

Getting to Win-Win



The Use of Body-Worn Cameras in Virginia Policing



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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.

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.

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 this 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 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.

Getting to Win-Win: The Cultural and Legal Context

The power of law enforcement is awesome – it has the authority to deprive individuals of their life and liberty. Particularly because of this level of power, law enforcement departments should deploy tools that enhance transparency, accountability, and public trust. Body worn cameras (BWCs), if properly deployed, can help law enforcement departments further these aims.

Reasons to Deploy Body-Worn Cameras

Deployment of BWCs can:

- Affect the conduct of both community members and law enforcement in a positive way, resulting in greater officer safety, the reduction of the use of force by law enforcement, and the reduction in the number of complaints by individuals about law enforcement conduct.⁶
- Provide communities an additional measure of transparency about the way in which they are policed.
- Promote law enforcement accountability by providing a real time video and audio record of police/community interactions.
- Help protect law enforcement officers by providing objective evidence to be used in resolving complaints and in disciplining officers.

BWCs can be an important tool in efforts to develop, protect, and, where necessary, restore trust between law enforcement and the communities that they serve. Their successful use is dependent, however, on the existence and implementation of policies that achieve the goals outlined by the Police Executive Research Forum (PERF) – fostering transparency

and accountability and protecting civil liberties and privacy interests. BWCs deployed without policies designed to achieve these goals will undercut rather than build trust.

The ACLU of Virginia believes that deployment of BWCs can be a “win” for both the public and police for two reasons. First, the power of law enforcement coupled with a history of abuse by some officers *can* justify the use of BWCs, even when balancing the potential negative impact on residents’ privacy. Historically, there was no real-time documentary evidence of most encounters between law enforcement and the public. Due to the sometimes-volatile nature of those encounters, this often resulted in radically divergent accounts of incidents. BWCs have the potential to be a neutral arbiter and serve as a check on law enforcement’s power.

Second, while it is too early to tell the true impact of BWCs on police-community relations, some early empirical studies document a positive trend.⁷ For example, a study on the impact of police and community relations in Rialto, California found that law enforcement use of force fell by 60% during the initial 12-month period of BWC use.⁸ In addition, public complaints against law enforcement decreased by 88% during that period.⁹ Researchers studying the impact of BWCs in Rialto also found that the likelihood of a law enforcement officer using force was roughly twice as high if the officer was not wearing a BWC.¹⁰

Nonetheless, as discussed in detail below, the positive impact of BWCs can only occur if policies are in place that protect the interests of **both** police and the public. In addition, while studies suggest the potential positive impact regarding police and community relations, the deployment of BWCs should not be viewed as an end in and of itself, but as a tool in achieving transparency and accountability.

BWCs have the potential to increase accountability, but will not solve the problem of law enforcement abuse or the community’s subsequent loss of trust in law enforcement.. Moreover, as was learned after the videotaped death of Eric Garner in New York City, the existence of cameras does not guarantee positive outcomes.¹¹

The solution to these important problems requires a structural shift in the culture and mindset of law enforcement and the reassertion of civilian authority over the policies that guide policing at all levels. At the foundation of this shift are the concepts and values of constitutional policing and respect for the value of human life -- concepts and values that should be inherent in all law enforcement personnel.

Establishing the Community Culture Needed to Support Effective Use of BWCs

Police, community members, and taxpayers must recognize that BWCs are only a tool. Localities should make the choice whether to deploy them using a process that assures the full engagement of community members in the development of the policies that guide their use.

Virginians must recognize that the deployment of body cameras cannot and will not solve problems such as racial profiling, excessive use of force, or other police abuses. Virginians must recognize that law enforcement cannot solve community problems arising from

poverty, drug use, and other social ills. Society cannot arrest its way out of a public health problem or school discipline issue.

To address these larger community problems, there must be a holistic approach that incorporates education, health care and drug treatment, and economic development.¹² Communities, and the elected leaders who serve them, must commit to funding public safety as a priority recognizing that underpaid and undervalued police compromise our safety. Public safety should be seen as a core function and fundamental expense of government, not a revenue stream. Police departments and the state or local jurisdictions they serve should not create, facilitate, or allow the development of a dependence on financial returns from policing (asset forfeiture, “million dollar mile,” red light cameras vs. extended yellow, success measured by increased arrests, tickets, summonses vs. increase safety outcomes).¹³

If a locality or the Commonwealth decides to purchase and deploy BWCs on its law enforcement personnel, it should do so only if it is committed to funding the program from its general funds and in its base budget.

Establishing the Law Enforcement Culture Needed to Support Effective Use of BWCs

In order for BWCs to be an effective tool of accountability and transparency, the culture in the law enforcement agency that deploys them must support both.

There must be a culture of service in the agency. Law enforcement personnel (whether in the local police department, sheriff’s office, or State Police) must reflect the communities they serve.¹⁴ They must also see the people in the community not as the “policed” but as the public they serve.

There must be a culture of transparency at all levels in every law enforcement agency. The “default” value in the agency must support openness rather than secrecy. The leadership of the law enforcement agency and all levels of government should take seriously the policy embraced in the Virginia Freedom of Information Act, §2.2-3700, that the Act “shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.” Information should be disclosed, rather than withheld, whenever possible.

In addition, law enforcement officials should take seriously the Act’s direction that it should not be “construed to discourage the free discussion by government officials or employees of public matters with the citizens of the Commonwealth.” There should be a willingness to engage the public in setting law enforcement agency policies on “use of force” and other policies directly affecting the people being served.¹⁵

There must be a culture of accountability. The peoples’ authority should be paramount. There should be a willingness to collect and report data that permits evaluation of departmental practices as has been done voluntarily by the Charlottesville Police Department.¹⁶ There must be openness to independent evaluation of outcomes good and bad.

Finally, there must be a culture of constitutionality. Police must see themselves as the guardians of the Constitution. Constitutional policing should be the paramount value in hiring, evaluation, training, policies and procedures, including policies on “consent searches,” pretextual stops, and use of body-worn cameras and other technologies. A body-worn camera can be a tool that supports constitutional policing **if and only if** the proper policies and training are in place before cameras are deployed.¹⁷

Getting to Win-Win: The Need for Statewide Uniformity

Virginians who wish to understand the policies governing the use of BWCs should not be expected to memorize dozens of different policies. Virginians should not need to seek out and understand various, complicated flagging and retention formulas that vary drastically from one jurisdiction to the next to understand how government agencies maintain their personal information. Virginians should not “experience” the use of BWCs differently on one side of a local law enforcement “border” than another. The ACLU of Virginia’s review of the existing BWC policies shows, however, that is exactly what Virginians face today.

In addition, law enforcement officers should be subject to equal expectations and equal discipline across jurisdictions, and there must be uniform consequences across jurisdictions for the misuse of the cameras or the data that they collect.

Recommendation No. 1 – The General Assembly must enact legislation that assures policies governing BWCs are uniform across the Commonwealth in each of four key areas: when and how they are activated by officers; how long the data they collect is kept; who has access to the data collected; and consequences of failure to comply with law or policy regarding their use.

Virginians and the law enforcement personnel who serve them have a right to expect uniformity of BWC policy, regardless of jurisdiction with respect to at least the following issues:

- Rules governing when law enforcement officers are recording civilian encounters and what notice requirements govern their deployment.
- Rules governing what data is stored and for how long.
- Rules and laws governing public access to data collected by BWCs.
- Rules governing consequences of failure to comply with BWC policies.

The lack of uniformity in the 59 local policies reviewed by the ACLU of Virginia makes clear that Virginia needs to establish certain minimum mandatory criteria for policies governing the use of BWCs by law enforcement agencies choosing to deploy them.

In addition, the General Assembly should address apparent conflicts between the protections offered data subjects under the Government Data Collection and Dissemination Practices Act, and the retention and disclosure requirements included in other laws governing public records (FOIA and the state record retention laws and policies). For example, Section 2.2-3805 gives data subjects the right to review personally identifiable information held by government agencies, and the limitations of this right relative to law enforcement records are unclear.¹⁸

Recommendation No. 2 – The General Assembly must enact legislation assuring Virginians that violations of state laws and departmental policies governing the use of BWCs do not result in harm to individuals.

BWCs should not be a tool to engage in unchecked surveillance. To minimize the incentive for engaging in mass surveillance, the General Assembly should enact legislation that provides that any data collected or stored in contravention of state law or in violation of departmental policy governing the use of BWCs (or any other surveillance technology) should be immediately destroyed and should not be admissible in any criminal or civil case.

Coupled with the need for effective discipline is the need to ensure that individuals are not harmed if a law enforcement officer's fails to follow department policy. For example, criminal defendants should have a rebuttable evidentiary presumption when they assert that exculpatory evidence was destroyed or not captured. In addition, individuals suing the government should have a rebuttable evidentiary presumption when they reasonably assert that evidence supporting their claim was destroyed or not captured.

In addition, the General Assembly should consider whether an officer disciplined or fired for failing to comply with departmental policies on the use of technology that gather and record personally identifiable information, including body cameras, should be subject to decertification as a law enforcement officer pursuant to Section 15.2-1707 of the Code of Virginia. Virginians should not be in a position where a noncompliant officer is simply moved from department to department because they continue to be certified by the Commonwealth pursuant to Section 15.2-1706 of the Code of Virginia.

Recommendation No. 3 – The General Assembly must enact legislation ensuring that personally identifiable data collected by BWCs is not disseminated to third parties for non-law enforcement purposes without the subject's consent, except where such public disclosure is determined in writing to be in the public interest.

The purpose of policies governing the use of BWCs is to create more transparent, accountable, and trusted law enforcement agencies without infringing unnecessarily on the right of privacy or liberty of Virginians. Data collected by BWCs should not be exploited by law enforcement agencies or third parties for commercial uses. In addition to undermining the purpose of the BWCs, personal information cannot be collected, stored, or disseminated under the Data Act unless the government's need for such collection has been clearly

established in advance and the information is appropriate and relevant for the purpose for which it was collected.¹⁹

Law enforcement agencies that contract with third-parties to maintain the data should ensure safeguards are in place to protect the data from unauthorized disclosure.

In addition, the General Assembly should enact legislation assuring data subjects the right to review any BWC collected data personally identifiable to them and prohibit third-parties from independently accessing, viewing, or altering the data unless they are acting as agents of a law enforcement agency with which the agency has contracted for data storage and maintenance.

Current law (FOIA and the Government Data Collection and Dissemination Practices Act) should be amended as needed to ensure that personally identifiable information about data subjects is not released without their consent unless the head of the law enforcement agency in custody of the data has determined in writing that disclosure is in the public interest and is necessary to assure transparency and accountability for the actions of law enforcement or the data subjects involved.

