



# **Police Body Cameras – An FOI Battle Headed to Ohio**

## ***A discussion paper from the Ohio Newspaper Association | May 2015***

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### **OUR VIEW SUMMARIZED**

It's in the public interest to narrowly craft any new exemptions to the public records law to govern the use of body cameras. Existing exemptions related to police records already cover most situations of concern. Let's preserve the critical principle that initial activity recorded by law enforcement personnel is presumptively open. Let's achieve consensus to deal with the remaining policy and practical issues raised by body cameras. An important path to achieving this involves uniform standards on archiving and when cameras must be activated by officers.

### **OVERVIEW**

Incidents around the country, including Ohio, have prompted growing usage of body cameras by police officers – a trend expected to accelerate. The ONA asserts that the Ohio open records law (ORC 149.43) makes footage captured by body cameras presumptively open, though release of such footage can fall into the many exceptions under the law, including the often cited confidential law enforcement investigatory records exemption.

However, litigation in Ohio by media outlets or citizen groups to dislodge video from police custody seems inevitable. If the law on disclosure evolves mainly through court interpretation, the outlook isn't promising based on trends we see in Ohio courts. "Leaving it to the courts to sort out" likely will narrow media access to an unacceptable level.

As media outlets and other groups navigate the courts, they also should anticipate legislation. Quoting [the National Conference of State Legislatures](#), the New York Times reported on April 27 that [87 bills related to bodycams have been introduced](#) in 29 states with 15 states moving to limit access. In Missouri, media outlets had to mobilize in April and May to stop HB 762, which would have closed police dash-camera and body-camera videos to the public unless there was a court order to open the videos. The media groups argued for treatment of the videos as investigative reports that could be open. At this writing, Missouri Press Association Executive Director Doug Crews said he believes the bill is dead for the current legislative session.

Back in Ohio, Rep. Kevin Boyce, D-Columbus, has announced [he plans bodycam legislation](#). Gov. John Kasich [has created the Ohio Collaborative Community Police Advisory Board and put changes on a fast track](#) in the wake of troubling use-of-force incidents. The governor plans to enact many of the recommendations in a recent advisory committee report by executive order. He wants statewide police standards on the use of deadly force and hiring practices in place before the end of the summer with other recommendations to follow. One of those recommendations directly addresses body cameras:



*(The committee recommends ...)* A thorough investigation of the use of body cameras that looks both at how they could bolster transparency and the challenges they present, such as privacy, storage capacity and maintenance of records.

Media groups such as the Reporters Committee for Freedom of the Press, the Radio & Television News Directors and the Media Law Resource Center are adopting positions. Absolutist positions from a sunshine law standpoint probably will not be sustained. Here's why: As a general proposition, the privacy issues and practical problems associated with body cameras can exceed those in other areas of police activity that involve open records. Officers often will be recording on private property and/or capturing images of witnesses and crime victims in sometimes horrific situations. Some witnesses and victims won't cooperate if they know the video is readily available -- not only to the traditional media but also to less-responsible outlets and the general public. Then there are issues such as funding the purchase of cameras, creating standards on everything from usage to archiving and figuring out how to review, edit and share footage in a legal, cost-effective manner.

It's no surprise, then, that considerations other than a presumption of openness have taken front and center in most early efforts to set policy. Much of the proposed legislation in other states is very concerning from a transparency perspective. Experience teaches us that government agencies, especially police agencies, will strongly favor no presumed public access and assert their ability to control release versus the arguments favoring citizen access.

That's exactly what we're observing. Police agencies are crafting policies at odds with Ohio's open records laws. Some policies only allow release with the approval of the officer shooting the video. The policy proposed by the Cleveland Police Department states that body camera footage is released at the sole discretion of the chief. This should be unacceptable and unlawful – and should remain so under any future Ohio statutes.

The following paragraph, from [a comprehensive, helpful discussion paper on the issue by the ACLU](#) explains a key reason why disclosure simply cannot be left to the discretion of the police chief or prosecutor. Perhaps the most important aspect of body cameras is the potential, to quote the ACLU, “to serve as a check against the abuse of power by police officers.” From the ACLU paper:

Much interest in the technology stems from a growing recognition that the United States has a real problem with police violence. In 2011, [police killed](#) six people in Australia, two in England, six in Germany and, according to an FBI count, 404 in the United States. And that [FBI number](#) counted only “justifiable homicides,” and was comprised of *voluntarily submitted* data from just 750 of 17,000 law enforcement agencies. Attempts by journalists to compile more complete data by collating local news reports have resulted in estimates as high



as 1,000 police killings per year in the United States. Fully a quarter of the deaths involved a white officer killing a black person.

