

COMMENTS ON THE NEW YORK CITY POLICE DEPARTMENT BODY-WORN CAMERA POLICIES

The New York City Bar Association supports the principal objectives of the New York City Police Department (NYPD) Body-Worn Camera (BWC) Program: “To provide a contemporaneous, objective record of police-civilian encounters, to foster police accountability, and to encourage lawful and respectful interactions between the police and the public.”¹ We appreciate the Department’s efforts to engage with the public, related stakeholders and the Bar on implementation and regulation of the NYPD camera program,² including their informative presentation to our Criminal Courts Committee in February. We respectfully offer the following endorsement as well as a few suggested modifications to the policies in order to better achieve the goals of objectivity, accountability, and respectful interaction.

- **Endorsement:** Officers should be permitted to review the recordings of an NYPD use-of-force incident which they witnessed or in which they participated, prior to making an official statement concerning the incident, at a time and place to be determined by the officer in charge of the investigation; we understand this to be current NYPD policy and we endorse it.
- **Recommendation 1:** Officers should activate their cameras before initiating a civilian encounter if there is any level of suspicion of unlawful activity by the civilian, or any prospect that the civilian will be asked to present identification, submit to a search, or be detained, summonsed, or arrested.
- **Recommendation 2:** Officers should notify subjects that they are being recorded immediately, except when doing so would be unsafe, impractical, or impossible.
- **Recommendation 3:** Recordings of police-civilian encounters should be made available promptly to the civilian who was recorded, subject to relevant safety and privacy limitations in the Freedom of Information Law, notwithstanding the fact that criminal proceedings are pending against them or others.

¹ Draft Operations Order No. 16, Issued March 22, 2017 (“March 2017 Draft Operations Order”), *available at* https://policingproject.org/wp-content/uploads/2017/04/NYPD_BWC-Response-to-Officer-and-Public-Input.pdf (Appendix B) (all websites last visited July 25, 2017).

² *See generally*, Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy, prepared by the Policing Project at New York University School of Law, *available at* <https://policingproject.org/wp-content/uploads/2017/03/Report-to-the-NYPD-Summarizing-Public-Feedback-on-BWC-Policy.pdf>.

- Recommendation 4: An unjustified failure to record or to preserve actions that are subject to mandatory recording – including arrests, vehicle or civilian stops, searches or uses of force – should be subject to the same discretionary range of judicial sanctions as wrongful failure to record or preserve any other form of discoverable evidence: adverse inference instructions, witness preclusion, or issue preclusion.

ENDORSEMENT

The NYPD allows its officers free access to their own and other officers' body-worn camera (BWC) recordings "in performance of their duties," or "in furtherance of an investigation or preparation of a case."³ There are exceptions for a "Level 3 use of force incident," which is roughly equivalent to "deadly force" as defined in Penal Law Sec. 10.00(11), or when the officer himself is the subject of or a witness to an official investigation. In those cases, pre-statement access to the recordings of the incident is permitted, but "at a time and place deemed appropriate by the supervisor in charge of the investigation."⁴ By adopting a policy of investigative supervisory control of access to footage of use-of-force incidents, the NYPD attempts to find a middle ground between a rule of "no access" that is proposed by the New York City Department of Investigation (DOI) and recommended by the American Civil Liberties Union (ACLU), and a rule of "free access" recommended by the United States Department of Justice (DOJ).

In support of a "no access" policy, the ACLU argues: "The risks that enabling officers to view footage prior to completing a report or providing a statement would, at best, color officers' recollection of events or, at worst, provides officers with the opportunity to deliberately tailor their statements based on the footage strongly counsel against this provision."⁵ According to the ACLU, the NYPD's policy must be modified to include a prohibition on viewing BWC footage until after the completion of any required reports or official statements.

The NYPD Inspector General's July 2015 report also raises concerns about the corrupting effects of access on the empirical validity of internal investigations: "BWC footage has no limitation on focus, attention, or recollection, and may capture events that officers themselves did not perceive, did not observe, or could not reasonably recall . . . [E]ven officers' honest recollections of an incident may be altered inadvertently by viewing video footage, leading them to omit events they recall but which were not captured on camera." The Inspector General also notes that prior access to BWC footage may affect the quality of NYPD's decision-making in disciplinary matters: "[E]xposing officers to events to which they may not have been privy at the time of the incident affects the ability of investigators to assess the officer's contemporaneous appraisal of the circumstances which led him or her to take the actions under investigation."⁶

³ *Supra* note 1, March 2017 Draft Operations Order at para. 17(a) and (b).

⁴ *Id.*, para. 17(c) and (d).

⁵ "Comments of the New York Civil Liberties Union In Regard to the New York Police Department's Proposed Body-Worn Camera Policy", Aug. 5, 2016, at 3, *available at* https://www.nyclu.org/sites/default/files/releases/NYCLU_Comment_NYPD_BWC.pdf.

