

**COUNCIL OF THE DISTRICT OF COLUMBIA  
COMMITTEE ON THE JUDICIARY**



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**COUNCIL OF THE DISTRICT OF COLUMBIA**

**PUBLIC HEARING**

**B21-0351, THE “BODY-WORN CAMERA PROGRAM REGULATIONS  
AMENDMENT ACT OF 2015”**

**B21-0356, THE “PUBLIC ACCESS TO BODY-WORN CAMERA VIDEO  
AMENDMENT ACT OF 2015”**

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**Testimony of Traci L. Hughes, Esq.  
Director, Office of Open Government  
Board of Ethics and Government Accountability**

**Wednesday, October 21, 2015  
10:00 A.M.  
1350 Pennsylvania Avenue NW  
Room 412  
Washington, D.C. 20004**

Good morning, Chairman McDuffie and members of the Committee. My name is Traci Hughes and I am the Director of the Office of Open Government under the Board of Ethics and Government Accountability. My office oversees agency compliance with the Freedom of Information Act (FOIA). In my capacity as director, I serve as the chief FOIA Officer for the District, advising agencies and the public on FOIA. Thank you for the opportunity to testify regarding the position of the Office of Open Government on the “Body-Worn Camera Program Regulations Amendment Act of 2015” and the “Public Access to Body-Worn Camera Video Amendment Act of 2015”.

First, thank you for your thoughtful leadership regarding the policy proposals of the Executive Office of the Mayor (EOM) and the Metropolitan Police Department (MPD) concerning access to body worn cameras (BWC) by the legal community and the public under the Freedom of Information Act. At your direction, the Office of Open Government was included in a group of stakeholders convened to advise the EOM on access to BWC video records; to offer recommendations to balance privacy interests with FOIA; and the proper storage of the video records in a manner that will ensure proper maintenance of data while reducing strain on server capacity and human resources.

To the EOM’s credit, it did call for the input of the Office of Open Government, which I provided to Deputy Mayor Donahue in July.<sup>1</sup> In addition to the written input, I, along with representatives from the Reporter’s Committee for Freedom of the Press, the Open Government Coalition, the Office of the Attorney General, and the Electronic Privacy Information Center met with Deputy Mayor Donahue, Helder Gil of the Office of the Deputy Mayor for Public Safety and Kelly O’Meara with MPD regarding the implications of any amendments intended to restrict access to BWC records under FOIA; and the factors that must be considered regarding any regulations guiding MPD’s deployment, use and retention of BWC video records.

Regrettably, the input of the Office of Open Government and other stakeholders has fallen on deaf ears. It appears that in light of the proposed FOIA amendments and the draft regulations put forward by the EOM for this Committee to consider, the proposed measures will still do nothing more than restrict access to records.

## **FOIA AMENDMENTS**

**The Mayor proposes amending D.C. Official Code § 2-532 right of access to public records. Specifically, the administration seeks to include language that would require all FOIA requests to be precise by referring to a specific location, date, and time, in addition to the FOIA requestor being required to pay the costs of video redaction. The proposed amendment is unnecessary and is duplicative.**

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<sup>1</sup> Office of Open Government BWC Rulemaking Recommendations, submitted July 2, 2015 to Deputy Mayor Kevin Donahue, <http://www.open-dc.gov/documents/7215-dm-donahuebwcrulemaking-hughes-recommendations> (site last visited 10.19.15).

Under District FOIA, all requestors are required to state with specificity the records sought. Subsection 1-402.4 of the District of Columbia Municipal Regulations provides: “A request shall reasonably describe the desired record(s).” A requestor is therefore required to submit requests with sufficient particularity to ensure that searches are not unreasonably burdensome, so that the agency may determine what records are requested and to conduct a reasonable search for those records.<sup>2</sup> This requirement under local FOIA is firmly supported by the Courts. Well established, consistent legal precedent clearly mitigates any fear that requests for BWC records will become fishing expeditions. Furthermore, agencies may deny requests for records on the basis of being overly broad and burdensome, should the requestor refuse to properly frame their request.<sup>3</sup> Viewed objectively, the FOIA process is indeed a two-way street. In-as-much as an agency has an obligation to search for and provide responsive records, a requestor must fulfil his/or her duty to submit a sufficiently detailed request to an agency to conduct a reasonable search for records.

