ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. **THE CINCINNATI ENQUIRER**	:	Case No. 2015-1222
STATE OF OHIO, ex rel. **SCRIPPS MEDIA INC. D/B/A WCPO-TV**	:	
STATE OF OHIO, ex rel. **THE ASSOCIATED PRESS**	:	
	:	**Original Action in Mandamus**
STATE OF OHIO, ex rel. **RAYCOM MEDIA D/B/A WXIX-TV**	:	
STATE OF OHIO, ex rel. **HEARST CORPORATION D/B/A WLWT-TV**	:	
STATE OF OHIO, ex rel. **SINCLAIR MEDIA III, INC. D/B/A WKRC-TV**	:	
Relators,	:	
v.	:	
JOSEPH T. DETERS, HAMILTON COUNTY PROSECUTING ATTORNEY	:	
Respondent.	:	

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STATEMENT OF THE CASE

The Revised Code of Ohio, in pertinent parts, provides that:

> ". . . [U]pon request, a public office . . . shall make copies of the requested public record . . . within a reasonable period of time." R.C. 149.43(B)(1). (Emphasis added.)

> ". . . [A] public office . . . shall transmit a copy of a public record . . . within a reasonable period of time after receiving the request for the copy." R.C. 149.43(B)(7). (Emphasis added.)

The matter now before this Honorable Court arises out of a traffic stop of one Samuel Dubose by University of Cincinnati Police Office Ray Tensing. The stop was made because the vehicle being operated by Dubose did not have a front license plate. During the investigation by Tensing, Dubose was shot and killed by Tensing. Officer Tensing was wearing a body camera ("body cam") which was activated and, in turn, recorded certain of the activities leading up to the shooting. This unfortunate shooting took place on Sunday, July 19, 2015.

Within a day or two, certain media outlets sought to have a copy of the video from the body cam released to them. The timeline of all of the foregoing is as follows:

> Sunday, July 19, 2015 - Ray Tensing, a University of Cincinnati Police Officer shot and killed Samuel Dubose during a traffic stop. (Respondent Evidence pg. 2.)

> Sunday, July 19, 2015 - Chief Assistant Prosecuting Attorney Mark Piepmeier of the Hamilton County Prosecutor's Office (HCPO) requested investigating officers to not release the body cam video until after the HCPO presented it to the grand jury. (Respondent Evidence pg. 2, 3.)

> Monday, July 20, 2015 - WLWT reporter John London contacted Julie Wilson, Chief Assistant Prosecutor and Public Information Officer for the HCPO by telephone, and requested a copy of the body cam video. On that day, the HCPO was not in possession of the video. (Respondent Evidence pg. 7.)

> Tuesday, July 21, 2015 - Mr. Piepmeier received a copy of the body cam video. (Respondent Evidence pg. 2.)

Wednesday, July 22, 2015 - Ms. Wilson sent the following statement to the media:

> The body cam video in the July 19th UC officer involved shooting will not be released pursuant to:
>
> 1. Sixth Amendment to the United States Constitution and ORC Section 149.43(A)(1)(v) as release could jeopardize a possible future fair trial; and
>
> 2. ORC Section 149.43(A)(1)(h) Confidential law enforcement investigatory records. See specifically ORC Section 149.43(A)(2)(c), Specific confidential investigatory techniques or procedures or specific investigatory work product, and State of Ohio ex rel. Mark W. Miller vs. Ohio State Highway Patrol, 2014-Ohio-2244. (Respondent Evidence pg. 7.)

Thursday, July 23, 2015 - Presentation of Dubose shooting to Grand Jury begins. (Respondent Evidence pg. 4.)

Thursday, July 23, 2015 - AP Cincinnati correspondent Dan Sewell by email to Ms. Wilson made the first request of any media outlet after the prosecutor's office had the video. (Respondent Evidence pg. 7.)

Thursday, July 23, 2015 - Ms. Wilson responded to Mr. Sewell's request, stating that Prosecutor Deters stood by his statement from yesterday. (Respondent Evidence pg. 7.)

Thursday, July 23, 2015 - Later that day, Ms. Wilson sent an email to the media with a statement from Prosecutor Deters:

> The law supports our position to not release the video. If you do not want to look at the law and just use your common sense, it should be clear why we are not releasing the video only a few days after the incident occurred. We need time to look at everything and do a complete investigation so that the community is satisfied that we did a thorough job. The Grand Jury has not seen the video yet and we do not want to taint the Grant Jury process. The video will be released at some point – just not right now. (Respondent Evidence pg. 7.)

Friday, July 24, 2015 - WKRC-TV news assignment manager Timothy Meredith sent a request to Ms. Wilson requesting a copy of the body cam video. (Respondent Evidence pg. 7.)

Friday, July 24, 2015 - Ms. Wilson reiterated that "we stand by our previous statements for not releasing the video at this time." (Respondent Evidence pg. 7.)

Monday, July 27, 2015 - Relators file this suit. The Cincinnati Enquirer, Raycom Media, and Scripps Media, Inc., never made a request for the body cam video to Respondent Deters. Relator WLWT's request was made by telephone before Prosecutor Deters had the body cam video.

Wednesday, July 29, 2015 - An indictment charging Officer Tensing with murder and voluntary manslaughter was returned by the Grand Jury. The body cam video was then shown to the Dubose Family and then was released to the media by Prosecutor Deters. (Respondent Evidence pg. 4, 8.)

Even a cursory review of the foregoing reveals that there was only one work day (*R.C. 1.14*) or at the most two work days before Relators filed suit. Then, within four work days from the first request, the video was turned over to Relators. Given any reasonable analysis, Relators cannot show by clear and convincing evidence that the "reasonable" time provisions of R.C. 149.43(B)(1) and R.C. 149.43(B)(7) were not complied with and that assumes, which Respondent denies as hereinafter set forth, that the involved video is a "public record" as set forth in R.C. 149.43.

Considering the unreasonableness of Relators' position, what is next? Is the Enquirer or a television station going to demand that the information be available to them in "real time" by way of a direct feed from every body cam worn by any law enforcement official? Certainly there must be at least a modicum of sensibility about all of this, given the myriad of issues, as set forth *infra* by Respondent.

Proposition of Law No. 1

Respondent believes that this case should be dismissed by this Honorable Court for the following reasons.

A.
Mootness

Respondent recognizes and respects the Court's decision to hear this case notwithstanding that the video sought by Relators has long since (within 4 working days of the first demand) been released to Relators thereby making this matter moot. Respondent reiterates his position only on the basis that this particular case, timewise, does not present this Court with a good set of facts upon which to decide these precedent-setting issues.

B.
Respondent's Reliance

This tragic event took place on a Sunday. Not until the next Thursday, after Respondent had come into possession of the video, did Respondent receive any media request.

Out of an abundance of caution, on the day before (Wednesday), Respondent advised media outlets that in not immediately releasing the video, he was, in part, relying on existing case law to-wit: *State ex rel. Miller v. Ohio State Highway Patrol*, (12th Dist.), 14 N.E.3d 396, 2014-Ohio-2244. Respondent had a right to rely on this Court of Appeals case law.

C.
"Record"

The video sought by Relators was not and is not a "record," public or not, of the Hamilton County Prosecutor's Office. R.C. 149.011(G). Specifically, the video does not ". . . document the organization, functions, policies, decisions, procedures, operations, or other activities" of the Prosecutor's Office. This Court has applied this definition in a number of

cases. See *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.* (1998), 82 Ohio St.3d 37, 42, 693 N.E.2d 789, 793, 1998 -Ohio- 597 and *State ex rel. DeGroot v.* Tilsley (2011), 128 Ohio St.3d 311, 943 N.E.2d 1018, 2011-Ohio-231, ¶6. As to "coming under the jurisdiction," please note that it must be a "record" of the office in the first place before the clause applies.

It is clear that just because a public office has information, that fact does not necessarily mean that the information documents the organization, functions, policies, decisions, procedures, operations or other activities of the office. In *State ex rel. O'Shea and Assocs. Co., L.P.A. v. Cuyahoga Metro Hous. Auth.* (2012), 131 Ohio St.3d 149, 962 N.E.2d 297, 2012-Ohio-115, ¶23, this Court set forth a three-part test in finding certain documents regarding elevated lead levels were not public records. The device in question, the body cam, was not created by Respondent's office nor did the video from the body cam serve to document the organization or policies of the HCPO.

D.
Reasonable Time

The information sought by Relators was released by Respondent within a "reasonable time" as provided for in R.C. 149.43(B)(1) and 149.43(B)(7). As discussed in more detail *supra*, the video was released within four (4) working days from the date of the first request. While Respondent recognizes that each case seeking records is to be judged on a case-by-case basis, *State ex rel. Morgan v. Strickland* (2009), 121 Ohio St.3d 600, 906 N.E.2d 1105, 2009-Ohio-1901. In *State ex rel. Wadd v. Cleveland* (1998), 81 Ohio St.3d 50, 689 N.E.2d 251, 998-Ohio-444 this Court found that eight (8) days was a "reasonable time" in which a Respondent must provide "public" records after a proper request. In *State ex rel. Striker v. Clerk of Court,* (5th Dist.) 2010-Ohio-2861, 2010 WL 2512540 ¶12, the Court noted that 10 business days to provide records was not a violation. Further, in *Strothers v. Norton* (2012), 131 Ohio St.3d 359, 965

N.E.2d 282, 2012-Ohio-1007 this Court held that a writ filed within a week was premature. In *State ex rel. Patton v. Rhodes* (2011), 129 Ohio St.3d 182, 950 N.E.2d 965, 2011-Ohio-3093, a 56 day period was determined to be a reasonable period of time. Respondent clearly released the record within a reasonable time.

