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## **PREAMBLE TO ABA TASK FORCE ON BODY-WORN CAMERA BASIC PRINCIPLES**

The Task Force comprised of a wide array of experienced stakeholders in the criminal justice system. It was co-chaired by Chief Anthony Holloway, Chief of Police, St. Petersburg, Florida, and Sheriff Susan Pamerleau of Bexar County Texas. A list of the members of the Task Force is set forth at the end of the Basic Principles. The ABA Criminal Justice Section is grateful for the participation of each member. The listing of a member does not signify that he or she agrees with the entire set of principles or any particular principle. It simply reflects the fact that each participated in the discussions that led to development of the principles. We attach in an Addendum additional statements by some entities with representatives on the Task Force.

The Task Force also benefited greatly from research conducted by The University of Chicago Law School's Kirkland & Ellis Corporate Lab. The research examined reports issued by various organizations and agencies on body-worn cameras and the existing literature. We include the research document as an Appendix to the Principles.

From the beginning of its work, the Task Force sought consensus on identifying the most important issues that should be highlighted and to identify the extent of agreement on the best ways to resolve those issues. It came as no surprise that the use of body-worn cameras has become a hot button issue as a result of law enforcement shootings, as well as shootings of law enforcement officers. America is now a nation in which people expect to see technology employed in aid of accountability and transparency.

The issues surrounding the use of body-worn cameras will and should be the subject of continuing discussion. Greater consensus might well emerge as

agencies experiment with differing technologies and policies and share their experiences among themselves and with the public.

We believe that we have identified issues that deserve attention and have highlighted some choices that law enforcement agencies must make. We have chosen not to address some issues, especially those that are extremely technical in nature or that are deeply in flux -- such as the optimal choice of equipment and most economical ways to deploy equipment and store recordings.

The issues that we addressed and that will continue to challenge law enforcement agencies and all those with a stake in the use of body-worn cameras span the spectrum of labor law, privacy, criminal discovery, and a host of legal questions. The relative newness of the technology and the breadth of the issues mean that it is likely to take some time to develop a broad consensus on the most difficult questions.

We trust that these Basic Principles will assist interest parties as they move forward in endeavoring the fairest, most efficient, and most effective ways to utilize body-worn cameras-

## **ABA TASK FORCE ON BODY-WORN CAMERA BASIC PRINCIPLES**

### **I. AUTHORITY AND INPUT**

1. Congress and State legislatures should consider whether to enact legislation regulating law enforcement entities use of body-worn cameras or providing standards to guide law enforcement entities in developing and implementing policies governing such use.

2. Legislatures and law enforcement agencies should seek broad input from all community stakeholders in the development of legislation and policies governing the use of body-worn cameras, including but not limited to community residents, elected officials, rank and file officers and their supervisors, union representatives, prosecutors, defense lawyers, community groups, civilian oversight authorities, and victim organizations.

3. Legislation should specify whether certain procedures are required of all law enforcement agencies and should authorize law enforcement entities to develop policies in an effort to make them as effective as possible.

### **II. GOALS**

4. Legislatures and law enforcement agencies should specify the goals they seek to achieve by utilizing body-worn cameras.

5. Among the goals that should be considered are: educating law enforcement officers and the community on the realistic expectations and limitations of body-worn cameras; increasing transparency in interactions between law enforcement and community members; increasing public understanding and confidence in law enforcement; improving training of law enforcement officers; gathering evidence of criminal activity; and assessing the adherence of officers to established rights, policies, and procedures.

### **III. TRAINING**

6. All officers who will use body-worn cameras should be trained on the proper use of the cameras before they are deployed. Training should focus on the proper mechanical use of the cameras (including how to download or upload

recordings) and the policies governing their use, including when they should be activated and whether they may ever be used when an officer is off duty.

7. Law enforcement entities should periodically review their training and policies regarding use of body-worn cameras, revise training and policy in light of practical experience with the cameras, and provide periodic retraining for officers who will wear the cameras.

8. Training should include instruction on the effect of stress on officers' ability to properly use body-worn cameras.

9. Training should also include instruction on proper handling and chain of custody protocols to assure that recordings satisfy evidentiary standards.

#### **IV. PROCEDURES**

##### **A. Notice**

10. Unless it is impractical to do so, law enforcement officers should inform individuals that encounters are being recorded by cameras (e.g., no time to give warnings before action is required).

##### **B. When to Record**

11. Unless exigent circumstances make it impractical or dangerous to activate a camera during an encounter or a service call, cameras should be active for any law enforcement-citizen encounter (other than undercover work) and call for service until that event has been concluded even if a suspect or participant requests that recording be stopped. Law enforcement agencies should clearly indicate which officers are required to use body-worn cameras, specify the training required of officers required to use such cameras, and indicate the penalties for a failure to adhere to agency recording requirements.

12. Cameras must be active during any encounter requiring a Fourth Amendment level of justification (reasonable suspicion or probable cause) until that event has been concluded even if a suspect or participant requests that recording be stopped, unless exigent circumstances documented in the officer's report make it impractical or dangerous to activate cameras.

13. During other events, officers should have discretion to honor requests that cameras be turned off, but an officer who chooses to honor a request should record an explanation for that decision, on camera, unless it is impractical to do so.

14. An officer should activate a camera when the officer is legally present at most locations, whether by virtue of consent or otherwise, but law enforcement agencies should develop policies that instruct officers not to activate cameras when certain privacy, First Amendment, or other identified societal interests outweigh the benefits of recording.

15. If an officer is present in a dwelling or other place based on consent of an occupant and the occupant demands that the officer either turn off the camera or leave, the officer should respect the demand and may not stay and continue recording unless the officer has a legal right to remain present and determines that the circumstances underlying the legal right to remain present should be recorded – e.g., where the officer decides that an arrest should be made or that contraband is visibly present.

### **C. Access to Recordings**

16. Suspects of a crime should be allowed, at a time when it will not interfere with an ongoing investigation, to access and view, in its entirety, any body-worn camera recording in which they are portrayed and that is relevant to the defense of themselves. Each law enforcement entity should determine whether it should seek statements from suspects, while respecting their constitutional rights, before they are permitted to access recordings and, if so, suspects should be permitted to supplement their statements after accessing recordings and to explain any variances between the original and supplemental statements.