Getting to Win-Win: Changes Needed in Local Policies and State Model

Protecting the Liberty, Rights, and Privacy of Individual Virginians

As the ACLU of Virginia's analysis documents, with limited exceptions, current BWC policies leave the privacy and First Amendment rights of Virginians in jeopardy.

Recommendation No. 4 – BWC policies must require police to inform people that they are being filmed.

Discussion:

BWCs have the potential to record interactions and locations that members of the public may wish to remain private. Thus, it is important that BWC policies include clear notice and privacy protections. To protect the privacy of members of the public, the deployment of BWCs should be limited to uniformed law enforcement officers and those non-uniformed officers involved in SWAT actions or other planned use of force and enforcement actions. This recommendation closely mirrors a recommendation made by the Police Executive Research Forum, which justified the importance of notice by pointing out that “[t]he mere knowledge that one is being recorded can help promote civility during police-citizen encounters.”²⁰

Law enforcement officers should be required to notify the subject(s) of the recording that they are being recorded by the BWC. This notification should be made as soon as reasonably possible following initiation of the encounter. The only exception to this mandate should be instances involving law enforcement pursuits or other exigent

circumstances where the officer cannot reasonably be expected to provide immediate notice. In those cases, the officer should provide notice at the first reasonable opportunity.

Law-abiding Virginians should not fear that their government is recording their personal conversations or their engagement in First Amendment-protected activities. Yet, the ACLU of Virginia's analysis of both the DCJS BWC Policy and the local BWC policies shows that this fear has merit in many parts of the Commonwealth.

This is all the more important because current FOIA interpretations regarding disclosure of personally identifiable data appear to compromise personal privacy without benefit to the public's right to know.

Findings:

DCJS BWC Policy

Key Finding: The DCJS BWC Policy requires officers to provide notice of the use of BWCs only when "practical."

Section III.E.1 provides that officers "shall inform individuals that they are being recorded" "whenever practical." There is no definition of "practical" in the policy.

Local Policies

Key Finding: Most BWC policies permit law enforcement officers to record individuals without notification.

Only two of the 59 departments that have deployed BWCs require their officers to inform the public that they are being recorded²¹ and one department requires notice only if asked.²² Of the remaining 56 departments, three encourage officers to provide notice,²³ four only provide notice protection to other members of the department,²⁴ and four grant officers complete discretion.²⁵ The policies that grant officers discretion range from suggesting notice is a good idea²⁶ to suggesting notice only be provided if it would assist the officer.²⁷ In addition to the general failure of departments to provide notice, only two departments explicitly state their officers must be truthful if asked whether an individual is being recorded, which makes one wonder about those policies that don't make this requirement to be truthful explicit.²⁸

Virginians deserve to know when BWCs are actively recording them. The rule should be that notice is given unless exigent circumstances prevent the officer from doing so, and, even then, notice should be given as soon as possible.

Recommendation No. 5 – BWC policies must require police to inform people that they may ask not to be filmed when police enter the privacy of their home (or other location where they have a reasonable expectation of privacy) without a warrant or when they are crime victims, witnesses who are seeking to provide information to police confidentially, or they are confidential informants.

Discussion:

The importance of protecting the privacy of Virginians should lead all law enforcement departments to mandate that people have a right to tell law enforcement to turn cameras off in their homes and other private spaces, and that the police inform them of that right. Notice of the right not to be filmed should be given immediately upon entering a home or other location where the people have a reasonable expectation of privacy. Law enforcement officers should seek permission from the resident(s) to record inside the house or private location, and, if the permission is denied, the officer(s) must abide by the individual's request and cease recording. The request to record inside the house or other private location and any denial should be recorded on the BWC.

The only exception to the requirement to turn BWCs off in private spaces upon request should be when entry is authorized by a search warrant or exigent circumstances justifying a warrantless search, or when after notice of both the right to refuse a search and to prohibit recording, the individual consents to the search and the recording.

BWC policies should must protect the privacy of crime victims and persons seeking to report a crime or assist in a law enforcement investigation anonymously. Law enforcement officers with BWCs should be required to ask a crime victim or person seeking to remain anonymous, as soon as practicable, if they wish to have the BWC deactivated. If the answer is yes, then the law enforcement officer should immediately deactivate the BWC. The request to deactivate the camera should be recorded by the BWC.

This is even more important given the limited ability of data subjects to control disclosure of personally identifiable information once acquired under current interpretations of FOIA by the FOIA Council.

Findings:**DCJS BWC Policy**

Key Finding: The DCJS BWC Policy does not require the police to provide notice to an individual of the right to decline to allow recording nor are the exceptions to the right to decline recording properly limited to entry to a private premises with a warrant or in exigent circumstances.

The DCJS BWC Policy provides that "in locations where individuals have a reasonable expectation of privacy, such as a residence, individuals may decline to be recorded unless the recording is being made pursuant to an investigation, arrest, or search of a residence or individuals within the residence." The DCJS BWC Policy also states that BWC generally should not be used to record "encounters" with undercover police or confidential informants or when "community members" "reporting a crime." Section III. E.

The DCJS BWC Policy should require that individuals be given notice of their right not to be recorded in private spaces or when they seek to provide confidential information to the police. Except in clearly exigent

circumstances, the exceptions to the notice requirement should be limited to when the police are filming while serving a warrant or they have obtained voluntary consent to search after full notice of the right to refuse both the search without a warrant and the filming.

Local Policies

Key Finding: With limited exceptions, local policies now in place give individuals in private homes, witnesses and confidential informants little control over whether they are recorded.

As noted above, only two of 59 departments require law enforcement to provide notice of the use of a BWC.²⁹ Only six of 59 departments prohibit the use of BWCs in a private residence if the resident objects.³⁰ Nevertheless, while residents in these six jurisdictions have the right to request the BWCs be turned off, none of the policies include a mandatory notice requirement. Accordingly, residents may not know that the BWC is deployed in the first place, and, therefore, may not know there is a need to exercise this right.

In almost every jurisdiction where police have deployed BWCs, the officers retain control over whether to record crime victims, witnesses, and confidential informants. Only three of the 59 jurisdictions permit a victim to decline to be filmed.³¹ Of those three, only Norfolk Police Department places a positive obligation on its officers to inform individuals that they are being recorded. Thus, victims in the other two jurisdictions may not know that they may exercise this right. Of the three that permit the victim to control whether they are filmed, only Norfolk and Orange Police Departments mandate that the victim's decision be documented on film.³² Of the remaining jurisdictions, Virginia Commonwealth University (VCU) Police Department prohibits the recording of victim statements regarding crimes of a sexual nature, unless directed by a supervisor.³³ Tazewell County Sheriff's Office deputies must record victims unless instructed otherwise by a supervisor, and Massanutten Police Department officers must record victims unless there is a legal exception.³⁴ Finally, though the Gordonsville Police Department does not have a policy specific to filming victims, it does encourage its officers to activate BWCs when responding to domestic situations, many of which may include interactions with a victim.³⁵

Only two of 59 jurisdictions permit anonymous witnesses to decline to be recorded.³⁶ Of those two, only Norfolk mandates notice of BWC use and requires that the informant's decision be documented on video.³⁷ Conversely, Patrick County Sheriff's Office suggests that its deputies record such interactions and Tazewell County Sheriff's Office mandates recording unless instructed otherwise by a supervisor. Finally, Ferrum College Police Department is the only jurisdiction that permits confidential informants to decline to be recorded.³⁸ Nine departments intentionally restrict the filming of confidential informants.³⁹

All agency policies should require that individuals be given notice of their right not to be recorded in private spaces or when they seek to provide confidential information to the police. Except in clearly exigent circumstances, the exceptions to the notice requirement should be limited to when the police are filming while serving a warrant or they have obtained voluntary consent to search after full notice of the right to refuse both the search without a warrant and the filming.

Recommendation No. 6 – BWC policies must prohibit the use of BWCs for mass video and audio surveillance and when people are engaging in activities protected by the First Amendment.

Discussion:

Law-abiding residents should not fear that their government is recording First Amendment-protected activities, such as political protests or faith services. If misused, BWCs can put this right in jeopardy. For example, while the U.S. Supreme Court has said private membership organizations cannot be compelled to turn over their membership lists to the government,⁴⁰ yet BWCs give law enforcement the ability to make an end run around this protection. All an officer would need to do is attend a NAACP or Tea Party meeting, download the data, and utilize facial recognition software. Not only would this provide the government with a list of people attending political or social events, but would also, if an officer attended each meeting, provide the government with a good idea of the leadership structure and who the more active members are. Therefore, BWC policies should prohibit the use of BWCs to gather intelligence information during First Amendment-protected activities if the activity is unrelated to a call for service or other interaction between a law enforcement officer and member of the public in a public space.

The DCJS BWC Policy and local policies should prohibit use of BWCs to conduct general surveillance at public gatherings.

Findings:

DCJS BWC Policy

Key Finding: The DCJS BWC Policy contains no limits on the use of BWCs to conduct general surveillance or to record members of the public engaged in First Amendment activities.

Local Policies

Key Finding: The vast majority of law enforcement departments with active BWC use fail to prohibit their officers from encroaching on First Amendment rights.

Only two departments, Manassas Park City Police Department⁴¹ and Woodstock Police Department,⁴² provide explicit prohibitions in their policies against the use of BWCs to record First Amendment-protected activities. The remaining 57 departments fail to include language relevant to protecting this right, with the exception of the Norfolk Police Department,

which provides no specific prohibition, but states that officers should not wear cameras at closed-door public or private meetings.⁴³

Recommendation No. 7 – BWC policies (or state law) must provide that individuals who are filmed have a right to view any video on which they appear as long as the video is maintained by the law enforcement agency or its agents.

Discussion:

Individuals recorded by BWCs should have access to the data for so long as it is maintained by a public agency. The Government Data Collection and Dissemination Practices Act says that data subjects should have the right to inspect records that contain personally identifiable information. Defendants in criminal investigations should be given a copy as a part of criminal discovery and department employees subject to adverse personnel actions based in whole or in part of such videos should also be provided with copies at the outset of any administrative process.

Where copies of such videos would reveal the identities of other private individuals, Virginia law should be amended if necessary to assure that the public agency providing the copies redacts such personally identifiable information before providing the video where appropriate under the circumstances. Individuals who are the subjects of BWC videos should have the authority to permit the disclosure of the data to their attorneys and to any other third party so long as the identities of any other private individuals are protected by video redaction.

Findings:

DCJS BWC Policy

Key Finding: The DCJS BWC Policy contains no provision regarding access to video by data subjects.

Local Policies

Key Finding: Generally, local policies include no provisions guaranteeing data subjects access to video in which they appear.

