

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.
THE CINCINNATI ENQUIRER, et al.,

Relators,

v.

JOSEPH T. DETERS, HAMILTON
COUNTY PROSECUTING ATTORNEY,

Respondent.

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Case No. 2015-1222

Original Action in Mandamus

BRIEF OF *AMICUS CURIAE*
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
IN SUPPORT OF RELATORS

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INTRODUCTION AND STATEMENT OF FACTS

This case concerns whether videos recorded by police body-worn cameras ("BWC" or "bodycams"), a technology designed to increase transparency and trust in law enforcement, can be withheld from the public under Ohio's Public Records Act, R.C. 149.43. The Reporters Committee for Freedom of the Press (hereinafter, the "Reporters Committee") submits this brief as *amicus curiae* in support of Relators to urge this Court to hold that bodycam videos, like other public records, must be disclosed upon request, and to emphasize the importance of ensuring press and public access to bodycam videos under the Public Records Act.

A rash of police shootings that began with the killing of Michael Brown in Ferguson, Missouri in August of 2014, spurred calls around the country for greater law enforcement transparency and accountability. In response to that national outcry, a growing number of state and local law enforcement entities have adopted body-worn camera technology in an effort to create a more objective record of officers' interactions with members of the public. Videos from police bodycams clearly fall within the definition of a "public record" under Ohio's Public Records Act because they are created by public agencies and document the operations and activities of their employees. *See* R.C. 149.43(A)(1); R.C. 149.011(G). That such videos are the result of the adoption of new technology by government entities does not alter their status as public records. Indeed, the General Assembly has mandated that the medium that government records are stored on does not affect the public's right to know. *See id.*

Respondent has argued, incorrectly, that all bodycam videos may be withheld pursuant to the investigatory work product exemption found in Section 149.43(A)(2)(c) of the Public Records Act. This Court has repeatedly held, however, that factual information that is routinely gathered by law enforcement personnel, such as that included in incident reports, must

be disclosed upon request. *See, e.g., State ex rel. Beacon Journal Publ. Co. v. Maurer*, 91 Ohio St.3d 54, 741 N.E.2d 511 (2001). Bodycam videos are simply a more accurate, more objective record of the facts of a situation encountered by an officer and—like incident reports—should be released upon request. If a particular bodycam video truly contains sensitive information that may be withheld pursuant to an applicable exemption, then the proper course of action under the Public Records Act is to redact only that information and release the rest of the record.

This State's recognition of the importance of public access to government records began almost two hundred and thirty years ago with the passage of the Northwest Ordinance. *See An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, 1 Stat. 52 (1787) (requiring the appointment of a secretary whose duties included keeping and preserving public records). That longstanding tradition should not be abandoned simply because, as a result of new technology, public records are as likely to be in video or electronic form as they are to be in paper form. As this Court has stated: "The rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people" *Dayton Newspapers, Inc. v. Dayton*, 45 Ohio St.2d 107, 109, 341 N.E.2d 576 (1976).

The purpose of using police body-worn camera technology is to ensure law enforcement accountability to the public. This Court should reject Respondent's invitation to craft a new exemption to the Public Records Act for bodycam videos that would make them unavailable to the press and the public, and prevent them from serving that purpose. For all the reasons set forth herein, the Reporters Committee respectfully urges this Court to grant Relators' writ and hold that bodycam videos are public records that must be disclosed upon request under Ohio's Public Records Act.

ARGUMENTS IN SUPPORT OF RELATORS' PROPOSITIONS OF LAW

Reporters Committee adopts and incorporates by reference the Propositions of Law of Relators, and further provides the following arguments in support of those Propositions.

I. POLICE BODYCAM VIDEOS ARE PUBLIC RECORDS THAT MUST BE DISCLOSED PURSUANT TO THE PUBLIC RECORDS ACT

A. Bodycam Videos Meet the Definition of a Public Record

The definition of a "public record" under Ohio law is broad. It includes all "records kept by any public office." R.C. 149.43(A)(1). "Records" are, in turn, defined as

"any document, device, or item, *regardless of physical form or characteristic*, including an electronic record . . . created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office."

