

LEGAL ISSUES WITH BODY CAMS

New technology requires putting protocols in place.

Recent events have accelerated law enforcement's timetable for adopting pilot programs to test the use of audio-video recording devices worn on the police uniform or accessories. Some early users have reported drops in complaints and use-of-force incidents. Prosecutors and jurors favor the incontestable evidence a recording often provides. Police-accountability activists urge that all officers be required to wear body cams at all times while on duty. There's no denying that this technology has many benefits to offer.



PHOTO: MARK W. CLARK

It also has legal ramifications that have to be understood by criminal justice stakeholders. These ramifications make it advisable for departments and their legal advisors to craft protocols for the use of body cams and for the processing of the voluminous recordings they produce. Legislation may be needed to modify certain aspects of laws that were drafted before advances in technology raised issues that present laws don't satisfactorily resolve.

IS IT LEGAL FOR YOU TO RECORD?

Police recording of interactions with members of the public may present issues under the Fourth Amendment and under state and federal laws regulating the interception and

recording of communications. The U.S. Supreme Court has ruled that law enforcement officers may generally record whatever they can lawfully see and hear, without violating the Fourth Amendment. (*Lopez v. U.S.*) However, the court has limited this general rule in instances where police used special technology to invade legitimate expectations of privacy in suspects' conversations and activities—for example, a spike mic (*Silverman v. U.S.*); unauthorized wiretap (*Katz v. U.S.*); thermal imaging device (*Kyllo v. U.S.*); and GPS tracker. (*U.S. v. Jones*)

Federal statutes in Title III of the Omnibus Crime Control and Safe Streets Act, the Electronic Communications Privacy Act, the Stored Communications Act and other federal bills place restrictions on intercepting and recording certain communications. (See, for example, Title 18, United States Code, sections 2510, 2701, and 3121.) Most states also have laws regulating the circumstances under which warrantless electronic surveillance, interception, and recording are permitted.

THE DUTY TO PRESERVE AND DISCLOSE

Constitutional due process mandates that prosecutors disclose to the defense any material exculpatory evidence in the possession of "the prosecution team," which includes the police. (*Brady v. Maryland*; *Kyles v. Whitley*) The Supreme Court has held that evidence that has an "apparently exculpatory value" to a defendant that cannot be otherwise obtained by the defense must be preserved by police for disclosure in a criminal prosecution. (*California v. Trombetta*; *Arizona v. Youngblood*)

This means that if suspects or witnesses make statements during recorded police encounters that appear to exculpate a suspect, the recording must usually be preserved for disclosure. Since most body cam and dash cam systems automatically upload an entire shift's recordings to a server when the police car and officer return to the station, some procedure is necessary that will enable officers to identify and segregate relevant portions of recordings for review, documentation, retention, and furnishing to the prosecutor for disclosure to the defense.

Failure to implement such protocols has already begun to



prove costly in court. In *People v. Alvarez*, for example, a California Court of Appeal recently reversed the robbery convictions of two defendants because of the failure of police to preserve and disclose their surveillance video. Said the court, "Police and prosecutors are more than willing to avail themselves of technology when it is to their advantage; there must be a level playing field that gives defendants equal access to the same evidence."

CHAIN OF CUSTODY

To be admissible in court, recordings have to be authenticated. How do we establish the date, time, and place of the recording, verify its content and the identities of those recorded, and furnish assurance that the recording has not been edited or overdubbed? If the original recording is kept in a cloud by a commercial vendor, how do we account for the fact that it has not been continuously in official custody, and satisfy the court that the recording introduced in evidence is a true and cor-

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rect version of the recording made on the indicated date and time?

PUBLIC ACCESS

In the federal jurisdiction, the Freedom of Information Act mandates that with specified exceptions, public records must be made available on request to the media and any member of the general public. Most states have similar public records acts. A police recording made on the job is, under controlling definitions, a public record. What provision must a department make for archiving, retrieving, redacting, and duplicating body cam recordings when a proper request is made for those public records?