Only two departments address the issue of ensuring that data is generally made available to the parties involved. Martinsville Police department's policy states that "[a]ny citizen who is recorded on one of the videos is welcome to view the video."⁴⁴ Aquia Harbour Police Department's written response to the ACLU of Virginia FOIA stated that data is generally made available to the parties involved and all data is made public on a case by case basis, though its actual policy does not address this issue.⁴⁵ The remaining 57 departments fail to include specific language ensuring that individuals recorded by BWCs can access the data.

Recommendation No. 8 – BWC policies should recognize the heightened privacy interests of children compelled to attend school and restrict use of BWCs on primary and secondary school grounds. BWCs should be activated only when law enforcement is engaged in the physical restraint or other use of force against a student.

Discussion:

Law enforcement officers acting in their official capacity should not be present on elementary or secondary school grounds unless responding to a real and imminent threat of harm to individuals on school property. Virginia public schools should focus their finite resources on evidence-based solutions to school discipline issues, and not on increasing the number or role of school safety and school resource officers. As the University of Virginia Curry School of Education found, Virginia “[s]chools are not dangerous places. . . . In fact, very few violent crimes take place at school. From the standpoint of violent crime, students are safer at school than at home. Moreover, schools have become even safer during the past decade”^[i] Therefore, unless a situation presents a real and imminent harm to students, parents, or school faculty or staff, students should not come into contact with law enforcement officers who have the power to interrogate, arrest, and use force against them.

Unfortunately, in many school divisions across the Commonwealth students will come into contact with law enforcement on much more regular basis, either through the establishment of a school resource officer (SRO) program or the use of local law enforcement to police student misbehavior. While the ACLU of Virginia opposes this overreliance of law enforcement in Virginia’s primary and secondary schools, BWC policies should ensure that any officer assigned a BWC and deployed to a primary or secondary school must activate their BWC for each encounter with a student that involves physical restraint or other use of force upon a student. If the restraint or use of force is not reasonably anticipated, the videotaping should begin as soon as reasonably possible after it begins.

BWC policies should prohibit the use of BWCs as a tool for law enforcement to routinely videotape outside of such situations. BWCs should not be used to conduct general surveillance in schools or at school activities or to record any non-criminal conduct by students, teachers, or parents in school or at school activities.

Findings:**DCJS BWC Policy**

Key Finding: The DCJS BWC Policy includes no reference to any special considerations regarding the use of BWCs on school grounds or at school activities.

Local Policies

Key Finding: Only three departments studied explicitly reference the use of BWCs on school grounds.

Virginia holds the unenviable position of sending a greater percentage of its students to law enforcement than any other state in the nation.⁴⁶ The overreliance by Virginia’s public schools on law enforcement and the courts to correct student misbehavior makes the need to restrict the use of BWCs on school grounds that much more vital. Yet, only three departments discuss the use of BWCs on school grounds.

Isle of Wight County Sheriff's Office mandates that BWCs be rendered inactive while school resource officers (SRO) are on school grounds or at a school related activity or event, unless the SRO believes a there arises a legitimate law enforcement need to activate the BWC.⁴⁷ Chesapeake Police Department permits its SROs to activate their BWCs "in cases of suspected criminal activity or when assisting school personnel with matters that may result in disorderly or otherwise disruptive behavior in the school environment."⁴⁸ The Suffolk Police Department policy prohibits the use of BWCs in school clinics and locker rooms and requires school administrators seeking BWC data to make a written request to the relevant SRO.⁴⁹

Thus, not only do 56 out of 59 policies fail to discuss if and when law enforcement can activate BWCs on school grounds, but the three departments that do include in the policies the use of BWCs on school grounds fail to sufficiently restrict their use, with Chesapeake Police Department affirmatively permitting its SROs to activate BWCs to record non-criminal student behavior.

Protecting the Public's Right to Know

The policies governing the collection and dissemination of personally identifiable data using BWCs should respect both the individual right of privacy of the data subject and the right of the public to access to public records.

Recommendation No. 9 – BWC policies should allow for public disclosure of videos on matters of public concern.

Discussion:

As the Police Executive Research Forum noted, "[a] police department that deploys BWCs is making a statement that it believes the actions of its officers are a matter of public record."⁵⁰ Thus, unless prohibited by the Virginia Freedom of Information Act⁵¹ or the Virginia Government Data Collection and Dissemination Practices Act⁵², law enforcement should err on the side of disclosure. Nevertheless, while law enforcement departments should embrace disclosure, they should do so in a way that minimizes invasiveness. For example:

- Any video not part of an active investigation should be made available for public disclosure if consent of subjects involved is granted.
- Law enforcement departments should redact, when feasible, the identity of subjects recorded.
- Unflagged and unredacted data should not be publicly disclosed unless consent of all subjects involved is granted.
- State law and local policies should prohibit the disclosure of data for any commercial purpose.

- Local elected officials should ensure that police departments adopt policies that they will not invoke the “law enforcement records” exception to open records laws for videos where officer misconduct is involved, as the general principles behind that exception do not apply in such instances.

As discussed in the section on the need for uniformity above, access to data should be defined in state law so that policies are uniform across the Commonwealth. The right to see personally identifiable data maintained by government should not vary jurisdiction by jurisdiction. The law should compel disclosure rather than allow it. Appropriate changes should be made in the Virginia FOIA to allow BWC policies to be implemented that meet these standards.

Findings:

DCJS BWC Policy

Key Finding: The DCJS BWC Policy should include specific encouragement of transparency rather than limiting further the discretion to make data public under FOIA.

The DCJS BWC Policy refers to the Freedom of Information Act and replaces exceptions granted in the Act for release of data with mandates that certain information be held confidential. Section III. F. 7. Implementation of this “model” DCJS BWC Policy will be destructive of transparency and accountability needed to restore trust.

Local Policies

Key Finding: Local policies generally make no clear reference to a process for public access to BWC data and rely on the Freedom of Information Act which allows broad discretion in denying the release of information.

Public information access as outlined in existing BWC policies varies greatly. Forty out of 59 policies make no clear reference to a process for public access to BWC data.⁵³ Two departments make no clear reference in their policies, but included general public access information in their written response to the ACLU of Virginia FOIA.⁵⁴

Three departments make no clear reference to a process (e.g. FOIA or department policy), but include specific information regarding disclosure of data. Of these three, Gordonsville Police Department states that a “request from the media or other non-law enforcement agencies may be charged a fee of \$25.00 All such requests are asked to be in writing and from persons entitled to view such recordings.”⁵⁵ York/Poquoson Sheriff’s Office’s process is unclear from its policy, but it does note that “due to the heightened privacy concerns associated with a video recording, any video recording disclosed to the media may be edited/redacted to preserve the privacy of individuals unrelated to the case who were captured on a recording.”⁵⁶ Frederick County

Sheriff's Office's policy is unclear from its policy, but requests from media or individuals must be accompanied by a minimum fee of \$25 per event.⁵⁷

Of those that do refer to a process, with one exception,⁵⁸ all mention that data is available either through an existing process, such as departmental policy or the Freedom of Information Act.⁵⁹ But, the departments that do mention an existing process fail to clarify disclosure issues that may be unique to data collected via BWC, such as policies surrounding whether individuals not present in the audio and visual depictions captured by the BWC may access that data. Instead, they revert to stock language. Moreover, a recent Advisory Opinion issued by the Freedom of Information Act Council complicates these issues by indicating that different rules regarding disclosure of information govern local police and Sheriffs than other law enforcement agencies.

Recommendation No. 10 – BWC policies must provide for videos to be flagged when uploaded indicating whether they are related to a criminal investigation, a personnel matter (any use of force incident or other incident that could result in a complaint) or other matter (e.g., a non-criminal traffic stop or other engagement with the public that does not result in criminal charges).

Discussion:

BWCs should be viewed by law enforcement as a tool to increase police accountability, transparency, and trust between law enforcement and the community. Therefore, any data collected by BWCs should be stored only as long as necessary to further the purpose of the BWCs and should be permanently deleted as soon as the data is no longer useful for the purpose of police accountability and oversight.

Retention policies should be sufficient to ensure proper review of BWC data. The retention time for data maintained by a law enforcement department should be governed by a flagging system. Any data collected that involves a use of force, interaction that led to a detention or arrest, or interaction that led to a formal or informal complaint shall be flagged. In addition to these automatic flags, any subject of a recording or law enforcement supervisors or internal investigators should be able to flag a recording.

There is wide variation among BWC policies at the local level and the DCJS BWC Policy only adds to the confusion by using new and undefined terms. As discussed in the section above on the need for uniform state policies, the findings below demonstrate unequivocally that the Commonwealth needs a set of minimum standards for data collection and flagging that all law enforcement departments must follow.

Findings:

DCJS BWC Policy

Key Finding: The DCJS BWC Policy provides for video files to be marked as “evidentiary, non-evidentiary, or training demo” when uploaded. Section III.C.10.

The terms used in the DCJS BWC Policy are not defined and are not the terms

used to guide decisions about disclosure of information either in the Virginia FOIA or in the Government Data Collection and Dissemination Practices Act. The use of these undefined terms will confuse rather than help resolve issues regarding permitted and required disclosures of data.

Local Policies

Key Finding:

Law enforcement policies vary greatly vis-à-vis what data is maintained and how data is flagged. Just 33 of 59 policies mandate that officers download all data from BWCs.⁶⁰ Sixteen departments utilize a policy that appears to require that all BWC data be downloaded, but includes language that does not explicitly mandate that all BWC data be downloaded.⁶¹ Finally, 10 policies lack any clarity regarding what BWC data must be downloaded.⁶²

Law enforcement policies across the Commonwealth vary greatly regarding how BWC data is stored after being downloaded. For example, 43 of 59 policies create some variation of a flagging system that distinguishes between and creates guidelines for evidentiary and non-evidentiary data (flagged and unflagged).⁶³ An additional 12 departments utilize a policy that provides clarity for one type of BWC data (e.g. flagged/evidentiary), but not for other types of data.⁶⁴ Two additional departments appear to grant officers discretion over how data is stored.⁶⁵ Finally, two departments provide no clarity regarding what data is downloaded and how it is flagged,⁶⁶ though Aquia Harbour Police Department did note in its response that data is deleted after 90 days if not needed for court.

Recommendation No. 11 – BWC policies must provide that videos flagged as related to criminal investigations or personnel matters shall be maintained for as long as provided by current Virginia law pertaining to criminal records and for the statute of limitations period for civil matters. Records not tagged should be purged as soon as the minimum retention period expires.

Discussion:

Retention policies should follow a state mandated policy that sets clear guidelines for length of data retention. The length of retention should be based on the type of data collected.