Additionally, any concern regarding overbroad requests may be allayed by MPD adoption of regulations requiring the agency to publish all metadata of BWC video. This may be easily accomplished by properly tagging video with time, date, location, recording officer, and general nature of the incident (i.e., traffic stop, burglary, assault, etc.). Requestors will then have all of the necessary information available to reasonably describe desired records under FOIA.

Next, the EOM seeks to triple the amount of time to process a request for BWC video records from 15 business days to 45 business days to either (1) supply the video, or (2) inform the requestor that MPD has reached the conclusion that no video record will be provided. Also, the EOM seeks to allow MPD to invoke an additional 30 business days to review and redact voluminous requests for video.

This proposed amendment is wholly unnecessary. At worst, it may be viewed by the public as an attempt to skirt the long-standing public policy of the District that all persons are entitled to full and complete information regarding our government and its employees. If left as is, this amendment will do nothing more than discourage requests for BWC video records. Simply put, when the requests are made, the public will be left with no other option than to hurry up and wait. Neither the EOM nor MPD have provided any reasonable basis to assume that it would take an average of four months to search, review and redact BWC video.

Now is the perfect opportunity for the Committee to have a meaningful discussion regarding the true cost and processing time of BWC video records. I believe this Committee can, and should, give full consideration to the available technology to timely review, redact and supply BWC video records to the public. This can be done in a manner that fully ensures the privacy rights of

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<sup>2</sup> *Assassination Archives & Research Center, Inc. v. CIA*, 720 F. Supp. 217, 219 (D.D.C. 1989).

<sup>3</sup> See *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978); *American Federation of Government Employees, Local 2782 v. U.S. Dep’t of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990).

all concerned parties are protected. It is ill-advised to adopt legislation and regulations that will dilute the very public policy that supports the public's right to know.

It is important to note that the District of Columbia has had an online FOIA processing system in place for more than a year. It is unclear why a new vendor must be procured when the current FOIA processing platform already supports the receipt, review and redaction of BWC video.

**The Mayor proposes amending D.C. Official Code § 2-534, exempting from release any BWC video recorded inside a residence or any other place where a person has a heightened expectation of privacy. Also, as part of this proposed amendment to § 2-534, the EOM is seeking to prohibit the release of any BWC footage related to cases involving domestic violence, sex assaults, or stalking. This amendment is unnecessary and duplicative.**

The EOM urges the Council to add this exemption to protect residents' "heightened expectation of privacy" in areas such as their homes, health care or social services facilities, and to exclude video of victims from FOIA requests. Existing law more than suffices to shield from release BWC video recorded in these non-public areas. D.C. Official Code §2-534(a)(2) (Exemption 2) provides for an exemption from disclosure of "[i]nformation of a personal nature where the public disclosure thereof would constitute a **clearly unwarranted invasion of personal privacy.**" D.C. Official Code §2-534(a)(3) (Exemption 3) provides an exemption from disclosure of [i]nvestigatory records compiled for law-enforcement purposes. Release of video recorded in non-public spaces must still pass very strict privacy review under Exemptions 2 and/or 3. Furthermore, personally identifying information such as home addresses, health information, etcetera, is already exempt under the personal privacy exemption.

**Proposed regulation, Section 3900.5 allows the Mayor on a case-by-case basis in matters of significant public interest and after consultation with the Chief of Police and the U.S. Attorney's Office, release BWC recordings.**

At present, the EOM has the authority to release BWC video records outside the confines of FOIA. The District's public policy concerning FOIA is established by Mayoral Order and states is that even when information is otherwise exempt from release under FOIA, an agency may do so if it will do no harm to the agency or to the public to release the records. Therefore, the insertion of the language in the proposed regulation allowing the Mayor the authority to release BWC video records in emergencies or in matters of great public interest is redundant, and may be seen by the public as an unwarranted expansion of the authority of the Mayor, the Chief of Police and the U.S. Attorney to unlawfully restrict access to BWC footage.

Thank you for the opportunity to testify. I look forward to answering any questions you may have.