For any or all of the foregoing reasons, Respondent respectfully requests this Court to dismiss the within action. In the alternative, if the Court finds that the video was a "record" and, ergo a "public record," then Respondent requests the Court to find that he fully complied with the pertinent provisions of R.C. 149.43.

Proposition of Law No. 2

Prior to filing a writ of mandamus to secure a public record, a petitioner must make a proper demand on a public office to produce the record.

R.C. 149.43(C) requires a prior request as a prerequisite to a mandamus action. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office,* (2012) 133 Ohio St.3d 139, 976 N.E.2d 877, 2012-Ohio-4246 ¶19 though ¶21. Relators The Cincinnati Enquirer, Scripps Media Inc., D/B/A WCPO-TV and Raycom Media D/B/A WXIX-TV have all failed to present any evidence that they ever made a public records request to the Hamilton County Prosecutor's Office. Accordingly, and notwithstanding the Relators' attempt to excuse their neglect, as set forth in Relators' Merit Brief on page 11, their error cannot be ignored or overlooked. Even given the requirement that R.C. 149.43 should be accorded a liberal construction, the standard is not, as Relators contend, "had notice" but, rather it is that those seeking release of records must, at least, make a specific request to the public office. These Relators did not do so and they should be stricken from the case.

A second and third requirement for the issuance of a writ of mandamus in a public records case is that a relator prove "a clear legal duty on the part of the [the public agency] to

provide that relief." *State ex rel. Simpson v. State Teachers Retirement Bd.* (2015), 143 Ohio St.3d 307, 37 N.E.3d 1176, 2015-Ohio-149 ¶17. The relator must establish entitlement to the requested extraordinary relief by clear and convincing evidence, *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, paragraph three of the syllabus. Relators fail on both counts.

R.C. 149.43(A)(1) defines "public record(s)" as "records kept by any public office." (Emphasis added). The word "kept" is the past participle of the word "keep." The HCPO did not "keep," in the normal course of business, the video. Accordingly, the record was not one "kept" by the office as required by the statute.

Likewise, Relators, given all the evidence presented by Respondent, have not and cannot show by clear and convincing evidence that they are entitled to the requested extraordinary relief. This Court has held that the Court must consider the propriety of a public-records request "in the context of the circumstances surrounding it." *State ex rel. O'Shea and Assocs. Co., LPA v. Cuyahoga Metro. Hous. Auth.*, supra ¶21 quoting *State ex rel. Morgan v. New Lexington* (2006), 112 Ohio St.3d 33, 857 N.E.2d 1208, 2006-Ohio-6365, ¶33. Given the surrounding circumstances of the situation that confronted the Prosecutor on that fateful and those ensuing days, as confirmed by even the editorial published by Relator Enquirer, the Prosecutor made the decision to, out of an abundance of caution, release the tape – just not immediately. His proper concern was for the safety of his city and its citizens and, also, so as not to impinge on the Constitutional fair trial rights of the soon-to-be defendant. Of course, also of concern was the tainting of the witnesses' testimony and the entire Grand Jury process.

The Honorable Prosecutor made the right decision. The "surrounding circumstances," as well as the law, guided and dictated his decision. This Court should not overrule that judgment.

Proposition of Law No. 3

Pursuant to *R.C. 149.43(A)(1)(g) and (h)* and, specifically *R.C. 149.43 (A)(2)(a)* and *(c),* body cam video is a confidential law enforcement investigatory record and/or specific investigatory work product.

Relators argue that the body cam video is not a confidential law enforcement investigatory record and/or specific investigatory work product because no investigation was underway when the video was made. If this is true, then no trace evidence such as fingerprints, shoe prints, ballistic groves on a bullet, semen or DNA markers are ever protected from disclosure to the public while an investigation is progressing. Fingerprints, shoe prints, ballistic groves on a bullet, semen or DNA markers are created or left at a crime scene while a criminal act is occurring. Otherwise, they have no evidentiary value.

In *State v. Lott* (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293, 302, this Court upheld a murder conviction based upon unexplained fingerprints at two separate locations in the victim's home, and by a shoeprint on the floor of the victim's house consistent with the accused's gym shoes. Obviously, if the suspect knew of the fingerprint evidence, he could provide an explanation of the presence of the fingerprints when initially interviewed. Similarly, if the public had access to the knowledge of the fact that a gym shoe print was recovered, a suspect could destroy the gym shoes. Even DNA evidence is not always outcome determinative. In *State v. Buehler* (2007), 113 Ohio St.3d 114, 863 N.E.2d 124, 2007-Ohio-1246, ¶37, this Court explained that the facts and circumstances of a case control whether DNA evidence is outcome determinative. Publication of the location of the DNA evidence can provide a suspect the basis to have an explanation for its presence. In *State v. Henderson* (1988), 39 Ohio St.3d 24, 27, 528 N.E.2d 1237, 1242 (prior to DNA testing) a jury found an accused not guilty of rape because a person, other than the suspect, who was also a Type O secretor, admitted having consensual

intercourse with the victim hours before her murder. Publication of the trace evidence left or created during criminal activity, before a crime is known and an investigation is started, will allow suspects to skew the results of an investigation.

In this case, as the Enquirer admitted in its editorial, premature publication of the body-cam video would have allowed Officer Tensing to adjust his story to match the video. (Respondent's Evidence, pg. 8.) The video, like trace fingerprints, shoe prints, DNA evidence and semen is left at a scene before an investigation begins. The time of creation is not a factor as to whether the evidence gathered in an investigation falls under the confidential law enforcement exception.

Trial preparation record

R.C. 149.43(A)(4) defines a "Trial preparation record" as any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

Assistant Prosecuting Attorney Piepmeier arrived at the scene of the Dubose shooting shortly after it occurred. His purpose was that of legal advisor and to prepare the case for presentation to the Grand Jury. (Respondent's Evidence pp 2.) This Court has explained that in order for the trial preparation exception to apply, *R.C. 149.43(A)(4)* requires records to be "specifically compiled in reasonable anticipation" of litigation. *State ex rel. Zuern v. Leis* (1990), 56 Ohio St.3d 20, 21, 564 N.E.2d 81, 83. Here, the Assistant Prosecutor was immediately on the scene collecting the evidence for presentation to the Grand Jury.

This Court, in *State ex rel. Hamblin v. Brooklyn* (1993), 67 Ohio St.3d 152, 616 N.E.2d 883, explained that the "Uncontradicted evidence existed that these statements 'were specifically

prepared * * * for the sole purpose of providing the prosecutor with the information necessary to present the case to the grand jury and to a jury at the criminal trial.'" In this case, the uncontradicted evidence is that the body-cam video was downloaded solely for presentation to the Grand Jury. It is, therefore, exempt from the definition of a public record under R.C. 149.43(A)(1)(g).

Confidential law enforcement investigatory records - R.C. 149.43 (A)(2)(a)

R.C. 149.43 (A)(2)(a) defines a confidential law enforcement record to include identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised.

At the time of the Relators' request for the body-cam video, the Grand Jury had not acted. Officer Tensing was not at that time charged with anything. *State ex rel. Musial v. N. Olmsted*, 106 Ohio St.3d 459, 835 N.E.2d 1243, 2005-Ohio-5521, ¶ 25 involved an investigation by a police department of an uncharged suspect. The question of exemption arose because the Grand Jury issued a no bill instead of an indictment. The Court held that "The uncharged suspect exception applies despite the passage of time, the lack of enforcement action, or a prosecutor's decision not to file formal charges." See also *State ex rel. Master v. Cleveland* (1996), 75 Ohio St.3d 23, 30, 661 N.E.2d 180, 1996 -Ohio- 228. Public knowledge of the accused and the alleged criminal conduct also does not preclude application of the exemption "because release of the records would subject suspects to additional adverse publicity and might compromise subsequent efforts to resolve the matter." (Emphasis added.) *State ex rel. Ohio Patrolmen's Benevolent Assn. v. Mentor* (2000), 89 Ohio St.3d 440 at 447, 732 N.E.2d 969, 976, 2000-Ohio-214.

The rationale for this exception clearly applies here. This Court cannot ignore the recent hostility toward police officers who are not charged. But, more importantly here, the Enquirer editorialized that the reason Prosecutor Deters did not release the video was to make certain that the suspect (and any witnesses) was deterred from "adjusting his story to match the video." The Affidavit of Assistant Prosecuting Attorney Piepmeier, based upon decades of experience, demonstrates how premature release can jeopardize an investigation. (Respondent's Evidence pg 3; Relators' Evidence H-8) Professor Wagner also explains the danger of premature release of the body-cam video. (Respondent's Evidence pg. 28.) Thus, *State ex rel. Rocker v. Guernsey County Sheriff's Office* (2010), 126 Ohio St.3d 224, 932 N.E.2d 327, 2010-Ohio-3288 is inapposite because the investigation in that matter was closed and the Grand Jury had, decades before, refused to return an indictment.

Confidential law enforcement investigatory records - R.C. 149.43 (A)(2)(c)

R.C. 149.43(A)(2)(c) defines a law enforcement investigatory record to include specific confidential investigatory techniques or procedures or specific investigatory work product. In *State ex rel. Miller v. Ohio State Hwy. Patrol* (2013), 136 Ohio St.3d 350, 995 N.E.2d 1175, 2013-Ohio-3720, this court remanded a case, where a dash-cam video was involved, to develop a record and apply the statutory language. This Court did not hold that all video evidence is always a public record. Dash-cam video is typically used as evidence in criminal proceedings undertaken under R.C. 4511.19. The dash-cam video demonstrates why a vehicle was stopped and details performance of psychomotor tests. (Respondent's Evidence pg. 40, 41.)