All flagged data involving a possible civil complaint against a law enforcement officer should be stored until the completion of any related investigations and court proceedings and should be permanently deleted following the conclusion of the investigation(s) and any related court proceedings or at the end of the statute of limitations period unless required to be maintained in the officer's personnel file. All flagged data involving an alleged misdemeanor offense should be stored for one year or until final judgment and all appeals are exhausted, whichever comes first. All flagged data that is evidence of an alleged felony offense should be maintained indefinitely given that there is no statute of limitations on

felonies. If the felony is charged and tried, the video data should be kept with the file as required with respect to any evidence.

Unflagged data should be purged routinely in accordance with state record retention policies unless the data subject requests that it be held for a longer period.

As the findings below demonstrate, BWC data retention periods vary greatly across the Commonwealth. As discussed in the section above on the need for uniform state policies, this is an issue on which state law should set uniform standards to be followed and applied by all law enforcement agencies.

Findings:

DCJS BWC Policy

Key Finding: The DCJS BWC Policy provides that all records should be stored in accordance with the records and retention schedules issued by the Library of Virginia.

There is no provision in the DCJS BWC Policy for a data subject to request that the records be maintained for a longer period of time, which means that data not flagged by the agency as related to a criminal or administrative personnel investigation could be destroyed in 30 days without notice to the data subject even though the subject's right to pursue constitutional claims against a department is subject to a two-year statute of limitations and their exposure to a felony prosecution is unlimited by time.

Local Policies

Key Finding: Local departments maintain vastly different BWC data retention policies.

Forty-three law enforcement departments follow a policy that creates includes some form of guidance for the storage of flagged and un-flagged data, though the specifics of these policies vary greatly.⁶⁷ For example, Orange Police Department maintains all data indefinitely⁶⁸ while Chincoteague Police Department maintains un-flagged for 30 days and evidentiary data for 30 days or until the case is resolved or evidence is released, whichever is longer.⁶⁹

Twelve departments provide clarity for only one type of data (e.g. un-flagged), but fail to provide clarity for retention periods covering other types of data.⁷⁰ For example, the Brunswick County Sheriff's Office maintains un-flagged data for three months, and if, during this time, data is determined to be evidentiary then it will be flagged and transferred to a disk for undefined "court purposes" that lack any specific retention schedule.⁷¹

Two departments create a retention policy that grants each individual officer the discretion to determine the retention period. Haymarket Police Department allows the officer to maintain the data until they are certain it will no longer be needed⁷² and Hopewell Sheriff's Office allows its officers to

maintain the data until “it is determined that there is no further need for the video,”⁷³ though who makes that determination is unclear.

Finally, two departments do not provide any clarity regarding BWC data retention periods,⁷⁴ though Aquia Harbour Police Department did include a retention period for what appears to be un-flagged data in its written response to the ACLU of Virginia FOIA.⁷⁵

Assuring Accountability

The purpose of BWCs is to promote accountability. As such, it is necessary that law enforcement department policies include mechanisms that ensure sufficient discipline or other actions when an officer fails to follow the department’s policy. These accountability policies should be uniform across the Commonwealth for the protection of both officers and the public alike.

Recommendation No. 12 – BWC policies must be explicit and mandatory regarding activation of BWCs by individual officers at the inception of every law enforcement encounter with a civilian including stops, frisks, searches, arrests, consensual searches and interviews, enforcement actions and any encounter that becomes confrontational or in any way hostile.

Discussion:

To ensure public trust and an accurate depiction of events, BWC policies must ensure that law enforcement officers cannot determine which encounters to record and which to not record. Allowing law enforcement to “edit on the fly” by turning the BWCs on and off at will would remove the utility of BWCs as an accountability mechanism.⁷⁶

Law enforcement department policies should mandate the activation of BWCs whenever a law enforcement officer is responding to a call for service or at the initiation of any other law enforcement or investigative interaction between a law enforcement officer and a member of the public. The BWC shall remain active until the interaction has concluded and the law enforcement officer has left the scene. The only exception to this mandate should be instances when an immediate threat to the law enforcement officer’s life or safety makes activating the camera impossible or dangerous. When this exception arises, the law enforcement officer should activate the camera as soon as reasonably possible.

Findings:

DCJS BWC Policy

Key Finding: The DCJS BWC Policy includes appropriate requirements regarding the activation of BWCs.

The DCJS BWC Policy requires activation of BWCs during “each law enforcement-public encounter related to a call for service, law enforcement action, subject stop, traffic stop, and/or police/deputy services provided that such activation does not interfere with officer/deputy safety or the safety of others. Section III.C.3.

Local Policies

Key Finding: Local policies generally provide clear expectations for when BWCs must be activated but do not require activation in all situations in which the ACLU recommends nondiscretionary use in order to provide the level of transparency and accountability needed to make BWCs effective tools in helping to restore public trust in law enforcement.

A basic principle of any good BWC policy is the assurance that officers cannot edit on the fly. The public should be confident that video and audio collected via BWCs presents the entire interaction between law enforcement and the civilian, and not just the part that law enforcement want you to see. The best way to ensure this is to provide law enforcement officers with clear directives regarding who must wear BWCs, when they must activate the BWC, and for what duration must the BWC stay activated.

The ACLU of Virginia's review of the 59 policies shows that many law enforcement departments permit their officers a great deal of discretion, undermining the purpose of BWCs. For example, while a majority of the policies (52 of 59) provide personnel with clear expectations for when BWCs must be activated,⁷⁷ only 39 departments include requirements that could arguably require filming when responding to calls for service or at the initiation of law enforcement and investigative encounters.⁷⁸ The remaining 20 policies range from requiring use of body cams during investigative or law enforcement actions,⁷⁹ to providing law enforcement with complete discretion vis-à-vis activation of their BWC.⁸⁰ Of the 6 policies that do not require BWC use in certain situations,⁸¹ the policies range from those that complete discretion⁸² to those that "strongly encourage" BWC use in certain situations.⁸³

In addition to the broad discretion granted to law enforcement vis-à-vis what law enforcement-community encounters require BWC activation, a review of BWC policies also shows law enforcement officers enjoy broad discretion over the duration of the recording. Forty-nine of 59 policies require law enforcement to activate their BWC until the law enforcement action is complete,⁸⁴ but only 20 of 59 policies clarify that the event should be recorded from contact⁸⁵ through conclusion.⁸⁶ Those that do not specify a timeframe that the BWC must be activated range from including no language relevant to duration⁸⁷ to a policy that permits officers to "intermittently restart [the BWCs] to keep tape segments short."⁸⁸

For BWCs to function as a tool to enhance transparency, accountability, and public trust in Law enforcement, community members must be assured that the BWCs provide an honest, unedited picture of law enforcement-community encounters. As the ACLU of Virginia found, most Virginia law enforcement agencies cannot offer that assurance. Accordingly, this is an

issue that should be resolved by enacting a state statute that applies the same rule across all agencies that choose to deploy BWCs.

Recommendation No. 13 – BWC policies must prohibit officers from reviewing BWC video before writing their reports of incidents in which they are involved that involve use of force or alleged misconduct.

Discussion:

Allowing law enforcement officers to view their BWC data prior to submitting their report regarding a use of force or other misconduct incident risks undermining fairness of the review or investigatory process and will risk harm to law-enforcement-community trust. Enabling officers to review the video data before submitting their report would provide them with an opportunity to amend their story to fit the facts as witnessed on the BWC, including the ability to omit facts that were not caught on the BWC. This would create a new precedent for law enforcement.

As Los Angeles Police Department (LAPD) Commander Andrew Smith noted when discussing why they don't let witnesses view autopsy results prior to their testimony, "We don't want the witnesses' testimony to be tainted," Smith said. Detectives want to obtain 'clean interviews' from people, rather than a repetition of what they may have seen in media reports about Ford's death, he added. "They could use information from the autopsy to give credibility to their story[.]"⁸⁹ Enabling officers to view their footage would not only taint the process, but would also give them an advantage not afforded to the public. There is no room for special treatment when we are talking about justice and accountability.

Not only would providing officers with a special right to view the BWC data undermine the basic trust and accountability values that argue for introduction of BWCs, but it also creates an opportunity for an unintentional shifting of one's memory. As the ACLU of Southern California wrote in a letter to the Federal Bureau of Justice Assistance challenging the LAPD's application to for funds to purchase BWCs, "[a] wealth of studies show the ways in which suggestion and the presentation of information that is new or different from the individual's percipient memory will actually alter the memory held by the person. Exposure to information that is not captured in the original memory does not supplement that memory; rather, it causes the entire memory to be reintegrated – to the point that the original memory is effectively lost."⁹⁰ As the letter went on to note, the Inspector General of the New York Police Department came to similar conclusions, and thus recommended that officers not review BWC data until after their initial statement is submitted.⁹¹

By providing officers with the right to view video before submitting their initial report or statement, departments risk undermining their very law enforcement-community trust that BWCs have shown promise to create.

Findings:

DCJS BWC Policy

Key Finding: The DCJS BWC Policy specifically allows officers and deputies to review video footage prior to preparing their reports.

Section III.F.3 of the DCJS BWC Policy explicitly authorizes officers/deputies to review video footage of “an incident in which they were involved” prior to preparing their report “or making a statement about the incident.” Allowing police but not data subjects to review video before they give witness statements results in an unfair advantage and detracts from the ability of the law enforcement agency to evaluate the officer/deputy’s actions and defense of them based on the officer/deputy’s unaided testimony. This is especially problematic in cases of officer involved-shootings where the independent assessment of the officer’s state of mind at the time of the shooting is essential to the investigation of the incident.

Local Policies

Key Finding:

Current policies adopted by a number of Virginia law enforcement departments risk undermining the law enforcement-community trust that BWCs were supposed to create. Twenty departments utilize a policy that provides no clarity on whether officers can view BWC data prior to submitting their report.⁹² Twenty-three department policies⁹³ are unclear about whether officers have an affirmative right to review the BWC data prior to submitting their report, but the policies from these departments create a strong presumption that officers can view the BWC data prior to submitting their report, as they generally state that BWCs can be used to “enhance”⁹⁴ and/or “supplement”⁹⁵ the reports. For example, the Waynesboro Police Department policy⁹⁶ states that BWCs are used, in part, to enhance officer reports, which implies that officers may view the data prior to report submission. The Galax Police Department policy⁹⁷ states that only officers suspected of wrongdoing or involved in a shooting may be denied access to BWC data,⁹⁸ thus implying that officers not involved in the listed actions may access the BWC data. Finally, 16 departments include a clear, special right for officers to view BWC data prior to the completion of their report.⁹⁹ Among the departments that create this special right, the scope of it varies from departments that create a discretionary special right¹⁰⁰ to those that create a mandatory special right.¹⁰¹ This system of special rights – rights not afforded to other witnesses – has no place in Virginia’s justice system.

Recommendation 14 – BWC policies must empower and encourage supervisory review of BWC videos to assure compliance with policies on their use.

