



Monday, November 18, 2019

**STATEMENT OF ASSISTANT DEPUTY COMMISSIONER OF LEGAL MATTERS
OLEG CHERNYAVSKY
NEW YORK CITY POLICE DEPARTMENT**

**BEFORE THE NEW YORK CITY COUNCIL
COMMITTEE ON PUBLIC SAFETY
COUNCIL CHAMBERS, CITY HALL
NOVEMBER 18, 2019**

Good morning Chair Richards and Members of the Council. I am Oleg Chernyavsky, Assistant Deputy Commissioner of Legal Matters for the New York City Police Department (NYPD). I am joined by Assistant Chief Matthew Pontillo and on behalf of Police Commissioner James P. O'Neill, we appreciate the opportunity to speak with you today about the Department's use of body-worn cameras.

In the last decade, the use of body-worn cameras by police officers has grown exponentially, with cameras increasingly becoming standard equipment for modern law enforcement. The benefits of cameras are clear; transparency into police activity, de-escalation of police encounters and accountability for police officers, through an independent account of interactions between the police and the citizens they serve. While they are not a panacea for police accountability, body-worn cameras can serve as a vital part of ongoing efforts to increase trust between the police department and the citizens our brave men and women serve.

Body-worn cameras are only one part of our effort to improve trust with the communities we serve. The Department has implemented neighborhood policing as a foundational principle to achieve this end and the overarching goal of partnering with our citizenry to fight crime and keep New York City safe. The Neighborhood Policing philosophy relies on transparency and accountability in order to achieve a lasting trust with the people of this city. There are countless examples of how Neighborhood Policing has solved and prevented crime, from our NCOs collaborating with community leaders to clean up drug infested lots, to partnering with building residents to take down violent criminal organizations, to getting the word out about the work our Crime Prevention Division and precinct Crime Prevention Officers do in providing no-cost security surveys for small businesses, which includes making recommendations to harden their physical security in order to prevent robberies and other violent crimes.

Body-worn cameras have the ability to provide an objective view of both officers and civilians during everyday interactions. Our officers are crime fighters, problem solvers, de-escalators, liaisons, and community leaders, and body-worn cameras allow more New Yorkers to witness our officers deploying these skills in the most stressful and complicated situations, from the officer's perspective.

I would like to now take you through the evolution of the NYPD's body-worn camera program and where it stands today. In 2013, the NYPD was ordered by a federal court to conduct a body-worn camera pilot in five precincts. At that time, Commissioner Bratton had already, on several occasions, expressed support for the use of body-worn cameras based on his experience in other

jurisdictions. As a result, given the unique needs of this city and the size of this Department, we began to study the technology behind body-worn cameras with an eye towards a significantly larger roll-out than the one mandated by the court.

In anticipation of this larger rollout, the NYPD initiated a pilot deploying 54 cameras in 6 commands from December 2014 through March 2016. This pilot helped shape the Department's relationship with the technology and the policy considerations going forward. We did not, however, rely solely on this experience when creating our body-worn camera policy. We reached out to police departments that had already successfully rolled out body-worn cameras, including Seattle, Washington D.C, Las Vegas, Los Angeles and London's Metropolitan Police. We sought input from a variety of stakeholders, including each District Attorney's Office, each of the institutional defense providers and the administrators of the 18b panel, CCRB, the Office of Court Administration, the Public Advocate's Office, the City Council, the New York Civil Liberties Union, the Center for Constitutional Rights, the NAACP LDF, Communities United for Police Reform, the Inspector General's Office, Latino Justice, Demos, and the Citizen's Crime Commission. In addition, with assistance from the NYU policing project, and with input from the Federal Monitor and the plaintiffs in the Floyd/Davis/Ligon litigation, we conducted a public survey, seeking input from everyday New Yorkers. In April of 2017, we released a 53-page report which explained each decision that we made. Obviously, with such a broad and diverse group of stakeholders providing input, who at times advocated for diametrically opposed policies, we could not adopt every recommendation provided or every preference expressed by the public, but this experience undoubtedly influenced the creation of the final policy.

We also learned how important training is to a successful roll-out of a body-worn camera program. We instituted a full-day training, which to my knowledge is the most comprehensive in the country. The training consists of a half-day of classroom lectures followed by a half-day of live scenarios that allow officers to get a feel for how to use body-worn cameras while performing their duties.

After releasing our report and policy, in April 2017 the Department commenced the first phase of the full body-worn camera rollout. Phase 1 equipped roughly 1,200 officers on the 3-11 tour in 20 commands. At the same time, experts on the Federal Monitor's team identified 20 control precincts of similar size, demographics and crime rates in order to compare a variety of factors in similarly situated commands. The Federal Monitor is currently working on this report, and once complete, it will be one of the largest studies ever produced on the effectiveness of body-worn cameras.

The Department remained committed to the use of body-worn cameras and after equipping the pilot commands, we began aggressively expanding our program. In December 2017, Phase 2 commenced and upon completion this past February all uniformed patrol officers are now equipped with cameras, as well as Detectives performing patrol duties, and Sergeants and Lieutenants assigned to precincts, transit districts and Police Service Areas, numbering over 20,000 in total. Phase 3, which provided an additional 4,000 or so cameras to specialty units such as the Emergency Services Unit, the Strategic Response Group, and the Critical Response Command was completed recently, bringing the initial rollout to a close. Additionally, we have nearly completed the ongoing process of issuing body-worn cameras to executives – Captains through Inspectors – assigned to commands which employ body-worn cameras.

Our body-worn camera program is continuously being studied, scrutinized, and updated. As a result, body-worn cameras are now an important aspect of the NYPD's training and disciplinary framework and each officer undergoes a full-day of live training on their use. The Training Bureau is also continually integrating body-worn camera footage into all aspects of training at all levels. For recruits in the Academy, the in-person continuing subject matter trainings for uniformed and civilian members of the service, and in our various on-line trainings which are used by all members of the service.

Footage is also used to ensure our officers are in compliance with the strict Patrol Guide procedures governing the use of body-worn cameras. Officers must activate their cameras during all investigative and enforcement actions with some obvious exceptions, such as undercover operations, interviewing victims of sex crimes, and when inside of a medical facility. At the end of each officer's tour, they are required to place the camera into a recharging station which automatically uploads the captured footage into a cloud storage system, rendering it impossible for anyone to alter or tamper with the saved footage. All footage is retained for a minimum of 18 months, but longer when needed as evidence in a criminal or civil proceeding.

Though it is impossible to view every video, the NYPD has instituted procedures to ensure compliance with the Patrol Guide's requirements. The Department randomly selects videos that each Sergeant must review and assess. The Sergeant is required to evaluate an officer on a variety of factors, including whether they were professional and courteous, whether the officer conducted a stop in a constitutional manner and the officer's tactics. In addition, the department audits a sample of arrests, stops, summonses, uses of force and aided cases to ensure that the body-worn camera was turned on during mandatory activation events. In the latest 28-day period, we had a 92% compliance rate during our audits. In this respect, the NYPD is ahead of the curve, as until recently, we were the only large police department conducting audits of this kind.

Last month, in the NYPD's ongoing effort to foster a culture of greater transparency, the Department issued a presumptive release policy which is committed to publicly release footage of critical incidents captured by our body-worn cameras within 30 days, with limited exceptions, while also balancing privacy concerns, protecting against compromising criminal investigations, and the need to comply with federal, state and local disclosure laws. I want to highlight that the 30-day timeframe is the maximum. Footage may be released sooner, but 30 days may be necessary in cases to allow the Department to adequately assess legal and privacy concerns, and to undertake a labor intensive redaction process so that uninvolved individuals and juveniles are not easily identifiable.