Exempt work product is information assembled by law enforcement officials in connection with a pending or highly probable criminal proceeding. *State ex rel. Gannett Satellite Info. Network, Inc. v. Petro* (1997), 80 Ohio St.3d 261, 266-267, 685 N.E.2d 1223, 1228, 1997 -

Ohio- 319. Trial preparation records are exempt from disclosure when such records are specifically compiled in reasonable anticipation of litigation. R.C. 149.43(A)(4). *State ex rel. Williams v. Cleveland* (1992), 64 Ohio St.3d 544, 546, 597 N.E.2d 147, 149, 1992 -Ohio- 115. Records containing information derived from a coroner's autopsy or information derived from particular scientific tests were exempt from release to prisoners based on the "specific investigatory work product exemption." R.C. 149.43(A)(2)(c); *State ex rel. Williams v. Cleveland, supra.* This Court has also ruled that when protected information is inextricably intertwined with the remainder of the record, it is appropriate to withhold the entire document. *State ex rel. Thompson Newspapers, Inc. v. Martin* (1989), 47 Ohio St.3d 28, 546 N.E.2d 939; *State ex rel. McGee v. Ohio State Board of Psychology* (1990), 49 Ohio St.3d 59, 550 N.E.2d 945; *State ex rel. Polovischak v. Mayfield* (1990), 50 Ohio St.3d 51, 552 N.E.2d 635.

In this case, there is a shooting of an unarmed man during a traffic stop. It was highly likely that a criminal case would be presented to the Grand Jury. That is why an assistant prosecutor went to the scene. The body-cam video, like the coroner's evidence derived from a particular test, was gathered for that highly-likely criminal case. To supply it immediately to the news media is the same as supplying it to the accused and any witnesses. They would have it before the debriefing protocol takes place, witness interviews are completed and presentation to the Grand Jury can occur. Premature release has a great potential of skewing the entire process. Under these circumstances, the body-cam video in this case meets the definition of *R.C. 149.43(A)(2)(c).*

Common Law

R.C. 149.43(A)(1)(v) exempts records the release of which is prohibited by state or federal law. This Court has used common law as the basis for an exemption from disclosure. The same common law exemption is found in Super R.44(C)(2)(a).

In *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.* (2009), 121 Ohio St.3d 537, 905 N.E.2d 1221, 2009-Ohio- 767 the Court held, in a case where an attorney was hired to examine issues at the Port Authority, that that common-law attorney-client privilege reaches far beyond a proscription against testimonial speech. The privilege protects against any dissemination of information obtained in the confidential relationship. *Am. Motors Corp. v. Huffstutler* (1991), 61 Ohio St.3d 343, 348, 575 N.E.2d 116, 120-121. This Court found that the material discovered by the attorney was exempt from disclosure.

The Sixth circuit found that an affidavit for a search warrant at common law could be sealed making it exempt from disclosure. *In re Search of Fair Finance* (6th Cir.2012), 692 F. 3d 424, 431 the Court explained: "The newspapers have not shown us any historical record of unrestricted public access to search warrant documents under the common law. We cannot accept the argument that the common law right of access supports a finding here of an analogous First Amendment right of access to search warrant documents. Moreover, in view of our discussion in Part III.A.2 *infra* of the effect on criminal investigations of public access to search warrant documents, it would appear that the magistrate judge's decision to seal in this case was not an abuse of discretion and thus the sealing here was proper under the common law."

Piepmeier acted as legal advisor to an investigation, immediately determined the video would be used in preparation of a case to be presented to the grand jury as part of a criminal investigation. (Respondent's Evidence pg. 2.) At common law, he was not required to provide items to the Relators which, before presentation to the Grand Jury, would jeopardize the result.

Professor Wagner stated that loss of control of when evidentiary items collected for an investigation are released to the public can jeopardize the reliability of an investigation. (Respondent's Evidence pgs. 32, 33.)

Under common law, the evidence here demonstrates the items collected by Piepmeier are exempt from disclosure.

Proposition of Law No. 4

In a matter that presents serious and far-reaching public policy issues, the Supreme Court will defer such matter to the General Assembly.

This Court, on many occasions, has made clear that where there is a clear matter of public policy to be decided, such decisions are left to the General Assembly and this Court, rather than legislate from the bench, will defer to the General Assembly.

The case now before this Court is of such a magnitude. Based upon concerns such as public safety and privacy and so many more, the General Assembly has been and is studying the entire subject of body cams[1]. Included in those deliberations are such matters as whether the video from a body cam is a public record and, if so, under what terms and conditions should it be released. Privacy is important. Timing is important. Public safety is important. These, and many other issues, are best left to the deliberative processes of the General Assembly. The Court should defer to the General Assembly and use this case to suggest that the General Assembly address the issues in a timely fashion.

Body cam video is a graphic medium because it allows video access into areas and situations that are often times off limits to the general public. This would include seeing the

[1] Appendix A1-A4 - US Department of Justice, Implementing a Body-Worn Camera Program, Recommendations and Lessons Learned, Chapter 2, Public Disclosure Policies Pages 17-19, http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf

inside of private homes and businesses, as well as murder victims, domestic abuse victims, child victims and even inside restricted areas such as airport security rooms. Without a proper statutory framework, body cam video could be manipulated for untold abuses.

In recent years, state legislatures, including just recently Ohio, throughout the country have introduced varying forms of legislation in an attempt to regulate the use of police body cams and the release of body cam video.[2] Several states have passed legislation to control body cam video. These states including Arizona, Maryland, Florida, North Dakota, Georgia, South Carolina and Illinois. In South Carolina, body cam video is not subject to disclosure, except to a few listed individuals, including the individual who is the subject of the recording, law enforcement professionals, and those involved in criminal or civil litigation. SC ST. § 23-1-240(G). In North Dakota, body cam video "which is taken in a private place is an exempt record." ND ST. 44-04-18.7(9). In Oregon, a court may order that a recording may not be disclosed, and any recording that is disclosed must be "edited in a manner as to render the faces of all persons within the recording as unidentifiable." OR ST § 192.501(38).

In their brief, the Relators point to the City of Chicago's failure to turn over video recordings as a reason why the Relators are justified in bringing their lawsuit. However, what the Relators fail to mention is that the Illinois State Legislature, not the court system, addressed this problem. The legislature enacted legislation to address the use of police body cam video. 50 Ill. Comp. Stat. Ann. 706/10-20(b). See also 50 Ill. Comp. Stat. Ann. 707/15. The Illinois statute is careful to take into consideration the privacy concerns of individuals that may be captured on the body cam video recordings. *Id.* The statute generally exempts body cam video; however the police agency is able to produce certain recordings if they receive written

[2]Appendix A5-12 – The PEW Charitable Trusts – States Grapple With Public Disclosure of Police Body-Camera Footage, September 22, 2015.

permission from the subject of the recording. *Id.* This amendment to the statute was discussed in 2015 and became effective as of January 1, 2016. In amending the statute, the Illinois State Legislature provided for governmental transparency while at the same time preserving the privacy rights of Illinois citizens. While the specific rules may vary from state to state, there is at least uniformity in the fact that this important policy decision has been left to state legislatures rather than the Courts. Ohio should follow this practice.

Following this longstanding tradition in Ohio, this Court has regularly deferred to the Ohio General Assembly where public policy matters are involved. Thus, *Johnson v. Microsoft Corp.,* 106 Ohio St. 3d 278, 284, 834 N.E.2d 791, 797, 2005-Ohio-4985, ¶ 14. this Court said that "The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues." In *Hambuechen v. 221 Mkt. N., Inc.,* 143 Ohio St. 3d 161, 164, 35 N.E.3d 502, 505, 2015-Ohio-756, ¶ 7. this Court stated that "this court will not legislate from the bench." The Court went on to find that the General Assembly should be the final arbiter of public policy. See also *Painter v. Graley*, 70 Ohio St. 3d 377, 385, 639 N.E.2d 51, 57, 1994-Ohio-334 (citing *State v. Smorgala* [1990], 50 Ohio St.3d 222, 223, 553 N.E.2d 672, 674). For whatever reason, the Relators choose to ignore this longstanding and well-stated policy and, instead, now ask this Court to create new policy through, in effect, an amendment to the Ohio Public Records Act. The Court should decline this invitation.

Like the rest of the country, Ohio is still trying to figure out how to properly handle body cam video. Many jurisdictions in Ohio do not currently use body cams, and those that do are still attempting to create appropriate policies to govern their usage.[3] City officials from both

[3] See Appendix A13-14 – The Columbus Dispatch – Capital Insider, January 3, 2016, third article; Appendix A15-17 - Cleveland.Com – Cleveland Police Body Cameras Reduce Citizen Complaints by 40% Officials Say, November 12, 2015; and, 131 House Bill 407.

Columbus and Cleveland have expressed concern over enacting policies without direction from the state legislature. Creating a new rule through this court case will not alleviate those concerns. There are far too many considerations that must be taken into account before a rule on body cams can be developed. These considerations are more appropriately addressed through the legislative process than the judicial process. The General Assembly is appropriately equipped, through the use of committees, to take testimony from all interested parties and to use this testimony to create law to govern body cam video.

Proposition of Law No. 5

Police body cam video is quantitatively and qualitatively different than 911 tapes and routine incident reports.