17. Victims of a crime should be allowed, at a time when it will not interfere with an ongoing investigation, to access and view, in its entirety, any body-worn camera recording in which they are portrayed. Each law enforcement entity should determine whether statements should be obtained from victims before they are permitted to access recordings and, if so, victims should be permitted to supplement their statements after accessing recordings and to explain any variances between the original and supplemental statements.

18. Witnesses to a crime should be allowed, at a time when it will not interfere with an ongoing investigation, to access and view the portions of a body-worn camera recording that are relevant to their testimony. Each law enforcement entity should determine whether statements should be obtained from witnesses before they are permitted to access recordings and, if so, witnesses should be permitted to supplement their statements after accessing recordings and to explain any variances between the original and supplemental statements.

19. In addition to disclosure required or authorized by statute, procedural rules or constitutional decisions, all necessary personnel – such as defense counsel, prosecutors and civilian oversight authorities -- should be allowed to access any portions of a body-worn camera recording that their clients (if applicable) can access, and, in the case of a prosecutor, any portions of a recording that are relevant to prosecution.

20. Any time that an officer is required to prepare a report regarding a citizen encounter, the report should specifically indicate whether a recording was made and, if so, whether the officer reviewed the recording prior to completing the report. Each law enforcement entity should determine whether in cases of use of force, officers should be permitted to review the recording prior to writing a report, or providing a statement to investigators. If an officer is required to write a report before reviewing a recording, the officer should be permitted to view the recording after the report is prepared and to explain any variance between the original report and supplemental statement.

21. The recording officer's supervisor should be allowed to access and view the footage from a subordinate officer's body worn camera whenever the officer's supervisor knows or has reason to believe the incident involved the officer's use of force, there is a specific complaint about the officer or there is reason to believe misconduct may have occurred.

22. Supervisors should be allowed to access and view recordings to determine an officer's compliance with the applicable recording policy. Supervisors should also be allowed to access the recordings from an officer's body-worn camera for training purposes only after all investigations related to the recording have concluded. The officer portrayed in any recording that is used for training purposes should be given [thirty or other specified number] days' notice before the

recording is so used. When possible, it is preferable for a separate audit unit to review a recording rather than the officer's chain of command supervisor.

23. The presumption should be that the public and the media have access to recordings that relate to citizen complaints and use of force incidents unless the recordings are withheld for a reasonable period of time because they relate to an ongoing criminal investigation, an internal investigation, or administrative proceeding. The presumption should be that the public and the media do not have access to other recordings. Public records and Freedom of Information Act laws should be tailored to be consistent with these presumptions. Law enforcement agencies should have publicly stated policies as to presumptive limits on "a reasonable period of time" and procedures for permitting extensions of a time period that require a good faith basis for an extension. Either a law enforcement agency or a recording requester should be able to seek a judicial order that, for good cause shown, a recording must or may not be disclosed.

24. Law enforcement agencies should be deemed owners of recordings, and officers and employees of these agencies should be permitted to use recordings for law enforcement purposes, for other purposes approved by their agencies, or as evidence when recordings are relevant to judicial or administrative proceedings.

25. State public records law should contain a personal privacy exemption from disclosure, and any necessary legislative action should be taken to ensure that the exemption exists and covers such recorded events as nudity, exhibition of juveniles, or areas of privilege (for example, medical treatment in a hospital, etc., and possibly including things like exhibition of a corpse).

## **V. COSTS OF PRODUCTION**

26. There should be no charge to an individual or entity that is permitted to view a recording.

27. Unless the recording must be provided according to law (e.g., in the case of a criminal defendant entitled to discovery), an individual or entity requesting a copy of a recording that the individual or entity is entitled to access should bear the reasonable cost of reproduction and disclosure (which an agency should seek to keep as low as reasonably practicable)

## **VI. RETENTION OF RECORDINGS**

28. Recordings that are held as evidence are subject to existing laws.

29. Recordings that are the subject of a citizen's complaint or depict the use of force should be held for a minimum of [2-3 years or other specified period], but if litigation ensues they are subject to existing laws regarding retention of evidence.

30. All other recordings should be retained for a minimum of [3-6 months or other specified period] but should not be destroyed so long as a request for disclosure is pending. If a request for disclosure has been denied a recording should not be destroyed for 30 days following the denial to provide a requester an opportunity to seek a judicial order of disclosure. If such an order is sought, the recording should not be destroyed until the court rules that the record need not be disclosed and any appeals process is completed.

31. A law enforcement agency's retention policy should be publicly announced and readily accessible.

## **VII. CONTINUING REVIEW**

32. Law enforcement agencies should recognize the need for periodic review, monitoring, and adjustment of their policies on body-worn cameras and should anticipate the following:

a. the use of body-worn cameras will inevitably raise questions that are not readily anticipated before such cameras are in regular use, and neither these principles nor other principles and policies that are recommended based on existing information and experience will address all issues that require attention over time;

b. law enforcement agencies can benefit from considering the successes and failures of other agencies and from sharing their experiences with other agencies;

c. it is highly probable that new and better technology and equipment will become available and that the cost of equipment and storage might decline over time;

d. body-worn cameras will not be a panacea that resolves all community concerns about law enforcement conduct, but if properly used they can



demonstrate a resolve of transparency and accountability and serve the interests of all involved stakeholders.

## APPENDIX

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Organization Endorsement Statements and Disclaimers

The University of Chicago Law School's Kirkland & Ellis Corporate Lab  
Memorandum

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## **Organization Endorsement Statements and Disclaimers**

### ABA Section of Civil Rights and Social Justice (pending)

#### ABA Section of Litigation

The ABA Section of Litigation appreciates the opportunity to participate in the Body Worn Camera Task Force convened by the ABA Criminal Justice Section. We thank the other participants for sharing their views and expertise, and support many of the recommendations in the task force report, however, the areas where the views of the Section of Litigation differ from the ABA Criminal Justice Section report are:

**Paragraph 14:** We note that there may be applicable state or federal privacy laws that could dictate or impact the propriety of these policies, and as such we suggest that there ought to be consideration given at the legislative level.

