

Getting to Win-Win



The Use of Body-Worn Cameras in Virginia Policing

Executive Summary



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Getting to Win-Win: Executive Summary

Body worn cameras (BWCs) are cameras worn on police officers' bodies that record audio and video of officers' interactions with the public from the officers' perspective. Many of the issues of data retention and access associated with use of BWCs are largely the same as with dash cameras, aerial surveillance video collected by drones, and data from any other law enforcement deployed recording devices. BWCs require specific, special consideration, however, because they can be used to record individuals in public and private settings

without the individual or the public's knowledge. Moreover, their ability to provide the "officer's eye view" of an interaction with a member or members of the public can make the data they acquire of particular interest to the public when either the conduct of police or community members is in question. As with many technological advances in policing, however, the deployment of this technology without proper safeguards and the right policies in place can turn a tool meant to promote police accountability into a tool that expands the surveillance state.

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On May 1, 2015, the U.S. Department of Justice announced the establishment of a \$20 million Body-Worn Cameras Pilot Partnership Program.¹ It followed the rush of departments seeking to obtain and deploy BWCs after the shooting death of Michael Brown in Ferguson, Missouri.² Some touted BWCs as the solution to the problem of police violence in America.³ While deployment of BWCs will not end police violence, it has the potential to help law enforcement departments become more transparent, accountable, and trusted, but if, and only if, the right policies are in place to guide deployment.

Virginia has followed the post-Ferguson trend toward increased use of BWCs.⁴ Indeed, five Virginia localities (the cities of Newport News, Waynesboro, Lynchburg, and Fairfax and Dinwiddie County) have now received \$500,000 in grants under the federal partnership program.

Given the public interest in assuring deployment of BWCs serves both the interests of Virginians and the police who serve them, the ACLU of Virginia initiated a project to gather and report to the public information on the use of BWCs by law enforcement agencies in the Commonwealth. That project has now led to the publication of this report and recommendations regarding the use of BWCs in Virginia.

To understand the use of BWCs in Virginia, the ACLU of Virginia sent a Freedom of Information Act (FOIA) request to 368 local law enforcement agencies to collect existing policies for review. We received and reviewed fifty-nine local policies in response to these requests. For more information on the methodology used to gather and review the data, please see the Methodology section of this report below.

We also reviewed the Department of Criminal Justice Services' "model" BWC Policy (developed with the participation of law enforcement but no citizen stakeholder input)(DCJS BWC Policy) that was presented in draft form to the Law Enforcement Technology subpanel of the Secure Commonwealth Panel at its meeting on September 15, 2015. The DCJS BWC Policy is attached to the report as [Appendix A](#).

BWC implementation in Virginia is inconsistent at best, chaotic at worst. There are vast disparities from jurisdiction to jurisdiction that make it difficult, if not impossible, for Virginians to know how BWCs are being used and what their rights are.

The ACLU of Virginia has determined from the review of existing local policies and the "model" proposed by DCJS that BWC implementation in Virginia is inconsistent at best, chaotic at worst. There are vast disparities from jurisdiction to jurisdiction that make it difficult, if not impossible, for Virginians to know how BWCs are being used and what their rights are. Virginians now face a bewildering array of policies governing the use of BWCs, as well as the retention and disclosure of the personally identifiable data acquired through their use. This situation is further complicated by an advisory opinion issued by the Virginia Freedom of Information Act

Advisory Council on October 2, 2015. The advisory opinion concludes that FOIA imposes different disclosure rules on local police and Sheriffs than apply to other law enforcement agencies, and it includes no discussion of the possible interplay between FOIA and the Government Data Collection and Dissemination Practices Act with regard to law enforcement collection and dissemination of personally identifiable information.⁵

Key gaps between policy and principle identified in our review that threaten individual liberty include:

- Only 3% of BWC policies now in place require officers to inform the public that they are being recorded. The DCJS BWC Policy only requires officers to inform the public where "practical."
- Only 5% of BWC policies now in place require officers to allow a victim of crime to decline to be filmed. The DCJS BWC Policy does not require officers to allow a victim to decline to be filmed.
- Only 3% of BWC policies now in place prohibit the use of BWC to record First Amendment protected activities such as peaceful protests. The DCJS BWC Policy does not prohibit filming First Amendment-protected activities.
- Only 5% of BWC policies now in place address BWC usage on school grounds. The DCJS BWC Policy does not address usage of BWCs on school grounds.
- Only 12% of BWC policies now in place prohibit the use of BWCs in a private residence if the resident objects. The DCJS BWC Policy does not prohibit use of BWCs in a private residence if the resident objects.

To address these gaps and bring uniformity to the implementation of BWCs across Virginia, this report sets out arguments in favor of statewide uniformity and recommended policies in four key areas. These include:

- Rules governing when law enforcement officers are recording civilian encounters and what notice requirements govern their deployment;
- Rules governing how long data is stored;
- Rules and laws governing individual and public access to data collected by BWCs; and
- Rules governing consequences of failure to comply with provisions of policies assuring transparency and accountability in the use of BWCs, including possible decertification as a law enforcement officer.