The Relators in this action argue that the body cam video is no different than 911 tapes and routine incident reports. Respondent concedes that in *State ex rel. Cincinnati Enquirer v. Hamilton County* (1996), 75 Ohio St.3d 374, 662 N.E. 2d 334, 1996-Ohio-214 this Court held that 911 calls are public records available for immediate release. A body cam worn by a police officer, is, however, markedly different than a 911 call. In the case of the 911 call, a civilian employee at the communication center received the call and responded to the emergency. No law enforcement official was or is involved in the calls. The 911 operator simply compiled information. She did not investigate. 911 calls are routinely recorded without any specific investigatory purpose in mind. The 911 call is far removed from the initiation of a criminal investigation. In fact, many 911 calls do not even involve criminal matters. Body cam video produced by a law enforcement official is quantitatively different than a call to a civilian dispatcher.

Although there may be several policy decisions behind when and where to activate a police body cam, it is clear that one of the specific reasons is to assist in the investigation of any crime that is ongoing or which the officer was sent to investigate. Activating the switch on the body cam more times than not will be the first step in the investigation of criminal activity that occurs among the general public. It is not the functional equivalent of a 911 call to a civilian operator.

The relators have also argued that the body cam is the same as a routine offense and incident report including the reports related to intoxilyzer tests.

On its face, body cam video is easily distinguishable from a routine incident report. The key is the word "routine." When body cam video becomes an issue, the activity is anything but routine. The two activities are qualitatively different. Thus, in *State, ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 639 N.E. 2d 83, this Court carved out the exception for routine offense and incident reports in a discussion of "work product" for public records under R.C. 149.43(A)(2)(c). That exception is not applicable here. Body cam video is part and parcel of a criminal investigation.

Finally, in the present case the entire work of the prosecutor with regard to potential homicide charges may not have been possible without the body cam video being withheld from immediate public disclosure as a public record. That is not "routine."

Proposition of Law No. 6

Where police body cam video is found to be a public record, release is subject to reasonable rules, restrictions and guidelines.

If this Court ultimately decides that the body cam video is a public record under the Ohio Public Records Law and that deferring the public policy considerations to the General Assembly

is not appropriate, the Court should then fashion a rule that allows law enforcement officials to effectively carry out their duties.

The public's right to information and public records must be balanced with law enforcement's responsibility to efficiently and effectively engage in the criminal justice process. The Relators' proposed solution, making body cam video immediately available upon request, completely ignores the reality that law enforcement officials face every day. The process of properly investigating a crime, convening a Grand Jury and obtaining a proper indictment is full of potential pitfalls for law enforcement officials. There is no good reason to add another way to taint the process by broadcasting body cam video before the process has been completed. Professor Wagner explained several of the reasons why immediately releasing the body cam video can taint the investigative process. The Professor explained that once body cam video is released, it is often times reviewed in the media by various "experts." (Wagner Opinion pg. 7.) The opinions expressed by these experts is often times limited to the one piece of video, and may not take into account all of the other evidence. Having media "experts" examine the video and then broadcasting their opinions only opens the door to potential grand jurors seeing those opinions and tainting the Grand Jury pool. *Id.* Additionally, broadcasting the video before the actions of an officer involved in a shooting have been properly reviewed could lead to the officer altering her or his testimony.

Hamilton County Chief Assistant Prosecutor Mark Piepmeier confirmed that the concerns expressed by Professor Wagner were present in this case. (Respondents's Evidence, pg. 3) Mr. Piepmeier was concerned that releasing the Tensing video could also have altered witness testimony before the Grand Jury process had been completed. *Id.* Media "expert" opinions could alter witness testimony. Witnesses could alter their testimony regarding what they actually

perceived and individuals who did not actually witness the incident may come forward as "witnesses" in order to seek fame or notoriety. *Id.* Mr. Piepmeier wanted to ensure a fair and impartial Grand Jury process. Denying immediate release of the body cam video was essential in order to maintain the integrity of this process.

Relators point to the case of the Chicago shooting of LaQuan McDonald as justification for the immediate release of body cam video. (Relators' Merit Brief, p. 24.) Relators then say that "[e]ditorials published by major news organizations went so far as to accuse city officials of trying to cover up LaQuan McDonald's murder." We all know what happened in Chicago after tardy release and, in fact, Ferguson, Missouri and Baltimore, Maryland after almost immediate release of available video and information. Contrast those events as to how an equally disturbing matter was handled by Respondent in Cincinnati.

It is significant that even lead Relator, The Enquirer, in an editorial published the following:

> Deters steadfastly refused to release the much-anticipated video from Tensing's body cam during the violent encounter. We disagreed with that stance, but this board does respect Deters' twin desires to keep Tensing from adjusting his story to match the video and to avoid a potentially explosive situation before today's indictment was announced.

(Respondent Evidence, pg. 8.) Given the great concerns that are associated with releasing body cam video, if this Court does decide to create a rule regarding the release of body cam video, the Respondent believes that such a rule should appropriately balance all of the interests involved. Accordingly, if this Court decides that video from a body cam is a public record, then Respondent respectfully suggests the following for the Court's consideration:

A.

In accordance with case law, 14 days for law enforcement authorities to release the record would be a "reasonable" time under the statute.

If the Court is concerned about the length of the Grand Jury process and delay by law enforcement officials, then the Court could create a rule that would provide a maximum number of days within which the body cam video must be released. Respondent respectfully suggests that 14 days would be a reasonable time. Such a rule would allow time for the Grand Jury process to take place, while also giving the public a measure of assurance that the video will be released in a short period of time. As previously stated, this Court has held that withholding records for a period of time is not unreasonable. Eight days, ten days and even fifty-six days have been found to be a "reasonable time" in which a Respondent must provide "public" records after a proper request. Admittedly, the imposition of a 14-day rule is an arbitrary number, and there is no guarantee that an investigation would be completed within that period. However, when faced with the alternative of immediate release, this limited withholding period would at least allow investigators the opportunity to attempt to complete the grand jury process before the video is released to the public.

B.

The Prosecuting Attorney may petition the Court to withhold or seal the record.

If the Court is concerned about leaving the decision to release or not release in the hands of a Prosecutor or other law enforcement officials, then the rule could be that the requirement to release is presumed subject to the Prosecutor petitioning the Presiding Judge of the local Common Pleas Court, upon proper showing of need, to defer release until a Grand Jury process is completed. Or, in the alternative, the Court could set what, in a given case, she or he considers a reasonable time or to order immediate release. This is the same procedure found in Crim.R. 16(D)(1), (3), (5) and (F)(1). The rule propounded by this Court could be that the petition must

be filed promptly (within 3 working days) and the Judge must also rule promptly (within 1 working day).

These suggestions are not meant to infringe on the prerogatives of this Court but this matter is of such great magnitude to law enforcement officials in this state that Respondent believes that it is his duty to call these matters to the attention of the Court.

Proposition of Law No. 7

Where a public agency follows existing case law and acts in the public interest in responding to a public records request, Relators are not entitled to attorney's fees.

The present case regarding the proper classification of body cam video under the Ohio Public Records Act is a case of first impression in this state. Neither Ohio case law nor the Ohio Public Records Act directly addresses the proper procedure for handling public record requests dealing with police body cam video. Despite this fact, the Relators are asking for attorney's fees based on the fact that they believe that "no well-informed public servant would reasonably believe" that: (1) the video on the Tensing video fits under the CLEIRs exemption of the Act and (2) withholding the video "served the Act's objectives of open government and transparency." (Relators' Merit Brief, p. 24.) Conversely, the Respondent reasonably believed and believes that several exceptions supported his decision not to immediately release the video and that withholding the video from immediate release properly served the objectives of the Ohio Public Records Act and was in the interest of public safety. Therefore, the Relators are not entitled to attorney's fees.

Under R.C. 149.43(C)(2)(c) of the Ohio Revised Code, a court may decide not to award attorney's fees if the court determines that a well-informed public office would reasonably believe that their actions did not constitute failure to comply with their obligations under the Act,

and that a well-informed public office would reasonably believe that their actions would serve the public policy foundations of the Ohio Public Records Act. R.C. 149.43(C)(2)(c). The Respondent has met both of these standards.

The Respondent based his decision not to release the video on relevant dashboard camera video case law, as well as the advice of the Ohio Attorney General's Office. (Rel. Ex. H-8); *State ex rel. Miller v. Ohio State Hwy. Patrol*, (12th Dist), 2014-Ohio-2244, ¶ 26, 14 N.E.3d 396. While the Respondent does not believe that dashboard camera video and police body cam video are to be treated exactly the same under the Act, considering the complete lack of case law on body cam video the dashboard camera video case law was the closest approximation that the Respondent could find. Based on *Miller*, dashboard camera video is appropriately classified as a confidential law enforcement investigatory record and is therefore exempt from disclosure under the Act. *Id.* Given the reasoning laid out in *Miller*, it was entirely reasonable for the Respondent to believe that body cam video was also a law enforcement investigatory record, and therefore not subject to disclosure, let alone immediate disclosure. *Id.* Even if this Court disagrees with the Respondent's assertion that the body cam video is a confidential law enforcement investigatory record, given the dearth of instructive law on the subject, it is hard to imagine how the Respondent could be seen as violating the standard of a "well-informed reasonable public official" by treating police body cam video like police dashboard camera video. The Respondent met the standard set out in R.C. 149.43(C)(2)(c)(i).

