

**TESTIMONY OF THE BRENNAN CENTER FOR JUSTICE**

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before

**THE NEW YORK STATE ASSEMBLY COMMITTEES ON  
CODES, JUDICIARY, & GOVERNMENTAL OPERATIONS**

regarding

**THE USE OF BODY-WORN CAMERAS BY LAW ENFORCEMENT OFFICIALS**

**December 8, 2015**

Thank you to the New York State Assembly and to the committee chairs for holding this important hearing and inviting public testimony on the use of body-worn cameras by law enforcement officials.

My name is Michael Price, and I am counsel for the Liberty and National Security Program at the Brennan Center for Justice. The Brennan Center is a nonpartisan law and policy institute at NYU School of Law that seeks to improve our systems of democracy and justice. The Liberty and National Security Program focuses on helping to safeguard our constitutional ideals in the fight against terrorism. As part of that work, we have long advocated for greater police oversight and accountability, including the 2013 creation of an NYPD Inspector General. At the same time, our work also includes scholarship and advocacy intended to ensure that our privacy is protected in an age of new technologies, such as body-worn cameras (BWCs).

At a time of heightened concern about mass incarceration, bias in the criminal justice system, and unlawful use of force by police officers, BWCs have been heralded as a means of increasing police accountability. Police departments across the country have begun to equip their officers with BWCs, including the New York City Police Department (NYPD).<sup>1</sup> But without the right policies in place, there is a danger that BWCs could increase scrutiny of communities that are already concerned about police activity in their neighborhoods.

BWCs may have the potential to improve police accountability, but they also dramatically increase the surveillance capacity of law enforcement agencies where the devices are in use. Police accountability is critically important, but the price tag must not be privacy rights. The use of BWCs therefore requires careful attention to the rules about what information is collected, how long it is kept, and who has access to it – including the public or other government agencies. The Brennan Center is in the process of completing a comprehensive review of BWC policies from 24 cities around the country, designed to inform police departments and policymakers about their options and best practices.<sup>2</sup> Three issues – data collection, retention, and access – pose difficult questions that defy easy answers, but the Brennan Center believes it is important to highlight them today and important for the Assembly to consider them carefully.

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<sup>1</sup> Beginning late last year, the NYPD launched a “Body-Worn Camera” pilot program in five precincts, as required by *Floyd v. City of New York*, the landmark stop-and-frisk case. There are currently 60 such cameras in use, although the NYPD is hoping to add another 5,000 devices, according to recent reports. Shawn Cohen and Daniel Prendergast, *NYPD Looks to Add Thousands of New Body Cameras*, N.Y. DAILY NEWS, Jun. 22, 2015, <http://nypost.com/2015/06/22/nypd-looks-to-add-thousands-of-new-body-cameras/>. The NYPD issued Operations Order 48 in 2014,<sup>1</sup> outlining the rules for officers participating in the program. N.Y. POLICE DEP’T, OPERATIONS ORDER 48: PILOT PROGRAM – USE OF BODY-WORN CAMERAS (2014). The Brennan Center raised concerns with this policy and the process that led to it in testimony before the New York City Council on June 29, 2015. *Creation of a Police Officer Body-Worn Camera Task Force: Hearing on Int. 607 Before the N.Y. City Council Comm. on Public Safety* (2015) (testimony of Michael Price, Brennan Center for Justice), available at <https://www.brennancenter.org/analysis/testimony-new-york-city-council-expanding-nypds-body-worn-camera-program>.

<sup>2</sup> The 24 cities are: Atlanta, Austin, Baltimore, Charlotte, Chicago, Dallas, Denver, Ferguson, Las Vegas, Los Angeles, Mesa, Minneapolis, New Orleans, New York, Oakland, Orlando, Phoenix, Rialto, San Diego, San Jose, Seattle, Tampa, Tucson, and Washington, D.C.

### *Collection*

One of the most basic questions with respect to the use of BWCs is deciding when they should or should not be required to collect and record data. Only two of 24 the policies reviewed by the Brennan Center require police to record all civilian interactions, while the other 22 require recording for law enforcement and investigative actions only, such as stops, searches, and arrests. The majority of policies permit officers to record other events at their discretion, but with certain exceptions. Most policies also forbid recording in especially private places, such as bathrooms or locker rooms, and limit recording in places like hospitals and doctor's offices.

Consider the NYPD's current policy on BWCs, for example. On the one hand, it requires officers to activate their cameras during a range of interactions, including all *Terry* stops and radio runs. On the other hand, it identifies circumstances in which officers should not record, such as attendance at political or religious events, as well as "places where a reasonable expectation of privacy exists," like "emergency rooms, locker rooms, and restrooms," and presumably, inside of a person's home.<sup>3</sup> Of course, there may be significant tension between these directives. What happens, for example, when officers respond to a domestic disturbance? Calling the police for help is not the same as wishing to have the interior of your home or apartment committed to film.

Some policies studied by the Brennan Center require a resident's permission to record inside their home when officers are not responding to an emergency or executing a search warrant. Other policies take the opposite approach, explicitly stating that a resident's consent to record is not required. A majority – unfortunately – do not address the privacy of homes at all. In New York City, a victim or witness must affirmatively request not to be recorded. But officers are also instructed to keep filming if the situation is deemed "confrontational," which is frequently true for domestic disturbance calls.