Body cameras also can and do support the police and improved community relations. Quite often the cameras capture officers acting professionally and heroically with restraint. In New Richmond OH this year, Officer Jesse Kidder's personally purchased body camera showed the laudable way he handled an incident in which a slaying suspect pleaded with the officer to open fire. Instead, he was able to take the suspect into custody.

Consider the words of Police Chief Randy Harvey in this excerpt [from an Associated Press account](#) of the issues around body cameras:

While some police around the country have balked at the use of body cameras, saying they would subject them to an unreasonable level of monitoring, interest in supplying them to officers is growing. Studies of camera use by police in Rialto, California, and Mesa, Arizona, show steep declines in citizen complaints and in use of force by officers.

In the Ohio village of New Richmond, where [Kidder's restraint last week in the face of a potentially deadly suspect](#) has drawn wide acclaim, police Chief Randy Harvey said the video shows why he'd like to have the wearable cameras for all his officers. But he needs to figure out to pay for them, an issue for many departments, large and small.

"It's all out there for everybody to see — it eliminates any questioning or second-guessing or speculation as to what really occurred," said Harvey, a police officer for more than three decades who said he "believes in my heart" that the vast majority of officers act with similar judgment.

## **THE ONA RESPONSE**

So, how should the ONA respond to this issue? To guide that decision, let's review the issues in more detail and offer some ideas on what policies and any statutory changes should look like. Here are the three key questions we see regarding body camera footage and open records:

1. What should be presumptively open and what should be presumptively closed?
2. Should officers have discretion to activate the cameras, or should there be specific requirements for when and how the cameras are activated?
3. What should be the standards for managing, storing, archiving and destroying records created by body cameras?

The final section of this paper will review what some other states are doing legislatively, followed by a summary of our position and links to additional information.



## **THE KEY QUESTIONS**

### **I. WHAT SHOULD BE PRESUMPTIVELY OPEN & WHAT SHOULD BE PRESUMPTIVELY CLOSED?**

The more you drill into this issue, the more complicated it seems to get, not only regarding the privacy interests of citizens and crime victims but also from the potential for cameras to be an intrusion into the routine activities of police officers. Police are the armed operatives of government with powers to use force, to arrest and to deprive citizens of not only their freedom but their lives. They clearly are not entitled to the same level of privacy as many other occupations. However, they also have rights themselves as citizens and employees. Police also are entitled to clear rules as they are ones making snap decisions in dangerous, emotionally charged situations.

However, there is a simple point to reduce some of this complexity. Let's follow the existing open records law, which has myriad exceptions already that will cover many, if not most, circumstances that might be problematic. Here are the circumstances in which we feel records should be presumptively open, subject to existing exemptions under the law:

1. Courts have ruled repeatedly that initial incident records are open, mainly because the investigation does not begin until a later point. This applies to written incident reports and 911 calls and extends to dash-camera recordings and body cameras. *(It should be noted that there have been lower court rulings to block release of dash-camera recordings in some specific circumstances. The Ohio Supreme Court recently affirmed the release of initial 911 calls as public records in the case [Cincinnati Enquirer v. Sage](#).)*
2. Recordings made in public places and non-private areas deserve a strong presumption of openness. Court decisions affirm that there is no reasonable expectation of privacy in public places.
3. Recordings should be presumed open when the content involves detention or arrest of a suspect or the initial response to a reported or suspected crime.
4. Recordings should be presumed open when there is an incident involving the use of force by the officer or when they document an incident about which there has been an allegation of police misconduct.
5. Any recording may be disclosed with the consent of the subjects of the recording, or the legal parent or guardian of an underage subject. "Subject" will need a clear definition, and related questions must be addressed. For example, if the recording would otherwise be closed without consent, do people in the background of a recording have to be pixelated or give consent?

The legal standard to close such recordings should be "clear and convincing evidence" of the need for closure, consistent with the stated presumption of openness in our public records law (ORC 149.43). Again, these situations are not as open-ended as critics might argue at first blush. The investigatory exception surely will close access to many recordings, just as it does now for other public records. This is exactly what happened in Cleveland when [the Northeast](#)



[Ohio Media Group requested video of an arrest](#) following a police shootout in March. The city denied the request, citing the exemption for material that is part of an ongoing investigation.

Whether that is a legitimate denial in those specific circumstances is not as important as the broader point: Current law will be more than adequate to cover disputes that arise over release in many situations. The procedures in current law on redaction also would apply. In other words, if a recording could be edited to make it an open record, the agency would do so.

However, there are situations in which privacy interests may well outweigh public disclosure and could be presumptively closed or subject to police discretion. Those circumstances would seem most likely to occur in these situations:

1. Recordings made on private property.
2. Recordings in which the subjects are minors.
3. Recordings of victims in cases involving homicide, sexual assault and domestic violence.
4. Recordings that show excessive violence or trauma to victims, though other portions of the recording may be releasable.