Any person may obtain body-worn camera footage of themselves through the FOIL process and any footage capturing evidence related to a criminal case is turned over to the District Attorney's Offices and will be provided to defendants through the criminal discovery process. So far this year there have been approximately 870 FOIL requests seeking body camera footage, with over 3,000 responsive videos provided. Each officer has the ability to share their body camera footage with the appropriate district attorney's office prosecuting their arrest immediately through a video sharing portal that was created for just this purpose.

Additionally, the Department provides footage to the CCRB that is relevant to disciplinary cases they investigate. So far this year, the CCRB has made approximately 3,700 requests, which generated almost 14,500 responsive videos, this is up from 2,080 such requests in 2018, which saw 6,134 responsive videos. It is important to stress that any single request by and large does *not* amount to only one responsive video. In fact, with the ever expanding distribution of cameras by this Department, there are generally multiple responsive videos to any one request, and at times there are dozens of responsive videos for each request.

Although the planned rollout has only recently been completed, and the largest portion only completed in February, the Department has accumulated approximately 8 million videos. These videos have an average duration of over 8 minutes and approximately 130,000 new videos are uploaded to the cloud each week.

I would now like to take a moment to comment on the bill being heard today.

Intro. 1136 would require the NYPD to report on various data points related to the Department's use of body-worn cameras.

While the Department supports the goal of transparency we cannot support this legislation as currently written. The bill would require us to report on data which could not be captured without a trained analyst watching and listening to every recording in its entirety, then conducting an investigation to gather additional data points. Data points such as, whether images were recorded and the reason if not; whether a camera failed at any time to record audio or video; whether the audio is at any time unintelligible; whether the visual clarity was compromised in any way at any time during the recording; whether an officer informed a subject that they are being recorded; whether an officer stopped the recording prior to when they should have, whether on purpose or by accident; and the race, gender and age of the individual recorded.

As I mentioned before, we have recorded approximately 8 million videos and are adding roughly 130,000 more videos each week. The average length of the videos is over 8 minutes. Performing a rough calculation, to watch just the 130,000 new videos every week we would have to hire and train approximately 800 new analysts/investigators, and that is not even accounting for the millions of videos on-hand or future expansion of the program. This would be a significant undertaking, to say the least.

Lastly, as for whether a video was used as part of a CCRB investigation, the CCRB is best left to answer whether this is feasible, however; this Department should not be placed in a position where we are left questioning the CCRB about the evidence they determine is relevant in connection with their investigation.

Thank you for the opportunity to speak to this critical issue and we look forward to answering any questions you may have.



PUBLIC ADVOCATE FOR THE CITY OF NEW YORK
Jumaane D. Williams

**TESTIMONY OF PUBLIC ADVOCATE JUMAANE D. WILLIAMS
TO THE NEW YORK CITY COUNCIL COMMITTEE ON PUBLIC SAFETY
OVERSIGHT HEARING ON NYPD'S ROLL-OUT OF BODY-WORN CAMERAS
NOVEMBER 18, 2019**

Good morning,

My name is Jumaane D. Williams, Public Advocate for the City of New York. I would like to thank Chairman Donovan Richards and the committee members for holding an oversight hearing on the New York Police Department (NYPD)'s use of body-worn cameras.

In 2013, the City Council passed the Community Safety Act, which established an Inspector General for the police department and eased the path for those with claims of bias-based policing to file claims in court. When my colleagues and I pushed for these reforms, critics and detractors shunned this legislation and claimed our proposals would reverse the drop in crime our City has seen through the '90s and '00s. We were told that the "sky was falling," and that biased-based policing was the best, even the only, way to keep crime down, and that the police needed to continue the abuses of the tactic known as stop-question-and-frisk. We were told that adherence to a 'broken windows' mentality and method of quality of life enforcement was necessary to make our streets safer.

We knew then that those assumptions were not true. We knew that we could have better policing and safer streets at the same time— and we were right. For the past six years, since passing the Community Safety Act, New Yorkers have experienced the lowest crime numbers in the "seven major index crime" categories – such as murder, assault, and robbery – than at any other time since the 1950s. I want to acknowledge that to victims of crimes and their families, those statistics mean nothing. I also want to acknowledge the recent uptick of shootings in certain areas. This of course means we must continue to do more. We must also avoid knee-jerk reactions in favor of advancing the strategies we know work.

The bill being heard today - Intro 1136-2018 - furthers the discussion. The bill requires the police department to submit quarterly public reports on information regarding the use of body-worn cameras. The department would also be mandated to annually publish information on each and every incident requiring an officer to engage body-worn cameras in accordance with department policy. This piece of legislation is essential to ensuring that we have full transparency in the information we get from the NYPD. Since the Inspector General's Office

kicked off in 2014, it has had the chance to look further into policing matters than any other office before it, and it has received a tremendous amount of raw data in the form of body-worn camera video. But the millions of body-worn camera videos that the City now has are not public, and there has not been a discussion on how to make those videos available to the public, let alone to the victims and their family members. Intro 1136-2018 would give New Yorkers access to information about these body-worn camera videos.

The need for greater transparency is evident now more than ever. In April of this year, two police officers were responding to a 911 harassment call at Hill House in the Bronx, in which one of them fatally shot a man named Kawaski Trawick. According to NYPD, Trawick charged at them with a knife in one hand and a stick in the other. The entire situation was captured on police body-camera video, and yet, up until now Kawaski's family has not been able to see the footage.

Just two months ago in the Bronx, a police chase resulted in 15 police bullets killing Brian Mulkeen, a plainclothes officer, and Antonio Williams, a civilian whom the police had stopped during a patrol. Officer Mulkeen did not have his body camera on, but the other five officers on the scene had their cameras on. Although Commissioner O'Neill said in October that the NYPD will end up releasing the footage from the body-worn cameras that show the moments leading up to the shooting, no video footage has been released to the public as of yet. The information reported from Intro 1136-2018 would not only give families like Kawaski's, Williams' and Mulkeen's answers to the questions that remain but also provide them with a small amount of closure. And right now, they have neither.

I also recommend the following departmental body-worn camera policy changes: 1) share footage with CCRB and District Attorneys in the same timeframe as federal and state authorities - 24 hours; 2) reduce the timeframe used to disseminate footage to the public; 3) allow for the release unedited footage to the family and/or the public; 4) provide equal access of the footage to the family and the members of service.

Accountability and transparency are at the heart of Intro 1136-2018. It is important that we respect our men and women in blue, and provide them the tools they need to do their job. We must also ask that they respect the civilians whom they police. Our communities and the police will be better off if we hold our officers to that standard.

I would like to thank Council Member Lancman for co-sponsoring this legislation. I would like to also thank a few staff for helping me prepare for today's hearing, including Nick E. Smith, First Deputy Public Advocate of Policy, Michelle Kim, Director of Legislation, Crystal Hudson, First Deputy Public Advocate of Community Engagement, Rama Issa-Ibrahim, Deputy Public Advocate of Justice, Health Equity and Safety, and Darian Harley, Community Organizer for

Justice, Health Equity and Safety. Again, I thank the Council for hosting this hearing today, and would be happy to answer any questions.

