with the benefit of public input.

Allowing Officers to Review BWV Footage Before Providing an Initial Statement in Categorical Uses of Force and Cases of Alleged Misconduct Taints the Investigative Process.

In our earlier letters, the ACLU SoCal has raised concerns that having officers review their own BWV video footage, and that of other officers, as the policy currently *requires* for Categorical Use of Force incidents, taints the investigative process not only by providing an officer who is inclined to be dishonest with an opportunity to shade his or her story so in a manner consistent with the video evidence, but also because even an officer who tries to provide a full and honest account will be less able to recall his or her percipient experience of the event after reviewing video, especially in the case of a stressful event like a shooting where the officer may review multiple videos, multiple times.

Social science has conclusively demonstrated the dangers in permitting officers involved in critical incidents or accused of misconduct to review their body-worn camera video before providing initial statements or reports. A wealth of studies has demonstrated the malleability of memory, and the ways in which suggestion and the presentation of information that is new or different⁶ from an

³ Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, v (2014) (excerpts attached).

⁴ See Michael De Yoanna, *Colorado Police Cautiously Eager About Body Cameras That Recognize Faces*, COLORADO PUBLIC RADIO (July 19, 2015); Shakeer Rahman, *Body cameras could transform policing – for the worse*, AL-JAZEERA AMERICA (April 17, 2015); Lauren C. Williams, *Why Body Cameras Alone Won't Solve Our Police Abuse Problem*, ThinkProgress (Aug. 19, 2014). See also Michele Coppola, *The future of body worn cameras for law enforcement*, PoliceOne (Nov. 11, 2013).

⁵ Departmental Directive DD14, *Digital Imaging, Audio & Video, and Body Worn Camera Systems*, Burlington Police Department, 4 (effective Aug. 1, 2014).

⁶ Although the scientific research uses the term “misinformation,” that term is meant to distinguish information that is not within the individual's original memory, rather than to indicate that the information is necessarily false.



individual's percipient memory will actually alter the memory held by that person.⁷ Exposure to information that is not captured in the original memory does not supplement that memory; rather, it causes the entire memory to be reintegrated—to the point that the original memory is effectively lost.⁸ Allowing an officer to review his or her body-worn camera video of an incident, therefore, cannot help but change that officer's account of the incident, even for individuals who are trying their best to provide an honest account of their memory. Given the vital importance of understanding an officer's own subjective perception of events when judging the appropriateness of conduct, requiring that officers' memories be tainted by viewing body-worn camera video is simply unacceptable.

On the basis of this overwhelming evidence, and in line with basic investigatory practices, several law enforcement agencies and prominent actors have recommended and adopted policies to the effect that officers must provide an initial statement to investigators before being permitted to review video of the incident at issue. The Los Angeles County Office of Independent Review, for example, determined that officers in the county's jails should not view video before providing statements, based on "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."⁹ The Inspector General for the New York Police Department came to similar conclusions that concerns about the effect on officers' memories and the impacts on investigative integrity warranted requiring an initial statement or report before review of body-worn camera video.¹⁰ 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 investigations arising from serious uses of force,¹¹ and the San Jose Police Department provides that the initial interview should occur before video is reviewed as well.¹²

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Given how crucial appropriate policies will be to the effectiveness of LAPD's body worn camera program, the ACLU SoCal urges the Board to reconsider these provisions of its body-worn video

⁷ See generally Morgan, Southwick, Steffian, Hazlett, Loftus, *Misinformation can influence memory for recently experienced, highly stressful events*, *International Journal of Law and Psychiatry* 36 (2013) 11–17; Jeffrey L. Foster, Thomas Huthwaite, Julia A. Yesberg, Maryanne Garry, Elizabeth F. Loftus, *Repetition, not number of sources, increases both susceptibility to misinformation and confidence in the accuracy of eyewitnesses*, *Acta Psychologica* 139 (2012) 320–326 (repeated viewing increases the chances that officers will remember video as their own perception); Loftus, *Planting misinformation in the human mind: A 30-year investigation of the malleability of memory*, *Learn. Mem.* 2005 12: 361–366. See also Kathy Pezdek, *Should Cops Get to Review the Video Before They Report?* THE MARSHALL PROJECT (Aug. 13, 2015); Lara Boyle, *Malleable Memories: How Misinformation Alters Our Perception of the Past*, YALE SCIENTIFIC (April 1, 2013).

⁸ See Loftus, *supra* note 7, at 363; Foster, et al, *supra* note 7.

⁹ Los Angeles County Office of Independent Review, *Eleventh Annual Report*, 36 (Dec. 2013).

¹⁰ New York City Department of Investigation, The Office of the Inspector General for the NYPD, *Body-Worn Cameras in NYC: An Assessment of NYPD's Pilot Program and Recommendations to Promote Accountability*, 26–29 (July 2015).

¹¹ Departmental General Order I-15.1, "Portable Video Management System," Oakland Police Department, 4 (effective Mar. 5, 2014).

¹² San Jose Police Body Worn Camera Policy, San Jose Police Department, 8 (effective date June 29, 2015).



policy, and to take steps to gather fuller information. I am happy to discuss the ACLU SoCal's recommendations with any members of the Police Commission or Department further.

Sincerely,



Peter Bibring
Director of Police Practices and Senior Staff Attorney