Additionally, the Respondent met the standard set out in R.C 149.43(C)(2)(c)(ii). The timeline of events in this case, from the day of the first request to the day of the video's release, lasted a total of six days including a Saturday and Sunday. The Respondent received the video on July 21, 2016. (Respondent's Evidence pg. 2.) The Respondent completed his investigation,

convened a Grand Jury, and secured an indictment by July 29, 2016. *Id.* Immediately following the return of an indictment on July 29th, the Respondent released the video to the public. (Respondent's Evidence pg. 8.) The Respondent did not sooner release the video because he believed that he was justified in withholding the video under an exemption to the Ohio Public Records Act and existing case law. In addition, Respondent did not want to taint the ongoing Grand Jury process. (Respondent's Evidence pg. 3, 10, 12, 13.) The Relators have argued that the Respondent did not properly serve the open government and transparency objectives of the Act. However, in looking at the timeline of events it is quite clear that the Respondent properly balanced the objectives of the Act with his duty to efficiently and effectively investigate and prosecute crimes in Hamilton County. The Respondent does not believe that he was required, under current Ohio law, to release the video after the grand jury proceedings. Even if the video is a "record" of the Hamilton County Prosecutor's Office, the video fits into several exemptions under the Ohio Public Records Act including the trial preparation records and confidential law enforcement investigatory records exemptions. R.C. 149.43(A)(1)(g-h). These exemptions do not require production of the "records" until "all 'trials,' 'actions' and/or 'proceedings' have been fully completed." *Steckman*, 70 Ohio St. 3d at 432. However, in order to maintain public trust and government transparency, the Respondent released the video immediately following the return of an indictment. In the Respondent's view, this was the earliest possible time that the video could be released to the public without tainting the Grand Jury process and risking public safety. The Relators claim that they were serving the public interest by providing news reports, and that the Respondent prevented that public benefit by delaying the video release for six days while the grand jury process was completed. However, the Relators fail to understand that the public interest is not simply served by putting out a newspaper or running a nightly news

program. The public interest is also served by the Prosecutor properly fulfilling his duties as part of the criminal justice system. In this case, the Respondent properly balanced the public interest in a transparent government with the public interest in the effective prosecution of criminal activity, and did so in a very short period of time. The Respondent has met both standards set out in R.C. 149.43(C)(2)(c) of the Act, and therefore this Court should deny the Relators request for attorney's fees in this case.

Amicus Brief

A few words about the Amicus Brief. The verbiage in the brief seems to assume that the video would never be released. This is, of course, not so. Respondent is not saying, and his recorded actions support this, that the video, forever or even for an extended period of time would not be released to the press and public. Release is the order of the day – just not immediately.

Noteworthy is that Amicus gives no consideration to public safety, law investigatory needs or tainting the Grand Jury process. Also, there is no explanation by Amicus as to how the redaction procedure it offers could take place. One can only imagine what a good defense lawyer would do with a "redacted" tape. Complicating all of this is the real question – who decides what can be redacted?

Conclusion

In the February 2016 edition of Court News Ohio, a publication of the Office of Public Information of the Supreme Court of Ohio and Ohio Government Telecommunications, a pertinent and informative article appeared. "Balancing Open Access to Court Records with Privacy Concerns" is both timely and instructive.

Ten years ago, this Court established a 10-member Commission to assist in overseeing

the Court's Rules of Superintendence governing the Courts of Ohio. The purpose of the commission was to give direction to courts about public access to their records.

The article points out that the public access rules were debated during extensive public comment periods leading up to their July 1, 2009 effective date. The Honorable Justice Judith Ann Lanzinger chaired the Commission when the public access rules were drafted and implemented.

To balance the tension between the idea that court records and proceedings are public (see Article 1, Section 16 of the Ohio Constitution), and the concerns of private parties whose personal cases may raise issues they wish to remain confidential, the rules provide for specific exemptions.

As to such records, before restricting access a Court must find by clear and convincing evidence "that the presumption in favor of public access is outweighed by a 'higher interest.'" The article goes on to point out that "[i]n determining whether a higher interest trumps the public's right to examine the record, the court considers" several elements.

One of those elements is:

> "Whether factors that support restricted public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process." (Emphasis added.)

A copy of the article is provided in the Appendix[4]. These are exactly the same concerns that Respondent has with premature release of video that, among other things, could affect public safety and the fairness of any subsequent adjudicatory process as well as the obvious privacy concerns of persons, locations and materials who and which, inadvertently, might be caught by

[4] Appendix 18-19 - CNO Review - Balancing Open Access to Court Records with Privacy Concerns, February 2016.

the eye of the camera while not even being part of what the body cam was meant to record.

Surely the better way would be to permit the General Assembly and other governmental jurisdictions to continue their work to reach a workable solution to the myriad of problems intrinsic to this new modern technology (which did not exist when the Public Records Law was conceived and enacted) or, in the alternative, for this Court to fashion reasonable exceptions and/or limitations on the release of body cam video.

In summary, Respondent seeks an order of this Court to:

1. Dismiss this case on the basis of mootness.

2. Dismiss this case on the basis that the video in question was not a "record of the Hamilton County Prosecutor's Office.

3. Find that if the video is a public record, that Respondent provided the record within a reasonable time as required by the statute.

4. That the video was exempt from release in accordance with the law investigatory and work-product exceptions.

5. Find that if body cam video is a public record, that law enforcement officials have a period of at least 14 days before release is required.

6. Find as an alternative procedure that law enforcement officials be allowed to petition the Presiding Judge of the local Court of Common Pleas for a determination as to *if*, and when, the requested record must be released.

Accordingly, Respondent respectfully requests that this Honorable Court deny the Writ or, in the alternative, provide guidelines and rules for the guidance of law enforcement officials who more and more find themselves in a quandary of conflicting interest between public safety and a fair judicial process as opposed to the oft-repeated phrase of the "public's right or need to know."

In addition, the Court should deny any request for attorney's fees especially given the facts of this case and Respondents actions in following existing case law.

Respectfully submitted,

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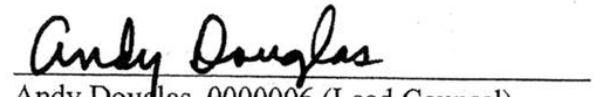

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served upon each party of record in this case by U.S. mail on the 26th day of February, 2016, addressed to:

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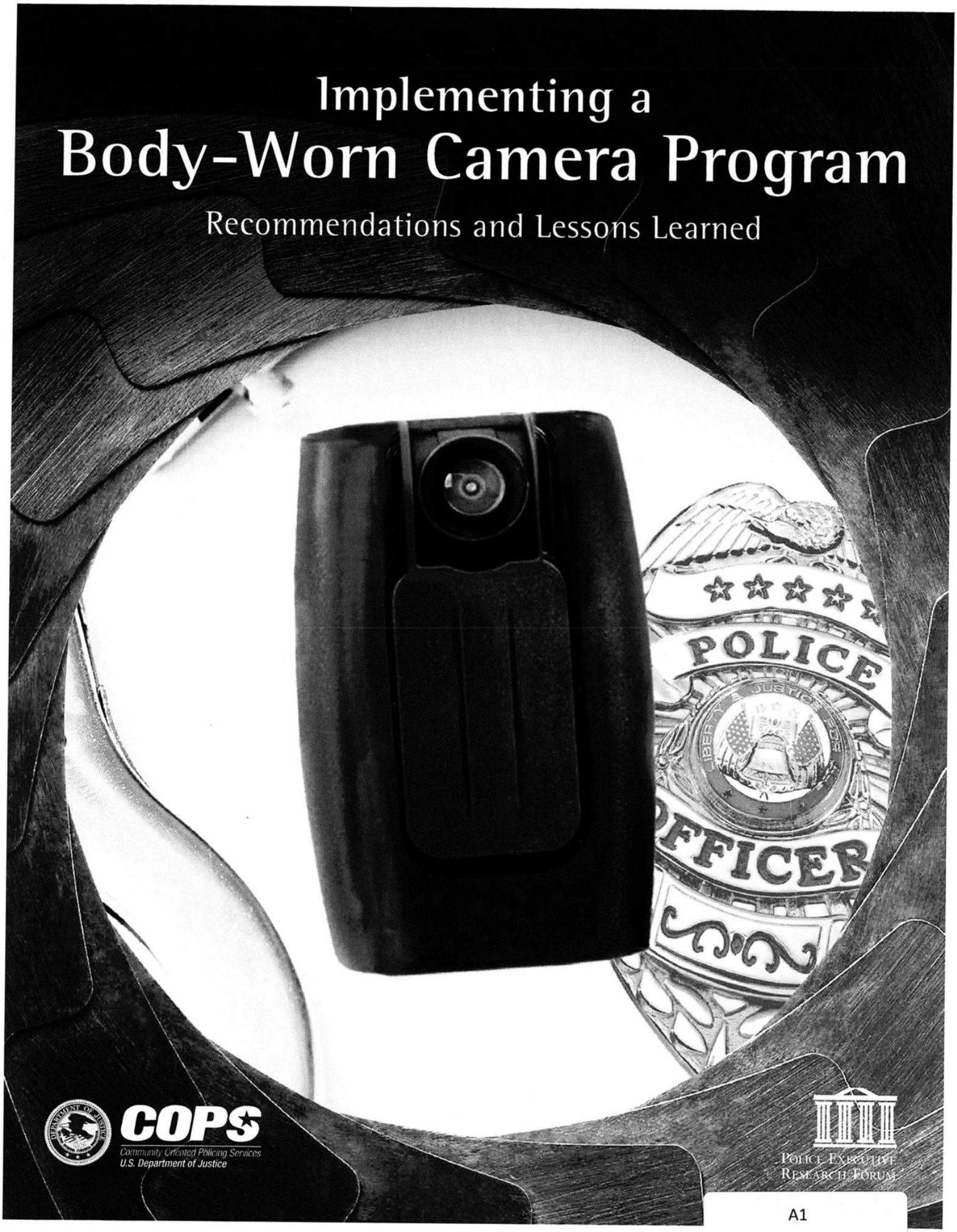
Implementing a Body-Worn Camera Program

Recommendations and Lessons Learned



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be retained indefinitely, but video of a traffic citation must be kept for only a matter of months. Departments often purge evidentiary videos at the conclusion of the investigation, court proceeding, or administrative hearing for which they were used.