**Testimony of Michael Sisitzky
On Behalf of the New York Civil Liberties Union
Before the New York City Council Committee on Public Safety
Regarding the NYPD's Body-Worn Camera Program**

November 18, 2019

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following testimony today regarding the New York Police Department’s (“NYPD”) body-worn camera program. We also express our qualified support for Intro. 1136 and offer suggestions intended to enhance this reporting measure’s utility in evaluating the NYPD’s use of body cameras.



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The NYCLU, the New York affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with eight offices throughout the state and more than 180,000 members and supporters. The NYCLU’s mission is to promote and protect the fundamental rights, principles, and values embodied in the Bill of Rights of the U.S. Constitution and the New York Constitution.

Defending New Yorkers’ right to be free from discriminatory and abusive policing is a core component of the NYCLU’s mission. In this role, we have advocated for the establishment of civilian complaint and officer discipline mechanisms that are accessible, transparent, and effective in holding police accountable for their actions. We have worked to ensure police department policies and data about police activities are publicly available. In representing individual clients, we have experienced firsthand how difficult it is to achieve accountability for officer misconduct, particularly in cases where the only evidence is one person’s word against an officer’s. And we have offered cautious support for the use of police body-worn cameras as a means of producing objective video evidence of officers’ actions during police encounters.

With the right policies in place governing their use, police body-worn cameras can be a powerful tool of transparency and accountability. But without clear commitments to those principles, body-worn cameras become just another tool for police surveillance and another shield for departments to use to protect abusive officers from public scrutiny.

The NYPD has yet to demonstrate a truly sincere commitment to using body cameras as a tool for repairing relationships with communities. Policymakers must continue to demand greater transparency from the NYPD regarding its use of body-worn cameras, including through the legislation before the committee today. But this must be part of an ongoing and broader examination as to whether the public is actually receiving the promised benefits from the thousands of cameras now deployed in our communities.

I. Brief History of the Department's Use of Body-Worn Cameras

In August 2013, U.S. District Court Judge Scheindlin issued a sweeping ruling declaring unconstitutional the NYPD's policy of stopping and frisking hundreds of thousands of New Yorkers each year. As part of her ruling, the judge ordered the NYPD to conduct a pilot study on the use of body cameras in order to evaluate "the effectiveness of body-worn cameras in reducing unconstitutional stops and frisks."¹ Before this court-ordered and court-supervised pilot program could begin, the NYPD conducted its own, much smaller pilot program beginning in December 2014 as an initial test of their functionality and reception to their use by patrol officers.²

Prior to formally launching the court-ordered pilot program, the NYPD solicited public input on a draft policy.³ Although the Department made a number of changes based on public comment, clear problems remained in the program that was ultimately rolled out. As one example, the NYPD did not require the recording of all investigative encounters by its officers, instead setting the threshold for mandatory camera activation at encounters where the person is "suspected of criminal activity."⁴ As a result, many low-level investigative encounters that can (and too often do) quickly escalate will not be recorded. Little changed between the pilot policies and the rules that now govern the devices being worn by all uniformed patrol officers following the NYPD's complete rollout of body-worn cameras in March 2019.⁵

By far the biggest area of concern was and remains the amount of control the Department exercises over the body camera program, including control of the individual cameras by officers themselves and the control being exercised by the NYPD more broadly in managing the vast amounts of footage and public requests for access. We address these concerns in detail below.

¹ *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013).

² Tina Susman, "New York City Police Officers to Wear Body Cameras in Pilot Program," *Los Angeles Times*, Dec. 3, 2014, <https://www.latimes.com/nation/nationnow/la-na-nypd-police-cameras-20141203-story.html>

³ The NYCLU provided comments in response to the draft policy. NYCLU, Comments of the New York Civil Liberties Union in Regard to the New York Police Department's Proposed Body-Worn Camera Policy, Aug. 2016, https://www.nyclu.org/sites/default/files/releases/NYCLU_Comment_NYPD_BWC.pdf

⁴ NYPD, NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy, Apr. 2017, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

⁵ Bobby Cuza, "All NYPD Officers Are Now Equipped with Body Cameras," NY1, Mar. 6, 2019, <https://www.ny1.com/nyc/all-boroughs/news/2019/03/06/nypd-finishes-body-camera-rollout-for-nyc-patrol-officers>

II. The NYPD's Complete Control Over BWC Footage Undermines Their Value as Transparency Tools

The single biggest threat to the effectiveness of body-worn cameras is the enormous level of control officers and departments have on the devices and the information captured. During police encounters, this means the public must rely on individual NYPD officers to actually turn the cameras on—and keep them on—when required, and on the back end, the public is asked to put their trust in the Department to provide meaningful access to the footage recorded by its officers.

A. Officer Control and Potential for Misuse

Because some of what takes place during an officer's shift should not be recorded—including conversations with confidential informants, undercover officers, or child victims—the NYPD's policy gives officers the ability to turn the cameras on and off and describes the rules for when cameras must be activated. The policy also clearly directs officers to continue recording until the conclusion of the encounter.⁶

It's difficult to know beyond anecdotal experiences the extent to which officers are recording required encounters without interruption, which is where the reporting contemplated by Intro. 1136 can be helpful. But one widely reported incident shows the danger in placing too much reliance on body camera footage to tell the complete picture of a police encounter given this large degree of officer control in the moment.

In February of 2018, two NYPD officers arrested a Staten Island man on a marijuana-related charge after stopping and searching his car.⁷ Both officers were wearing body cameras, but after an initial search of the car produced no evidence, one of the officer's cameras stopped recording for more than four minutes, reactivating just moments before the officer discovered marijuana in an area of the car that had previously been searched. Though the officer blamed the interruption on a technical difficulty, lawyers for the defendant alleged that the officer deactivated the camera in order to conceal the planting of evidence, and prosecutors ultimately dismissed the charges, citing the gap in the camera footage of the search. The NYPD reported that it investigated the incident but found no wrongdoing on the part of the officer.

It is worth noting that nowhere in the NYPD's policy is there any mention of potential disciplinary consequences for failure to adhere to the

⁶ NYPD Patrol Guide 212-123, *available at* https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf.

⁷ Joseph Goldstein, "Teenager Claims Body-Cams Show the Police Framed Him. What Do You See?" N.Y. Times, Nov. 19, 2018, <https://www.nytimes.com/2018/11/19/nyregion/body-cameras-police-marijuana-arrest.html>



requirements of the body-worn camera program, including the requirement to keep the cameras on for the entire duration of an encounter. Although such a statement, by itself, would be insufficient to guarantee that the Department would actively pursue disciplinary consequences for non-compliance, it would remind officers that the public expects the rules for body camera use to be taken seriously, both during the encounters and once the footage is uploaded into the NYPD's database.

Once an officer's recordings have been uploaded into the NYPD's video management system, there is still a risk that an individual officer may utilize the recordings in a way that undermines their effectiveness as accountability tools. The NYPD's policy expressly permits officers to view their own recordings prior to providing any official statement regarding an incident, even if that officer is under investigation for potential misconduct and even if the investigation is related to the use of deadly force.⁸ In a 2015 report examining the earlier NYPD pilot program, the Inspector General for the NYPD pointed out the potential problems with such a provision, noting:

BWC footage has no limitation on focus, attention, or recollection, and may capture events that officers themselves did not perceive, did not observe, or could not reasonably recall . . . [E]ven officers' honest recollections of an incident may be altered inadvertently by viewing video footage, leading them to omit events they recall but which were not captured on camera.⁹

The Inspector General also expressed concerns that allowing officers to view footage related to an incident under investigation would undermine the credibility of that investigation, noting that "[e]xposing officers to events to which they may not have been privy at the time of the incident affects the ability of investigators to assess the officer's contemporaneous appraisal of the circumstances which led him or her to take the actions under investigation."¹⁰

The NYPD continues to permit this level of access in its current body-worn camera policy. At best, this provision risks scenarios in which an officer's recollection of events is inadvertently colored by what they see on the footage. At worst, this provision provides officers under investigation with the opportunity to deliberately tailor their statements based on what the footage reveals.