Now, let's walk back from the "video" issue and note that such visual documentation already exists in many cases with still photos. The public does not routinely see still photos created or obtained by police in the course of an investigation unless the police release the photos, or they become public as evidence in a criminal case. (And there are important reasons why disclosure outweighs privacy interests in many of these situations when such images are available.) This is because, again, existing exceptions adequately keep these images out of the public sphere.

Still, there is no question that broad use of body cameras is going to create far more visual content. What happens when recordings in the first (open) group also cover recordings in the second (closed or open to discretion) group? Say, for example, there is an alleged use of police force on private property, captured in real time by a body camera?

In those situations, we propose an appeal or mediation process to determine if a citizen wants to assert that the public right-to-know outweighs the decision not to release. Appeals from the process would be taken to the courts. The groundwork already is laid for this type of process in Ohio. In other words, there would remain an avenue to argue that there is "legitimate public interest" in disclosure. Plus, police always have the option to release recordings at their discretion unless otherwise prohibited by law.

As no list can cover all potential uses of bodycams, this process could apply to other recordings that are not covered by the above situations.



## **2. SHOULD OFFICERS HAVE DISCRETION TO ACTIVATE THE CAMERAS, OR SHOULD THERE BE SPECIFIC REQUIREMENTS FOR ACTIVATION?**

While not a question that directly affects whether the footage would be presumptively opened or closed, it is a related and important policy matter. Why do we weigh in on this subject? It's because the work of journalists and other watchdogs will be inhibited if there aren't clear requirements for when the cameras should be activated, particularly if there are allegations of police misconduct. There already are documented cases in which pieces of footage are "missing" from dashcam recorders.

The ACLU paper addresses this in detail. We agree with the ACLU that, first of all, activation cannot be left to the total discretion of officers. The ACLU paper also notes that a purely technological solution remain flawed as there is no software capable of recognizing when the camera should be turned on and off in all pertinent circumstances.

Once we agree officers should have limited discretion on when activation is required, the standards must be clear. We agree with the ACLU's position that the balance must be struck to "ensure that officers can't manipulate the video record, while also ensuring that officers are not subject to a relentless regime of surveillance."

The ACLU's solution is that if the officer has a bodycam, activation should be required during any interaction with the public. This seems overly broad to us, as someone asking the officer for directions, for example, hardly requires the creating and archiving of footage. We would pursue a definition that focuses on any interactions involving the possible violation of law. The standards listed in Question 1 would cover when these recordings are presumptively open, closed or available for discretionary release.

The ACLU also covers some nuances that need to be considered. For example, should the activation requirement only cover uniformed officers with the exception of SWAT-type engagements? (We agree with the ACLU that the cameras always should be used if available during SWAT situations.) Should officers be required to notify people they are being recorded whenever practicable? Are there circumstances in which a witness or victim could opt out of being recorded? Police probably need some discretion in terms of when they must disclose.

These are all important policy decisions that should not be left to the discretion of individual police departments. Uniform, statewide standards make far more sense. These decisions will impact the ability of journalists to perform their newsgathering functions.

## **3. WHAT SHOULD BE STANDARDS FOR MANAGING, STORING, ARCHIVING AND DESTROYING BODY CAMERA RECORDS?**

Archiving is one of the most important and complicated issues and will affect the most meaningful work of journalists – stories involving old or closed cases, research into possible



wrongful convictions and stories involving tips that require checking but may not be offered until days, weeks or months after the initial incident.

From the government's standpoint, the practical issues with storage, managing and archiving cannot be dismissed out of hand. A fully equipped department will be recording thousands of hours of footage. This must be stored in a manner that is accessible. Staff and equipment will be required to not only store the footage but review, edit and redact (or blur/pixelate) as needed to meet disclosure requirements. This could be a costly, time-consuming responsibility. However, technology is advancing rapidly, and there is reason to believe that review and preparation for release can occur much faster than first feared.

Here are some points to ponder on this subject:

- Systems should be in place so that only authorized personnel can destroy, edit, copy or delete a video once footage is obtained. Officers on scene should not be able to edit.
- Permanent, detailed logs must be maintained of any video stored or archived for a longer term. These logs would be public records, of course. Minimally, the log entry should include who (names of officers with possible exceptions for undercover officers), what (at least in general terms), when and where.
- Careful consideration must be given to how long a recording should be maintained before it is deleted. Perhaps routine recordings of non-incidents could be deleted in a much shorter period of time than other types of recordings. The ACLU argues that, for reasons of privacy, retention periods "should be measured in weeks, not years" for most of the captured video unless it has been flagged. We would differ with the ACLU regarding a storage time that short, but agree the conceptual point is worth considering. Ninety days seems like plenty of time to store video that no one has asked about and isn't involved in any pending case. Any "flagged" recording should become part of a longer retention schedule under the state's standard for archiving of police records.