Discussion:

Law enforcement BWC policies should ensure that data is regularly reviewed to ensure compliance with policies. Such reviews should be random. In addition, BWC policies should ensure that supervisors and civilian review boards review all footage flagged as involving a use of force or complaint.

Findings:

DCJS BWC Policy

Key Finding: The DCJS BWC Policy includes provisions for regular supervisory review of BWC video footage. Section III. D.1

The DCJS BWC Policy gives supervisors the right to review “evidentiary” video and reclassify it for indefinite retention if there is a complaint or possibility thereof, and to conduct “random weekly reviews of selected recordings’ to assess “officer/deputy performance.” Section III. D.1. The policy is both too vague (there is no definition of what constitutes an evidentiary video) and too specific (why random, weekly reviews only?). The DCJS BWC Policy should give broad discretion to supervisors to conduct reviews as needed to determine compliance and require that they be done on a regular ongoing basis.

Local Policies

Key Finding: Less than half of the law enforcement agencies surveyed give supervisory personnel explicit authority to audit BWC programs to ensure compliance with policies on their use.

A key to holding officers accountable is their knowledge that supervisors, even absent allegations of abuse, can review their actions. While 24 of 59 policies grant supervisors the authority to randomly review officer’s BWC footage,¹⁰² and seven other policies arguably provide this authority,¹⁰³ in 27 of 59 policies it is unclear whether supervisors have this authority¹⁰⁴ and it is prohibited at Woodstock Police Department.¹⁰⁵ Sworn officers should not be held to different standards vis-à-vis compliance with their department orders depending on what jurisdiction they work in. All officers should be held accountable to their department’s policies, and should be subject to decertification if they violate them.

Recommendation No. 15 – BWC policies must provide that the failure of an officer to comply with policies regarding the use of BWCs will result in appropriate discipline, up to and including termination.

Discussion:

BWC policies must ensure that they include disciplinary mechanisms that incentivize compliance with the department’s policy. For example, officers who fail to activate their BWCs or fail to notify the subject that they are being recorded must be held accountable for their failure. As such, law enforcement department personnel policies should ensure that officers who fail to follow the BWC policy face serious employment repercussions, including possible termination and, if authorized by state law, decertification.

Findings:

DCJS BWC Policy

Key Finding: The DCJS BWC Policy does not specify clearly that officers will be disciplined, and possibly terminated, for violating the policies on the use of BWCs.

Section III. E. of the DCJS BWC Policy regarding equipment states “intentional misuse or abuse of BWC equipment may result in disciplinary action.” Because of its placement in the DCJS BWC Policy in a section referring only to the issuance and use of the equipment, this statement does not clearly state that violating the policies that protect the privacy of individuals or the public’s right to know would lead to disciplinary action. In addition, the requirement that there must be “intentional misuse or abuse” for any discipline to be applied is too narrow a standard to assure the protection of the public’s interest in the appropriate use of BWCs in constitutional and community policing.

Local Policies

Key Finding: More than half of the local agencies studied do not provide any mechanism for holding officers who violate BWC policies accountable.

Officers who fail to follow established policies should not benefit because they work in a jurisdiction that lacks an accountability mechanism. Yet, that is exactly the process Virginia has established. For example, 23 of 59 policies lack an accountability mechanism for officers who fail to comply with the BWC policy.¹⁰⁶ Thirty-six of 59 policies create some type of accountability mechanism,¹⁰⁷ but the severity of these mechanisms vary greatly, from Radford University Police Department’s policy of creating both civil and possible criminal penalty options if the threshold is met¹⁰⁸ to Colonial Heights Police Department’s policy that creates a discretionary disciplinary option.¹⁰⁹ Thus, depending on the jurisdiction in which an officer works, in they may or may not get away with ignoring established policies.

Conclusion

The deployment of BWCs can be a “win” for both the public and police. The purpose of policies governing the use of BWCs is to create more transparent, accountable, and trusted law enforcement agencies while protecting Virginians’ privacy and liberty. 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.

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

Local agencies and sheriffs will face particular difficulties implementing the data retention and disclosures policies that we recommend without appropriate changes in state law to assure uniformity across all law enforcement agencies.

do not properly safeguard footage from inappropriate sharing. They fail to provide ordinary citizens access to their own data to which they are entitled. Finally, they lack mechanisms to hold officers accountable for intentionally or unintentionally violating policy.

As the summaries of the local policies show attached to this report at [Appendix E](#), Virginia law enforcement agencies offer a divergent set of policies leaving Virginians without a clear understanding of when and how their interactions with law enforcement may be recorded or their data disclosed. Without the establishment of minimum standards uniformly applied across the Commonwealth, Virginians cannot be assured that the deployment of body worn cameras by state or local police agencies is truly a win-win for the police and the public alike. Unfortunately, neither the local policies in place as of the summer of 2015 nor the DCJS BWC Policy recommended to the Law Enforcement subpanel of the Secure Commonwealth Panel in September 2015 are sufficient to get Virginia to win-win. In addition, local agencies and sheriffs will face particular difficulties implementing the data retention and disclosures policies that we recommend without appropriate changes in state law to assure uniformity across all law enforcement agencies.

Methodology

In June, the ACLU of Virginia sent a request under the Virginia Freedom of Information Act (FOIA) to 368 law enforcement agencies asking about current deployment of BWCs and requesting any policies or regulations in place to guide their use. A copy of the FOIA request is attached to this report as [Appendix C](#).

As of the date of this report, in response to the FOIA request and follow up, the ACLU of Virginia collected and reviewed policies from 59 local law enforcement agencies in Virginia that have deployed BWCs.¹¹⁰ Many others reported they were considering deploying BWCs but had no policies in place. Still others said they had no BWCs and no plans to deploy them. Some law enforcement agencies initially provided no response to our FOIA request. The ACLU of Virginia followed up with some but not all of the agencies who failed to reply, believing that the sample of policies covered in this report is sufficiently representative of the law enforcement agencies in Virginia, and thus can provide the public with a reliable picture of the deployment of BWCs in the Commonwealth.

In addition, the ACLU of Virginia reviewed the Department of Criminal Justice Services' model BWC Policy (DCJS BWC Policy). This policy is the product of deliberation between various law enforcement entities. Civil liberties and community groups were not consulted during the development of the DCJS BWC Policy. A copy of the DCJS BWC Policy is attached as [Appendix A](#) to this report.

To ensure an accurate and consistent review of the BWC policies, the ACLU of Virginia developed a 25-question document ([Appendix D](#)) that served as the baseline for reviewing each policy, including the DCJS BWC Policy. Each local policy is summarized in three charts in [Appendix E](#) to this report organized under the following headings: [Protecting the Liberty, Rights and Privacy of Individual Virginians](#); [Protecting the Public's Right to Know](#); and [Assuring Accountability](#).¹¹¹

In its review, the ACLU of Virginia only considered policies that were in effect at the time they were submitted to the ACLU of Virginia. In some cases, the policy was unclear, but the law enforcement representative responding to the request provided a statement regarding the rules governing BWCs that was not noted in the official policy. This report includes a notation clarifying to the reader anytime the report addressed an issue that was not part of the approved policy, but was rather a position provided by the responding law enforcement personnel. In addition, some issues, such as when cameras must be activated, required subjective judgment, as the language in certain policies did not necessarily match the ACLU of Virginia's recommendations, but represented language substantially similar to the ACLU of Virginia's recommendation. Cases that required subjective judgment are noted in the relevant section of the body of the paper. In addition, in areas where the policy lacked a clear answer, the report notes no policy.

Finally, to provide clarity on what a good policy should include, this report includes the ACLU of Virginia Model BWC Policy that is attached as [Appendix B](#).

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- 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 of 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>
- ⁶ Reduction in use of force, <http://www.policefoundation.org/content/body-worn-cameras-police-use-force>; reduction in citizen complaints, Paul M. Barrett, The Verdict From Ferguson: Put Video Cameras on Cops, BUSINESS WEEK, Nov. 25, 2014, <http://www.businessweek.com/articles/2014-11-25/the-verdict-from-ferguson-put-video-cameras-on-cops> (noting that “Rialto citizens lodged about one-tenth the number of complaints about police conduct during the study period as they did during the prior 12 months.”); Ian Lovett, In California, a Champion for Police Cameras, N.Y. TIMES, Aug. 21, 2013, available at <http://www.nytimes.com/2013/08/22/us/in-california-a-champion-for-policecameras.html?pagewanted=all> (citing 88% decline); deterring misconduct by officers and civilians http://www.richmond.com/news/virginia/government-politics/article_ca02e58c-db06-54fe-8f26-2f988feef884.html
- ⁷ Michael White, Office of Justice Programs Diagnostic Center, Police Officer Body-Worn Cameras: Assessing the Evidence, 35-36 (2014), available at <https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>.
- ⁸ Rory Carroll, Body cameras worn by police in Rialto, California have resulted in better policing – and now other forces may follow suit, The Guardian, Nov. 4, 2013, available at <http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto>.
- ⁹ Rory Carroll, Body cameras worn by police in Rialto, California have resulted in better policing – and now other forces may follow suit, The Guardian, Nov. 4, 2013, available at <http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto>.
- ¹⁰ Barak Ariel, William A. Farrar, Alex Sutherland, The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial, J Quant Criminal (2015), available at http://download.springer.com/static/pdf/797/art%253A10.1007%252Fs10940-014-9236-3.pdf?originUrl=http%3A%2F%2Flink.springer.com%2Farticle%2F10.1007%2Fs10940-014-9236-3&token2=exp=1441615884~acl=%2Fstatic%2Fpdf%2F797%2Fart%25253A10.1007%25252Fs10940-014-9236-3.pdf%3ForiginUrl%3Dhttp%253A%252F%252Flink.springer.com%252Farticle%252F10.1007%252Fs10940-014-9236-3*~hmac=bced859913f46c08167bf5344f6165d2472e6ea33ba0150635417ba37bdab004.
- ¹¹ ACLU, Grand Jury Decision Underscores Need for Wholesale Reform of the NYPD, Dec. 3, 2014, available at <https://www.aclu.org/news/grand-jury-decision-underscores-need-wholesale-reform-nypd>.
- ¹² See, e.g., The War on Marijuana in Black and White, [https://www.aclu.org/report/war-marijuana-black-and-white](https://www.aclu.org/report/war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white) See, also, Right on Crime, <http://rightoncrime.com/statement-of-principles/>
- ¹³ Investigation of the Ferguson Police Department, Civil Rights Division, USDOJ, March 4, 2015, http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf
- ¹⁴ Racially Biased Policing: A Principled Response, Police Executive Research Forum (PERF), COPS, 2001, pp.

