

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



---

**COUNCIL OF THE DISTRICT OF COLUMBIA**

**PUBLIC HEARING**

**B23-0882, THE “COMPREHENSIVE POLICING AND  
JUSTICE REFORM AMENDMENT  
ACT OF 2020”**

---

**Testimony of Niquelle M. Allen, Esq.  
Director of Open Government  
Board of Ethics and Government Accountability**

**Thursday, October 15, 2020  
10:00am  
Virtual Hearing via Zoom**

Good afternoon, Chairman Allen and Members of the Committee on the Judiciary and Public Safety. I am Niquelle Allen, the District of Columbia Director of Open Government. The Office of Open Government, an office within the Board of Ethics and Government Accountability, facilitates District of Columbia Government's compliance with the Freedom of Information Act (FOIA) and advocates for a fair and efficient FOIA process. Thank you for this opportunity to testify regarding Bill 23-0882, The "Comprehensive Policing and Justice Reform Amendment Act of 2020." My testimony today concerns "Subtitle B: Improving Access to Body-Worn Camera Video Recordings."

## **INTRODUCTION**

I would like to begin by commending the D.C. Council for taking significant action to increase transparency in policing in the District of Columbia in light of the mass demonstrations that have occurred since the murder of George Floyd on May 25, 2020, and many other victims of police misconduct in the United States. Body-Worn Camera (BWC) recordings of the police along with civilian video recordings have proven indispensable in the call for justice for all persons impacted by police misconduct. It also informs the public about policing and police actions. The release and preservation of BWC footage is intended to deter officer misconduct and eliminate ambiguity in excessive force cases. This Bill makes great strides in increasing government transparency through the BWC program by requiring the Mayor, with consent of the subject of the video and/or their next of kin, to publicly release BWC footage and names of officers involved in five days when there is use of excessive force or a death.

However, while the Bill takes important steps to increase transparency, it does not address the problems that the Office of Open Government is aware of concerning the general release of BWC footage. Significant barriers to transparency exist when members of the public and the media request BWC footage through the FOIA process. These barriers are over-redaction of the video footage, timely production of the video footage, and the cost associated with processing FOIA requests. I am presenting this testimony today to offer suggestions regarding how this Bill could be enhanced to address these issues.

## **BODY WORN CAMERAS AND D.C. FOIA**

The effectiveness of the District's use of BWCs must be viewed through the lens of the FOIA. The videos taken with BWCs are public records that are created and maintained by the Metropolitan Police Department (MPD) and the public may request access to those records under FOIA. While citizens have access to BWC footage under FOIA, its release and availability are often limited due to FOIA exceptions. The limited release of BWC footage calls into question the utility of BWCs in providing the public with a timely, relevant, and clear view of the MPD officers' actions. There is also a financial barrier to obtaining this information because the cost of producing BWC footage may be passed on to FOIA requesters.

## Personal Privacy Redactions under D.C. FOIA Law

MPD's current BWC policies consider privacy protections of law enforcement personnel and the public; access protocols; the retention of non-evidentiary video versus video that may be used in the litigation of criminal and civil matters; cost of video storage and the collection of metadata; and the monetary and human capital costs inherent to the review and editing of video pursuant to public access laws.<sup>1</sup> MPD may reasonably and legally rely upon several exemptions that prevent the full release of unredacted BWC footage to the public.<sup>2</sup> Namely, the investigatory records exemption and the personal privacy exemptions may cause much of the footage to require redaction.<sup>3</sup> In response to FOIA requests, we have received complaints that MPD has released BWC videos that have been redacted beyond recognition — that is, videos with all faces, all voices, all street names, badge numbers, every car tag in sight, and the like redacted. While the redactions based on the law enforcement FOIA exemptions may be valid, if the BWC camera footage that is released is unrecognizable it has no value. When BWC footage is released to the public in extremely redacted form, the public does not get the full story and it appears as if the government has something to hide.

### *Personal Privacy*

In many of these instances, MPD relies on the personal privacy exemption when it redacts information concerning individual law enforcement officers. I do not interpret this exemption to extend to police officers operating in their official capacity. There should be no expectation of personal privacy for individual officers acting on behalf of the District of Columbia and in uniform. Further, there should be no redactions when in the public space. It is reasonable to have an expectation of privacy in spaces closed to the public, medical facilities, and the like. If the incident recorded occurs in the public space, then the signs and other indicators of locations should not be redacted. I encourage the Committee to consider amending the law or regulations concerning BWC to address this issue. Further, while maintaining the public's privacy and protecting witness identities are reasonable justifications for redacting videos, releasing these excessively redacted videos is not in the public's interest.