**Paragraphs 16 -18:** We suggest incorporating language suggesting that those who view these tapes should be subject to some kind of confidentiality limitation, as appropriate under the circumstances of the case.

**Paragraph 27:** We suggest adding to the parenthetical cites to other sources of legal entitlement to these recordings: *Brady*, *Giglio*, and the *Jencks* Act. Our proposed revised parenthetical would read: “(e.g., in the case of a criminal defendant entitled to discovery and/or entitled to the material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), or the *Jencks* Act, 18 U.S.C. § 3500).”

### International Association of Chiefs of Police

The International Association of Chiefs of Police (IACP) participated in the Task Force discussions but does not endorse all of the recommendations presented in this report. IACP strongly encourages law enforcement and security agencies to collaborate with community stakeholders and victim advocate representatives to develop policies and programs on body-worn cameras that take into consideration victim/witness safety, privacy, and confidentiality and capture the needs of the diverse and specific populations in their jurisdictions.

### Major Cities Chiefs Association

Major Cities Chiefs Association does not endorse the recommendations of this report

### National District Attorneys Association

The National District Attorneys Association (NDAA) appreciates the opportunity to participate in the Body Worn Camera Task Force to address critical issues impacting prosecutors across the



country. NDAA supports many of the recommendations in the Task Force report, however, NDAA would like to emphasize that police departments must coordinate with their prosecutors regarding their body worn camera policies, including procedures for identifying and delivering evidentiary recordings and methods of data retention and storage. Special attention must be given to the costs imposed on a prosecutor's office associated with reviewing and redacting recordings, as well as preparing them for discovery and trial.

#### Police Executive Research Forum

PERF participated in the Task Force and endorses the recommendations of this report to the extent that they align with the 2014 PERF/COPS Office publication, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*.

## MEMORANDUM

February 7, 2016

**To:** Judge Bernice Donald and Professor Stephen Saltzburg  
ABA Criminal Justice Section's Task Force on Law Enforcement Body Camera

**From:** Nate Beaton, Tom Howland, Sten Jernudd, and Bill Kalas  
The University of Chicago Law School's Kirkland & Ellis Corporate Lab

**Re:** Policy Recommendations for Law Enforcement Body-Worn Cameras

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### INTRODUCTION

The memorandum that follows was prepared by The University of Chicago Law School's Kirkland & Ellis Corporate Lab. Professor Saltzburg, the Reporter, reviewed it and re-formatted it to make it easier for the Task Force to focus on specific recommendations. Professor Saltzburg also added some suggestions for the Task Force to consider. They are identified **[SAS]** and are in bold to differentiate them from the original Memorandum.

The use of body-worn cameras by police departments raises several important policy questions. Nearly all police departments plan to use body-worn cameras, but there is little consensus about how to use them.<sup>1</sup> This memorandum aims to synthesize the policy preferences and concerns of a variety of stakeholders (these stakeholders include, but are not limited to, the American Civil Liberties Union, Police Executive Research Forum, Labor Relations Information System, and various state legislatures) relating to the use of body-worn cameras by police departments and to provide guidance on any areas which might lead to conflict or controversy.

The ABA Criminal Justice Section's Task Force on Law Enforcement Body Camera (the "Task Force") asked the University of Chicago Law School's Kirkland & Ellis Corporate Lab (the "Corporate Lab"), with respect the five issues enumerated below, to research and analyze where consensus exists and provide details on different positions where it does not. In synthesizing these

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<sup>1</sup> Mike Maciag, *Survey: Almost All Police Departments Plan to Use Body Cameras*, Governing The States and Localities, January 2016, available at <http://www.governing.com/topics/public-justice-safety/gov-police-body-camera-survey.html>.

policy proposals, the Corporate Lab reviewed existing state statutes, model policies, position papers, news articles, and case studies that were published by various stakeholders.

Based on its analysis, the Corporate Lab provides policy recommendations regarding the following five issues:

- A. notice to citizens;
- B. when to record;
- C. placement of the body-worn cameras on officers;
- D. data retention; and
- E. access to recordings.

These policy recommendations represent the consensus of stakeholders (where there is consensus), and provides details on different positions where there is no consensus. Where there is no consensus, the Corporate Lab generally recommends the majority view and describes the position(s) of the minority view. In instances where no existing source addressed a given policy, the Corporate Lab exercises its personal judgment and provides the reasons why it supports the recommended policy.

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**[SAS]Preliminary Questions:**

1. **Who should develop and adopt the policy on body-worn cameras?**
  - a. **The Chief of Police or head of the department in consultation with police leadership and with the political bodies that oversee the department.**
2. **What should the involvement of line officers be?**
  - a. **Collective bargaining may require policy to be developed as part of renewing labor contracts.**
  - b. **Whether or not this is so, the department should make every effort to explain the purposes of utilizing body-worn cameras?**
3. **Where should the cameras be worn?**
  - a. **There may be trade-off between fully capturing events and officer safety.**
  - b. **Officer safety is a primary concern and should not be compromised.**
  - c. **Placement is an issue on which line officers should have a voice before a decision is made.**
  - d. **One issue not addressed in the Memorandum is whether a department should permit individual officers to make varying decisions as to placement.**
4. **When should the cameras be tested?**
  - a. **The proposal in MD states: Testing: Prior to beginning each shift, the assigned agency member shall perform a function test of the BWC in accordance with the manufacturer's recommendations and agency policy. Malfunctions: Upon discovering a BWC malfunction, agency members shall promptly report the malfunction to a supervisor or other appropriate authority in accordance with agency policy regarding malfunctions.**

**[A] Notice to Citizens**

1. Officers should be required, whenever feasible, to provide oral notice to people that they are being recorded by a body-worn camera.<sup>2</sup>