R.C. 149.011(G) (emphasis added). The Ohio General Assembly, like the legislatures of many other states, foresaw that public records might take a variety of forms on different mediums, and recognized that the public's right to information about government operations should not turn on the information's physical form, or how the information is maintained. *See State ex rel.*

Margolius v. City of Cleveland, 62 Ohio St.3d 456, 460, 584 N.E.2d 665 (1992) (recognizing General Assembly's intent to provide broad access to public records).

Ohio courts have faithfully followed this intent, holding that as technology advances so too does the public's right to government information stored on or created using that technology. *See, e.g., Lorain Cty. Title Co. v. Essex*, 53 Ohio App.2d 274, 373 N.E.2d 1261 (9th Dist.1976) (microfilm); *Margolius*, 62 Ohio St.3d 456 (magnetic computer tapes); *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686 (email). Video

recordings, for example, have been held to be public records by this Court since at least 1986. *State ex rel. Harmon v. Bender*, 25 Ohio St.3d 15, 494 N.E.2d 1135 (1986) (video of trial proceedings).

Consistent with the broad mandate of the Public Records Act, these cases make clear that the advent of a new form of informational medium, like bodycam videos, does not inhibit the public's right to access government records. Absent any action from the General Assembly and the Governor to the contrary, O.H. CONST. Art. II §§ 15-16, bodycam videos cannot be accorded disparate treatment under the Public Records Act. They are records created by public institutions that document the activities and operations thereof, and accordingly belong to the people of this State. *Dayton Newspapers*, 45 Ohio St.2d at 109.

B. Bodycam Videos are Not Confidential Law Enforcement Records.

While the definition of a public record under Section 149.43(A)(1) is broad, there are a limited number of statutory exclusions, R.C. 149.43(A)(1)(a)-(cc), that must be narrowly construed in favor of public access. *See Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, ¶ 7 (the Public Records Act "is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records") (citation omitted). One such exclusion, asserted here by Respondent, is for "confidential law enforcement investigatory records" the release of which would create a "high probability of disclosure of . . . [s]pecific confidential investigatory techniques or procedures or specific investigatory work product." R.C. 149.43(A)(1)(h). According to Respondent, all bodycam videos fall within this exemption.

This Court has made clear, however, that the investigatory work product exemption of Section 149.43(A)(2)(c) is limited in scope to material that goes beyond the routine documentation of the facts of a situation. The exemption only applies to records that show:

"an investigator's deliberative and subjective analysis, his interpretation of the facts, his theory of the case, and his investigative plans. The exception does *not* encompass the *objective facts and observations he has recorded.*"

State ex rel. Nat'l Broad. Co. v. City of Cleveland, 38 Ohio St.3d 79, 83-84, 526 N.E.2d 786 (1988) (emphasis added). For example, incident reports prepared by law enforcement officers that describe an event, including narrative statements, are not investigatory work product and must be disclosed. *State ex rel. Beacon Journal Publ. Co. v. Maurer*, 91 Ohio St.3d 54, 741 N.E.2d 511 (2001). *See also State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 435, 639 N.E.2d 83 (1994) ("Routine offense and incident reports are subject to immediate release upon request."). Most recently this Court has held that 911 audio tapes, including outgoing calls placed by the dispatcher, cannot be withheld as investigatory work product. *State ex rel. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616. *See also State ex rel. Dispatch Printing Co. v. Morrow Cty. Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685, 824 N.E.2d 64. Together, these cases make clear that factual information that is gathered by the government about an event, even if it is done by law enforcement personnel, is not exempt from disclosure under the Public Records Act.