We are offering some productive suggestions to resolve some of these issues so that the practical and financial challenges won't lead to problematic solutions that will presumptively close more records or create new obstacles, such as high costs, to obtaining records.

For example, it is predictable and understandable that departments will fear numerous time-consuming requests. This is a key reason why uniform standards for detailed, permanent logs of the "who/what/when/where" for stored recordings are important, as it could significantly reduce the time involved in searching.

If the cameras are going to be ubiquitous, we also propose funding for centralized review of recordings on a statewide or regional basis. These centers would have the staff expertise and technology to handle public records requests in an efficient manner. Even the servers storing the footage could be maintained regionally or statewide. The generating department would receive the edited/redacted/blurred file and control release.



Such a policy also would be very consistent with the movement in Ohio and across the country to manage government data and other content so that is readily available in standard, searchable software formats. Again let's consider the positive impact of having uniform procedures and formats for maintaining detailed logs. Then add in the expertise of personnel trained in the technology. This would greatly expedite handling, save money for individual departments and allow journalists and other groups to quickly review, compare and contrast data from different departments.

There could be an even bigger payoff from law enforcement's perspective: Centralization and uniformity will make it easier for all participating police agencies to access footage for their investigative purposes, and there surely will be many situations in which Department A wants to see footage created by Department B. An analogous situation involves the obvious advantage of first responders being able to communicate readily with one another instead of the old system of hundreds of different agencies using equipment and protocols that do not connect with neighboring agencies.

The summary point here, again, is that both the policy and practical implications of archiving are serious and must be addressed thoughtfully and creatively. Otherwise, the results won't serve the public or the police.

## **WHAT ARE OTHER STATES DOING?**

The following list is not exhaustive, but an attempt to show how some states are dealing with issues addressed in this paper.

**Oklahoma** – one of the few states with specific legislation already in law. HB 2676 in 2014 specifically made body camera footage subject to the state's open records law. The law gives the police agency the right, before release, to "redact or obscure" portions of the video which show dead bodies, nude bodies or minors under age 16. Agencies also can redact or obscure records showing officers under internal investigation until the investigation is completed.

**Arizona** – pending bill. Officers can control operation of the body camera. The bill has lengthy description of situations when recording should and should not occur. Specifically states that the recordings and data associated with the recordings are not public records. Agencies can release only when the public's "need to view" outweighs a long list of other interests. Citizens can ask courts to rule on denials of access.

**Florida** – New law makes release of body camera footage optional for law enforcement unless there is a court order "to advance a compelling interest." Exempts recordings from the Florida public record requirements if the recording occurs in certain locations and situations, such as inside a health care facility, private residences or any time a person depicted "has a reasonable expectation of privacy."



**Michigan** – pending bill. Exempts body camera recordings from disclosure in the “law enforcement body-worn camera privacy act.” Those who appear in recordings or parents of minors in recordings can request copies. Any recording retained by a law enforcement agency in connection with an ongoing criminal or internal investigation is presumptively closed as long as it meets any of six conditions. Recordings also are closed if they have been obtained related to civil actions. Archiving standards of 30 days or three years are established, depending on the nature of the recording. Fees can be charged for copies.

**Washington State** – pending bill. Competing bills are moving with bipartisan support for one that exempts recordings from public records disclosure. (See link below.)

### **SOME ADDITIONAL LINKS:**

- [Gov. Kasich calls for swift action on recommendations by police-community relations task force / Cleveland.com](#). Includes links to earlier coverage. [Click here](#) for the full report (at the end of this story) of the governor’s advisory committee on police-community relations.
- [Experts discuss issues with Cleveland police body cameras / Cleveland.com](#). Also from Cleveland.com: [Cleveland police release body camera policy](#). And this FAQ: [Everything you need to know about Cleveland police body cameras](#).
- [LAPD Proposes Worrying Body Camera Policies / Cato Institute](#) discusses special treatment afforded LA police officers and lack of public access to body camera footage. Includes links to [Los Angeles Times coverage](#).
- [Police body-camera bill stirs debate over privacy, power / Seattle Times](#) discusses bipartisan bill that exempts recordings from disclosure over objections. Also in Washington: [YouTube channel with blurred recordings](#) are being posted by Seattle police as part of a pilot program.
- [Police body cameras bring problems of their own / Wall Street Journal](#); a good overview of the issue, including problems surrounding processing and storing video data.
- [Access to police body camera videos: The Wild West of open records requests](#); article by the Reporters Committee for Freedom of the Press. Also: [RCFP launches interactive map of policies and legislation around the country](#).

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