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<sup>2</sup> The American Civil Liberties Union (ACLU) suggests notifying people “wherever practicable.” Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All—Version 2.0*, American Civil Liberties Union, March 2015, available at [https://www.aclu.org/sites/default/files/assets/police\\_body-mounted\\_cameras-v2.pdf](https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf) at 5 (hereinafter “ACLU”). The Denver Office of the Independent Monitor similarly suggests notifying people “whenever possible.” *The Denver Police Department’s Body Worn Camera Pilot Project: A Focus on Policy and Lessons Learned*, The Denver Office of the Independent Monitor, March 2015, available at <https://www.denvergov.org/Portals/374/documents/BWC%20analysis%20summary%20Final.pdf> at 2 (hereinafter “Denver”). The Data & Society Research Institute (hereinafter “DRSI”) memorandum, Police Executive Research Forum (PERF) report, and the Leadership Conference on Civil and Human Rights all “highlight the need for notice.” Alexandra Mateescu, Alex Rosenblat and Danah Boyd, *Police Body-Worn Cameras—Working Paper*, Data & Society Research Institute, Feb. 2015, available at <http://www.datasociety.net/pubs/dcr/PoliceBodyWornCameras.pdf> at 13 (hereinafter “DRSI”); See also

2. In exigent circumstances, oral notice may not be practical without undue risk to the officer's or the public's safety.<sup>3</sup>
3. Because oral communication is not always practical or possible, officers should also wear easily-identifiable pins or stickers that notify citizens that the officer might be recording.<sup>4</sup>
4. The use of body-worn cameras should generally be limited to uniformed police officers.<sup>5</sup> However, the use of body-worn cameras should be permitted without notice for situations such as serving warrants, SWAT raids or other similar enforcement actions.<sup>6</sup>
5. If they are allowed to record (see Section [B](2)), officers should be required to provide express notice before recording inside private homes, or other places where there are greater expectations or legal protections of privacy, such as hospitals, mental institutions, and scenes of medical emergencies.<sup>7</sup> Recording in these places heightens the chance that officers will encounter private, stressful, extreme, and potentially embarrassing situations involving suspects, victims, and witnesses.<sup>8</sup>

## [B] Determining When to Record

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Lindsay Miller, Jessica Toliver, and Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* (Washington: Office of Community Oriented Policing Services, 2014), available at [http://www.policeforum.org/assets/docs/Free\\_Online\\_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf](http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf) at 14 (hereinafter "PERF"); *Letter to President's Task Force on 21<sup>st</sup> Century Policing*, The Leadership Conference on Civil & Human Rights, Jan. 1, 2015, available at <http://www.civilrights.org/advocacy/letters/2015/21st-century-policing.html>. PERF additionally states that "some agencies have found that announcing the camera is running promotes better behavior and defuses potentially confrontational encounters." PERF at 19. However, the San Diego Police Department's policy argues "private citizens do not have a reasonable expectation of privacy when talking with police officers during the scope of an officer's official duties...therefore, officers are not required to give notice they are recording." DRSI at 14 (citing *San Diego Police Department Procedure: Axon Body Worn Cameras*, San Diego Police Department, July 8, 2015, available at <http://www.sandiego.gov/police/pdf/2015/dp149.pdf> at 4 (hereinafter "San Diego"))).

<sup>3</sup> See ACLU at 6.

<sup>4</sup> The ACLU suggested that "one possibility departments might consider" is that officers wear a pin or sticker saying "lapel camera in operation" or words to that effect." ACLU at 5. DRSI suggested that cameras could have front-facing playback screens. See DRSI at 13 (citing *Body Worn Video Cameras*, Reveal Media, accessed February 6, 2015, available at <http://revealmedia.com/>).

<sup>5</sup> See ACLU at 5.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.* at 6. Places in which there is a heightened expectation of privacy vary by state. Express notice should generally be required before recording in such places. However, "many law enforcement agencies have taken the position that officers have the right to record inside a private home as long as they have a legal right to be there." PERF at 15.

<sup>8</sup> See ACLU at 2, 5, 6; PERF at 11.

1. Officers should be required to activate their body-worn cameras during law enforcement and investigative encounters.
2. Body-worn cameras should not be engaged continuously, in order to protect officers' privacy when acting in a non-law enforcement capacity, such as when officers discuss precinct politics in the squad car.<sup>9</sup>
3. However, officers should have discretion to deactivate cameras in certain sensitive circumstances, such as in speaking to certain victims, witnesses, and informants. **[SAS: MD has a proposed rule, "Prohibited Activation." A law enforcement officer shall not activate a camera to record: 1. Agency personnel during routine administrative activities; or 2. Non-work related personal activity.]**
4. Officers should be required to document and provide reasons for instances when they do not record.<sup>10</sup>
5. When practicable, an off-site supervisory officer should have the authority to approve or disapprove<sup>11</sup> of an officer's decision to deactivate his or her body-worn camera. Department policies and officer guidance should clearly delineate the circumstances under which recording is mandatory and departments and states should adopt policies to ensure compliance.

## I. Officers Should Be Granted Discretion Not to Record in Certain Situations

6. Officers should be required to activate their body-worn cameras when responding to a call for service or at the initiation of any law enforcement or investigative encounter between a police officer and a member of the public.<sup>12</sup>

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<sup>9</sup> See ACLU at 3.

<sup>10</sup> See Denver at 2.

<sup>11</sup> Department resources permitting, off-site supervisory officers could have the ability to engage or disengage body-worn cameras. Having off-site ability to engage or disengage body-worn cameras could better ensure compliance but poses a risk to legitimate officer privacy, when shooting the breeze with colleagues. See ACLU at 3. The assumption that officers should be treated as "professionals" that motivates the discretionary recording recommendation may be at odds with an off-site controlled body-worn camera. See PERF at vi ("This discretion is important because it recognizes that officers are professionals").

<sup>12</sup> See *A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement*, American Civil Liberties Union, March 2015, available at [https://www.aclu.org/files/field\\_document/aclu\\_police\\_body\\_cameras\\_model\\_legislation\\_may\\_2015.pdf](https://www.aclu.org/files/field_document/aclu_police_body_cameras_model_legislation_may_2015.pdf) (hereinafter "Model Act") at 1. Many police departments have adopted policies limiting mandatory recording to "calls for service and law enforcement-related contacts." See PERF at 22. Cf. *Model Act for Regulating the Use of Body-Worn Cameras by Law Enforcement*, International Municipal Lawyers Association, available at <http://www.aele.org/imla-bwc.pdf> at 6 (limiting recording exclusively to calls for service or investigative encounters) (hereinafter "IMLA"). PERF describes the benefits of allowing discretion not to record investigative encounters for certain witnesses or informants that otherwise may not cooperate with police officers. See *id.* at 23.