As an initial matter, it is important to remember that police bodycams are, first and foremost, tools to promote transparency and accountability, *not* investigative tools for law enforcement. *See Police Body Cam Footage: Just Another Public Record*, Yale Law School Media Freedom & Information Access Clinic at 6 (Dec. 2015), *archived at* [5](http://perma.cc/A6PQ-</p></div><div data-bbox=)

24FH (the "Yale Bodycam Report") (noting that legislatures and police departments have created bodycam programs to increase transparency). As United States Attorney General Loretta Lynch has stated, "[b]ody-worn cameras hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve." *Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program*, United States Dep't of Justice (May 1, 2015), *archived at* perma.cc/9QM8-QGDZ. Accordingly, any attempt to characterize bodycam videos as "confidential law enforcement investigatory records," R.C. 149.43(A)(1)(h), is misguided, and overlooks the purpose they are intended to serve.

In any event, police bodycam videos do not meet the standard Section 149.43(A)(2)(c) requires for them to be withheld from the public, as Respondent asserts. Bodycams simply record whatever is in front of them. Because the resulting videos do nothing more than document "objective facts and observations," *State ex rel. Nat'l Broad. Co.*, 38 Ohio St.3d at 83-84, they must be released to the public upon request. They do not (and indeed cannot) document an investigator's internal thoughts or "investigative plans[]." *Id.* Nor are they an officer's working papers or memoranda prepared in advance of litigation. *Steckman*, 70 Ohio St.3d at 434.

Law enforcement's use of bodycams to document incidents – not investigate them – is routine. This is not unlike law enforcement's use of incident reports, a category of records that this Court has long held must be immediately disclosed under the Public Records Act. *See Maurer*, 91 Ohio St.3d 54; *Steckman*, 70 Ohio St.3d at 420. The University of Cincinnati BWC policy, for example, states that bodycams must be activated, "[p]rior to arriving on-scene when dispatched on a call where they are likely to detain or arrest a person," as well as if they have/are

attempting to detain/arrest a person. *Body Worn Digital Recording Systems*, University of Cincinnati, *archived at* perma.cc/RMX7-U49C. In other words, bodycam video is nothing more than an objective incident report of the kind that has long been required to be disclosed under the Public Records Act. Indeed, they are, in fact, a *more* accurate accounting than any written report could ever be. Bodycam videos do not forget or omit information, nor do they let it be distorted by other events and witnesses; they simply record whatever they are pointed at. Such records must be released just like any other routine incident report.

To hold that all bodycam video falls within the exception of R.C. 149.43(A)(2)(c) would be radically inconsistent with this Court's previous decisions regarding law enforcement records. Consider a situation in which a police officer, wearing a bodycam, responds to the scene of an incident when a victim is still on the phone with the 911 dispatcher. The police officer's bodycam would, upon arrival, record the same audio as the 911 call. After the situation is handled the officer will review the bodycam video of the incident and write an incident report laying out the facts of what transpired, the same facts that the officer observed and were recorded by his bodycam. It would make no sense if the 911 audio from that incident is a public record that must be released, *Cincinnati Enquirer*, 142 Ohio St.3d 392, and the officer's written report must be released, *Mauer*, 91 Ohio St.3d 54, but the bodycam video showing the same incident—arguably the *most objective* and *most reliable* accounting of what occurred—could be withheld.

C. Any Exempt Information in Bodycam Videos Can Be Redacted and the Remainder of the Video Must Be Released

As explained above, if there is information contained in a bodycam video that truly falls within the confidential law enforcement investigation (or any other) exception, then the appropriate course of action is to redact that information and release the rest of the record.

State ex rel. Nat'l Broad. Co., 38 Ohio St.3d at 85 (noting that if "records contain excepted information, this information must be redacted and any remaining information must be released."). The technological capability to efficiently review and redact video records for release to the public already exists and is widely used by police departments around the nation. For example, thousands of officers use TASER International's Axon body-worn cameras and Evidence.com service. See TASER, *TASER Reports Record Quarterly Revenue of \$50.4 million* (Nov. 3, 2015), <http://bit.ly/1GJtrz7> (estimating 33,000 total paid users of Evidence.com in September 2015). Among other things, Evidence.com offers an "automated redaction tool" designed to "take[] the pain out of current manual processes and makes it easier to fulfill requests." Axon, *The Future of FOIA: Find, Redact, Deliver*, Axon Webinar, <http://bit.ly/1JY6qtw>.