Non-evidentiary video involves footage that does necessarily have value to aid in an investigation or prosecution, such as footage of an incident or encounter that does not lead to an arrest or citation or of general activities that an officer might perform while on duty (e.g., assisting a motorist or clearing a roadway). Agencies often have more leeway in setting retention times for non-evidentiary videos, which are generally not subject to state evidentiary laws.

Of the departments that PERF consulted, the most common retention time for non-evidentiary video was between 60 and 90 days. Some departments retain non-evidentiary video for an even shorter period. Fort Collins, Colorado, for example, 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. On the other end of the spectrum, some departments, such as Albuquerque, retain non-evidentiary video for a full year.

Many police executives express a preference for shorter retention times for non-evidentiary video. Shorter retention periods not only address privacy concerns but also reduce the costs associated with data storage. On the other hand, police executives noted that they must keep videos long enough to demonstrate transparency and to have footage of an encounter in case a complaint arises about an officer's actions. For example, departments in Rialto, Fort Collins, Albuquerque, Daytona Beach, and Toronto base retention times in part on how long it generally takes for complaints to be filed.

"It is important to have retention policies that are directly linked to the purposes of having the video, whether that purpose is to have evidence of a crime or to hold officers and the public accountable. Agencies should not retain every video indefinitely, or else those videos could be used down the road for all sorts of inappropriate reasons."

– Lorie Fridell, Associate Professor, University of South Florida

Public disclosure policies

State public disclosure laws, often known as freedom of information laws, govern when footage from body-worn cameras is subject to public release. However, most of these laws were written long before law enforcement agencies began deploying body-worn cameras, so the laws do not necessarily account for all of the considerations that must be made when police departments undertake a body-worn camera program.

Although broad disclosure policies can promote police agency transparency and accountability, some videos—especially recordings of victims or from inside people's homes—will raise privacy concerns if they are released to the public or the news media. When determining how to approach public disclosure issues, law enforcement agencies must balance the legitimate interest of openness with protecting privacy rights.[10]

In most state public disclosure laws, exceptions are outlined that may exempt body-worn camera footage from public release. For example, even the broadest disclosure laws typically contain an exception for video that contains evidence or is part of an ongoing investigation. Some state disclosure laws, such as those in North Carolina, also exempt personnel records from public release. Body-worn camera videos used to monitor officer performance may fall under this type of exception.

10. Scott Greenwood of the ACLU recommends that police executives work with the ACLU to ensure that state disclosure laws contain adequate privacy protections for body-worn camera videos. "If interpreted too broadly, open records laws can undermine the accountability of law enforcement agencies," said Greenwood. "You want to make sure that the video is not subject to arbitrary disclosure. It deserves the highest level of protection."

These exceptions to public disclosure can help police departments to avoid being required to release videos if doing so could jeopardize a criminal prosecution. The exceptions can also help police to protect the privacy of crime victims and witnesses. However, by policy and practice, law enforcement agencies should apply these exceptions judiciously to avoid any suspicion by community members that police are withholding video footage to hide officer misconduct or mistakes. In launching body-worn camera programs, law enforcement agencies should convey that their goal is to foster transparency and accountability while protecting civil liberties and privacy interests. When an agency decides whether to release or withhold body-worn camera footage of a particular incident, the agency should articulate its reasons for doing so.

"When developing body-worn camera policies, agencies have to consider how open the public disclosure laws are in their state. Are they going to have to give up all of their footage to any person that requests it? Or are there some protections? This is important to think about when it comes to privacy."

– Ron Miller, Chief of Police, Topeka (Kansas) Police Department

In addition, some agencies have adopted recording and retention policies that help to avoid violations of privacy. For example, some agencies allow officers to deactivate their cameras during interviews with crime victims or witnesses. And short retention times for non-evidentiary video footage can reduce the window of opportunity for requests for release of video footage that would serve no legitimate purpose.

Lessons learned on privacy considerations

In their conversations with PERF staff members, police executives and other experts revealed a number of lessons that they have learned regarding body-worn cameras and privacy rights:

- Body-worn cameras have significant implications for the public's privacy rights, particularly when it comes to recording victim interviews, nudity, and other sensitive subjects and when recording inside people's homes. Agencies must factor these privacy considerations into decisions about when to record, where and how long to store data, and how to respond to public requests for video footage.
- In terms of when officers should be required to activate their cameras, the most common approach is requiring officers to record all calls for service and law enforcement-related encounters and activities and to deactivate the camera only at the conclusion of the event or with supervisor approval.
- It is essential to clearly define what constitutes a law enforcement-related encounter or activity in the department's written body-worn camera policy. It is also useful to provide a list of specific activities that are included, noting that the list is not necessarily all inclusive. Many agencies give a general recommendation to officers that when they are in doubt, they should record.
- To protect officer safety and acknowledge that recording may not be possible in every situation, it is helpful to state in policies that recording will not be required if it would be unsafe, impossible, or impractical.
- Significant privacy concerns can arise when interviewing crime victims, particularly in situations involving rape, abuse, or other sensitive matters. Some agencies prefer to give officers discretion regarding whether to record in these circumstances. In such cases, officers should take into account the evidentiary value of recording and the willingness of the victim to speak on camera. Some agencies go a step further and require officers to obtain the victim's consent prior to recording the interview.
- To promote officer accountability, most policies require officers to document, on camera or in writing, the reasons why the officer deactivated the camera in situations that are otherwise required to be recorded.

- In one-party consent states, officers are not legally required to notify subjects when officers are recording. However, some agencies have found that announcing the camera is running promotes better behavior and defuses potentially confrontational encounters.
- When making decisions about where to store body-worn camera footage, how long to keep it, and how it should be disclosed to the public, it is advisable for agencies to consult with departmental legal counsel and prosecutors.
- Regardless of the chosen method for storing recorded data, agencies should take all possible steps to protect the integrity and security of the data. This includes explicitly stating who has access to the data and under what circumstances, creating an audit system for monitoring access, ensuring there is a reliable back-up system, specifying how data will be downloaded from the camera, and including protections against data tampering prior to downloading.
- It is important that videos be properly categorized according to the type of event contained in the footage. How the videos are categorized will determine how long they are retained, who has access, and whether they can be disclosed to the public.
- To help protect privacy rights, it is generally preferable to set shorter retention times for non-evidentiary data. The most common retention time for this video is between 60 and 90 days.
- When setting retention times, agencies should consider privacy concerns, the scope of the state's public disclosure laws, the amount of time the public needs to file complaints, and data storage capacity and costs.
- Evidentiary footage is generally exempt from public disclosure while it is part of an ongoing investigation or court proceeding. Deleting this video after it serves its evidentiary purpose can reduce the quantity of video stored and protect it from unauthorized access or release. It is important to always check whether deletion is in compliance with laws governing evidence retention.
- Informing the public about how long video will be retained can help promote agency transparency and accountability. Some agencies have found it useful to post retention times on the department's website.
- It is important for the agency to communicate its public disclosure policy to the community when the body-worn camera program is deployed to develop public understanding of the technology and the reasons for adopting it.

In launching body-worn camera programs, law enforcement agencies should convey that their goal is to foster transparency and accountability while protecting civil liberties and privacy interests.

Impact on community relationships

Building positive relationships with the community is a critical aspect of policing, and these relationships can exist only if police have earned the trust of the people they serve. Police rely on these community partnerships to help them address crime and disorder issues.

At the PERF conference, a number of participants expressed concern that excessive recording with body-worn cameras may damage the relationships officers have developed with the community and hinder the openness of their community policing interactions. Some police executives fear, for

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STATELINE

States Grapple With Public Disclosure of Police Body-Camera Footage

September 22, 2015

By Sarah Breitenbach

A body camera shows police in Spokane, Washington, making an arrest. Police

A5

body cameras are becoming more popular, but some lawmakers want to restrict public viewing of the footage. (Spokane Police Department via The Associated Press)

The images inside the police cruiser are fuzzy, impossible to discern until a laptop glows and street lights illuminate the dash. A few minutes pass and the officer is on foot, approaching a white sedan. There are flashlights in the darkness, and maybe that's the light of a shopping center in the distance.

The half-hour video, which looks like it was shot through a Vaseline-smeared lens, is among hundreds of hours of recordings from body cameras the Seattle Police Department has uploaded to YouTube. Before roughly 800 officers begin using the cameras next year, Seattle police want to know whether posting the videos online is an efficient and affordable way to ensure the public can access them. The videos are "redacted" so that viewers cannot identify the people in them.

As police departments across the country equip their officers with body cameras, many are struggling to strike a balance between the public's right to know and privacy protections. This year 10 states—Arizona, Florida, Georgia, Maryland, Nevada, North Dakota, Oklahoma, Oregon, South Carolina and Texas—have passed laws concerning public access to the footage, according to the Reporters Committee for Freedom of the Press, a nonprofit group that assists journalists.

The South Carolina law exempts footage recorded by the cameras from public disclosure under the state's Freedom of Information Act. A Georgia law that took effect in July limits who can request the videos and pending legislation would deem the videos "records of law enforcement" and not subject to disclosure under that state's public records law.