7. Department policies should delineate when officers are required to activate their body-worn cameras.<sup>13</sup>
8. Department policies should expressly define law enforcement and investigative encounters and officers should be provided adequate guidance and training on when recording is mandatory. Law enforcement encounters and investigative encounters should be defined to include traffic stops, arrests, searches, interrogations, and pursuits.<sup>14</sup>
9. Recording should not cease until: (i) the event has concluded, (ii) victim or witness contact has concluded, (iii) all persons stopped have been released, or (iv) custody of any arrestee has been transferred to a detention facility.<sup>15</sup>
10. Recording certain sensitive situations, including police interactions with witnesses concerned about retaliation or victims of sensitive crimes such as sexual assault, may be particularly harmful to police-community relations and pose a heightened risk to the privacy of members of the public.<sup>16</sup> In these situations, officers should be given discretion in determining whether to activate or deactivate their body-worn cameras.<sup>17</sup>
11. The situations in which discretion not to record is permitted should be expressly described in department policies.
12. Officers should be provided adequate guidance on when recording is discretionary.
13. Officers should be required to document that they did not record and their reasons for doing so when they elect not to record.<sup>18</sup>
14. When practicable, officers should describe the circumstances to an off-site supervisor, with authority to approve or disapprove the decision not to record.

## **II. Officers Should Prohibited from Recording in Situations where there is a Reasonable Expectation of Privacy**

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<sup>13</sup> See Denver at 2.

<sup>14</sup> See ACLU at 4; PERF at 22.

<sup>15</sup> See *Model Body-Camera Policy*, Labor Relations Information System, September 2014, available at <https://www.lris.com/2014/09/12/model-body-camera-policy/> (hereinafter “LRIS”) at 3; Denver at 2.

<sup>16</sup> See ACLU at 3-4; PERF at 23; *Police Body Camera Policies: Privacy and First Amendment Protections*, Brennan Center for Justice at New York University School of Law, February 2016, available at <https://www.brennancenter.org/analysis/police-body-camera-policies-privacy-and-first-amendment-protections> (hereinafter “NYU”) (NYU surveyed 24 U.S. city policies on the limits of recording in sensitive situations. Seven cities did not specify any limit. .

<sup>17</sup> See ACLU at 3-4; PERF at 23; NYU (cities were split evenly as to whether an officer should be required to stop recording when a victim or witness or victim requests not to be recorded or should have discretion to do so. Since ACLU and PERF both do not require officers to stop recording, however, and because certain requests for officers to stop recording could preclude the recording of valuable evidence, this decision should be discretionary).

<sup>18</sup> See LRIS at 3; See generally PERF at 14.

15. Officers should be prohibited from recording in places where a reasonable expectation of privacy exists, such as locker rooms, dressing rooms, or restrooms.<sup>19</sup>
16. Officers should, however, be permitted to record in private residences without consent if there is a lawful reason for the officer(s)' presence.<sup>20</sup>

### **III. Ensuring Compliance**

17. Officers should be subject to supervisory audits, and those officers who fail to comply with department policies on the activation of body-worn cameras should be subject to internal disciplinary action.<sup>21</sup>
18. When an officer fails to record or tampers with a body-worn camera, states should adopt rebuttable evidentiary presumptions on behalf of criminal defendants and civil plaintiffs suing the government, police departments, and/or officers for damages based on officer misconduct.<sup>22</sup>
19. States should not, however, adopt rebuttable evidentiary presumptions against police officers in criminal proceedings against officers under these circumstances.<sup>23</sup>

### **[C] Placement of Body-Worn Cameras**

1. A body-worn camera should be worn either (i) on the officer's lapel on the officer's shooting side or (ii) on the officer's torso, in a position designed to produce an effective recording.<sup>24</sup>
2. With placement on an officer's head, there is concern about officer safety if a suspect attempts to destroy the camera, as well as a general concern that the headbands used

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<sup>19</sup> NYU (seventeen cities prohibited recording in these areas, while seven cities did not provide any express limits on recording).

<sup>20</sup> NYU (NYU found that six cities allowed recording in private residences as long as there is consent or another lawful reason for the officer(s)' presence. Only one city, Seattle, required consent for an officer to record in a private residence).

<sup>21</sup> *See* ACLU at 4.

<sup>22</sup> *See id.*; IMLA at 11-12.

<sup>23</sup> *See* ACLU at 4; IMLA at 11-12. No policy suggests adopting a rebuttable presumption against officers who fail to record or tamper with a body-worn camera recording. This would create too high of a risk of false criminal complaints against officers and would be difficult to reconcile with the beyond a reasonable doubt standard of proof.

<sup>24</sup> There is no consensus on where body-worn cameras should be placed, and the topic is not addressed by most model policies and proposals. *See, e.g.*, Model Act; IMLA. When addressed, placement on the officer's torso or lapel are the most commonly accepted positions for body-worn cameras. With placement on an officer's head, there is concern about officer safety if a suspect attempts to destroy the camera, as well as a general concern that the headbands used to attach the cameras might cause persistent discomfort. *See* PERF at 39.

to attach the cameras might cause persistent discomfort.<sup>25</sup> The torso is the most popular placement choice among police departments.<sup>26</sup>

## [D] Data Retention

1. Body-worn camera recordings should be categorized by their relevance to an investigation.
2. Departments should retain body-worn camera data for longer periods when such data (i) are evidentiary, (ii) depict events which are the subject or a complaint or investigation, or (iii) depict the use of force or incidents leading to detention or arrest.
3. Departments should develop technological safeguards to prevent unauthorized access to or tampering with body-worn camera recording data.

### I. Categorizing Data for Retention

4. Departments should categorize data from body-worn cameras by such data's relevance to an investigation, with relevant data having a longer deletion schedule than irrelevant data. Relevant data should be "flagged" and retained for a longer period of time than irrelevant, "unflagged" data.<sup>27</sup> As a proxy for relevance, departments should automatically flag data when such data contains footage of any incident that involves the use of force, leads to detention or arrest, or where either a formal or informal complaint has been registered.<sup>28</sup> Data categorization is already a common practice among many police departments.<sup>29</sup>

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<sup>25</sup> See, e.g., *id.*; Michael D. White, *Police Officer Body-Worn Cameras: Assessing the Evidence*, Washington, DC: Office of Community Oriented Policing Services, 2014, available at <https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf> at 29 (hereinafter "DOJ"). With placement on an officer's glasses or sunglasses, the same concerns as the head apply, as well as the practical difficulty of always wearing glasses. PERF at 39; LRIS at 3.

