

NYS Assembly Public Hearing – December 8, 2015
Use of Body-worn Cameras by Law Enforcement Officials

Testimony of
The Bronx Defenders, represented by Sarah Lustbader

Good morning. My name is Sarah Lustbader, and I am a staff attorney with the Bronx Defenders. Thank you to the New York State Assembly and in particular to Assemblyman Lentol and Assemblywomen Weinstein and Peoples-Stokes for convening this hearing on such a pressing issue, and for inviting the Bronx Defenders to testify. For the past 18 years, the Bronx Defenders has been providing innovative, holistic, and client-centered criminal defense, family defense, civil legal services, social work support and advocacy to indigent people of the Bronx. Today, our staff of over 250 represents 35,000 individuals each year and reaches hundreds more through outreach programs and community legal education. I have worked as a staff attorney in the Criminal Defense Practice at the Bronx Defenders for approximately five years. I have defended over 1,000 criminal cases and worked closely with advocates in our other practice areas.

I will address most of the questions posed in the notice of this hearing, but in a somewhat different order. I also will address two other questions important to the Legislature's consideration of this subject.

1. Is it appropriate to facilitate or require the use of body-worn cameras by law enforcement officials in this state?

Over and over, we hear from people in the Bronx that when it comes to interactions with law enforcement, they feel voiceless and disempowered. I have heard time and again, "No one will believe me over an officer." Sadly, that worry is not illegitimate; officers walk into court with badges, and often do carry more credibility than ordinary citizens. But on the street, things are different. Trust between law enforcement and the people of the Bronx has broken down.

Body cameras hold tremendous promise to help redress this situation, to help us work toward a reality where officers are not automatically trusted in the courtroom and mistrusted on the street. But only if they are implemented fairly, guided by the goals put forward by Attorney General Loretta Lynch earlier this year, who said that body cameras "hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve." Body cameras can help create a more neutral narrative, putting our clients on more even footing with law enforcement, giving a voice to those who feel ignored, and hopefully, over time, helping to improve police-community trust and keep everyone safer.

But if they are implemented by law enforcement according to law enforcement interests, with no oversight, as is currently the case in many jurisdictions across the country, and with the NYPD pilot project implemented earlier this year, we will not achieve accountability, transparency, or safety; instead, we will further empower law enforcement, the very party we seek to hold accountable. Further,

we will do so at the expense of the privacy rights of civilians, particularly civilians in disadvantaged communities where police presence is greater, in addition to the privacy rights of the officers themselves. A program like this is worse than no program at all.

5. Who should maintain custody and control of the video recordings? Should recordings be accessible by or transferred to an oversight or independent entity when an allegation of police misconduct is made?

This is in some ways the most important question. It is essential for all body-camera footage to be owned and controlled by a neutral third party. Those who call for body-camera programs, including the Department of Justice, look to body cameras to increase police accountability and transparency. The programs that we see developing now, however, do not serve those goals. They serve the interests of law enforcement, because they are developed and run exclusively by police departments.

This amounts to the fox guarding the henhouse. Not only can the police retain footage that they would rather not release; they can also use it for purposes that have nothing to do with transparency and accountability, such as mass surveillance. Until control of this footage is taken away from law enforcement and vested in a neutral third party, with equal access for all legitimately interested parties, body cameras will further empower the very party they were designed to check. Third-party administration would also help protect the privacy of civilians and officers, for reasons I will address momentarily. Third parties in fact already manage much of the body-camera footage produced today. Many police departments contract third-party vendors to store the footage on the cloud and manage the data. The only difference between that practice and what we suggest is that we believe that law enforcement should not have special access to that footage.

