

BRENNAN  
CENTER  
FOR JUSTICE

*at New York University School of Law*

## **Privacy and First Amendment Protections**

**Last Updated: July 8, 2016**

**“Limits on Recording Witnesses and Victims,” “Limits on Recording Private Situations,” and “Limits on Recording 1st Amendment Activity”:** Some policies include restrictions on recording in circumstances with greater potential for abuse. It is valuable for police to have recordings of witness and victim statements, but recording also might make people reluctant to talk. A few policies restrict recording of First Amendment activity, such as protests and religious meetings, to avoid the possibility of targeting people based on this activity or creating a chilling effect. Other policies, however, insist on recording it, often based on a history of police abuses at protests. Most have some mention of heightened privacy expectations in places such as restrooms and locker rooms, and some provide special rules for recording inside a private home.

**“Limits on Facial Recognition Technology”:** Facial recognition technology has the potential to fundamentally change the nature of how body-worn camera video can be used. Technology that is either currently available or under development would allow departments to scan their databases of video footage for a particular suspect, to keep a database of the locations and movements of everyone they record, or to analyze video in real-time so an officer can identify suspects or passers-by based on pictures in police records or online. This functionality could help find suspects faster and augment police officers’ ability to identify and remember people they encounter. Privacy advocates worry that combining BWCs with facial recognition could create an unprecedented level of intrusion into private moments and everyday activities, effectively eliminating anonymity in public. Furthermore, because individuals may not always be correctly identified, people who simply look like the intended target run the risk of being tracked or arrested. Due to these concerns, departments may wish to set limits on the application of facial recognition technology to the BWC recordings. So far, Baltimore’s is the only policy on our list to address this issue.

| City                                     | Limits on Recording Witnesses & Victims   | Limits on Recording Private Situations   | Limits on Recording 1st Amendment Activity  | Limits on Facial Recognition Technology   |
|--|---|--|---|---|
| <a href="#"><u>Austin</u></a>            | Recording witness and victim interviews is encouraged but at the officer’s discretion.  | None   | None  | None  |
| <a href="#"><u>Baltimore (pilot)</u></a> | An officer has discretion to stop recording if a victim, witness, or other person wishes to make a statement and requests not to be recorded. | Private residences are treated like any other property. Officers have discretion not to record in “sensitive circumstances.” No recording in medical facilities unless responding to a call involving a suspect or taking a suspect statement, and officers should avoid recording persons other than the suspect. | No limit on recording, but a recording of a “constitutionally protected activity” cannot be used to identify persons present unless they are suspected of criminal activity or in need of assistance. | BWC video “shall not be used to create a database or pool of mug shots” or “be searched using facial recognition software.” This does not prohibit using recognition software on the video of a “particular incident” when a supervisor “has reason to believe” a specific suspect is on the recording. |

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| <a href="#">Charlotte, NC</a>   | No recording witnesses and victims.  | Unless necessary for law enforcement purposes, no recording in “bathrooms, locker rooms, or other places where there is an expectation of privacy,” during strip searches, or in patient care areas. If a citizen withdraws consent for recording during a consent search of a “non-public” place, the officer shall consider consent to be withdrawn for the search itself. | None   | None                                    |
| <a href="#">Chicago (pilot)</a> | Must stop recording if a victim or witness requests not to be recorded, unless exigent circumstances exist or officer has reasonable articulable suspicion that a victim or witness has committed a crime. | No recording dressing rooms, restrooms, nudity (including strip searches), officers’ personal activities, or inside medical facilities unless required in order to capture evidence. Can record in homes if there is a lawful reason for presence of officers; consent of residents not required.  | None   | None                                    |
| <a href="#">Dallas</a>          | Not specified  | No recording in places “where individuals have an expectation of privacy, such as bathrooms or locker rooms” unless needed for evidence; limit use in medical setting. But “[w]hen in a private residence in an official capacity, officers are not required to advise the resident they are recording.”   | Protests are defined as a “law enforcement activity” and must be recorded. | None                                    |
| <a href="#">Denver</a>          | Officer can stop recording if a victim requests not to be recorded.  | In places with reasonable expectation of privacy such as locker-rooms, restrooms, or patient-care areas, only official law enforcement activity should be recorded. For strip searches, officers should only capture   | None   | None                                    |