7- 8, <http://ric-zai-inc.com/Publications/cops-w0172-pub.pdf>

¹⁵ Civil Rights and Law Enforcement Intelligence, http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1206&issue_id=62007

¹⁶ Charlottesville Police Department, http://www.roanoke.com/news/virginia/charlottesville-stop-and-frisk-cases-percent-black-percent-white/article_97c52064-d59a-11e3-b84c-001a4bcf6878.html

¹⁷ Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned, COPS/PERF Report 2014, <http://ric-zai-inc.com/Publications/cops-p296-pub.pdf>

¹⁸ See, Section 2.2-3806 of the Code of Virginia, <http://law.lis.virginia.gov/vacode/title2.2/chapter38/section2.2-3806/>

¹⁹ See February 2013 Opinion to Superintendent of the State Police Flaherty regarding use of automated license plate readers for passive surveillance, http://ag.virginia.gov/files/Opinions/2013/12-073_Flaherty.pdf

²⁰ Police Executive Research Forum, Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned, 40 (2014), available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

²¹ See response provided to the ACLU of Virginia by the Chesapeake Police Department and Norfolk Police Department.

²² See response provided to the ACLU of Virginia by the Tappahannock Police Department.

²³ See response provided to the ACLU of Virginia by the Henrico Police Department, Hurt Police Department, and Kenbridge Police Department.

²⁴ See response provided to the ACLU of Virginia by the Rocky Mount Police Department, Warrenton Police Department, Waynesboro Police Department, and Woodstock Police Department.

²⁵ See response provided to the ACLU of Virginia by the Frederick County Sheriff's Office, Galax Police Department, Halifax Police Department, and Tazewell County Sheriff's Office.

²⁶ See response provided to the ACLU of Virginia by the Henrico Police Department (When reasonable, practicable, and safe to do so, officers should advise citizens that the encounter is being recorded.).

²⁷ See response provided to the ACLU of Virginia by the Tazewell County Sheriff's Office (May inform the person if they feel it will be beneficial to do so.).

²⁸ See response provided to the ACLU of Virginia by the Halifax Police Department (If asked whether they are recording an event, officers are required to be truthful.) and Tappahannock Police Department (Officers will inform any person that they are being recorded if they so ask.).

²⁹ See response provided to the ACLU of Virginia by the Chesapeake Police Department and Norfolk Police Department.

³⁰ See response provided to the ACLU of Virginia by Colonial Heights Police Department, Dinwiddie County Sheriff's Office, Hopewell City Sheriff's Office, Hurt Police Department, Kenbridge Police Department, Suffolk Police Department.

³¹ See response provided to the ACLU of Virginia by Ferrum College Police Department, Norfolk Police Department, and Orange Police Department.

³² See response provided to the ACLU of Virginia by Norfolk Police Department and Orange Police Department.

³³ See response provided to the ACLU of Virginia by Virginia Commonwealth University Police Department.

³⁴ See response provided to the ACLU of Virginia by Tazewell County Sheriff's Office and Massanutten Police Department.

³⁵ See response provided to the ACLU of Virginia by Gordonsville Police Department.

³⁶ See response provided to the ACLU of Virginia by Ferrum College Police Department and Norfolk Police Department.

³⁷ See response provided to the ACLU of Virginia by Norfolk Police Department.

³⁸ See response provided to the ACLU of Virginia by Ferrum College Police Department.

³⁹ See response provided to the ACLU of Virginia by Colonial Heights Police Department, Dinwiddie County Sheriff's Office, Hampton Police Department, Henrico Police Department, Hopewell City Sheriff's Office, Hurt Manassas City Police Department, Newport News Police Department, Regent University Police Department, Tazewell County Sheriff's Office

⁴⁰ National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958).

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- ⁴¹ See response provided to the ACLU of Virginia by the Manassas Park City Police Department.
- ⁴² See response provided to the ACLU of Virginia by the Woodstock Police Department.
- ⁴³ See response provided to the ACLU of Virginia by the Norfolk Police Department.
- ⁴⁴ See response provided to the ACLU of Virginia by the Martinsville Police Department.
- ⁴⁵ See response provided to the ACLU of Virginia by the Aquia Harbour Police Department.
- ⁴⁶ Susan Ferriss, Virginia tops nation in sending students to cops, courts: Where does your state rank?, The Center for Public Integrity, Apr. 10, 2015, available at <http://www.publicintegrity.org/2015/04/10/17089/virginia-tops-nation-sending-students-cops-courts-where-does-your-state-rank>.
- ⁴⁷ See response provided to the ACLU of Virginia by the Isle of Wight County Sheriff's Office.
- ⁴⁸ See response provided to the ACLU of Virginia by the Chesapeake Police Department.
- ⁴⁹ See response provided to the ACLU of Virginia by the Suffolk Police Department.
- ⁵⁰ Police Executive Research Forum, Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned, v (2014), available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.
- ⁵¹ The Virginia Freedom of Information Act, §§2.2-3700-14.
- ⁵² Virginia Government Data Collection and Dissemination Practices Act, §§2.2-3800(C6-7).
- ⁵³ See response provided to the ACLU of Virginia by Abingdon Police Department, Ashland Police Department, Bedford Police Department, Berryville Police Department, Blackstone Police Department, Brunswick County Sheriff's Office, Chesapeake Police Department, Chincoteague Police Department, Colonial Heights Police Department, Dinwiddie County Sheriff's Office, Drakes Branch Police Department, Farmville Police Department, Ferrum College Police Department, Greene County Sheriff's Office, Haymarket Police Department, Henrico Police Department, Hopewell City Sheriff's Office, Hurt Police Department, Isle of Wight County Sheriff's Office, Kenbridge Police Department, Lawrenceville Police Department, Longwood University Police Department, Louisa County Sheriff's Office, Massanutten Police Department, New Market Police Department, Orange Police Department, Patrick County Sheriff's Office, Pearisburg Police Department, Radford University Police Department, Regent University Police Department, Richlands Police Department, Roanoke County Sheriff's Office, Rocky Mount Police Department, Salem Police Department, Shenandoah County Sheriff's Office, Smithfield Police Department, Tappahannock Police Department, Warrenton Police Department, West Point Police Department, and Wintergreen Police Department.
- ⁵⁴ See response provided to the ACLU of Virginia by Aquia Harbour Police Department and Galax Police Department.
- ⁵⁵ See response provided to the ACLU of Virginia by the Gordonsville Police Department.
- ⁵⁶ See response provided to the ACLU of Virginia by the York / Poquoson Sheriff's Office.
- ⁵⁷ See response provided to the ACLU of Virginia by the Frederick County Sheriff's Office.
- ⁵⁸ See response provided to the ACLU of Virginia by the Martinsville Police Department ("[a]ny citizen who is recorded on one of the videos is welcome to view the video").
- ⁵⁹ See response provided to the ACLU of Virginia by Danville Police Department (as provided in FOIA), Halifax Police Department (Subpoenas or Freedom of Information requests will be handled by the chief of police), Hampton Police Department (Disclosure of the contents of videos to others shall be made in accordance with the provisions of the Virginia Freedom of Information Act, and/or the approval of the Chief of Police), Manassas Park City Police Department (Data subject to the same statutory exemptions from disclosure as any other Departmental records), Newport News Police Department (All requests will be honored in compliance with FOIA. Data tagged as evidence will only be released with approval from commonwealth's attorney. Legitimate confidential information will be redacted or obscured), Norfolk Police Department (Per established procedure. Copies can be edited or redacted to preserve the privacy of individuals unrelated to the case who may have been captured), Radford Police Department (Per general Records Management Guidelines for records release), Tazewell County Sheriff's Office (Data permitted under FOIA. Recordings that contain audio or video of a legitimate confidential nature will be redacted or obscured from downloaded copies. Active cases and evidence are exempt from being released to the public under current FOIA guidelines), University of Virginia Police Department (Freedom of Information Act), Virginia Commonwealth University Police Department (Freedom of Information Act), Waynesboro Police Department ("Release of data subject to the same statutory and department guidelines as any other department record and must be approved by the Chief of Police or his/her designee. In addition, the department retains the right to limit or

restrict, for any reason at any time, the viewing or accessing of the data), Woodstock Police Department (In accordance with department policy, FOIA, and only upon authorization of Chief of Police), and York Police Department (In accordance with law).

⁶⁰ See response provided to the ACLU of Virginia by: Abingdon Police Department, Aquia Harbour Police Department, Ashland Police Department, Bedford Police Department, Berryville Police Department, Blackstone Police Department, Chincoteague Police Department, Colonial Heights Police Department, Dinwiddie County Sheriff's Office, Drakes Branch Police Department, Farmville Police Department, Galax Police Department, Gordonsville Police Department, Henrico Police Department, Hopewell City Sheriff's Office, Hurt Police Department, Isle of Wight County Sheriff's Office, Kenbridge Police Department, Longwood University Police Department, Louisa County Sheriff's Office, Newport News Police Department, Norfolk Police Department, Pearisburg Police Department, Radford University Police Department, Richlands Police Department, Rocky Mount Police Department, Tappahannock Police Department, Virginia Commonwealth University Police Dept., Warrenton Police Department, Waynesboro Police Department, West Point Police Department, Wintergreen Police Department, and York/Poquoson Sheriff's Office.

⁶¹ See response provided to the ACLU of Virginia by: Brunswick County Sheriff's Office, Chesapeake Police Department, Ferrum College Police Department, Halifax Police Department, Haymarket Police Department, Lawrenceville Police Department, Manassas Park City Police Dept., New Market Police Department, Patrick County Sheriff's Office, Radford Police Department, Regent University Police Department, Roanoke County Sheriff's Office, Salem Police Department, Tazewell County Sheriff's Office, University of Virginia Police Department, and Woodstock Police Department.

⁶² See response provided to the ACLU of Virginia by: Danville Police Department, Frederick County Sheriff's Office, Greene County Sheriff's Office, Hampton Police Department, Martinsville Police Department, Massanutten Police Department, Orange Police Department, Shenandoah County Sheriff's Office, Smithfield Police Department, and Suffolk Police Department.

⁶³ See response provided to the ACLU of Virginia by: Abingdon Police Department, Ashland Police Department, Bedford Police Department, Berryville Police Department, Blackstone Police Department, Chesapeake Police Department, Chincoteague Police Department, Colonial Heights Police Department, Danville Police Department, Dinwiddie County Sheriff's Office, Drakes Branch Police Department, Farmville Police Department, Ferrum College Police Department, Frederick County Sheriff's Office, Galax Police Department, Greene County Sheriff's Office, Halifax Police Department, Henrico Police Department, Hurt Police Department, Isle of Wight County Sheriff's Office, Kenbridge Police Department, Louisa County Sheriff's Office, Martinsville Police Department, New Market Police Department, Newport News Police Department, Norfolk Police Department, Orange Police Department, Pearisburg Police Department, Radford Police Department, Radford University Police Department, Richlands Police Department, Smithfield Police Department, Suffolk Police Department, Tappahannock Police Department, Tazewell County Sheriff's Office, University of Virginia Police Department, Virginia Commonwealth University Police Dept., Warrenton Police Department, Waynesboro Police Department, West Point Police Department, Wintergreen Police Department, Woodstock Police Department, and York/Poquoson Sheriff's Office.