⁶ "Body-Worn Cameras in NYC: An Assessment of NYPD's Pilot Program and Recommendations to Promote Accountability" Office of the Inspector General for the NYPD, NYC Dept. of Investigation, July 2015, at 28, *available at* <http://www1.nyc.gov/assets/oignypd/downloads/pdf/nypd-body-camera-report.pdf>.

The International Association of Police Chiefs urges caution in granting free access: “The question of whether an officer should be allowed to review recordings before writing a report, especially following an officer-involved shooting or accident, is a matter that should be closely examined by administrators.”⁷

The DOJ recommends free access on the theory that free access to the recordings actually promotes the truth: “Officers should be permitted to review video footage of an incident in which they were involved, prior to making a statement about the incident. This can occur, for example, if an officer is involved in a shooting and has to give a statement about the shooting that may be used in an administrative review or a criminal or civil court proceeding... Reviewing footage will help officers remember the incident more clearly, which leads to more accurate documentation of events. The goal is to find the truth, which is facilitated by letting officers have all possible evidence of the event. Real-time recording of the event is considered best evidence. It often provides a more accurate record than an officer’s recollection, which can be affected by stress and other factors. Research into eyewitness testimony demonstrates that stressful situations with many distractions are difficult even for trained observers to recall correctly. If a jury or administrative review body sees that the report says one thing and the video indicates another, this can create inconsistencies in the evidence that might damage a case or unfairly undermine the officer’s credibility.”⁸

We believe that a policy of unsupervised access to the recordings prior to making an official report is misguided in cases where the officer or a comrade may be liable or culpable for a substantial use of force, and the Departmental process occurs in advance of prosecutorial review. Allowing an officer to harmonize his report with the BWC recordings does not necessarily serve the truth, and indeed, may permanently impair the ability of DOI, police supervisors and prosecutors to make the right decisions, and the ability of courts and juries to determine the truth. We endorse the middle ground adopted by the NYPD. Officers involved in a Level 3 use of force should be permitted to review the recordings “at a time and place deemed appropriate by the supervisor in charge of the investigation.”⁹

RECOMMENDATION 1

Officers should activate their cameras before initiating a civilian encounter if there is any level of suspicion of unlawful activity by the civilian, or any prospect that the civilian will be asked to present identification, or will be searched, detained, summonsed, or arrested.

The March 2017 Draft Operations Order follows a different protocol. Officers are directed to “activate BWC prior to engaging in . . . interactions with persons suspected of

⁷ Body-Worn Cameras, Concepts and Issues Paper, IACP National Law Enforcement Policy Center, April 2014, at 5, available at <http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/BodyWornCamerasPaper.pdf>.

⁸ “Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned” Office of Community Oriented Policing Services, U.S. Department of Justice Police Executive Research Forum, Sept. 2013, Recommendation , at 45, available at http://www.policeforum.org/assets/docs/Free_Online_Documents/Technology/implementing%20a%20body-worn%20camera%20program.pdf.

⁹ *Supra* note 1, March 2017 Draft Operations Order at para. 17(c).

criminal activity.”¹⁰ However, “founded suspicion,” the predicate for a De Bour level-2 inquiry, is the triggering event for camera activation.¹¹ The Department has remarked, “We also plan to train our officers that in many cases they should record “level-1” encounters if they feel it is likely their suspicion level will elevate during the encounter.”¹² This training recommendation should be included in the policy.

Both DOJ and the International Association of Police Chiefs recommend a policy of routine deployment for enforcement-related encounters: “Agency policy should require that officers activate their BWC whenever they make contact with a citizen in the course of conducting official police business.”¹³ DOJ counsels exceptions for situations where camera activation would be unsafe, impossible, or impractical. DOJ counsels against activating cameras during most encounters that are not enforcement-related, particularly “during conversations with crime witnesses and members of the community who wish to report or discuss criminal activity in their neighborhood.”¹⁴ This is consistent with NYPD policy, which either prohibits recording such conversations, or discourages recording them as counter-productive or chilling.

The policy of not recording low-level encounters has been criticized because the initiation of a low-level encounter often produces an unexpected escalation that requires enforcement: “Although Level 1 encounters are meant to be brief and non-threatening, a request by an officer to produce identification or an officer approaching a person with his or her hand on a holstered gun can be perceived as threatening or intimidating to the person being approached, and such encounters have the potential to quickly escalate. Given this inherent risk for escalation, the NYPD policy should mandate activation of BWCs for all Level 1 encounters and above.”¹⁵ We agree with this assessment.

For purposes of training and oversight, there is no viable alternative to a policy of routine recording of all police initiated interactions. Unless officers are trained to routinely record all potential enforcement actions, including those that start at “level 1,” it will be impossible to determine whether the officers observe the difference between a polite level 1 and pointed level 2 inquiry; whether they abide by the proscription against making search requests at level 1, and whether their search requests at level 2 actually convey the option to decline.

