

## BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



**Office of Open Government**

July 2, 2015

***VIA ELECTRONIC MAIL***

Mr. Kevin Donahue  
Deputy City Administrator and Deputy Mayor  
for Public Safety and Justice  
1350 Pennsylvania Avenue, NW  
Washington, D.C. 20004

Dear Mr. Donahue:

Thank you for the opportunity to provide input into what the Executive Office of the Mayor will propose as rulemaking governing the access and retention to police body-worn camera (hereinafter, BWC) footage.

In addition to access and retention, you also requested during our June 19 meeting recommendations addressing assessment of impact of the BWC program. As my area of expertise falls squarely within the bounds of public access to the video and retention of agency records, I have limited my comments to those categories. I respectfully defer to those most knowledgeable about public safety to address indicators of impact of the BWC program on officers and communities.

The below recommendations are intended to balance and protect, as much as possible, the integrity of law enforcement processes, due process, and privacy rights with the public's right to know.

**Public Access to BWC Video**

The videos created by the BWCs are agency records maintained by the Metropolitan Police Department (MPD). As such, structures in place concerning public access to the BWC video records must conform to the requirements of the District's Freedom of Information Act (FOIA). The proposed regulation must specifically state that access to the BWC footage is subject to all exemptions under D.C. Official Code § 2-534. Redactions should be made to all video records requested under FOIA in a manner that blurs or distorts images or audio that if otherwise left unredacted would violate personal privacy interests and/or jeopardize law enforcement

investigations or personnel.<sup>1</sup> Please bear in mind that all exemptions applied by an agency will be strictly construed on appeal.<sup>2</sup>

The protection of privacy interests can be bolstered with the proper recording and retention controls.<sup>3</sup> Privacy considerations may be waived if the subject of a video provides written consent for public disclosure. Video records taken in public areas where there is no evidence of a crime or police misconduct should be proactively released in a common repository accessible by the public with the proper redactions. Since such video is innocuous, and will do little to arouse public interest, it should be published in a common portal for a finite period of time. Doing so will reduce data storage loads, and reserve server capacity.

Finally, all video records supplied pursuant to FOIA requests should be placed in the District of Columbia Public Access Library in the FOIA portal. For that reason, any system or software used to review and redact video records under FOIA should be interoperable with the city's central processing system via FOIAXpress. It is preferable that MPD ensure that all redactions are made within FOIAXpress to ensure there is a complete record of native and edited files, and a log of who conducted the review.

## **Retention**

To minimize overly broad and burdensome FOIA requests, the public, to the extent it can, must state with specificity the records sought. District of Columbia Municipal Regulation 1-402.4 requires requestors to provide sufficient information to enable agencies to conduct reasonable searches for records. Therefore, video record tags used by MPD personnel to categorize and/or “flag” records<sup>4</sup>, should also be made available to the public so that requestors are better able to frame requests and narrow the time it takes to search for footage. Redacted and unredacted “flagged” video should be subject to disclosure under FOIA.

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<sup>1</sup> 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...but only to the extent that the production of such records would interfere with (A) Enforcement proceedings; (B) Deprive a person of a right to a fair trial or impartial adjudications; (C) Constitute and unwarranted invasion of person privacy. The standard for evaluating a threatened invasion of personal privacy interests under Exemption (3)(C) is broader than Exemption 2.

<sup>2</sup> See *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987) and *Dunhill v. Director, District of Columbia Dept. of Trans.*, 416 A.2d 244, 247 n. 5 (D.C. 1980).

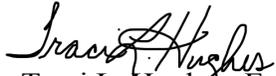
<sup>3</sup> For example, the Office of Open Government would support MPD authorizing officers to deactivate cameras under limited circumstances -- such as to interview victims or witnesses.

<sup>4</sup> The categories of tags/flags are set out in MPD Special Order 14-14 under Section V(A)(5). The Office of Open Government's recommendations will not speak to encryption methods and means of storage. However, to ensure proper retention, the MPD policy regarding record retention should specify a process for data integrity and data recovery.

Video footage retention regulations must require the MPD to continue to maintain and store all metadata from BWC video records so that even if video records are deleted (i.e., innocuous video or video that is no longer required for evidentiary purposes), there is an audit trail of the record and an indication of what was recorded. Metadata includes date of creation, duration, officer name, badge number, file size, file type, general incident description, file name/identification number, etc.<sup>5</sup> Video deletion must be approved by an MPD supervisor in accordance with clearly defined data retention and destruction schedules. All record retention policies must be proactively disclosed under D.C. Official Code § 2-536.

Thank you once again for soliciting the input of all stakeholders on this matter. It is my hope that the recommendations contained in this correspondence are useful as we work together to craft sound policies to support the success of the BWC program.

Sincerely,



Traci L. Hughes, Esq.

Director, Office of Open Government

Board of Ethics and Government Accountability

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<sup>5</sup> The City of Seattle video storage process is instructive. Police video records provide sufficient detail to allow the public to narrow records requests. See <https://data.seattle.gov/view/bj92-due5>.