<sup>26</sup> See *id.* PERF prefers placement on the torso because a body-worn camera placed on an officer's lapel may be blocked or displaced when an officer raises his or her arms. See *id.* Placement on the torso also captures a view similar to what the officer sees whenever he or she is looking forward, which is beneficial. However, a camera on the lapel will often do the same. Placing the body-worn camera on the officer's shooting-side lapel also affords a clearer view of the events that occur during shooting incidents, which is a very important benefit. See *id.*

<sup>27</sup> "Flagged" data is data that is relevant to a police investigation, external or internal. Synonyms for "flagged" data are "evidentiary" data and "categorized" data.

<sup>28</sup> See *id.*

<sup>29</sup> PERF notes that "[a]lthough protocols vary by department, footage is typically categorized as either 'evidentiary' or 'non-evidentiary.'" *Id.* at 43. Evidentiary video involves footage of an incident or encounter that could prove useful for investigative purposes, such as a crime, an arrest or citation, a search, a use of force incident, or a confrontational encounter with a member of the public, while non-evidentiary video involves footage that does not necessarily have value to aid in an investigation or prosecution. See *id.* at 17. The ACLU recommends that "[a]ny subject of a recording should be able to flag a recording, even if not filing a complaint or opening an investigation." ACLU at 6.

5. The most common retention period for non-evidentiary data is 60 to 90 days.<sup>30</sup> There is a significant disparity<sup>31</sup> among data retention periods for individual police departments, and police-centric stakeholders do not take a particular stance on the optimal data retention period.<sup>32</sup>
6. Nevertheless, both flagged and unflagged data should be retained for as short a period as possible, given the significant cost of data retention.<sup>33</sup>
7. For those departments whose data retention schedules do not account for body-worn cameras, a sound policy recommendation is to define retention times by how long it typically takes for all community members to file complaints or submit requests for footage.<sup>34</sup>

## II. Best Practices for Data Retention

8. Data storage systems should include technical safeguards to properly categorize and classify body-worn camera data.<sup>35</sup>
9. In addition, storage systems should be designed to prevent data tampering, deleting, and copying,<sup>36</sup> and to promote public transparency regarding data storage and access.<sup>37</sup>

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<sup>30</sup> PERF does not recommend a specific period of time for either “flagged” or “non-flagged” data. *See* PERF at 17. Instead, the report simply notes that police departments should both comply with state law and ensure that retention times are made known to the public. *Id.* Notably, the PERF report also provides examples of departments who are outliers on both ends of the spectrum. For example, Fort Collins, Colorado, discards footage after seven days if there is no citizen contact recorded and after 30 days if contact is made but no enforcement action is taken. In contrast, Albuquerque, New Mexico, retains non-evidentiary video for a full year. *See id.* at 17.

<sup>31</sup> DSRI found a large disparity among police departments, concluding that “there are few clear policy trends amongst police departments using body-worn cameras,” noting that “[r]etention times for the uncategorized video range from 14 days in Grand Forks North Dakota to two years in New Orleans.” DSRI at 16.

<sup>32</sup> In the same manner as PERF, the International Association of Chiefs of Police (IACP) is mostly silent on the issue of data retention, leaving the issue to the deference of state record retention laws. *See* “Body Worn Cameras Model Policy,” International Association of Chiefs of Police, April 2014, *available at* <http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/BodyWornCamerasPolicy.pdf> at 2 (hereinafter “IACP”). However, one notable exception is that the IACP does stipulate that in capital punishment prosecutions, recordings should be kept until “the offender is no longer under control of a criminal justice agency.” *See id.* at 2

<sup>33</sup> *See infra* at N. 17

<sup>34</sup> *See* PoliceOne Staff, “3 Key Considerations for Creating Your Agency’s Retention Policy,” *available at* <https://www.policeone.com/police-products/body-cameras/articles/8441729-3-key-considerations-for-creating-your-agencys-retention-policy/>.

<sup>35</sup> *See id.*

<sup>36</sup> *See* PERF at 43.

<sup>37</sup> *See id.* at 44.

10. Back-end systems should be configured to retain data, delete such data after the relevant retention period expires, prevent deletion by individual officers, and provide reliable audit information.<sup>38</sup>
11. Such systems should feature immutable audit logs, a system architecture that prevents data copying, and certain safeguards against video deletion (in whole or in part).<sup>39</sup> Access to body-worn camera data should require authorization by a senior officer and all access should be audited to ensure that only authorized users are accessing the data for authorized purposes.<sup>40</sup>

### III. Cost of Data Retention

12. Data storage and costs can be a “major stumbling block” to the successful implementation of a body-worn camera program.<sup>41</sup> The longer body-worn camera data must be retained, the higher the cost of retaining such data.
13. One way to alleviate the cost of data retention is to utilize cloud services.<sup>42</sup> “Savings estimates, when comparing cloud storage to an on-premises solution, with servers, labor costs and networks, can range between 30 and 60 percent, according to industry analysts.”<sup>43</sup>
14. Because cloud storage carries some security and privacy risks,<sup>44</sup> departments should invest in cloud storage that satisfy the requirements of Federal Bureau of Investigation Criminal Justice Investigation Services Division.<sup>45</sup>

### [E] Access to Body-Worn Camera Recordings

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<sup>38</sup> See ACLU at 7.

<sup>39</sup> See *id.*

<sup>40</sup> See IACP at 2.

<sup>41</sup> Tod Newcombe, “Body Worn Camera Data Storage: The Gorilla in the Room,” Gov’t Tech., September 2015, *available at* <http://www.govtech.com/dc/articles/Body-Worn-Camera-Data-Storage-The-Gorilla-in-the-Room.html>.