RECOMMENDATION 2

Officers should be required to immediately notify subjects that they are being recorded, unless doing so would be unsafe, impractical, or impossible.

¹⁰ *Id.* para. 5(d).

¹¹ *People v. De Bour* 40 NY2d 210 (1976).

¹² The NYPD’s Response to Public and Officer input on the NYPD’s Body-Worn Camera Policy, Jan 20, 2017, p.10 (on file with City Bar).

¹³ *Supra* note 7, IACP Report at 3.

¹⁴ *Supra* note 8, DOJ Recommendations at 57 (recommendation 11).

¹⁵ *Supra* note 5, NYCLU Comments at 4.

The draft policy requires officers to notify members of the public that an interaction is being recorded “as soon as is reasonably practical... unless notification could compromise the safety of any person or impede an investigation.”¹⁶

The exception for “impeding an investigation” was not recommended by DOJ, and was not part of the original draft policy for public comment. This exception to notification appears to have been added to the policy as a result of the negotiations that produced an agreement for citywide deployment of BWCs. Most NYPD patrol officers would prefer to record surreptitiously. According to a survey of NYPD Patrol officers by the NYU Marron Institute of Urban Management, 65% of officers oppose any notification of recording during public encounters, and 50% of officers oppose notification of recording even within the subject’s home.¹⁷ An earlier draft of the NYPD policy “encouraged” rather than required, notification as a way of assuring officers that they would never be penalized for failing to notify a civilian.¹⁸ DOJ recommends: “Officers should be required to inform subjects when they are being recorded, unless doing so would be unsafe, impractical, or impossible.” DOJ observes that most states, including New York, do not require the consent of the subject, but nevertheless recommends that all states inform subjects that they are being recorded: “The mere knowledge that one is being recorded can help promote civility during police-citizen encounters. Police executives report that cameras improve both officer professionalism and the public’s behavior, an observation that is supported by evaluations of body-worn camera.”¹⁹

As evidence of the civilizing effect of notification, DOJ cites a 2013 study in Rialto California which identified a 50% reduction in the use of force where subjects knew they were being recorded.²⁰ Based on the same study, Judge Scheindlin opined: “The knowledge that an exchange is being recorded will encourage lawful and respectful interactions on the part of both parties.”²¹ Of course, the beneficial effect can only occur if the civilian knows he is being recorded.

In some cases, the subject’s awareness of recording should promote courtesy and reduce strife. In other cases, the camera may exacerbate a situation where a subject is already hostile or enraged. Only by studying the actual effects of notification will we learn how police-civilian interaction is affected by the awareness of the camera.

¹⁶ *Supra* note 1, March 2017 Draft Operations Order, para. 4.

¹⁷ Report on the NYPD Officer Body-Worn Camera Questionnaire, NYU Marron Institute of Urban Management, Feb. 21, 2017, at 7-8, *available at* http://marroninstitute.nyu.edu/uploads/content/NYPD_Officer_BWC_Questionnaire_Report.pdf.

¹⁸ The NYPD’s Response to Public and Officer input on the NYPD’s Body-Worn Camera Policy, April 2017, at 1 *available at* https://policingproject.org/wp-content/uploads/2017/04/NYPD_BWC-Response-to-Officer-and-Public-Input.pdf.

¹⁹ *Supra* note 8, DOJ Recommendations at 40.

²⁰ William Farrar, “Operation Candid Camera: Rialto Police Department’s Body-Worn Camera Experiment,” *The Police Chief* 81 (2014): 20–25.

²¹ *Floyd v. City of New York*, 959 F.Supp 668, 685 (S.D.N.Y 2013).

RECOMMENDATION 3

BWC footage of a police-civilian encounter should be promptly available under the Freedom of Information Law to the person who has been recorded, notwithstanding the fact that criminal proceedings are pending against them or others.

The NYPD intends to afford public access to BWC recordings within the framework and the limits of the State Freedom of Information Law, Public Officers Law Sec 87. We applaud this intent and urge the NYPD to develop a FOIL mechanism that will afford members of the public meaningful access to BWC footage. As it currently stands, FOIL requests often take a significant period of time before they are answered and are denied in many cases. The Department acknowledges that the FOIL process can be slow and cumbersome, but maintains the need for a legal framework that assures necessary and effective privacy controls. For example, FOIL-access to BWC recordings of an arrest that did not result in a conviction and was sealed by the Criminal Court would require a notarized request or authorization from the arrestee. To expedite access for persons who were recorded, which generally would not implicate statutory exemptions, the NYPD intends to adapt its FOIL form to identify uncomplicated requests. In addition, FOIL requests may now be made via email at FOIL@NYPD.ORG.