---

<sup>1</sup> Police Executive Research Forum (PERF), *Implementing a Body-Worn Camera Program Recommendations and Lessons Learned* (<http://ric-zai-inc.com/Publications/cops-p296-pub.pdf>).

<sup>2</sup> D.C. Official Code § 2-532 affords to any person the "...right to inspect...and to copy any public record of a public body" except as expressly provided in the enumerated exemptions under D.C. Official Code § 2-534.

<sup>3</sup> D.C. Official Code § 2-534(a)(3)(A-F) exempts investigatory records compiled for law enforcement purposes if release would interfere with enforcement proceedings; Council investigations; Office of Police Complaint investigations; deprive a person of due process; constitute and unwarranted invasion of personal privacy; disclose a confidential source; disclose investigative techniques; endanger law enforcement personnel. D.C. Official Code § 2-534(a)(2) exempts from disclosure information of such a personal nature that release would constitute an unwarranted invasion of personal privacy.

### *Balancing the Public's Interest and Personal Privacy*

With respect to the release of BWC footage when there is a significant public interest in the content, when it does not involve excessive force or death, the Committee should consider articulating a litmus test for the MPD to follow when determining whether releasing the video is in the public's interest and outweighs personal privacy considerations. Such considerations could include the public response to the incident, the location (public vs. private property), and the degree of harm resulting from withholding the video. Even without a change to the law or regulations, MPD should enact and release clear policies that inform the public – in plain language – of when it will release BWC footage and under what conditions. MPD's articulation of clear, well-reasoned policies about the release of BWC footage in response to FOIA requests will bolster the long-term success of the BWC program.

### *Timing and Cost of Production*

The Committee should consider including a provision in this Bill that requires MPD to waive any cost for producing BWC video footage or limit (impose a cap) the cost MPD may charge a requester to receive the footage. Notably, in California, on May 28, 2020, the state supreme court ruled that California's government agencies cannot pass the cost of redacting police body-camera footage and other digital public records onto the members of the public who requested them under the California Public Records Act.<sup>4</sup> The court held that:

“Just as agencies cannot recover the costs of searching through a filing cabinet for paper records, they cannot recover comparable costs for electronic records. Nor, for similar reasons, does ‘extraction’ cover the cost of redacting exempt data from otherwise producible electronic records.”

This case is instructive and I believe the District should take similar action. In the interest of transparency, MPD should not be permitted to pass the cost of video production and redaction to requesters. These costs are prohibitive for many requesters and serve as a significant barrier to transparency.

If these costs are not waived, they should be significantly reduced and MPD should release to the public, in the form of policy or regulation, redaction guidance that explains the cost of the act of redaction in actual work hours (cost per hour). Promulgating regulations or policies respecting cost per hour for production and guidelines for redacting would serve the public interest by clarifying the video production process and ensuring that any cost incurred is reasonable.

---

<sup>4</sup> <https://www.rcfp.org/wp-content/uploads/2019/05/2020-05-28-NLG-v.-City-of-Hayward-Opinion.pdf>

To reduce cost and control the time it takes to produce the video, I also encourage MPD to consider internal resources to process BWC video footage and prepare it for production. Having government personnel perform video redactions could reduce costs to the public to receive BWC footage. MPD should have an attorney and technical personnel available to process these FOIA requests internally. Using internal resources could result in a cost savings and decrease the amount of time it takes to turn over footage.

## **CONCLUSION**

Giving the media and the public full, transparent, and timely information ensures that the public has full access to the government and ensures that the government's actions may be examined and scrutinized when necessary. In the area of policing, where citizens and officers may find themselves in life or death situations, the recordings get us closer to the truth of whether or not the police have infringed upon the rights and liberties of citizens or have acted properly. Transparency through the use of BWCs and timely release of useable footage is paramount to maintaining an informed citizenry and a just, transparent government.

Thank you, Chairman Allen, for the opportunity to testify. I am happy to answer any questions from the Committee.