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|                                  |   | audio, not video.  |   |   |
| <a href="#">Ferguson</a>         | None  | None   | None  | None                                    |
| <a href="#">Las Vegas</a>        | May record initial statements, but use discretion. In the case of sexual assault & other sensitive crimes, explicit recorded permission from the victim is required. Recording juvenile victims & witnesses requires parental permission. | No recording in “places where a reasonable expectation of privacy exists, such as locker rooms, dressing rooms or restrooms.” In other places where recording may be inappropriate, such as places of worship, hospitals, law offices, and day care facilities, officers have discretion to stop recording. When an officer’s legal basis for a residence search is based solely on consent, officer is required to advise and obtain consent to record. | None  | None                                    |
| <a href="#">Los Angeles</a>      | An officer has discretion to stop recording if a victim or witness refuses to provide a recorded statement.   | Not required to record if recording would interfere with investigation or be inappropriate because of “victim or witness’s physical condition, emotional state, age, or other sensitive circumstances,” or in healthcare facilities unless an enforcement action is taken.   | None  | None                                    |
| <a href="#">Mesa, AZ (pilot)</a> | An officer has discretion to stop recording if a victim requests not to be recorded.  | No recording in “places where a reasonable expectation of privacy exists, such as dressing rooms or restrooms.”  | None  | None                                    |
| <a href="#">Minneapolis</a>      | Officer’s discretion. Officer should attempt to gain consent from victim or witness to record statement.  | Strip searches must be recorded with camera positioned to collect audio data only.   | No recording “solely for the purpose of surveillance of, or identification of[,]” | None                                    |

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|  |   |   | individuals engaged in constitutionally protected activities conducted in a lawful manner.”  |   |
| <a href="#">New Orleans</a>                            | An officer may stop recording with supervisor authorization if the officer believes recording would limit the cooperation of a victim or witness.   | At a medical facility, restrict recording in accordance with facility privacy protocols. No recording in places “where an employee has a reasonable expectation of privacy, such as locker rooms, dressing rooms or restrooms” unless a crime took place there, in which case avoid “recording videos of persons who are nude or when sensitive areas are exposed.” | None   | None                                    |
| <a href="#">New York</a><br>(draft for public comment) | No recording a victim of a sex crime. Officers should generally record victims and witnesses, but must “consider the needs of victims and witnesses and the sensitivity of the nature of the crime” in deciding whether and how long to record. | No recording strip searches or in a medical facility.   | Do not record “any individuals who are engaged in political activity.... Political activity is the exercise of a right of free expression or association for the purpose of maintaining or changing governmental policies or social conditions.” | None                                    |

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| <a href="#">Oakland, CA</a>         | No recording statements from child abuse or sexual assault victims. Consent required to record other victims and witnesses.                           | Can deactivate recording at a hospital if recording may compromise patient confidentiality. No recording “at Department facilities where a reasonable expectation of privacy exists (e.g., bathrooms, locker rooms, showers)” unless required by policy.                | No, though Incident Commander can give special orders during crowd control, protest, or mass arrest incidents. | None                                    |
| <a href="#">Orlando</a>             | An officer has discretion to stop recording if a victim, witness, or community member requests not to be recorded, as long as suspect is not present. | No recording in “places where a reasonable expectation of privacy exists, such as, but not limited to, locker rooms, dressing room, or restrooms” unless part of official law enforcement incident.   | None   | None                                    |
| <a href="#">Phoenix, AZ (pilot)</a> | None  | No recording in “a place where a reasonable expectation of privacy exists, such as dressing rooms, precinct locker rooms, and restrooms.”   | None   | None                                    |
| <a href="#">Rialto, CA</a>          | Not specified   | No recording in places like locker rooms, dressing rooms, or restrooms, and in medical settings.  | None   | None                                    |
| <a href="#">San Diego</a>           | Generally do not record witnesses and victims. Exception: record domestic violence victims with serious injuries and their children.                  | No recording in places like locker rooms, dressing rooms, or restrooms, or in medical or jail facilities unless use of force is likely. Can record in homes without consent or notice if there is a lawful reason for presence of officers, including consent searches. | Generally “refrain from video recording or photographing peaceful demonstrations.”                             | None                                    |
| <a href="#">San Jose (pilot)</a>    | Must stop recording if a victim or witness requests not to be recorded.   | No recording in “public or private locker rooms, changing rooms, restrooms,” “doctor’s  | Recording someone based solely on  | None                                    |