In South Carolina, the goal was to protect the privacy of people recorded by police, according to Democratic state Sen. Gerald Malloy, who sponsored the legislation. Malloy noted that the measure allows people with a direct interest in a

body-camera video, including the state attorney general, law enforcement agencies and subjects of recordings, to watch it.

"What you want is to have some responsibility," Malloy said. "[So] you don't just have everyone requesting it, placing it on the Internet, those kinds of things."

Earlier this month in Washington, D.C., Democratic Mayor Muriel Bowser proposed legislation that would restrict public access to police videos of assaults and limit what people can review if charges are brought against an officer. In Minnesota, 16 cities have petitioned to make the videos private until legislators decide otherwise.

But Adam Marshall, a legal fellow with the Reporters Committee, called the public records restrictions a "misguided effort" that is unnecessary and risks complicating existing public records laws. "Our position is that almost all are duplicative or unwarranted."

Existing privacy standards cover which body-camera videos cannot be released, he said, and creating more regulations might hide police misconduct from the public.

"We don't disagree by any means that there may be body-camera videos that shouldn't be disclosed under public records laws," Marshall said. "It seems bizarre to say that if a police officer did something inappropriate and the police officer was inside their home and not on their front porch, then the public wouldn't have access."

Body Camera Laws

Undo

The Seattle Experiment

The Seattle Police Department seeks to protect people's privacy by heavily redacting the dashboard- and body-camera images it posts. People can sift through video by date and other tags to find a specific incident, and then file a public information request to view an unedited copy, expediting public access to certain videos and conserving police resources, said Mike Wagers, the department's chief operating officer.

Officials in the department, which has been operating under a federal consent

decree since 2012 when the U.S. Department of Justice identified a pattern of excessive force among officers, realized they had to address public access last year, when a local man requested all of the videos from the city's in-car police dash cameras.

Watching and appropriately redacting the roughly 2 million dashboard videos was impossible, Wagers said, prompting him to host hackathons in the hope that members of Seattle's high-tech workforce would find efficient, automated ways to make the videos available as required by Washington's Public Records Act.

The amount of time needed to manually redact videos may prompt some police departments to shy away from implementing body-camera programs. Jay McDonald, national vice president for the Fraternal Order of Police (FOP), said some agencies estimate it takes about two hours to redact one hour of footage by hand.

In Seattle, hackers wrote codes to automatically distort the dash- and body-camera videos in various ways before posting them to YouTube, where the police department temporarily publishes the footage, Wagers said. He is hopeful companies making body cameras will eventually offer built-in options for redaction.

Police department records account for more than 75 percent of Seattle's public disclosure requests, about 6,000 requests this year, he said. During the pilot program, which wrapped up earlier this year, 12 officers wore the cameras and the department uploaded selected footage ahead of next year's roll out to all patrol officers.

Department officials are now determining what types of redacted video they should post online. They likely won't upload videos taken inside homes or images of juveniles or sexual assault victims, Wagers said.

"We're not going to put things on the site that are going to revictimize someone or really isn't in the public interest," he said.

This attempt to automate access to videos for the public is a good first step, said Jared Friend, who works on technology and liberty issues at the American Civil Liberties Union of Washington. But Friend said the redacted videos aren't particularly helpful because it is so difficult to determine what is going on, and that the public should have access to unredacted versions.

"It is really important that the public has an unedited view of what transpires in events where police involvement is called into question," he said.

Balancing Privacy and Access

High-profile deaths involving police have spurred both policing reform advocates and law enforcement officials to lobby for camera policies. The cameras, their costs and the price associated with storing and disseminating their data have created roadblocks in some jurisdictions, and the federal government has responded with a $20 million pilot program to equip local law enforcement officers with the devices.

The ACLU has drafted model body-camera legislation for states. Under the sample legislation, police would only be required to release footage that is covered by automatic 3-year retention policies for certain kinds of recordings. Videos that are required to be kept are typically ones that illustrate a use of force, result in a felony-level arrest or complaint, or have been requested by a law enforcement officer or subject of a video.

No state has adopted the ACLU law outright, though the law in Maryland closely mirrors it, said Chad Marlow, an attorney with the ACLU. North Dakota and Florida recently enacted measures that would exempt from public records requirements videos taken in private places, like someone's home.

Footage from body cameras should be treated in line with other government documents because the devices collect information on private citizens, said Jay Stanley, a senior policy analyst for the ACLU.

Those records should be available for review, Stanley said. "Police officers are going to wear body cameras and they will be routinely collecting photographs with the potential to invade privacy in a way that government does not ordinarily do, and I think that's the biggest issue," he said.

But McDonald, of the FOP, said public information laws need to be adapted to manage body cameras. Protecting private citizens is the chief reason police officers want to carefully regulate which videos can be released, he said, pointing to videos recorded during routine patrol duties, like visiting a home during a domestic argument, as footage not to be released.

"No crime has been committed, but now we have a video that could be used to ruin somebody's life," he said.

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By Darrel Rowland

The Columbus Dispatch • Sunday January 3, 2016 10:02 AM

The next five weeks will determine whether Gov. John Kasich has a realistic shot at the GOP presidential nomination.

It is a period that will be dominated by visits to New Hampshire, plus several to Iowa and South Carolina, all early voting states.

Fundraising isn't neglected, as Kasich will venture to the West Coast and other locales far from early voting states to collect campaign cash.

One of the more-intriguing stops comes this week when Kasich goes before *The New York Times* editorial board. Does the Ohio governor have a chance of landing support from the traditionally liberal editorial page of the gray lady?

He is one of the few still standing in the 12-person GOP field who could be considered a moderate, and thus even "eligible" for kind words from the influential newspaper. Another in that category, New Jersey Gov. Chris Christie, has not exactly been popular in New York, especially after the Bridgegate mess.

• • •

Here's a safe prediction for 2016: former Ohio Gov. Ted Strickland will not debate Cincinnati City Councilman P.G. Sittenfeld, according to *Dispatch* Reporter Jessica Werhman.

The reasons? First, Strickland goes into the primary election with name recognition to spare. Engaging with Sittenfeld might give the lesser-known candidate a chance to gain exposure. There's no way that helps.

Second, Strickland is a hale and hearty 74-year-old. But despite his energy, it's hard to look young next to a 31-year-old.

Public-radio station WVXU and WCPO-TV in Cincinnati have offered the only debate invitation before the March 15 primary. Sittenfeld has readily agreed to debate; Strickland has demurred.

For his part, Strickland insists that his race is against Republican Sen. Rob Portman. The overwhelming bulk of Strickland's news releases and public statements have contained criticisms of Portman, with few policy statements of his own.

"There are so many differences between Sen. Portman and myself, I simply do not want to use my time and energies doing anything that will distract me from drawing a contrast between me and the fellow that I'm going to be running against next November," Strickland told the Associated Press last year.

• • •

The State Highway Patrol is testing body cameras, but don't look for troopers to be wearing the devices soon.

The gadgets are seen as both documenting inappropriate use of force and protecting officers from undeserved complaints.

Ludlow.

Born, a former patrol superintendent, said he thinks the devices can play an important role in documenting troopers' actions and promoting transparency and accountability with the public.

But Born will await body-cam standards to be developed by an advisory group — he is a co-chairman — before seeking a way to fund the body cams and roll them out in the field.

The Ohio Collaborative Community Police Advisory Board formed by Gov. John Kasich is taking up the issue as it creates statewide standards and best practices for upgrading the state's nearly 1,000 law-enforcement agencies.

Cleveland police and other agencies are beginning to use body cams. Columbus is studying their use.

Legislators also have introduced bills to require police use of body cams, although those efforts will have to be revived this year in the new legislative session.

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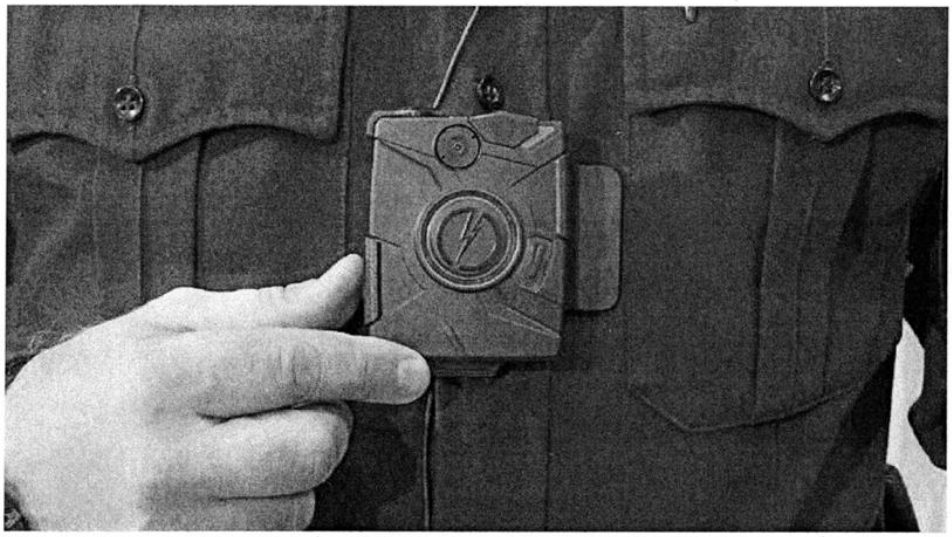

Cleveland Police Sgt. Todd Melzer, the officer in charge of the police department's Mobile Support Unit, demonstrates a body camera in this March 2015 photo. Police officials reported Wednesday that patrol officers in all five police districts have now been outfitted with the technology. (Dave Andersen, cleveland.com)

By **Leila Atassi, cleveland.com**
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on November 11, 2015 at 3:58 PM, updated November 12, 2015 at 7:42 AM

CLEVELAND, Ohio -- Cleveland police officials said Wednesday that citizen complaints against officers have dropped nearly 40 percent since the department **began using body-worn cameras in February.**

Larry Jones, who is overseeing the body camera implementation for the city, told members of City Council's Safety Committee that between January and September 30, the department's Office of Professional Standards received 225 complaints against officers – down from 374 during the same period last year.