This provision, and the lack of any clear commitment in the policy to hold officers accountable for failing to adhere to what the policy requires of

⁸ NYPD Patrol Guide 212-123.

⁹ Office of the Inspector General for the NYPD, N.Y.C. Dep't of Investigation, *Body-Worn Cameras in NYC: An Assessment of NYPD's Pilot Program and Recommendations to Promote Accountability* (2015), at 28, available at <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf>.

¹⁰ *Id.*

them undercut the public's confidence that the NYPD accepts body-worn cameras as tools meant for enhancing police accountability.

B. Civilian Complaint Review Board Access to body camera footage

The Civilian Complaint Review Board's ("CCRB") has repeatedly noted the value of video evidence in its investigations into allegations of NYPD misconduct. However, the CCRB has also reported that it has been encountering significant delays in obtaining this evidence when CCRB requests it from the NYPD. In the agency's November 2019 report, the CCRB reported having 574 pending requests for NYPD body-worn camera footage. Of these requests, 57.5% have been pending for at least 30 days, with 16.4% of requests remaining pending for 90 or more days.¹¹ It is worth emphasizing that CCRB charges are generally subject to a 180 day statute of limitations that runs from the date of the alleged misconduct, which these delays seriously cut into.¹² As the November report notes, "The timeliness of the response to BWC footage request has a direct impact on the length of time it takes to complete an investigation."¹³

The NYPD attributes these delays to their need to review and, in some cases, apply redactions to recordings prior to sharing them with the CCRB. Unlike the Department's protocols with prosecutors, who receive complete, unedited footage from body cameras through "a proprietary management system used by the NYPD that automatically transmits footage once an officer plugs their camera into a docking station and registers an arrest," the agency tasked with civilian oversight over the police force is forced to endure excessive delays before obtaining footage that is critical to resolving misconduct complaints.¹⁴

The CCRB has acknowledged the possibility that redaction or withholding may be appropriate in individual cases, including potentially in cases where the arrest record is sealed.¹⁵ However, the CCRB also notes that the question of whether body camera footage is subject to sealing is unresolved, and that the NYPD regularly allows officers access to this footage prior to CCRB interviews, while telling the CCRB investigators conducting the

¹¹ Civilian Complaint Review Board, Executive Director's Monthly Report, Nov. 2019, https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/monthly_stats/2019/20191113_monthlystats.pdf.

¹² N.Y. Civil Service Law § 75(4).

¹³ CCRB, *supra* note 11 at 12.

¹⁴ Ethan Geringer-Sameth, "Vast Difference in NYPD Provision of Body Camera Footage to District Attorneys Versus Police Watchdog," Gotham Gazette, Nov. 12, 2019, <https://www.gothamgazette.com/city/8880-nypd-body-camera-footage-district-attorneys-ccrb>.

¹⁵ Civilian Complaint Review Board, Memorandum Re: BWC and Document Request Issues with the NYPD, July 5, 2019, https://brooklyneagle.com/wp-content/uploads/2019/07/20190710_boardmtg_BWC_memo-2-1.pdf.



interview that the recordings cannot be shared because they are part of a sealed case.¹⁶ As a government investigative and oversight agency, the CCRB should generally be afforded direct access to unredacted footage, as is the case in places like San Francisco, New Orleans, and Washington, DC.¹⁷ To the extent that the NYPD is limited by state law on accessing or sharing sealed records, the Department must apply those rules equally, and not just use them as a shield against record-sharing with oversight agencies.

With all of its resources and technical expertise, the NYPD can and must produce body-worn camera footage more quickly. The disconnect between the speed with which the Department provides footage to prosecutors for use as evidence against civilians and the sluggishness with which the Department responds to requests for footage that could shed light on official misconduct undercuts the promise of body cameras as a tool for accountability and suggests that the NYPD views the technology primarily as just another gadget to collect evidence for use in criminal prosecution.

C. Release of Footage Related to Critical Incidents

An essential purpose of body-worn cameras is their potential for increasing public understanding of events surrounding the most severe and tragic police encounters, as well as providing an objective accounting of events to facilitate investigations into excessive force. But for this benefit to be realized, the NYPD needs to do a better job of producing body camera footage of such incidents in their entirety.

The first incident involving a fatal police shooting recorded on NYPD body cameras occurred on September 6, 2017. Officers, responding to a wellness check in the Bronx, shot and killed Miguel Richards, who was apparently experiencing a mental health crisis. The eight officers who were present were all wearing body cameras. A week later, the NYPD released edited and redacted footage taken from body cameras worn by four of the eight officers on the scene, which included some of the events leading up to the shooting and the shooting itself, but not the aftermath.¹⁸

Seeking to gain a more comprehensive understanding of the circumstances that led to Mr. Richard's killing and its aftermath, New York Lawyers for the Public Interest ("NYLPI") submitted a FOIL request for unedited body camera footage from all of the officers involved. The NYPD invoked a number of objections in response, including that the recordings constituted personnel records under 50-a, that release of the unredacted footage would constitute an unwarranted invasion of Mr. Richards' and his

¹⁶ *Id.*

¹⁷ Cindy Rodriguez, "When it Comes to Police Misconduct, Body-Worn Camera Videos Are Slow to Come," WNYC, July 22, 2019, <https://www.wnyc.org/story/police-misconduct-body-worn-camera-videos-slow-come/>.

¹⁸ *New York Lawyers for Pub. Interest v. New York City Police Dep't*, 64 Misc. 3d 671, 673, 103 N.Y.S.3d 275, 278 (N.Y. Sup. Ct. 2019).

family's personal privacy, that it would endanger the life and safety of witnesses, and that portions of the recordings were exempt as inter/intra-agency materials.¹⁹

These arguments were rejected by a court in June 2019. In reaching its decision, the court found that “[t]here is significant public interest in disclosing the reacted footage as it would illuminate the officers’ immediate response after the shooting and their interactions with Mr. Richards.”²⁰ It is worth quoting at length from the court’s opinion discussing how the release of footage in this case fits within the purported objectives of the NYPD’s body camera program overall:

Transparency is one of the key objectives of the BWC pilot program. The fact that respondents have released almost all the pre-shooting footage demonstrates the public’s interest in the information and diminishes the expressed privacy concerns. To argue that the post-shooting record is no longer subject to disclosure because the interaction with Mr. Richards ended after shots were fired, is belied by the redacted footage. It is clear from the redacted footage that the officers continued to interact with Mr. Richards and public disclosure of this footage will contribute to a greater understanding of the incident and simultaneously promote the key objectives of the BWC pilot program. Indeed, shielding the post-shooting footage from public disclosure, violates the statute’s stated requirement of providing maximum public access to government records, and frustrates the key objectives of the BWC pilot program.²¹

It is not clear that the Department has fully internalized these ideas as it relates to the release of footage in incidents like the shooting of Miguel Richards. Until October 2019, the NYPD did not have a written policy governing the Department’s proactive release of body-worn camera footage to the public. Last month, the Department released a policy to specifically govern the release of footage related to “critical incidents,” which are defined to include encounters involving the use of force resulting in death or serious physical injury and/or “[a]ny incident which the Police Commissioner determines the release of BWC footage will address vast public attention, or concern, or will help enforce the law, preserve peace, and/or maintain public order.” For such incidents, the policy states, in relevant part, that:

[T]he Department will decide when to publicly release BWC footage...within 30 calendar days, excluding any non-disclosure period(s), provided that the force investigation review is completed. The Department will release representative samples of the BWC video(s)

¹⁹ *Id.* at 675.