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|  |   | <p>or lawyer’s offices,” “medical or hospital facilities,” or “other places where individuals unrelated to the investigation are present and would have a reasonable expectation of privacy” unless the officer is taking a listed police action. When an officer’s legal basis for a residence search is based solely on consent, the officer is required to advise and obtain consent to record.</p> | <p>First Amendment activity is prohibited.</p>   |   |
| <p><a href="#">Seattle (pilot)</a></p> | <p>None</p>   | <p>No recording in places with heightened expectation of privacy, such as restrooms, jails, or hospitals, unless for a direct law enforcement purpose. Consent required for homes.</p>   | <p>Unless there is reasonable suspicion to believe criminal activity is occurring, officers may not record people exercising their First Amendment rights.</p> | <p>None</p>                             |
| <p><a href="#">Tampa</a></p>           | <p>Must stop recording if a victim requests not to be recorded.</p>                         | <p>None</p>  | <p>None</p>  | <p>None</p>                             |
| <p><a href="#">Tucson</a></p>          | <p>An officer has discretion to stop recording if a victim requests not to be recorded.</p> | <p>No recording “in places where privacy would be expected, such as locker/dressing rooms or restrooms, except in the official performance of a law enforcement function.”</p>   | <p>None</p>  | <p>None</p>                             |

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| <p><u>Washington, D.C.</u></p> | <p>Citizens can request camera be turned off to provide an anonymous tip. If responding to an intrafamily event, officers are to avoid recording discussions between the On-Call Advocacy Program and the victim, and to position themselves “as to afford the victim as much privacy as possible.”</p> | <p>No recording “on private space unless present for a lawful purpose,” no recording “gratuitous or obscene images, such as the effects of extreme violence or imagery” except as needed for evidence, and no recording “in places where a reasonable expectation of privacy exists, such as locker rooms or restrooms.” No recording patients during medical or psychological treatment unless engaged in police action; when recording in medical facilities, avoid recording anyone but suspect, complainant, and witnesses. <a href="#">DC law</a> prohibits recording at primary or secondary schools or while engaged in “non-critical contacts with students.”</p> | <p>Officers are to record First Amendment assembly, but not “for the purpose of identifying and recording the presence of” law-abiding participants. Recordings are kept for 3 years (versus 90-day default for other recordings). Officers shall not record a particular person based on membership in a listed protected class (e.g. race, religion, political affiliation).</p> | <p>None</p>                             |



Model Policies

| Org   | Limits on Recording Witnesses & Victims   | Limits on Recording Private Situations   | Limits on Recording 1st Amendment Activity  | Limits on Facial Recognition Technology  |
|---|---|--|---|--|
| <a href="#">ACLU Model Statute</a>                            | Must stop recording at the request of a victim or person seeking to anonymously report a crime. | Prior to entering a home without a warrant or in non-exigent circumstances, officer must ask if the occupant wants the officer to stop recording; if occupant so requests, camera must be turned off. No recording at schools except when responding to imminent threat to life or health. | “Body cameras shall not be used to gather intelligence information based on First Amendment protected speech, associations, or religion.” | Video not marked for retention shall not “be subject to automated analysis or analytics of any kind.” No limits on facial recognition specified for other video. |
| <a href="#">International Association of Chiefs of Police</a> | Policies should offer some discretion for sensitive situations.                                 | Officers should not record in “any location where individuals have a reasonable expectation of privacy, such as a restroom or locker room.” In a residence, individuals may decline to be recorded unless the recording is being made pursuant to an arrest or search.                     | None  | None   |
| <a href="#">Police Executive Research Forum</a>               | Obtain consent before recording.  | Include a consideration for places with heightened expectation of privacy.   | None  | None   |