In addition, a variety of free and low-cost tools exist to enable automated facial blurring that could be used to obscure the identities of police informants, witnesses, or crime victims. See Yale Bodycam Report at 23 (referencing automated redaction tools such as ObscuraCam, the NVeiler Video Filter plug-in, and automated facial blurring on YouTube). The ObscuraCam software is free, and "the NVeiler Video Filter plug-in applies automated face detection and blur for video at a cost of approximately \$32." *Id.* Indeed, one police department has written its own "free and open source facial blurring software consisting of five lines of code." *Id.* at 24. Accordingly, law enforcement entities can easily, and cost-efficiently, comply with their obligation under the Public Records Act to redact any information that properly falls within an exemption and release the rest of a bodycam video upon request.

II. THE PURPOSE OF POLICE BODY WORN CAMERAS IS TO PROMOTE TRANSPARENCY AND PROVIDE THE PUBLIC WITH INFORMATION ABOUT THE ACTIONS OF LAW ENFORCEMENT PERSONNEL

Over the last few years, troubling videos of interactions between law enforcement and members of the public have been at the forefront of an ongoing public debate regarding race and police use of force. See Damien Cave and Rochelle Oliver, *The Videos That Are Putting Race and Policing Into Sharp Relief*, N.Y. Times (Nov. 24, 2015), <http://nyti.ms/1IMtFWL>. While such videos are not new, see Erik Ortiz, *George Holliday, Who Taped Rodney King Beating, Urges Others to Share Videos*, NBC NEWS (Jun. 9, 2015), [archived at perma.cc/CP5V-5YAM](http://perma.cc/CP5V-5YAM), their increased prevalence has led to widespread calls for the implementation of bodycam programs to ensure a more objective record of such interactions is available to resolve doubt and ensure accountability. See, e.g., *Michael Brown's family in Atlanta to begin campaign for police body cameras*, WSB-TV (Sep. 21, 2014), <http://bit.ly/1JVxxWs>, [archived at perma.cc/8Y9D-JDC6](http://perma.cc/8Y9D-JDC6).

While the implementation of bodycam technology has rapidly progressed, these cameras cannot and will not accomplish their purpose—transparency and accountability—if the videos they capture are withheld from the press and the public. As the Yale Bodycam Report states:

"Accomplishing this accountability goal requires public access to body cam footage. Unlike most categories of public records, which serve some function even if they cannot be released to the public, body cam footage serves no legitimate purpose without public oversight. Without an affirmative right of public access, police departments would have a strong incentive to only release footage in which they appear sympathetic—law enforcement officials have succumbed to such temptation in the past."

Yale Bodycam Report, *supra*, at 7.

For this reason, the public, news media, civil society groups, and law enforcement generally agree that most bodycam videos that depict use of force should be released to the public upon request. For example, the executive director of the Police Executive Research Forum has stated that:

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

Letter from the PERF Executive Director in Implementing a Body-Worn Camera Program:

Recommendations and Lessons Learned, United States Dep't of Justice (2014),

<http://1.usa.gov/1s7UIxl>. This widespread agreement on the value of public access to most bodycam videos by civil society and law enforcement alike highlights the importance of ensuring that such records are not removed from the scope of the Public Records Act.

It is especially important for the media, which serves as the eyes and ears for the public, to have access to bodycam videos, just like other public records, "so that complete and accurate news reports can be broadcast and reported to the public." *State ex rel. Multimedia, Inc. v. Whalen*, 51 Ohio St.3d 99, 100, 554 N.E.2d 1321 (1990). "In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." *White v. Clinton Cty. Bd. of Comm'rs*, 76 Ohio St.3d 416, 420, 667 N.E.2d 1223 (1996) (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491, 95 S.Ct. 1029 (1975)).