²⁰ *Id.* at 679.

²¹ *Id.* at 679–80 (internal citations omitted).





depicting the critical incident, as well as any salient events leading up to the event. Extraneous and/or redundant material may be omitted.²²

The policy goes on to note that the footage released to the public will be redacted but that the unedited footage will be maintained and available to “an appropriate investigating authority” and that the Department may release unreacted footage to the media in the interest of transparency. It also provides that the Department will give consideration to requests from prosecutors to delay public release of footage by an additional 30 days.

This policy does little to allay concerns about excessive delays and unchecked discretion. The Department must commit to a greater degree of transparency for footage of critical incidents, which means a commitment to the expeditious release of footage that is clearly in the public interest and less selectivity in determining how much to release. As the court in the NYLPI case noted, there is a strong public interest in having the complete picture of what happens during and in the aftermath of critical incidents. A policy that frames the release of footage in terms of “representative samples” and “salient events leading up to the event” is not enough to inspire public confidence, especially when it is the NYPD itself who will be deciding which samples are representative and which events salient. At worst, it suggests more of a concern about controlling the narrative in the aftermath of critical incidents than it does a commitment to providing the public with a full and objective accounting of the actions taken by NYPD officers. And given the court’s reasoning in the NYLPI case, the likely outcome is that these recordings will eventually become public through FOIL, with the narrative in the interim likely being that the NYPD has something to hide.

D. The (Mis)Application of Section 50-a

The NYPD’s initial invocation of 50-a in response to the NYLPI request discussed above was alarming, if to be expected at the time. The NYPD and Mayor de Blasio’s administration have been the driving force behind 50-a’s shameful expansion in recent years, enabling police departments across the state to hide vitally important records concerning police accountability from public view. To their credit, the Department has reconsidered this position, announcing in April 2019 that they will no longer cite 50-a as a justification for withholding footage from its officers’ body cameras.²³

But the Department’s initial position lent some credence to a challenge by the Police Benevolent Association’s 2018 lawsuit seeking to block the release of any body camera footage, claiming that these records could be used

²² NYPD Operations Order 46, Oct. 18, 2019, *available at* https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/oo-46-19-bodyworn-camera-footage.pdf.

²³ Alison Fox, “NYPD Will Stop Citing Legal Loophole to Deny Freedom of Information Law Requests,” *amNewYork*, Apr. 2, 2019, <https://www.amny.com/news/nypd-foil-domestic-abuse-1-29257412/>

to evaluate officer performance and that they were therefore personnel records within the meaning of 50-a.²⁴

While this lawsuit was pending, the NYPD was barred from releasing any body camera footage to the public, effectively denying the public one of the key promised benefits of body cameras: greater transparency.²⁵ That lawsuit resulted in a decision from the Appellate Division holding that body camera recordings are not personnel records covered by 50-a.²⁶ As the Appellate Division correctly noted, “To hold otherwise would defeat the purpose of the body-worn-camera program to promote increased transparency and public accountability.”²⁷

Although the Appellate Division opinion remains controlling, this issue is almost certain to resurface as more police departments throughout the state adopt body camera programs. It is critical that the NYPD not go back on their commitment to stop invoking the wide sweep of 50-a in responding to requests for body camera footage – and it is equally imperative that the City Council express its support for full repeal of this worst-in-the-nation police secrecy law.



III. Intro. 1136 – Qualified Support

In light of this history and the principles underpinning the use of body-worn cameras, the NYCLU expresses qualified support for Intro. 1136, which would provide detailed reporting on the NYPD's use of body-worn cameras. This type of data can prove helpful to understanding whether officers are using the cameras as they should, and for the public and policymakers alike to assess whether these cameras remain a worthwhile investment.

However, we note a potential issue in that the categories for which the bill mandates *reporting* are not coterminous with the categories for which NYPD policy mandates that cameras be *recording*. The section defining “law enforcement activity” appears to largely borrow language from the local law requiring officers to identify themselves and provide business cards in the course of specified law enforcement activities.²⁸ The legislation appears to make an effort to cover non-overlapping categories by also requiring reporting on “qualified incidents,” defined as law enforcement activities that, in accordance with department policy, require officers to activate their cameras. But to the extent that “law enforcement activity” is limited to the definition provided in the legislation itself, it may not succeed in filling those gaps. Further, the reference to circumstances that “require” recording in the

²⁴ *Patrolmen's Benevolent Ass'n of City of New York v. De Blasio*, 171 A.D.3d 636, 101 N.Y.S.3d 280 (N.Y. App. Div. 2019)

²⁵ Victoria Bekiempis, “State Appeals Court Temporarily Blocks Release of NYPD Body Cam Footage,” N.Y. Daily News, July 3, 2018, <https://www.nydailynews.com/new-york/ny-metro-body-cam-footage-20180703-story.html>.

²⁶ 171 A.D.3d at 637.

²⁷ *Id.* at 638.

²⁸ See N.Y.C. Admin. Code § 14-174.

definition of qualified incidents potentially overlooks those encounters for which officers have *discretion* to activate cameras pursuant to Step 9 of the NYPD's policy but are under no directive to do so.²⁹

The legislation should be amended to more clearly specify the types of activities that will be reported to the public. Simply permitting the NYPD to disaggregate its reporting based on the categories as defined in the NYPD's policy itself would cede to the NYPD the power to define the scope of its reporting obligations by revising its own policy. The Council should instead more explicitly state the precise categories of encounters for which it seeks reporting and ensure that this list is comprehensive, including all levels of investigative and enforcement encounters and use of force incidents. The list of law enforcement activities provided in the legislation should not be based on Admin. Code § 14-174, which became law over the objection of advocates including the NYCLU because of its failure to include level one investigative encounters and traffic stops, both of which merit inclusion in the categories of data to be reported.³⁰



Additionally, given the concerns we raise above regarding the NYPD's failure to expeditiously provide body camera footage to the CCRB and to FOIL requesters, we recommend that the bill also include a requirement for the NYPD to report on the number of days it takes the Department to respond to such requests, including whether such requests are denied or granted. Where the NYPD denies requests or makes redactions, the Department should also be required to report on its justification for so doing.

IV. Conclusion

We thank the Committee for the opportunity to provide testimony today. The NYCLU remains hopeful that body cameras can be a tool for greater transparency and accountability. But this must be an ongoing conversation. If it becomes apparent that these cameras are primarily focused on surveillance and tools for prosecution, New York City must be open to reconsidering whether the substantial sums currently spent on this NYPD program could be better invested in our communities.

²⁹ NYPD Patrol Guide 212-123.

³⁰ It should be noted that although the NYPD body camera policy does not mandate activation of cameras during level one encounters, it permits discretionary activation.