One need only look to the recent events in Chicago to understand why neutral management of body-camera footage is crucial. An officer shot and killed 17-year-old Laquan McDonald in October of 2014, but most of us did not learn Mr. McDonald's name until thirteen months later, when a court ordered the dashboard camera video of his killing released. That is when we learned that, contrary to the version of events put forward by the Chicago police at the time, Mr. McDonald was walking away from police and was not threatening any officers when he was shot 16 times, most of those shots coming when he already lay on the ground. The release of the video also coincided with Mayor Rahm Emanuel ousting the Chicago Police Superintendent and forming an accountability task force. Importantly, the video's release also coincided with the prosecutor's decision to bring first-degree murder charges against the officer; until that time, the officer had not even been reprimanded, let alone charged with a crime. The lesson could not be clearer: we will not see gains in accountability or transparency until body camera footage is outside the control of law enforcement.

An additional issue deserves our attention: When should officers record? How much discretion should officers have in deciding when to record? How should recording policies be enforced?

It should go without saying that under any body camera program, police must be forbidden from editing, destroying, or otherwise tampering with video, as that would defeat the purpose of creating a credible record and achieving transparency and accountability. Both common sense and empirical experience show that continuous recording is the only way to achieve those goals. For that reason, we

believe that all uniformed officers working outside their precincts should wear cameras with no ability to switch them off. The footage should upload directly from the camera, or from a docking station, to the custody of a third party before officers have a chance to view, edit, or otherwise manipulate it. Automatic uploading, with no need for tagging or categorizing, would also eliminate hours of paperwork. More fundamentally, allowing officers the freedom to choose when the cameras are rolling undermines the very purpose of having the cameras in the first place. We have already seen widespread violations of police department policies and scant enforcement of those rules. When police control the cameras, we end up with an incomplete and biased record.

Currently, every police department of which we are aware allows officers to control when cameras are recording. Many instruct officers to record all law enforcement-related encounters and activities. But these rules are broken at an alarming rate. Research indicates that violations of these policies are widespread and frequent, with compliance as low as 30%. The Department of Justice conducted an investigation into Albuquerque's police practices and found that officers consistently failed to record critical encounters, in violation of departmental policy. The DOJ noted that officers "failed to record some incidents even when it was the officers themselves who initiated the contact, making their failure to switch on their cameras or recorders before beginning the encounter especially troubling." Despite rampant violations of the policy, the investigation found very few instances where officers were ever reprimanded for failing to record. A separate DOJ investigation into the police practices of the New Orleans Police Department found that officers failed to use body cameras and dashboard cameras in 60 percent of the use of force incidents reported between January and May of 2014. Some of those failures may have been unintentional: In high-stakes and stressful situations, it may be unreasonable to ask that officers divert their attention from the situation they are confronting to switch on their cameras, or even to remember to do so. We want officers focused on the task at hand. In addition, many encounters that start out innocuously, such as an individual asking for directions, can rapidly escalate into violent altercations for which video would be mandated— and it is unrealistic to expect officers to turn cameras on at the exact moment of escalation. And selective recording is also likely to exclude crucial early moments during encounters that later become crucial evidence, such as predicates for stops and consents to search. Whatever the reason, we know that officers cannot be relied upon to turn on their cameras when so required. Any collection of video footage that was recorded selectively will not create a true record, will lack integrity, and will not promote police accountability, transparency, or public safety.

Continuous recording of course produces a great deal of footage, which carries the risk of privacy violations and mass surveillance by law enforcement. These concerns would be addressed if law enforcement never controlled the footage, and instead it was placed in the hands of a neutral third party. A policy of continuous recording, without third-party ownership of the resulting footage, would pose a significant threat to civil liberties. Third-party ownership would alleviate those fears.

Storage cost is another barrier to continuous recording. However, many of those costs would be offset by quicker resolution of criminal and civil cases and fewer civilian complaints against police. In New York City, settlement payouts by the city totaled nearly \$1 billion over the decade ending in 2010. Further, most footage would be retained only for short periods, further reducing storage costs.

4. What length of time should body-worn video recordings be retained?

Retention time considerations must balance the interest of storage cost and privacy on the one hand with civilian access on the other. We believe that video recordings should be retained for the minimum time necessary to give civilians a fair chance to request access to the footage to file a complaint. We support a 6-month retention period, after which all video would be permanently deleted. This period could be extended by flagging. Anyone who believes that he or she has a legal interest in the video, or believes there is a compelling public interest in the video's wider release, could flag a particular video for an additional 6 months of preservation, during which that person would have to demonstrate the legitimate basis of their interest.