Proponents of BWCs argue that they can serve as a tool to increase law enforcement transparency, accountability, and trust. The ACLU of Virginia believes that the decision whether to acquire and deploy BWCs should be made by local and state law enforcement agencies with appropriate input and participation from the communities they serve. At the same time, however, the ACLU of Virginia believes strongly that deployment of BWCs can serve the interests of police and the public only if proper policies are in place to guide their use. The ACLU of Virginia has advocated before the Fairfax County Ad Hoc Police Review Commission and the Law Enforcement Subpanel of the Secure Commonwealth Panel that the following principles guide law enforcement use of BWCs:

The ACLU of Virginia believes strongly that deployment of BWCs can serve the interests of police and the public only if proper policies are in place to guide their use.

- Policies must prohibit use of body-worn cameras to gather information about people surreptitiously. They should not be turned on at public events to surveil those in attendance.
- Only officers with arrest authority should be authorized to use BWCs.
- Officers must be required to notify people when the cameras are on and they are being recorded.
- Policies should protect the privacy of officers by making clear that cameras are only required to be turned on during defined interactions with the public.
- Policies should be explicit about when cameras are to be turned on and when and whether they can be turned off. Officers should have no discretion to deviate from departmental policy.
- Policies should require that every officer wearing cameras turn the recording device on at the inception of every law enforcement encounter with a member of the public, including stops, frisks, searches, arrests, consensual searches and interviews, enforcement actions and any encounter that becomes confrontational or in any way hostile.

- People who are being filmed should have the right to request that BWCs be turned off when the officer is entering their home or business, hospital room or other private location or when they are seeking to make an anonymous report of a crime or claim to be a victim of crime. Their request should be filmed. In addition, policies should include specific guidelines for recording juveniles and in schools.
- Strict policies should guide how the recorded information is uploaded from the individual camera and stored so that videos cannot be manipulated or erased.
- Data should be retained only as long as necessary for intended purposes. It should be maintained and destroyed pursuant to applicable law and record retention policies and never by the officer involved in the recording.
- Videos of specific value should be “flagged” and retained for as long as needed for personnel actions or criminal investigations. Those with no ascertainable value should be deleted in accordance with a published schedule except on the request of a data subject. Flagging should occur automatically for incidents involving the use of force, leading to detention, summons, or arrest, and/or resulting in a citizen complaint.
- Policies should provide access to the videos by the people recorded for as long as the videos are maintained by the government/law enforcement. Properly redacted footage should be made available to the public in accordance with well-defined guidelines, where the public interest would be served by disclosure.
- Failure to comply with the policies governing use of the cameras and videos should result in appropriate disciplinary action, including termination.

As a whole, the 59 local agency BWC policies and the DCJS BWC Policy that the ACLU of Virginia analyzed fail to ensure that BWCs are deployed in a way that promotes transparency, accountability, and trust.

Adherence to these principles is essential to ensure that deployment of body worn cameras by state or local police agencies is truly a win-win for the police and the public alike. Unfortunately, our review found that neither the local policies now in place nor the DCJS BWC Policy comply fully with these principles. In addition, in some instances, current FOIA law may stand in the way of adopting local policies that comply with these principles in some instances.

While some individual policies do a better job in addressing some or all of these principles than others, as a whole, the 59 local agency BWC policies and the DCJS BWC Policy that the ACLU of Virginia analyzed fail to ensure that BWCs are deployed in a way that promotes transparency, accountability, and trust. The policies often do not articulate clearly what actions and events should be filmed, and they miss the mark when it comes to protecting the privacy of individuals in sensitive situations. They do not properly safeguard footage

from inappropriate sharing. They fail to provide ordinary citizens the access to their own data to which they are entitled. Finally, they lack mechanisms to hold officers accountable for intentionally or unintentionally violating policy.

To help solve these problems, the ACLU of Virginia developed its own Model Body Worn Camera Policy that includes the elements we believe are essential to getting to “win-win,” that is, ensuring that use of BWCs serves the interest of both law enforcement and the public protecting liberty and privacy as well as assuring accountability and transparency. The ACLU Model Policy is attached to the report as [Appendix B](#). We recognize that implementing our Model policy and getting to win-win may require changes in FOIA and the Government Data Collection and Dissemination Practices Act and adoption of laws requiring statewide uniformity on certain policy elements to best protect individual privacy and the public’s right to know. Nonetheless, we believe that Virginia can only get to “win-win” in the use of BWCs if these changes are made and uniform policies adopted statewide.

¹ Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program, Department of Justice, May 1, 2015 available at <http://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program>.

² Alan Gomez, Ferguson, police rush to buy body cameras, USA Today, Oct. 11, 2014, available at <http://www.usatoday.com/story/news/nation/2014/10/11/police-body-cameras-ferguson-privacy-concerns/16587679/>.

³ Michael McAuliffe, Police Body Cameras Seen As A Fix For Ferguson-Style Killings, Huffington Post, Nov. 25, 2014, available at http://www.huffingtonpost.com/2014/11/25/ferguson-body-cameras_n_6221558.html.

⁴ Nick Ochsner, Who's watching you? Police struggle to pay for more cameras, 13News Now, Feb. 9, 2015, available at <http://www.13newsnow.com/story/news/local/13news-now-investigates/2015/02/09/more-police-cameras/23134669/>.

⁵ See Virginia Freedom on Information Advisory Council advisory opinion issued to Sterling E. Rives, III, Hanover County Attorney, on October 2, 2015 available online at <http://foiacouncil.dls.virginia.gov/ops/welcome.htm>