TESTIMONY OF THE BRENNAN CENTER FOR JUSTICE

Laura Hecht-Feella

Legal Fellow, Liberty & National Security Program

before the New York City Council Committee on Public Safety

**on Intro. 1136-2018: Requiring the NYPD to issue public reports on
the Department's use of body-worn cameras**

November 18, 2019

Good morning members of the Committee on Public Safety. Thank you Chairman Richards for holding this hearing and inviting the Brennan Center to testify.

My name is Laura Hecht-Feella. I am a Legal Fellow with the Liberty and National Security Program at the Brennan Center for Justice at NYU School of Law.

The Brennan Center is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. The Liberty and National Security Program focuses on ensuring that law enforcement use of new and existing technologies does not violate fundamental rights. As part of this work, the Brennan Center has documented the body camera policies of police departments throughout the United States.¹ In addition, body cameras were one of several tools that the Brennan Center analyzed in a chart published last month on the New York City Police Department's ("NYPD") surveillance technologies.²

Although body cameras are often heralded as a straightforward tool to improve law enforcement accountability, they raise significant and complicated issues around privacy, data retention, and disclosure. In the wake of high-profile incidents involving use of force by police officers, some civil rights groups have encouraged law enforcement to adopt

¹ *Police Body-Worn Camera Policies*, BRENNAN CENTER (last updated July 19, 2019),

<https://www.brennancenter.org/our-work/research-reports/police-body-worn-camera-policies>.

² *New York City Police Department Surveillance Technology*, BRENNAN CENTER (Oct. 4, 2019),

<https://www.brennancenter.org/our-work/research-reports/new-york-city-police-department-surveillance-technology>

body-worn cameras as part of broader transparency reforms.³ Body cameras have distinctive potential as accountability tools because, if used appropriately, they can help provide a contemporaneous record of interactions between police officers and the public.

However, without adequate safeguards, body cameras also have the potential to significantly increase scrutiny of already over-policed communities.⁴ Particularly when used in conjunction with other technologies, body cameras could conceivably function as mass surveillance devices. They can record significant amounts of information about the people that officers encounter while in the course of their regular duties, regardless of their relationship to a suspected crime. The possibility that body cameras might be equipped with facial recognition technology raises constitutional concerns,⁵ as well as issues regarding effectiveness and racial bias.⁶ It also magnifies the risk that they will become a tool of dragnet surveillance. Strong oversight over access to, retention, and analysis of body camera data is critical to protecting the privacy of New Yorkers.

The NYPD's use of body-worn cameras has increased exponentially in the last five years. The Department first began using body cameras in 2014 as part of a pilot program required by a federal judge in *Floyd v. City of New York* – a lawsuit challenging the NYPD's unconstitutional stop-and-frisk program.⁷ In March 2019, the NYPD announced that all of its approximately 20,000 uniformed patrol officers had been equipped with

³ See, e.g., *Police Body-Worn Cameras: Let's Do It Right*, ACLU (last accessed Nov. 15, 2019) <https://www.aclum.org/en/police-body-worn-cameras-lets-do-it-right>.

⁴ Press Release, The Leadership Conference on Civil and Human Rights, Civil Rights, Privacy, and Media Rights Groups Release Principles for Law Enforcement Body Worn Cameras (May 15, 2015), <https://civilrights.org/2015/05/15/civil-rights-privacy-and-media-rights-groups-release-principles-for-law-enforcement-body-worn-cameras/>.

⁵ Facial recognition is recognized as extraordinarily intrusive, challenging reasonable expectations of privacy. Law enforcement use of facial recognition can chill the exercise of First Amendment rights by exposing protesters to persistent surveillance and identification. See, e.g., *Garbage In, Garbage Out: Face Recognition on Flawed Data*, GEORGETOWN LAW'S CENTER ON PRIVACY AND TECHNOLOGY (May 16, 2019), <https://www.flawedfacedata.com>.

⁶ Numerous studies have found that facial recognition performs poorly when analyzing the faces of women, children, and people with darker skin tones. See Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH 1(2018), <http://gendershades.org/overview.html>; see also Salem Hamed Abdurrahim, *Review On The Effects Of Age, Gender, And Race Demographics On Automatic Face Recognition*, 34 THE VISUAL COMPUTER 1617 (2018), <https://doi.org/10.1007/s00371-017-1428-z>; Jacob Snow, *Amazon's Face Recognition False Matched 28 Members of Congress with Mugshots*, ACLU (July 26, 2018), [www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28.d](http://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28)

⁷ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

body-worn cameras. The Department also stated that it would be providing an additional 4,000 body cameras to its specialty units.⁸

Although the NYPD solicited public feedback⁹ and ultimately published a policy regarding its use of body cameras,¹⁰ it has been difficult for the public to get information about how the program is operating or to obtain recorded footage.¹¹ Moreover, the Department's policy on its public release of body camera footage, published last month, has serious gaps and leaves much to the Police Commissioner's discretion.¹² Although the NYPD is one of the most technologically advanced police forces in the United States,¹³ historically it has not been the most transparent. The NYPD often reveals details about its surveillance technologies only after costly Freedom of Information Law (FOIL) litigation, investigative reporting, or court orders.¹⁴ This erodes public trust and can lead to abuses of constitutional rights.

As this bill contemplates, it is important that the NYPD's use of body cameras is overseen closely by the City Council. However, the Brennan Center is concerned that the proposed bill does not go far enough. It leaves out many of the factors critical for ensuring body-worn cameras do not unduly invade New Yorkers' civil rights and civil

⁸ Press Release, NYPD, NYPD Completes Rollout of Body-Worn Cameras to All Officers on Patrol (Mar. 6, 2019), <https://www1.nyc.gov/site/nypd/news/pr0306/nypd-completes-rollout-body-worn-cameras-all-officers-patrol>.

⁹ Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy (Policing Project at New York University School of Law, Fall 2016), <https://www.policingproject.org/nypd-bodycam-report>; NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy (NYPD Apr. 2017), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

¹⁰ Use of Body-Worn Cameras, NYPD Patrol Guide (Jan 8, 2018), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf.

¹¹ In February 2019, an appellate court ruled that body worn camera footage is not a personnel record protected from FOIL under Civil Rights Law Section 50a. *Matter of Patrolmen's Benevolent Association of the City of N.Y., Inc. v. De Blasio*, 169 A.D.3d 518, *recalled and vacated by* 171 A.D.3d 636 (1st Dept. 2019). However, civil rights groups and the Civilian Complaint Review Board have still reported difficulties obtaining footage. See Yasmeen Khan, More Than a Third of Police Misconduct Investigations Waiting for Body Camera Footage, GOTHAMIST (June 17, 2019), https://gothamist.com/2019/06/17/ccrb_body_camera_videos.php; Memorandum from the Civilian Complaint Review Board on BWC and Document Request Issues with the NYPD (July 5, 2019), https://brooklyneagle.com/wp-content/uploads/2019/07/20190710_boardmtg_BWC_memo-2-1.pdf.

¹² Public Release of Body-Worn Camera (BWC) Footage of Critical Incidents, NYPD Operations Order (Oct. 18, 2019), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/oo-46-19-bodyworn-camera-footage.pdf.

¹³ *About NYPD*, NYC.gov, www1.nyc.gov/site/nypd/about/about-nypd/about-nypd (last accessed Oct. 3, 2019).