7. Who should be permitted to view body camera video recordings? When and under what circumstances should recordings be made available to the public?

Flagging would be a relatively low bar, but actually gaining access to the video footage would require a showing of a legitimate legal interest – either as a party to a criminal case as a prosecutor, defendant, or defense attorney – or as a party to a civil complaint as a plaintiff, defendant, or oversight agency. If a party can show a legal interest, the footage would be released to the parties for the duration of the case, with its use limited to the ongoing legal proceeding and copying and dissemination prohibited.

We do not support public availability of these videos under freedom of information laws because of the sensitive nature of what will be depicted in the videos and the sheer quantity of mass surveillance contemplated. Instead, we propose that any journalist or other party seeking to make footage public should be required to show a compelling public interest, to be decided by an oversight agency or a judge. The definition of “compelling public interest” should be narrow enough to keep all but the most shocking footage away from the public. The precise contours of this line would evolve over time, as cases are decided and the appropriate balance between public access to police activity and civilian privacy is developed.

6. Will editing or redacting of video footage ever be necessary or appropriate? If so, who should be authorized to do so?

For video released in the public interest, the faces and other identifying markers of all non-participants must be redacted. As for editing, law enforcement of course should never have the opportunity to view, edit, or in any way access video before it is uploaded to be stored by a neutral third party.

8. How will civil and criminal discovery rules and freedom of information laws impact the availability of video recordings? Under what circumstances should such video recordings be admissible in court?

Body camera video should be treated as any other evidence in court: it must be relevant and must be authenticated. However, for the purposes of discovery, it is important to remember that body camera programs are unlike other forms of discovery because, unlike, say, police reports, body cameras were designed as a tool for police accountability. Therefore, the ordinary process of discovery in a criminal case, which originates usually with law enforcement, is then handed to a prosecutor, and then, often

very late in the course of a case, to the defense, should not apply. This is not typical evidence. Far from it. Law enforcement and prosecutors should have no advantage in accessing this information. All parties should be equally situated to request and receive the footage.

9. How should the privacy concerns of any person captured in a recording be balanced against the people's right to know the facts in matters of public concern? To what extent are there privacy implications for members of law enforcement?

Privacy is a major concern for all parties. Body camera footage is mass surveillance on a monumental scale. The intrusion of video cameras could be especially harmful to people in sensitive situations, including victims of domestic violence or rape, and witnesses who fear retaliation. It is possible that if the proper safeguards are not in place, these people could suffer as much from the recording and distribution of the videos as from the incidents themselves. As a result, some might be reluctant to talk to police. To address those concerns, we propose that most video should be deleted automatically after six months and never see the light of day. The video which is flagged and accessed for the purpose of litigation should never be made public. Civilian bystanders caught on video released in the public interest should be blurred. Most importantly, a neutral third party should own and control all video footage to ensure that it is not used for any other purpose.

As for law enforcement, because police officers are granted tremendous power in our society, it is reasonable to expect them to forego some of the privacy that ordinary citizens reasonably expect. However, certain officers, for example union activists or whistle-blowers, might legitimately fear that their supervisors could comb through their body-camera footage in search of a pretext for punishment. Third-party ownership and management of footage would alleviate those officers' fears.

10. Should state funds budgeted for body-worn cameras be maintained, increased, or decreased?

We would welcome NYS participation in the implementation of body camera programs, whether that means funding such programs directly, funding studies to ascertain best practices, or providing oversight. There are many important details to be studied and considered here. Wherever the funds originate, it is important to fund these programs adequately and create a fair program that promotes accountability, transparency, and safety. We expect many costs to be offset with savings in fewer complaints, fewer payouts, and shorter litigation times in civil and criminal matters. But even if the costs are still high, it does not matter. If we cannot afford a fair, equitable program, then we cannot afford body cameras at all.