We also urge that FOIL exemptions be applied narrowly. We disagree with the currently held broad interpretation of the law enforcement FOIL exemptions, pursuant to which the NYPD has declared that it will provide no FOIL-access to BWCs that pertain to pending criminal cases: “Requests by a witness or victim to view a BWC recording must be declined and referred to the appropriate prosecutor handling the case. Confirmatory identifications (“showups”) must be done in person and not by the witness viewing a BWC video of the suspect. Requests by civilians to view a BWC recording that is not related to a criminal case must be declined and referred to the Legal Bureau’s Document Production Unit.”²²

A policy of non-access to BWC recordings during lengthy criminal prosecutions and investigations is inimical to the goal of public access. While we believe that in some instances, there may be good reasons for limiting FOIL-access to BWC footage that pertains to a pending criminal case or investigation, access to recordings should not be denied completely to concerned civilians and the public based solely on the fact that a criminal case or investigation is pending. FOIL-access should be denied only upon an affirmative showing that disclosure would actually “interfere” with the pending proceeding or investigation, and only to the extent that other law enforcement exemptions actually apply.²³

²² *Supra* note 1, March 2017 Draft Operations Order, “Legal Considerations.”

²³ Section 87 of the Public Officers Law makes all agency records available for public inspection, with major exemptions for privileged matter, including law enforcement personnel records, POL 87(a). See Civ. Rights 50-a. In addition, FOIL exempts from disclosure “records compiled for law enforcement purposes,” including records whose disclosure could “interfere with law enforcement investigations and judicial proceedings” or “deprive a person of a fair trial or impartial investigation,” “identify a confidential source or disclose confidential information relating to a criminal investigation,” “reveal non-routine criminal investigative techniques or procedures,” or “endanger the life or safety of any person.” POL 87(e) and (f).

RECOMMENDATION 4

An unjustified failure to preserve or record enforcement actions that are subject to mandatory recording - arrests, vehicle stops, Terry stops,²⁴ searches or uses of force - should be subject to the same discretionary range of judicial sanctions as wrongful failure to preserve any other form of discoverable evidence: “Where discoverable evidence gathered by the prosecution or its agent is lost, the People have a heavy burden of establishing that diligent, good-faith efforts were made to prevent the loss.”²⁵ Otherwise, the trial court will exercise its discretion in choosing an appropriate sanction.²⁶

To assure preservation, discoverability and competency of the recordings as evidence, the policies require that recordings be uploaded at the end of each tour, electronically labeled or “tagged” according to the nature of the action, and documented in the related complaint report, arrest report or memo book entry, which must also identify any other officers who recorded the same event. The existence of BWC footage must be brought to the attention of the interested prosecutor and NYPD attorney or detective, and made available to them and to no one else.

The recordings must be maintained for the entire statute of limitations period associated with its potential use: Five years for recordings of crimes, three years for potential civil actions, and one year for mandatory recordings in general. The cost of BWC data storage is expected to be substantial. The NYPD Office of Information Technology anticipates an up-front investment of approximately \$5 million for the initial purchase of devices, and an annually recurring cost in the tens of millions of dollars for storage.²⁷

Given the strict regulations for recording certain events, and the mechanisms in place for identifying, preserving and transmitting the recordings to prosecuting agencies, judicial sanctions normally should be imposed where a law enforcement officer, acting within the scope of his or her official duties, fails to record, loses or destroys material evidence already committed to the police custody. The sanctions may take the form of an adverse inference instruction, witness preclusion, or issue preclusion.²⁸

CONCLUSION

To assure objectivity, we recommend that NYPD body-worn cameras be activated at the outset of all police-civilian interactions, including those that begin innocuously and unexpectedly

²⁴ *Terry v. Ohio* 392 US 1 (1968).

²⁵ *People v. James*, 92 NY2d 620 (1999); citing *People v. Kelly*, 62 N.Y.2d 516, 520 (1984).

²⁶ *People v. Kelly*, at 521.

²⁷ “Developing the NYPD’s Information Technology,” available at <http://www.nyc.gov/html/nypd/html/home/POA/pdf/Technology.pdf>.

²⁸ See *People v. James*, 93 N.Y.2d 620 (1999); *People v. Joseph*, 86 N.Y.2d 565 (1995); *People v. Wallace*, 76 N.Y.2d 953 (1990); *People v. Haupt*, 71 N.Y.2d 929 (1988); *People v. Martinez*, 71 N.Y.2d 937 (1988); *People v. Kelly*, 62 N.Y.2d 516 (1984).

escalate. To promote mutual respect, we recommend that civilians be told they are on camera at the inception of every police-initiated encounter. Moreover, individuals who have been recorded must be given timely access to the recordings under the Freedom of Information Law, and established legal consequences should apply to an unjustified failure to record or preserve evidence.

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