¹⁴ Dustin Volz, *Privacy Group Sues NYPD For Release Of Facial-Recognition Documents*, REUTERS (May 2, 2017), www.reuters.com/article/us-usa-cyber-face-recognition-idUSKBN17Y1Z1.

liberties. These include information on how body camera footage is retained, who has access to it, how it is analyzed, and how it might be combined with a number of other surveillance technologies currently being used by the NYPD.

The retention of body-worn camera footage generates a large database that can be used as a powerful instrument of surveillance. NYPD policy permits body camera footage to be stored for a year or longer, and authorizes officers to view their own body-worn camera recordings for any reason, and that of other officers if “the viewing is in furtherance of an investigation” or for another official purpose.¹⁵ It is important to know in what kinds of cases NYPD officers are utilizing recordings from body-worn cameras, and to ensure that body camera footage is not being used to conduct generalized surveillance. The Department should be required to track, audit, and make generalized reports on who is accessing body camera footage and for what stated purpose. The body camera program was originally created to improve accountability and repair public trust in the NYPD after a federal judge found the Department’s stop-and-frisk policies were racially biased and unconstitutional.¹⁶ It is important to ensure that surveillance of those very communities is not a by-product.

The City Council should also require the NYPD to report on whether, and how often, it shares body camera footage with other law enforcement agencies. The NYPD belongs to the New York State Intelligence Center (NYSIC), which is a “fusion center” that facilitates joint information sharing between the private sector and local, state, and federal government agencies.¹⁷ To the extent the NYPD is disseminating footage outside of the Department, it should be required to report on it. In addition, given the reported difficulties the public and oversight agencies like the Civilian Complaint Review Board have had in obtaining NYPD body camera footage, the NYPD should report on its responses to FOIL or other requests.

The City Council should also require the NYPD to track and report on its use of biometric tools, like facial recognition, to analyze recordings or assist in identification, whether in real time or through historical video. This could be incorporated in the quarterly reporting contemplated by subsection (b) of the proposed legislation.

Combining body cameras with biometric technologies, such as facial recognition, creates an unprecedented level of intrusion into the everyday lives of New Yorkers, and poses serious implications for our basic liberties. Unlike some of the NYPD’s other technologies, body cameras can simultaneously record audio and video. They are transportable, allowing officers to record not just in public spaces, but also inside New

¹⁵ Use of Body-Worn Cameras, NYPD Patrol Guide, *supra* Note 8.

¹⁶ *Floyd*, 959 F. Supp. 2d at 563.

¹⁷ Faiza Patel & Andrew Sullivan, Brennan Center, A Proposal for an NYPD Inspector General (Sept. 2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_NYPD_Inspector_General.pdf.

Yorkers' apartment buildings and homes. Moreover, even videos of discrete, individual incidents could include a significant amount of personal information about not only the subject of the video, but also anyone in the background – especially if layered with facial recognition capabilities. In the past, the collection of biometric information generally required a physical search, like taking someone's fingerprints or conducting a buccal swab. However, facial recognition enables law enforcement officers to make a multitude of real-time identifications remotely and in secret, raising concerns about the impact on Fourth Amendment-protected privacy rights. It also may discourage political activism by enabling the instantaneous and widespread identification of individuals at constitutionally protected gatherings. These concerns are magnified by the fact that facial recognition software has been shown, in study after study, to have large error rates in identifying women, people of color, children, and the elderly.¹⁸

We cannot continue to address surveillance technologies like body cameras in isolation. These tools are used in combination with one another, creating layered surveillance that is incompatible with democratic society. It is worth noting that body-worn cameras would be covered by the Public Oversight of Surveillance Technology (POST) Act, introduced by Council Member Vanessa Gibson. The POST Act would require the NYPD to disclose basic information about the surveillance tools it uses and the existing safeguards to protect the privacy and civil liberties of New Yorkers.¹⁹ Because it would require the NYPD to provide high-level data about its body-worn camera program, it would be a valuable companion to today's proposed bill, which requires more detailed reporting on specific incidents. The POST Act is supported by over half the City Council, with thirty co-sponsors and endorsements from the Black, Latino/a, and Asian Caucus and the Progressive Caucus.

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

¹⁸ *Supra*, Note 6.

¹⁹ New York City Council Int. 0487-2018, available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3343878&GUID=996ABB2A-9F4C-4A32-B081-D6F24AB954A0>.



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**HEARING ON THE CIVILIAN COMPLAINT REVIEW BOARD
BEFORE THE PUBLIC SAFETY COMMITTEE OF THE NEW YORK CITY COUNCIL**

TESTIMONY OF IAN HEAD,
SENIOR LEGAL WORKER OF THE
CENTER FOR CONSTITUTIONAL RIGHTS

November 18, 2019

On behalf of the Center for Constitutional Rights, I would like to thank the New York City Council's Public Safety Committee for holding this hearing and inviting us to take part. The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization committed to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights.¹

The Committee has requested testimony regarding Int. 1136 which would require the New York City police department to issue public reports on the department's use of body-worn cameras.² The issue of a body-worn camera program in New York City first emerged as part of the 2013 remedial order in CCR's federal class action litigation, *Floyd v. City of New York*.³ Although not part of the relief requested by plaintiffs, the Court ordered a the New York Police Department ("NYPD") to implement a one-year "pilot program" of body-worn cameras in a limited number of NYPD precincts as a possible way to "address[] the constitutional harms at issue" in *Floyd*, namely the unconstitutional and racially discriminatory "stop-and-frisk practices" of the NYPD. However, at the same time the court-ordered pilot was taking place, the De Blasio administration moved forward on its own to equip the entire NYPD with body-worn cameras, a policy shift from the previous administration.

Through the *Floyd* case, the Center for Constitutional Rights has been involved in varying degrees with New York City's body-camera program and policy since 2013. We feel strongly that body-worn cameras by themselves will not bring about more accountability in policing, but instead the cameras must be paired with robust systems of oversight, transparency and discipline within

¹ For more information, see <http://ccrjustice.org>.

² See Intl. 1136.

³ See *Floyd v. City of New York*, 959 F. Supp. 2d 688540 (S.D.N.Y. 2013). The *Floyd* case, now in its remedial phase, remains ongoing and is being litigated by CCR and Beldock, Levine and Hoffman LLP. The case is overseen for the past five years by a federal, court-appointed monitor.

the NYPD. Over the past several years, we have made this clear in our court filings as well op-eds in local and national media outlets.⁴

The need for police accountability and civilian oversight continues to be incredibly high in the 6 years since the *Floyd* decision. While the *reported* numbers of stops-and-frisks may have declined, the NYPD struggles with accurately documenting the true number of stops, and more importantly severe racial disparities and discriminatory practices remain. Furthermore, recent and ongoing incidents of police violence and other misconduct show that there has yet to be a real and necessary culture-shift within NYPD rank-and-file in regards to the policing of communities of color and real accountability for officers who endanger and violate the rights of New Yorkers.⁵

The communities of color that were at the center of the NYPD's illegal practice of stop-and-frisk and that continue to be the most impacted by police violence and misconduct should have a central role in determining how police body-worn cameras and footage are used. As part of the same remedial decision ordering the original body-worn camera pilot, the *Floyd* court correctly stated that "No amount of legal or policing expertise can replace a community's understanding of the likely practical consequences of reforms in terms of both liberty and safety."⁶ This continues to hold true in 2019, and the Center for Constitutional Rights believes that the voices and leadership of these communities must be given the same if not more weight than any other decision-making body, including the NYPD, when it comes to body-worn camera policies.