⁶⁴ See response provided to the ACLU of Virginia by Brunswick County Sheriff's Office, Gordonsville Police Department, Hampton Police Department, Lawrenceville Police Department, Longwood University Police Department, Manassas Park City Police Dept., Patrick County Sheriff's Office, Regent University Police Department, Roanoke County Sheriff's Office, Rocky Mount Police Department, Salem Police Department, and Shenandoah County Sheriff's Office.

⁶⁵ See response provided to the ACLU of Virginia by Haymarket Police Department (BWC data maintained until the officer is certain it will no longer be needed) and Hopewell City Sheriff's Office (BWC data is maintained on file until it is determined that there is no further need of the video).

⁶⁶ Aquia Harbour Police Department and Massanutten Police Department.

⁶⁷ See response provided to the ACLU of Virginia by Abingdon Police Department, Ashland Police Department, Bedford Police Department, Berryville Police Department, Blackstone Police Department, Chesapeake Police Department, Chincoteague Police Department, Colonial Heights Police Department, Danville Police Department, Dinwiddie County Sheriff's Office, Drakes Branch Police Department, Farmville Police Department, Ferrum College Police Department, Frederick County Sheriff's Office, Galax Police Department, Greene County Sheriff's Office, Halifax Police Department, Henrico Police Department, Hurt Police Department, Isle of Wight County Sheriff's Office, Kenbridge Police Department, Louisa County Sheriff's

Office, Martinsville Police Department, New Market Police Department, Newport News Police Department, Norfolk Police Department, Orange Police Department, Pearisburg Police Department, Radford Police Department, Radford University Police Department, Richlands Police Department, Smithfield Police Department, Suffolk Police Department, Tappahannock Police Department, Tazewell County Sheriff's Office, University of Virginia Police Department, Virginia Commonwealth University Police Dept., Warrenton Police Department, Waynesboro Police Department, West Point Police Department, Wintergreen Police Department, Woodstock Police Department, and York/Poquoson Sheriff's Office.

⁶⁸ See response provided to the ACLU of Virginia by the Orange Police Department.

⁶⁹ See response provided to the ACLU of Virginia by the Chincoteague Police Department.

⁷⁰ See response provided to the ACLU of Virginia by: Brunswick County Sheriff's Office, Gordonsville Police Department, Hampton Police Department, Lawrenceville Police Department, Longwood University Police Department, Manassas Park City Police Dept., Patrick County Sheriff's Office, Regent University Police Department, Roanoke County Sheriff's Office, Rocky Mount Police Department, Salem Police Department, and Shenandoah County Sheriff's Office.

⁷¹ See response provided to the ACLU of Virginia by the Brunswick County Sheriff's Office.

⁷² See response provided to the ACLU of Virginia by the Haymarket Police Department.

⁷³ See response provided to the ACLU of Virginia by the Hopewell Sheriff's Office.

⁷⁴ See response provided to the ACLU of Virginia by Massanutten Police Department and Aquia Harbour Police Department.

⁷⁵ See response provided to the ACLU of Virginia by the Aquia Harbour Police Department.

⁷⁶ Michael White, Office of Justice Programs Diagnostic Center, Police Officer Body-Worn Cameras: Assessing the Evidence, 9 (2014), available at

<https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf> ("Moreover, the Mesa (Arizona) Police Department's evaluation, which focused on the cameras' impact on reducing civil liability, addressing departmental complaints, and enhancing criminal prosecution, clearly demonstrates that administrative policy influences camera usage (MPD 2013). During the one-year evaluation, Mesa employed two different policies governing use of the camera: one that was restrictive (implemented the first six months) and one that gave officers much more discretion in determining when to record events (implemented the last six months). Camera use declined by 42 percent when the discretionary policy was in effect.")

⁷⁷ See response provided to the ACLU of Virginia by: Abingdon Police Department, Ashland Police Department, Bedford Police Department, Berryville Police Department, Blackstone Police Department, Brunswick County Sheriff's Office, Chesapeake Police Department, Chincoteague Police Department, Colonial Heights Police Department, Danville Police Department, Dinwiddie County Sheriff's Office, Drakes Branch Police Department, Farmville Police Department, Ferrum College Police Department, Galax Police Department, Gordonsville Police Department, Greene County Sheriff's Office, Halifax Police Department, Hampton Police Department, Haymarket Police Department, Henrico Police Department, Hurt Police Department, Isle of Wight County Sheriff's Office, Kenbridge Police Department, Lawrenceville Police Department, Longwood University Police Department, Louisa County Sheriff's Office, Massanutten Police Department, New Market Police Department, Newport News Police Department, Norfolk Police Department, Orange Police Department, Radford Police Department, Radford University Police Department, Regent University Police Department, Richlands Police Department, Roanoke County Sheriff's Office, Rocky Mount Police Department, Salem Police Department, Shenandoah County Sheriff's Office, Smithfield Police Department, Suffolk Police Department, Tappahannock Police Department, Tazewell County Sheriff's Office, University of Virginia Police Department, Virginia Commonwealth University Police Dept., Warrenton Police Department, Waynesboro Police Department, West Point Police Department, Wintergreen Police Department, Woodstock Police Department, and York/Poquoson Sheriff's Office.

The following departments provided the ACLU of Virginia with policies that either grant officers discretion vis-à-vis when to activate their BWC or are unclear about when officers must activate their camera: Aquia Harbour Police Department, Frederick County Sheriff's Office, Hopewell City Sheriff's Office, Manassas Park City Police Dept., Martinsville Police Department, Patrick County Sheriff's Office, Pearisburg Police Department, Shenandoah County Sheriff's Office, Smithfield Police Department, and Wintergreen Police Department.

⁷⁸ The following departments provided the ACLU of Virginia with policies that arguably mandate filming when

responding to calls for service or at the initiation of law enforcement or investigative encounters: Ashland Police Department, Bedford Police Department, Berryville Police Department, Blackstone Police Department, Chesapeake Police Department, Chincoteague Police Department, Drakes Branch Police Department, Ferrum College Police Department, Galax Police Department, Gordonsville Police Department, Halifax Police Department, Hampton Police Department, Haymarket Police Department, Henrico Police Department, Hurt Police Department, Isle of Wight County Sheriff's Office, Kenbridge Police Department, Longwood University Police Department, Louisa County Sheriff's Office, New Market Police Department, Newport News Police Department, Norfolk Police Department, Radford Police Department, Radford University Police Department, Regent University Police Department, Richlands Police Department, Rocky Mount Police Department, Salem Police Department, Smithfield Police Department, Suffolk Police Department, Tappahannock Police Department, Tazewell County Sheriff's Office, University of Virginia Police Department, Virginia Commonwealth University Police Dept., Waynesboro Police Department, West Point Police Department, Wintergreen Police Department, Woodstock Police Department, and York/Poquoson Sheriff's Office.

⁷⁹ See response provided to the ACLU of Virginia by the Farmville Police Department (BWC shall be used during high risk and/or volatile situations).

⁸⁰ See response provided to the ACLU of Virginia by the Frederick County Sheriff's Office (Deputy may self-initiate a recording of any event).

⁸¹ See response provided to the ACLU of Virginia by Aquia Harbour Police Department, Frederick County Sheriff's Office, Hopewell City Sheriff's Office, Manassas Park City Police Dept., Patrick County Sheriff's Office, and Pearisburg Police Department.

⁸² See response provided to the ACLU of Virginia by the Frederick County Sheriff's Office (Deputy may self-initiate a recording of any event).

⁸³ See response provided to the ACLU of Virginia by the Aquia Harbour Police Department (Generally at the discretion of the officer, however, activation is strongly encouraged for a specific list of police-community encounters).

⁸⁴ See response provided to the ACLU of Virginia by the Abingdon Police Department, Aquia Harbour Police Department, Ashland Police Department, Bedford Police Department, Berryville Police Department, Blackstone Police Department, Brunswick County Sheriff's Office, Chesapeake Police Department, Chincoteague Police Department, Colonial Heights Police Department, Danville Police Department, Dinwiddie County Sheriff's Office, Drakes Branch Police Department, Farmville Police Department, Ferrum College Police Department, Frederick County Sheriff's Office, Galax Police Department, Gordonsville Police Department, Halifax Police Department, Hampton Police Department, Henrico Police Department, Hopewell City Sheriff's Office, Hurt Police Department, Isle of Wight County Sheriff's Office, Kenbridge Police Department, Lawrenceville Police Department, Longwood University Police Department, Louisa County Sheriff's Office, Manassas Park City Police Dept., New Market Police Department, Newport News Police Department, Norfolk Police Department, Patrick County Sheriff's Office, Pearisburg Police Department, Radford Police Department, Radford University Police Department, Regent University Police Department, Richlands Police Department, Rocky Mount Police Department, Salem Police Department, Smithfield Police Department, Suffolk Police Department, Tappahannock Police Department, Tazewell County Sheriff's Office, University of Virginia Police Department, Virginia Commonwealth University Police Dept., Waynesboro Police Department, West Point Police Department, and Woodstock Police Department.

⁸⁵ For purposes of this analysis, departments that create a requirement that officers clarify why they failed to record the entire contact are counted in this number.

⁸⁶ See response provided to the ACLU of Virginia by the Brunswick County Sheriff's Office, Danville Police Department, Hampton Police Department, Isle of Wight County Sheriff's Office, Lawrenceville Police Department, Longwood University Police Department, Louisa County Sheriff's Office, Kenbridge Police Department, Newport News Police Department, Radford University Police Department, Regent University Police Department, Rocky Mount Police Department, Salem Police Department, Shenandoah County Sheriff's Office, Tazewell County Sheriff's Office, University of Virginia Police Department, Waynesboro Police Department, West Point Police Department, Woodstock Police Department, and York/Poquoson Sheriff's Office.

⁸⁷ See response provided to the ACLU of Virginia by the Greene County Sheriff's Office.

⁸⁸ See response provided to the ACLU of Virginia by the Aquia Harbour Police Department.

⁸⁹ Frank Stoltze, Update Ezell Ford shooting: LAPD places 'security hold' on autopsy report, KPCC, Aug. 18 2014, available at <http://www.scpr.org/news/2014/08/18/46063/ezell-ford-lapd-places-security-hold-on-autopsy-fo/>.

⁹⁰ Peter Bibring, ACLU of Southern California Letter to Bureau of Justice Assistance, Sept. 3, 2015, available at <https://www.aclusocal.org/wp-content/uploads/2015/09/ACLU-Letter-to-DOJ-re-LAPD-Body-Camera-Funding.pdf>.