<sup>42</sup> Large vendors, such as Microsoft, now offer cloud storage that meets FBI requirements. See *id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Roger A. Grimes, “The 5 Cloud Risks You Have to Stop Ignoring,” Info World, Mar. 19, 2013, *available at* <http://www.infoworld.com/article/2614369/security/the-5-cloud-risks-you-have-to-stop-ignoring.html>. Body-worn cameras that are linked to the internet may also be hacked to reveal the location of officers in the field, causing safety risks. See Shirley Lee, “Cloud Control: The Trouble with Body Cameras,” The Wire, Sept. 24, 2014, *available at* <http://www.thewire.com/technology/2014/09/cloud-control-the-trouble-with-body-cameras/379068/>.

<sup>45</sup> See *Criminal Justice Information Services (CJIS) Security Policy*, Oct. 6, 2015, FBI, *available at* <https://www.fbi.gov/about-us/cjis/cjis-security-policy-resource-center>. Cloud service providers that meet these requirements include Microsoft Azure Government and CJIS Solutions.

1. States **[SAS: Should departments have any flexibility or should there be a binding stae rule?]**departments should limit access to body-worn camera recordings to specific individuals in particular circumstances. Whenever recordings are made available to the public, all individuals except criminal suspects and officers who are not working undercover should have their identities redacted.

## I. Parties with Access to Body-Worn Camera Recordings

2. The following parties should be granted access to body-worn camera recordings upon request under the following circumstances:
  - i. **the recording officer** should be allowed to view the footage from his or her own body-worn camera at any time, including prior to giving a report about an incident.<sup>46</sup>
  - ii. **the recording officer's supervisor** should be allowed to view the footage from a subordinate officer's body-worn camera only when there is either a specific complaint about the officer or an incident that the officer's supervisor has reason to believe involved the officer's use of force or other misconduct.<sup>47</sup> Supervisors should be allowed to access recordings to determine an officer's compliance with

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<sup>46</sup> See PERF at 29-30. Some organizations believe that officers should not be allowed to access recordings from their body-worn cameras before giving a statement because it could prevent them from giving an accurate assessment of how they felt during the incident by giving them an opportunity to craft a story based on what the footage depicts rather than how they felt during the incident. See, e.g., *Watching the Watchmen: Best Practices for Police Body Cameras*, The Cato Institute, October 2015, available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa782.pdf> (hereinafter "Cato"); *Body-Worn Cameras in NYC: An Assessment of NYPD's Pilot Program and Recommendations to Promote Accountability*, New York City Department of Investigation, July 2015, available at <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf> (hereinafter "NYPD"). However, the vast majority of organizations believe that officers should be allowed to access these recordings, generally at any time. See, e.g., PERF at 62; LRIS at 3; IMLA at 10; *Body Worn Video Procedures*, Chief of Police of the Los Angeles Police Department, April 2015, available at [http://www.aele.org/lapd--bwc\(proposed\).pdf](http://www.aele.org/lapd--bwc(proposed).pdf) (hereinafter "LAPD"). According to the majority view, viewing a recording prior to giving a report enhances the officer's ability to give an accurate report by allowing him or her to view important details related to the encounter. It allows the officer to remember the events more clearly since the officer's memory may be diminished by stress and other factors. This accuracy also reinforces the officer's credibility.

<sup>47</sup> The majority view is that a supervisor should not be allowed to review recordings for the purpose of evaluating an officer's performance. See, e.g., PERF at 25; LRIS at 4. Cf. NYPD at v. This reflects concerns over officer privacy and independence, and allows officers to independently perform their jobs without the fear of being watched. Such a policy prevents supervisors from conducting "fishing expeditions" to discover policy violations and conducting performance reviews.

the applicable recording policy.<sup>48</sup> Supervisors should also be allowed to access the recordings from an officer's body-worn camera for training purposes, but only after all investigations related to the recording have concluded.<sup>49</sup> The officer portrayed in any recording that is used for training purposes should be given thirty days' notice before the recording is released.<sup>50</sup> When possible, it is preferable for a separate audit unit to review a recording rather than the officer's chain of command supervisor.<sup>51</sup>

- iii. **suspects of a crime** should be allowed to access and view any recording in which they are portrayed.<sup>52</sup>
- iv. **victims of a crime** should be allowed to access any body-worn camera recording in which they are depicted.<sup>53</sup>
- v. **witnesses to a crime** should be allowed to access the portions of a body-worn camera recording that are relevant to their testimony.<sup>54</sup>
- vi. **attorneys, defense counsel, and prosecutors** should be allowed to access any portions of a body-worn camera recording that their clients (if applicable) can

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<sup>48</sup> See PERF at 25; LRIS at 34.

<sup>49</sup> See PERF at 25; LRIS at 34. Using the recordings from body-worn cameras for training purposes is another positive byproduct of a body-worn camera policy, and access to recordings should be granted freely to officers within a police department.

<sup>50</sup> See LRIS at 4. This policy provides gives the officer involved in the recording an opportunity to contest any release of the video for training purposes and make requests for redaction, if desired.

<sup>51</sup> See PERF at 25-26. This policy ensures that officer behavior is monitored but that an officer's standing with a chain of command supervisor is not influenced in any way by body-worn camera recordings.

<sup>52</sup> The view that any suspect accused of a crime should be allowed to access any body-worn camera recording related to the events in question is unanimous. See, e.g., *id.* at 39; ACLU at 7; IMLA at 8; DOJ at 9. This is also consistent with the nearly unanimous view that any person recorded by a body-worn camera, regardless of whether they are accused of a crime, be allowed access to the recording. See, e.g., ACLU at 7; IMLA at 8; DOJ at 41.

<sup>53</sup> This is consistent with the general view that any person depicted in a body-worn camera recording should have the right to view the recording. See generally, e.g., PERF at 16, 39; LRIS at 4; ACLU at 7; DOJ at 32; Fla. Stat. § 943.1718 (2015).