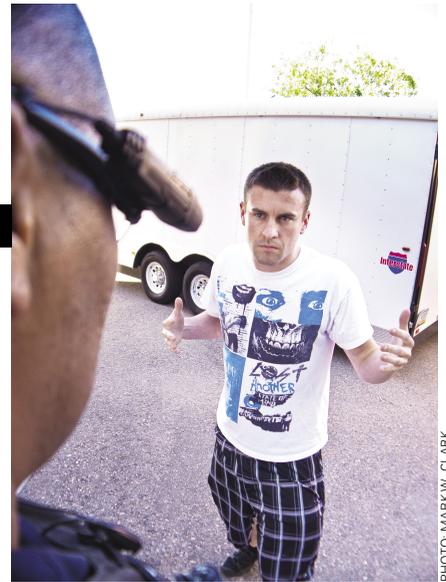


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In some jurisdictions, requests by news media and private individuals for "all recordings made by all officers for the past 5 years" have inundated agencies with obligations they have neither the personnel, resources, nor time to fulfill. If the recordings may contain information that is

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exempt from disclosure under the acts, it takes assigned reviewers matching periods of real time to review and redact the recordings.

Most public records acts carry short deadlines for compliance. If a department has, say, 20 officers, each making 40 hours of recordings per week, that's 800 hours of recordings per week, or 41,600 per year. A request for 5 years of recordings would consume at least 208,000 hours of someone's time to review, redact, duplicate, and produce. In a jurisdiction where requests have a 30-day compliance limit, for example, that same agency would need an extra 867 full-time screeners to finish the job on time.

What's the solution to such dilemmas? Obviously, public records acts have to be amended. But legislative amendments take time. Meanwhile, how should a law enforcement department plan to cope with requests for copies of all recordings made by body cams worn by its officers in a pilot project?

INVASION OF PRIVACY

Not surprisingly, some of those most vocal in demanding body cams for police accountability and transparency are also the most strident in their insistence that personal privacy be protected. Body cams will often capture people at their worst—drunk, abusive, profane, and at their most personal—during domestic disputes, mental health crises, medical emergencies, etc. Quite understandably, those people would not want recordings turned over to bloggers whose public records requests were intended to provide fodder for a reality television series.

But how should a law enforcement agency balance the public's right to know with the individual's right to privacy and to protection from commercial exploitation of their most personal and embarrassing moments?

PERSONNEL

Should supervisors permit officers to review their own recordings before writ-

ing arrest reports, or prior to answering IA questions about a use of force or OIS incident? Some say "Yes," to enhance reliability and avoid creating a "gotcha" atmosphere; some say "No," to encourage candor that is uninfluenced by a review of the recording.

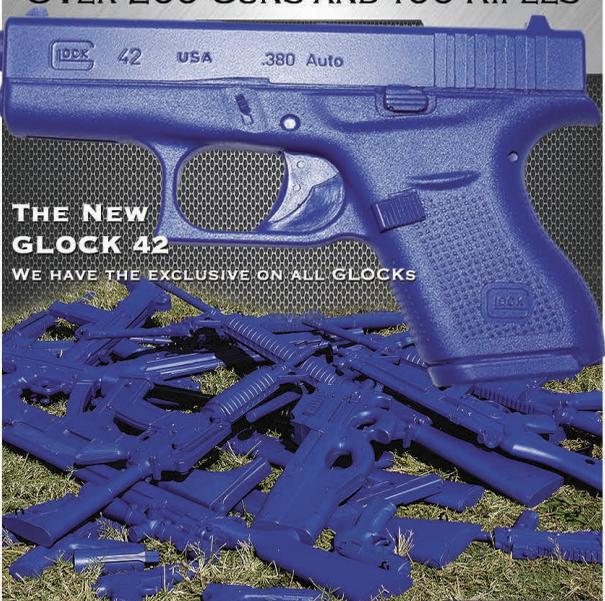
Should recordings from body cams be used to check on officers' work habits, inappropriate language, worker's comp claims, etc.?

LEGAL ADVICE

These are just a few of the kinds of legal issues that make it imperative to seek the advice of local prosecutors and civil legal counsel before adopting and implementing a body cam or car cam program. "Shooting (video) first and asking questions later" is rarely the best practice. ☉

Devallis Rutledge is a former police officer and veteran prosecutor who currently serves as special counsel to the Los Angeles County district attorney.

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