⁹¹ Peter Bibring, ACLU of Southern California Letter to Bureau of Justice Assistance, Sept. 3, 2015, available at <https://www.aclusocal.org/wp-content/uploads/2015/09/ACLU-Letter-to-DOJ-re-LAPD-Body-Camera-Funding.pdf>.

⁹² See response provided to the ACLU of Virginia by Abingdon Police Department, Aquia Harbour Police Department, Brunswick County Sheriff's Office, Chesapeake Police Department, Danville Police Department, Greene County Sheriff's Office, Hampton Police Department, Haymarket Police Department, Henrico Police Department, Lawrenceville Police Department, Longwood University Police, Massanutten Police Department, Orange Police Department, Patrick County Sheriff's Office, Regent University Police Department, Roanoke County Sheriff's Office, Shenandoah County Sheriff's Office, Smithfield Police Department, Tappahannock Police Department, and Wintergreen Police Department.

⁹³ See response provided to the ACLU of Virginia by: Bedford Police Department, Berryville Police Department, Blackstone Police Department, Chincoteague Police Department, Drakes Branch Police Department, Farmville Police Department, Frederick County Sheriff's Office, Galax Police Department, Gordonsville Police Department, Hurt Police Department, Isle of Wight County Sheriff's Office, Kenbridge Police Department, Louisa County Sheriff's Office, Martinsville Police Department, New Market Police Department, Pearisburg Police Department, Radford Police Department, Radford University Police Department, Richlands Police Department, Salem Police Department, Warrenton Police Department, Waynesboro Police Department, and West Point Police Department.

⁹⁴ See, e.g. response provided to the ACLU of Virginia by Louisa County Sheriff's Office.

⁹⁵ See, e.g. response provided to the ACLU of Virginia by Chincoteague Police Department.

⁹⁶ See, e.g. response provided to the ACLU of Virginia by the Waynesboro Police Department.

⁹⁷ See, e.g. response provided to the ACLU of Virginia by the Galax Police Department.

⁹⁸ See, e.g. response provided to the ACLU of Virginia by the Galax Police Department.

⁹⁹ See response provided to the ACLU of Virginia by Ashland Police Department, Colonial Heights Police Department, Dinwiddie County Sheriff's Office, Ferrum College Police Department, Halifax Police Department, Hopewell City Sheriff's Office, Manassas Park City Police Dept., Newport News Police Department, Norfolk Police Department, Rocky Mount Police Department, Suffolk Police Department, Tazewell County Sheriff's Office, University of Virginia Police Department, Virginia Commonwealth University, Woodstock Police Department, and York/Poquoson Sheriff's Office.

¹⁰⁰ See, e.g. response provided to the ACLU of Virginia by Virginia Commonwealth University Police Department (May be reviewed by an employee to assist with writing a report, supplement or memorandum.).

¹⁰¹ See, e.g. response provided to the ACLU of Virginia by Suffolk Police Department ("Officers shall review all applicable video footage (to include supporting officer video footage) prior to submission of any formal statement.").

¹⁰² See response provided to the ACLU of Virginia by Ashland Police Department, Berryville Police Department, Blackstone Police Department, Chesapeake Police Department, Danville Police Department, Frederick County Sheriff's Office, Galax Police Department, Greene County Sheriff's Office, Hurt Police Department, Isle of Wight County Sheriff's Office, Kenbridge Police Department, Louisa County Sheriff's Office, Manassas Park City Police Dept., Norfolk Police Department, Orange Police Department, Shenandoah County Sheriff's Office, Suffolk Police Department, Tappahannock Police Department, Tazewell County Sheriff's Office, University of Virginia Police Department, Virginia Commonwealth University Police Dept., Waynesboro Police Department, West Point Police Department, and York/Poquoson Sheriff's Office.

¹⁰³ See response provided to the ACLU of Virginia by Brunswick County Sheriff's Office (BWC data can be utilized by supervisory personnel for reviews of deputy performance and states that shift supervisors shall periodically inspect the BWC equipment of all officers on their watch to insure compliance with this general order), Ferrum College Police Department (BWC data may be reviewed by a supervisor to ensure that Department procedures are being followed), Halifax Police Department (Chief may access and review BWC footage of officers as part of the department's ongoing inspections and audits program), Henrico Police

Department (Commander, Quality Assurance shall periodically conduct a random review recordings to assess the overall performance of the equipment), Hopewell City Sheriff's Office (BWC data shall be made available from the officer is requested from the supervisor), Martinsville Police Department (supervisors can view the BWC data of the officers they supervise), and Patrick County Sheriff's Office (supervisor shall periodically inspect the equipment of all officers on his watch to insure compliance of this general order).

¹⁰⁴ See response provided to the ACLU of Virginia by Abingdon Police Department, Aquia Harbour Police Department, Bedford Police Department, Chincoteague Police Department, Colonial Heights Police Department, Dinwiddie County Sheriff's Office, Drakes Branch Police Department, Farmville Police Department, Gordonsville Police Department, Hampton Police Department, Haymarket Police Department, Lawrenceville Police Department, Longwood University Police Department, Massanutten Police Department, New Market Police Department, Newport News Police Department, Pearisburg Police Department, Radford Police Department, Radford University Police Department, Regent University Police Department, Richlands Police Department, Roanoke County Sheriff's Office, Rocky Mount Police Department, Salem Police Department, Smithfield Police Department, Warrenton Police Department, and Wintergreen Police Department.

¹⁰⁵ See response provided to the ACLU of Virginia by Woodstock Police Department.

¹⁰⁶ See response provided to the ACLU of Virginia by Abingdon Police Department, Aquia Harbour Police Department, Ashland Police Department, Blackstone Police Department, Chincoteague Police Department, Danville Police Department, Drakes Branch Police Department, Farmville Police Department, Halifax Police Department, Hampton Police Department, Haymarket Police Department, Henrico Police Department, Kenbridge Police Department, Martinsville Police Department, New Market Police Department, Newport News Police Department, Norfolk Police Department, Radford Police Department, Regent University Police Department, Roanoke County Sheriff's Office, Tappahannock Police Department, Waynesboro Police Department, and York/Poquoson Sheriff's Office.

¹⁰⁷ See response provided to the ACLU of Virginia by: Bedford Police Department, Berryville Police Department, Brunswick County Sheriff's Office, Chesapeake Police Department, Colonial Heights Police Department, Dinwiddie County Sheriff's Office, Ferrum College Police Department, Frederick County Sheriff's Office, Galax Police Department, Gordonsville Police Department, Greene County Sheriff's Office, Hopewell City Sheriff's Office, Hurt Police Department, Isle of Wight County Sheriff's Office, Lawrenceville Police Department, Longwood University Police Department, Louisa County Sheriff's Office, Manassas Park City Police Dept., Massanutten Police Department, Orange Police Department, Patrick County Sheriff's Office, Pearisburg Police Department, Radford University Police Department, Richlands Police Department, Rocky Mount Police Department, Salem Police Department, Shenandoah County Sheriff's Office, Smithfield Police Department, Suffolk Police Department, Tazewell County Sheriff's Office, University of Virginia Police Department, Virginia Commonwealth University Police Dept., Warrenton Police Department, West Point Police Department, Wintergreen Police Department, and Woodstock Police Department.

¹⁰⁸ See response provided to the ACLU of Virginia by Radford University Police Department ("Violations of law will form the basis for civil and criminal sanctions in a recognized judicial setting. Any employee who erases, modifies, edits or tampers with a recording will be disciplined according to the Police Department policies and may be subject to criminal sanctions.").

¹⁰⁹ See response provided to the ACLU of Virginia by Colonial Heights Police Department ("Non-compliance with this order could result in disciplinary action.").

¹¹⁰ The following law enforcement departments submitted their BWC policy to the ACLU of Virginia: Abingdon Police Department, Aquia Harbour Police Department, Ashland Police Department, Bedford Police Department, Berryville Police Department, Blackstone Police Department, Brunswick County Sheriff's Office, Chesapeake Police Department, Chincoteague Police Department, Colonial Heights Police Department, Danville Police Department, Dinwiddie County Sheriff's Office, Drakes Branch Police Department, Farmville Police Department, Ferrum College Police Department, Frederick County Sheriff's Office, Galax Police Department, Gordonsville Police Department, Greene County Sheriff's Office, Halifax Police Department, Hampton Police Department, Haymarket Police Department, Henrico Police Department, Hopewell City Sheriff's Office, Hurt Police Department, Isle of Wight County Sheriff's Office, Kenbridge Police Department, Lawrenceville Police Department, Longwood University Police Department, Louisa County Sheriff's Office, Manassas Park City Police Dept., Martinsville Police Department, Massanutten Police Department, New Market Police Department, Newport News Police Department, Norfolk Police Department, Orange Police

Department, Patrick County Sheriff's Office, Pearisburg Police Department, Radford Police Department, Radford University Police Department, Regent University Police Department, Richlands Police Department, Roanoke County Sheriff's Office, Rocky Mount Police Department, Salem Police Department, Shenandoah County Sheriff's Office, Smithfield Police Department, Suffolk Police Department, Tappahannock Police Department, Tazewell County Sheriff's Office, University of Virginia Police Department, Virginia Commonwealth University Police Dept., Warrenton Police Department, Waynesboro Police Department, West Point Police Department, Wintergreen Police Department, Woodstock Police Department, and York/Poquoson Sheriff's Office.

¹¹¹ In its analysis, the ACLU of Virginia only considered policies that were in effect at the time they were submitted to the ACLU of Virginia. In some cases, the policy was unclear, but the law enforcement representative responding the request specifically provided a statement regarding the rules governing BWCs that was not noted in the official policy. In those cases, it is noted in the paper that a policy is not part of the approved policy, but is rather a position provided by the responding law enforcement personnel. In addition, some issues, such as when cameras must be activated, required subjective judgment, as the language in certain policies did not necessarily match the ACLU of Virginia's recommendations, but represented language substantially similar to the ACLU of Virginia's recommendation. Cases that required subjective judgment are noted in the relevant section of the body of the paper. In addition, in areas where the policy lacked a clear answer, the compliance with ACLU of Virginia policy decision noted no policy.

Appendix A: [DCJS Model Body Worn Camera Policy](#)

Appendix B: [ACLU of Virginia Model Body Worn Camera Policy](#)

Appendix C: [Freedom of Information Act Request Sent to Local Law Enforcement Regarding Body Worn Cameras](#)

Appendix D: [25 Questions Used to Review Body Worn Camera Policies](#)

Appendix E: Summaries of Local Body Worn Camera Policies

[Protecting the Liberty, Rights and Privacy of Individual Virginians](#)

[Protecting the Public's Right to Know](#)

[Assuring Accountability](#)