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<sup>3</sup> See NYC DEP'T OF INVESTIGATION, OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, BODY-WORN CAMERAS IN NYC: AN ASSESSMENT OF NYPD'S PILOT PROGRAM AND RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY 11 (2015), available at <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf>.

In general, the Brennan Center opposes the use of BWCs to record all police interactions with the public, as this policy would dramatically increase the surveillance of communities that are already heavily-policed and chill the reporting of sensitive crimes such as rape and domestic violence. At the same time, if law enforcement is going to use BWCs, we believe that they should be required to document all law enforcement interactions. This is not a perfectly bright line, but it is a good starting point for policymakers to craft additional rules addressing specific concerns, such as the privacy of the home and the rights of victims and witnesses. The Assembly should carefully consider these situations as it attempts to strike the appropriate balance between privacy and police accountability.

### ***Retention***

In addition to deciding when BWCs should record, policymakers will also need to determine which footage to retain and for how long. There is a wide range of options among the policies reviewed by the Brennan Center. All of them incorporate some kind of review process designed to identify and save videos that are evidence or likely to be the subject of a complaint. But the nature of that process as well as the subsequent retention period for flagged recordings is often the product of local evidentiary laws with considerable variation.

For data that has not been flagged, 14 of the 24 policies reviewed by the Brennan Center explicitly permit police to retain the data for a specified period of time. Five keep them for 180 days or less; five keep them for one year; and one (Oakland) keeps all BWC data for five years. Ten of the policies are silent on this issue entirely. In New York City, the NYPD maintains all recordings for one year unless “archived” for various reasons.

The Assembly should consider whether such a blanket rule is the best practice. On the one hand, there is a three-year statute of limitations for filing a federal civil rights claim. On the other hand, three years is a very long time to keep BWC data with no obvious purpose, making it a ripe target

for abuse, misuse, or hacking.<sup>4</sup> As a result, the Assembly may wish to explore a more graduated approach based on the type of information recorded. But in general, the Brennan Center favors relatively short retention periods for data that has not been flagged.

### *Access*

Finally, the Assembly should pay particular attention to rules governing who can access BWC video and under what circumstances. This issue arises in the context of law enforcement access as well as public access under the New York State Freedom of Information Law (FOIL).

On the law enforcement side, one question is whether police officers should be allowed to review BWC footage before making a report or statement. Of the 24 policies reviewed by the Brennan Center, 15 guarantee officers the ability to review their videos before documenting their actions while only one explicitly prohibits officers from doing so. The underlying concern is that police involved in misconduct will be able to tailor their stories to the video evidence, a possibility that the Assembly will need to take into account. An important related question is whether police can share or disseminate BWC footage with other officers or law enforcement agencies. Many departments have limited the ability of supervisors to view BWC footage for purposes of internal discipline, highlighting another hurdle in using BWCs to increase police accountability. At the same time, many departments – including the NYPD – do not have clear rules about if or when BWC footage can be shared outside the department. Given the trend toward sharing data among law enforcement agencies, such as the creation of regional data “fusion centers,”<sup>5</sup> the Assembly should consider requiring limitations on sharing BWC data in this context. One potential solution would be to require “reasonable suspicion” that the video reflects another crime properly under investigation by an outside agency before sharing occurs. Restrictions on further dissemination should also be strongly considered.

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<sup>4</sup> See, e.g., Robinson Meyer, *Seen It All Before: 10 Predictions About Police Body Cameras*, THE ATLANTIC, Dec. 5, 2014, available at <http://www.theatlantic.com/technology/archive/2014/12/seen-it-all-before-10-predictions-about-police-body-cameras/383456/>.

<sup>5</sup> See MICHAEL PRICE, NATIONAL SECURITY AND LOCAL POLICE 18-22 (2013), available at [https://www.brennancenter.org/sites/default/files/publications/NationalSecurity\\_LocalPolice\\_web.pdf](https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf).

Outside of the law enforcement context, members of the public may also request BWC recordings through to their local freedom of information laws, which of course vary from state to state. In New York, the public may seek BWC videos from the NYPD through FOIL. The NYPD does not, however, appear to account for this eventuality in its current policy. In order to balance the need for privacy and transparency, it is critical for policymakers to explore solutions that permit public access while preserving individual privacy. One option may be the use of technology that would blur or pixilate faces in video released to the public – a technique that has already met with cautious praise in Seattle.<sup>6</sup> But this would not address other concerns, such as the privacy of the home. As a result, the Assembly may need to consider additional measures to account for the novel privacy concerns posed by BWCs.

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In sum, the use of body cameras raises difficult questions that have not yet received the intensive consideration, expert advice, and public input they deserve – even though many police departments, including the NYPD, have already deployed body cameras and developed rules for their use. Those rules are a start, but they require careful scrutiny and improvement with the input of community stakeholders and experts. The Brennan Center is therefore grateful to the Assembly for convening this hearing and for soliciting our views today.

Thank you again for the opportunity to testify today about these important issues. I am happy to answer any questions.

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<sup>6</sup> Jessica Glenza, *Seattle Police Post Blurry Body-Camera Videos to YouTube in Transparency Bid*, THE GUARDIAN, Mar. 9, 2015, <http://www.theguardian.com/us-news/2015/mar/09/seattle-police-posting-body-camera-footage-youtube-transparency>.