<sup>54</sup> See DOJ at 41. While there is some concern that a witness's testimony could simply be a narration of the recording rather than an account of the witness's recollection of the events, it is viewed as overall beneficial for a witness to be allowed to review body-worn camera recordings to augment his or her memory of the events. Only allowing the witness to view portions of the recording relevant to his or her testimony minimizes privacy concerns.

access, and, in the case of a prosecutor, any portions of a recording that are relevant to the prosecution.<sup>55</sup>

- vii. **other subjects portrayed in a body-worn camera recording** should be allowed to access the portions of a body-worn camera recording in which they are portrayed.<sup>56</sup> Jurisdictions should adopt procedures for an individual to request such a recording and penalties for any individual who fraudulently attempt to access recordings of which he or she is not a subject.<sup>57</sup>
  
- viii. **the media and members of the general public** should be allowed to access body-worn camera recordings upon request when (1) all persons portrayed in the recording have consented; or (2) the recording has been “flagged”<sup>58</sup> and all appropriate redactions have been made.<sup>59</sup> Flagged recordings, however, should remain confidential from the public when they are taken inside of a private residence, inside a mental health care or social services facility, taken in a place where a person would have a reasonable expectation of privacy, taken at the scene of a medical emergency, or depicting a minor.<sup>60</sup>

## II. Redaction of Body-Worn Camera Recordings

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<sup>55</sup> See PERF at 16, 39; ACLU at 7; Fla. Stat. § 943.1718 (2015).

<sup>56</sup> This is consistent with the general view that any person depicted in a body-worn camera recording should have the right to view the recording. See generally, e.g., PERF at 39; LRIS at 2; ACLU at 7; DOJ at 41; Fla. Stat. § 943.1718 (2015).

<sup>57</sup> This policy will help to minimize problems such as cost and privacy issues that may otherwise result from citizens falsely claiming that they were depicted in a body-worn camera recording.

<sup>58</sup> Footage should be flagged for arrests, use of force incidents, detentions, and any other events related to or likely to be related to a formal or informal complaint. See ACLU at 6. Some commentators believe that any subject of a recording should be able to automatically flag the recording. See, e.g., *id.* However, since such a rule could potentially be abused to release large amounts of innocent conduct, requests to flag a video from subjects should be allowed, but reviewed by police departments.

<sup>59</sup> The dominant majority view is that “unflagged” recordings should not be accessible to the public. See, e.g., ACLU at 7. Some laws allow access to all recordings that are not on private property, including unflagged recordings, but there are privacy and cost concerns associated with this rule. See, e.g., Fla. Stat. § 943.1718 (2015). Body-worn camera policies would be very expensive due to redaction expenses if all recordings could be released as public records. Proponents of such a rule say that the purpose of a body-worn camera policy is transparency, but releasing all flagged videos accomplishes transparency on all potentially objectionable police conduct. There is a significant trend toward limiting public access to recordings. See Sarah Breitenbach, *States Grapple with Public Disclosure of Police Body-Camera Footage*, The Pew Charitable Trusts, September 2015, available at <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/09/22/states-grapple-with-public-disclosure-of-police-body-camera-footage> (the article contains a U.S. survey, which found that 10 states had passed laws limiting public access to body-worn camera footage, 21 states had proposed but not passed a law, and the remaining 19 states had yet to propose such a law).

<sup>60</sup> See, e.g., Fla. Stat. § 943.1718 (2015).



3. All persons except police officers and criminal suspects depicted in body-worn camera recordings generally should have their identity redacted when those recordings are made accessible to parties other than law enforcement.<sup>61</sup> Undercover officers should also be redacted.<sup>62</sup>
4. When a third party, such as media or a member of the general public, requests access to a body-worn camera recording, that third party should bear the costs of making the necessary redactions.<sup>63</sup>

## [F] Conclusion

According to the weight of authority from stakeholders' body-worn camera policy proposals, the Task Force should propose the following body-worn camera policy guidelines: (i) Officers should generally be required to notify people, whenever practicable, that they are being recorded; (ii) Officers should be required to activate their body-worn cameras for law enforcement or investigative encounters and when responding to a call for service, except when dealing with witnesses or victims fearing retaliation, or with victims of certain sensitive crimes. Failure to record should be documented by the officer and closely monitored by police departments; (iii) Officers should be required to wear their body-worn cameras on either their shooting-side lapel or torso, in a position high enough to produce an effective recording; (iv) Access to body-worn camera recordings should be limited to the recording officer, suspects, victims, prosecutors, defense counsel, and subjects portrayed in recordings, and their legal counsel or next of kin. The recording officer's supervisor, a police

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<sup>61</sup> There are two main concerns on the subject of redaction: cost and privacy. Redaction is very costly, and can take a very long time. For example, it took one police department over 30 hours to make redactions for three body-worn camera recordings that were 60-120 minutes each. *See* Cato at 11. There is a consensus that victims and witnesses should have their identities redacted from body-worn camera recordings. *See, e.g.* Cato at 13. This protects their identities and dignity and makes them much more likely to testify. A more contentious area is whether bystanders who are recorded by body-worn cameras should have their identities redacted. Some organizations argue that anyone who is interacting with law enforcement has no expectation of privacy and implicitly consents to being recorded. *See, e.g.*, San Diego at 4 ("Private citizens do not have a reasonable expectation of privacy when talking with police officers during the scope of an officer's official duties, even when the contact is in a private residence"). However, this would make body-worn cameras less popular as a policy by creating a sense of constant surveillance. Therefore, it is best to redact these individuals' identities. While this will create some costs, this is mitigated by a policy that only grants access to recordings upon request and makes parties who were not involved in the recording pay for the costs of redaction. Even police organizations recognize that law enforcement agencies should limit privacy exceptions to avoid any suspicion that police officers are withholding information from the public, so police officers' identities should not be redacted. *See generally* PERF at 38. Redaction is not limited to third-party faces but may include other identifiers, such as license plates.

<sup>62</sup> *See generally* LRIS at 4.

<sup>63</sup> This will significantly mitigate the costs that the government incurs in redacting body-worn camera recordings while still allowing them to be freely available. *See* Cato at 12. A third party is any person who is not: the officer whose body-worn camera made the recording, the subject of the recording, a victim, a witness, or the representative or next of kin of such a person.

department auditor, witnesses in a proceeding, and the media and general public should also be allowed access to recordings under specific, limited circumstances; and (v) Body-worn camera data should be categorized, with evidentiary data retained for a longer period than non-evidentiary data. Police departments should use technological safeguards to protect access to recordings and prevent tampering.