On numerous occasions public access to, and publication of, videos depicting interactions between police officers and members of the public have promoted government accountability. In Denver, for example, a local TV station obtained bodycam video—though a public records request—of an arrest that led to an officer's discipline for use of excessive force. Brian Maass, *New DPD Body Cam Video Shows Excessive Force*, CBS Denver (Mar. 12, 2015), *archived at* <https://perma.cc/SP7Y-ZYTH>. Contrary to the officer's statements that he had placed his knee on the suspect's shoulders, the video showed that his knee had been placed on the suspect's neck. *Id.* Bodycam video of that incident not only resulted in the suspension of the officer, but its disclosure to the press resulted in important information being disseminated to the public, which facilitated public debate about the propriety of the officer's actions. *See id.* Numerous other instances of bodycam video contradicting officers' written reports abound. *See, e.g.*, David Kravets, *Body cam footage leads to indictment for cop accused of beating woman*, Ars Technica (Jan. 13, 2016), *archived at* perma.cc/FAW6-V5UX; Conor Friedersdorf, *When Police Shoot Dogs: Disturbing Footage from a Body Cam Prompts a Public Outcry*, The Atlantic (Oct. 21, 2014), <http://theatltn.tc/ZFjXzD>; Andy Grimm, *NOPD Ignored, Mischaracterized Evidence in Officer-Involved Shooting, Monitor Finds*, The Times-Picayune (Aug. 4, 2015), <http://bit.ly/1QFBQEH>. A public records regime where inaccurate police reports are released to the public, while law enforcement is permitted to withhold videos that objectively document what actually transpired, does not serve the interests of either the public, or law enforcement. It is axiomatic that an informed debate on legal and policy issues relating to law enforcement requires accurate information, and if there is to be meaningful public discussion regarding the laws and policies that govern police-civilian interactions, bodycam videos must be made available.

Access to bodycam videos is important not only to show officer misconduct, but also to help the media explain the lawful use of force to the public. This has already happened in Ohio, where the public release of BWC video led to widespread praise of Officer Jesse Kidder, who did not respond with lethal force to a homicide suspect that charged at him. Jackie Congedo, *Officer: 'I wanted to be absolutely sure before I used deadly force'*, WLWT5 (Apr. 20, 2015), <http://bit.ly/1EXuKaK>, *archived at* perma.cc/7HM8-JXEU. Because the public was able to see exactly what transpired, the public's trust in that officer, and indeed the police department, undoubtedly increased. In another incident where a civilian was shot and killed by police in Oklahoma, BWC video released to the public showed the civilian pointing a gun at an officer just before he was shot—providing an objective basis for the police department to reassure the community that the use of force was appropriate. *See* Rhett Morgan, *Sand Springs police release body-cam video of officer fatally shooting armed man*, Tulsa World (Apr. 23, 2015), *archived at* perma.cc/V8CQ-Y2HY. These and other incidents show that public access to bodycam video can speed up the process of exonerating police officers who have not committed misconduct. Yale Bodycam Report at 7.

"The purpose of Ohio's Public Records Act, R.C. 149.43, is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy." *State ex rel. Gannett Satellite Info. Network v. Petro*, 80 Ohio St.3d 261, 264, 685 N.E.2d 1223 (1997) (citation omitted). Excluding bodycam videos from the disclosure requirements of Ohio's Public Records Act will mean that law enforcement and law enforcement alone will decide what the public knows when questions are raised about an officer's actions. Such secrecy is not only antithetical to this State's long-standing commitment to transparency, but will undermine the entire purpose of body-worn cameras.

CONCLUSION

For all the reasons stated herein, the Reporters Committee respectfully urges this Court to grant Relators' writ and hold police body-worn camera videos are public records that must be disclosed upon request under the Ohio Public Records Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of *Amicus Curiae* The Reporters Committee for Freedom of the Press in Support of Relators has been served on the following counsel of record via electronic mail and regular U.S. Mail, this 8th day of February, 2016:

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