The department has rolled out the program systematically over nine months, and the cameras have been fully deployed to front-line officers in all five police districts only since September, he said.

But the department is looking forward to analyzing the data on citizen complaints again after a year of full deployment, Jones said.

Deputy Chief Dornat Drummond said the department's research on the efficacy of body cameras revealed that citizen complaints had dropped as much as 87 percent in some jurisdictions.

And police use of force had been reduced by as much as 60 percent, he said. He did not say, however, whether Cleveland police were found to have used force less often since the cameras were issued.

The **underlying philosophy, officials have said,** is that officers and the public alike remain on their best behavior -- and citizens are less likely to file false complaints -- when they know the interactions are being recorded.

In January, the city bought 1,500 cameras from Taser International at a cost of $2.4 million, which included a five-year subscription to EVIDENCE.com, the company's digital evidence storage and management system.

According to departmental policy, officers are required to record during pedestrian or vehicle investigative stops, pursuits and emergency driving situations, crime or accident scenes, physical violence, civil disturbances, criminal suspicious activity or police use-of-force incidents.

Officers also are required to alert citizens that the interaction is being recorded. A victim or witness can ask the officer to turn off the camera. A supervisor must approve the decision to deactivate, and when practical, officers are advised to record the victim or witness stating that they do not wish to be recorded.

Officers are responsible for charging their cameras and uploading their own footage by docking the unit at the end of each shift. The footage is automatically uploaded to EVIDENCE.com, where video clips can be grouped into case files, tracked for chain of custody, accessed from anywhere and shared with those given security clearance.

During Wednesday's council hearing, Drummond said that about 347,000 videos have been uploaded since Feb. 2 – more than 70,000 of those were in October alone.

Drummond said that about a thousand cameras have been issued in all, and the department is now moving on to outfit support units, such as narcotics, SWAT and gang units with the technology. That phase should be completed by the end of March, he said.

Police officials also are working with the Transportation Security Administration to develop policies for body camera use in secured areas of the airport, he said.

City Councilman Kevin Conwell said he plans on asking the state legislature to create uniform guidelines for body camera use, to eliminate discrepancies in policies across jurisdictions.

Drummond said Cleveland considered internationally recognized "best practices" when devising its policy, and that the department feels confident that the camera program has improved service to the public, while respecting citizens' privacy.

Council members asked the police officials if the video footage qualifies as a public record, and if so, who determines when to release it.

"Just about anything we do as public servants are subject to public records requests," Drummond responded. "What's going to be released might be different because it depends on what's going on. If there is a shooting involving an officer, we can't release that information until the conclusion of the investigation. If there are lawsuits, we won't release it until the conclusion of the lawsuits."

Drummond said the city's law department makes those decisions.

But councilmen Zack Reed and Jeffrey Johnson said there must be a clear policy articulating the time frame for redacting and releasing videos and what kinds of footage can be held back from the public.

Reed pointed out that his own drunken driving arrest in 2013 was the subject of an open criminal investigation when the city released footage of that event to the media.

Yet, the city cited an open investigation as justification for waiting seven months to release the body camera footage of an officer-involved shooting in the Slavic Village neighborhood in March.

Reed said the footage indicated that the officer was clearly justified, and that the public had a right to see it sooner.

When Drummond, again, responded that the law department makes those decisions, Johnson became upset, arguing that the law

department's response to public records requests is "terrible."

"I need you to care about the public access to your video," Johnson said. "I don't need you to push it off on the law department. ... Because you know what? They're terrible."

Safety Committee Chairman Matt Zone said his committee will invite the law department to a hearing on the topic in January.

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BALANCING

Open Access to Court Records with Privacy Concerns

Case decisions involving access to public records draw the passionate attention of the media. However, the state's well-known public records act doesn't govern the courts because of the separation of powers required among the three branches of government. Instead, the Ohio Supreme Court regulates court records statewide through its Rules of Superintendence for the Courts of Ohio.

It was 10 years ago that the Court established the 19-member commission that assists in overseeing these rules that govern Ohio's courts. Rules 44 to 47 give direction to courts about public access to their records.

The public access rules, which were debated during extensive public comment periods leading up to their July 1, 2009 effective date, reflect a core underlying principle of openness while considering individual privacy rights and other societal interests.

"The courts, as a third branch of government, are expected to conduct the people's business in an open, rather than a secret, manner," said Justice **Judith Ann Lanzinger**, who chaired the Commission on the Rules of Superintendence when the public access rules were drafted and implemented. "There is an inherent tension between the idea that court records are public and the concerns of private parties whose personal cases may raise issues they wish to remain confidential."

To balance these responsibilities, the rules identify specific exemptions, of which some courts may not be aware. The rules first explain that court records include case documents and administrative documents, which are both defined, and that each category exempts some materials. Here are the key categories of documents that aren't open to the public.

Case Documents

Particular case documents and parts of case documents are excluded from disclosure. Specifically restricted from public access are:

Personal Identifiers

Personal identifiers are Social Security numbers, except for the last four digits; financial account numbers, which include debit card, charge card, and credit card numbers; employer and employee identification numbers; and a juvenile's name in an abuse, neglect, or dependency case, except for the child's initials or a generic abbreviation such as "CV" for "child victim." Forms containing these personal identifiers are also exempt.

The duty to redact personal identifiers resides with the parties filing documents with the clerk or submitting them to the judge for the record. A clerk of court isn't required to redact these identifiers from orders or other items issued by the court.

Certain Juvenile and Domestic Relations Records

Except as it pertains to the juvenile's prosecution later as an adult, a juvenile's previous disposition in abuse, neglect, and dependency cases, juvenile civil commitment files, post-adjudicatory residential treatment facility reports, and post-adjudicatory releases of a juvenile's social history aren't open to the public.

Most recently, on Jan. 1 of this year, the Court added exemptions to protect other sensitive personal information in juvenile and domestic relations cases. The rules ban the release of documents, such as health-care records, child custody evaluations, and domestic violence risk assessments. These protected materials are still accessible to the involved parties and their legal representatives, but non-parties don't have access to family details that relate to health, abuse, financial, and familial history.

"These exemptions were added in recognition of a party's need for

privacy, particularly in regard to sensitive medical records and custody evaluations," Judge **Patricia Delaney**, the commission's current chair, said. "Proposed by the Advisory Committee on Children and Family, the changes were vetted through the commission, public comment, and the Ohio Supreme Court. We believe it balances public record access with concerns for individual privacy rights and a court's critical need for this material."

Other Specified Records

Also excluded from disclosure are documents or information in documents exempt from access under state, federal, or common law. In addition, the rules protect notes, drafts, recommendations, advice, and research of judicial officers and court staff, as well as Ohio Courts Network information in some circumstances.

Materials Limited by Court on Request or Through Own Order

If none of the rules' distinct exemptions apply, a party to a case or a person mentioned in case materials may ask a court in writing to restrict public access to specific information or to an entire case document. A court also may decide to prohibit the release of some information through its own authority.

Before restricting access, though, the court must find "by clear and convincing evidence" that the presumption in favor of public access is outweighed by a "higher interest." In determining whether a higher interest trumps the public's right to examine the record, the court considers these elements:

- Whether public policy is served by restricting public access
- Whether a state, federal, or common law exempts the document or information from public access
- Whether factors that support restricted public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process

The rules stress, though, that courts are required to use the least restrictive means available when limiting access to a case document.

If none of the rules' distinct exemptions apply, a party to a case or a person mentioned in case materials may ask a court in writing to restrict public access to specific information or to an entire case document. Before restricting access, though, the court must find "by clear and convincing evidence" that the presumption in favor of public access is outweighed by a "higher interest."

Administrative Documents

Administrative documents are also open to the public unless a specific exemption applies. As with court documents, the rules regarding administrative documents exclude from release personal identifiers and materials barred from disclosure under state, federal, or common law. In addition, the rules restrict access to materials in six other categories, which include court security plans and software, and those exempted by the Rules for the Government of the Bar.

Common Questions About Managing Documents Excluded from Public Access

John VanNorman, the Supreme Court's staff liaison to the superintendence rules commission, explains that the handling of exempt materials is at times confusing for court officials.

"Some local courts misunderstand the effect of something being exempt," VanNorman said. "It simply means that the public doesn't have a right to access the document or information. Occasionally, clerks and judicial officials think that nobody, including court staff, can see an exempted document, or they believe the exempted material must be permanently removed from the case file. Instead, judges and court personnel are generally permitted to view materials excluded from public access. And, exempted information doesn't need to be removed or kept separately from the case file. However, exempted information should be taken out of the file before allowing the public to inspect and copy it."

Information with Restricted Access May Later Be Made Public

In addition, records withheld from public access because a court approved a request or determined it was necessary may again become available to the public. A court may re-open access to a case document or information in the case document if it determines that permitting open access is no longer outweighed by more significant considerations.

"The commission took a measured approach to clarify that secrecy was not the default position, and that a finding that a higher interest clearly and convincingly outweighed public access was needed before records are made unavailable," Justice Lanzinger said.