The public narrative supporting the implementation of these cameras has been to shine a light on police interactions and increase accountability. In 2014, body-worn cameras became a national talking point when former President Barack Obama suggested (and then funded) body-worn camera programs across the country following the horrific police killings of Black people, such as Michael Brown and Eric Garner. Talking points from the Department of Justice at the time stressed the use of the cameras for "transparency."⁷

⁴ See *Floyd v. City of New York*, Dkt. No. 546 at 1-5 (*Floyd* Plaintiffs' letter to the court describing reasons for Plaintiffs' objection to the proposed body-worn camera policy for court-ordered pilot). Also see Ian Head and Darius Charney, *Don't Let the NYPD Co-opt Body-Worn Cameras*, New York Times, April 27, 2017; Ian Head, *Help write the rules on NYPD body cameras*, NY Daily News, July 7, 2016.

⁵ For example, see Christopher Robbins, *Video Shows NYPD Cops Brazenly Ignoring Stop And Frisk Reforms*, *Gothamist*, November 8, 2019; Michael Sisak, *New York City wrestles with surge of violent police clashes*, ABC News, November 10, 2019; Madeline Holcombe, *Hundreds gather in Brooklyn to protest the NYPD after a violent subway video*, CNN.com, November 2, 2019; Spectrum News Staff, *Protesters Rally in Wake of Confrontations Between NYPD Officers and Civilians*, NY1, November 1, 2019.

⁶ *Floyd v. City of New York*, Dkt. No. 372 at 29.

⁷ See Department of Justice press release regarding body-worn cameras available at: <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>

In the years since, Mayor De Blasio and outgoing police commissioner O’Neill have often praised the cameras as an important tool for transparency.⁸ Yet, both the mayor and the NYPD have far from lived up to their rhetoric, instead implementing policies and decisions that divert and undermine transparency and accountability. This includes reported massive lags and backlog in getting body-camera video to the Civilian Complaint Review Board, as well as forcing members of the public to navigate the often confusing Freedom of Information Law process just to see video of their own interactions with police. And it includes the latest NYPD Operations Order, released last month, which provides the NYPD with a myriad of excuses not to publicly release BWC footage of “critical incidents.”

The bill proposed by Council Member Williams fits within a framework of public transparency and oversight. As written, it could potentially provide a window for New Yorkers to understand whether or not the BWC program is actually working as a tool for police accountability. For that reason the Center for Constitutional Rights does not oppose this bill, but much can be done to bolster it.

First, public reporting is only a first step. If body-worn cameras are going to continue to be used by the NYPD, there must be additional and immediate accountability measures beyond public reporting, so that the footage they record is used as a tool for police accountability, and not for police surveillance and repression.

Second, we have several suggestions that could be added to this bill to make it stronger. We suggest adding reporting on:

- We suggest that the language regarding “noncustodial questioning” be more specifically tailored to the levels of police encounters enumerated in *People v. DeBour* 40 N.Y. 2d 210.⁹ This would ensure that all possible police enforcement encounters under the law would be included in public reports. In this case, we believe “noncustodial questioning” should specifically include “Level 1” and “Level 2” per *DeBour*.

⁸ For example, see Mark Santora and Nikita Stewart, *Police Body Cameras Could Come to New York Soon*, New York Times December 3, 2014 (“New York City Mayor Bill DeBlasio has touted body-worn cameras as ‘one of the ways to create a real sense of transparency and accountability’ for police departments.”); Press Release, *De Blasio Administration, NYPD Announce All Officers on Patrol to Wear Body Cameras by End of 2018, One Year Earlier Than Expected*, January 2018. (De Blasio says “Body cameras have helped guide a new day in policing, bolstering transparency and increasing accountability”); Associated Press, *NY court: Public allowed to see police body camera footage*, February 19, 2019. (NYPD Commissioner O’Neill embraces the ruling allowing access to video, saying “This ruling is an important step forward for transparency and affirms what the NYPD believes...the public entitled to this information.”).

⁹ Under *DeBour*, there are four separate levels of legal police encounters in New York state. Level 1 allows police to approach a person to request information if they have an “objective credible reason.” Level 2 allows officers to make more pointed inquiries if they have “founded suspicion.” In both Level 1 and Level 2 encounters a person is legal free to leave at any time. Level 3 encounters require reasonable suspicion and are detentions of a person, and allow officers to frisk for weapons. Level 4 is an arrest requiring probable cause.

- We believe the definition of “qualified incident” should be stronger. It should at a minimum include all of the items included under “Mandatory Activation” in the NYPD Patrol Guide.¹⁰
- Detailed data should also be reported regarding supervisory review of BWC video, broken down by command and video category.
- We reiterate that we believe additional ideas and input from directly-impacted community members and organizations representing impacted communities be given priority in shaping this bill.

We thank you for hearing our testimony today.

Sincerely,

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¹⁰ See NYPD Operations Order 212-123 “Use of Body-worn Cameras”



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FOR THE RECORD

STATEMENT OF
ALBERT FOX CAHN, ESQ.
EXECUTIVE DIRECTOR
SURVEILLANCE TECHNOLOGY OVERSIGHT PROJECT, INC.
BEFORE THE
COMMITTEE ON PUBLIC SAFETY
NEW YORK CITY COUNCIL
FOR A HEARING CONCERNING,
NYPD'S ROLL OUT OF BODY-WORN CAMERAS
&
INTRODUCTION 1136-2018
SUBMITTED
November 18, 2019

My name is Albert Fox Cahn, and I serve as Executive Director of the Surveillance Technology Oversight Project (“S.T.O.P.”) at the Urban Justice Center. S.T.O.P. advocates and litigates for New Yorker’s privacy rights, fighting discriminatory surveillance. I commend Chair Richards for today’s hearing, Public Advocate Williams for sponsoring Intro 1136, and I am grateful for the opportunity to discuss the privacy implications of NYPD’s body-worn cameras (“bodycams”).

I speak today in support of Intro 1136, but I also note that this legislation is just a first step in the fight to ensure that bodycams are a tool of police accountability, and not just another form of public surveillance. I believe further reforms will be needed from the Council, lawmakers in Albany, and the NYPD itself.

I. The False Promise of Bodycams

Let me be frank, the public has been sold a bill of goods on bodycams. We were promised an increased accountability and justice, but instead we provided police with yet another tool of mass surveillance.

Bodycam adoption was initially driven by police use of force, particularly the 2014 police killings of Eric Garner, Michael Brown, Tamir Rice and many others. Initial evaluations offered the tantalizing promise that bodycams could increase “officer professionalism, helping agencies evaluate and improve officer performance, and allowing agencies to identify and correct larger structural problems within the department.”¹ Mayor de Blasio cited these justifications when expanding the NYPD bodycam program, promising to make New York City “fairer, faster and grow trust between police and communities.”²

The practice has fallen short of this promise, as lax departmental policies allow NYPD officers untenable discretion over when and what to record.³ At the same time, department officials have exercised their own discretion to shield officers from unfavorable footage, while quickly releasing videos that support their narrative. The net result are cameras that are less a tool to restrain cops and more a facet of public surveillance.

The public privacy impact is exacerbated by the NYPD’s growing use of facial recognition and other forms of biometric surveillance. These technologies allow the police to turn a walk down the block into a warrantless search of thousands of New Yorkers.⁴ The thought is disturbing, but it is even more alarming when one contemplates the use of such technology near political protests, health care facilities, an alcoholics anonymous meeting, or anyplace else where New Yorkers have heightened privacy concerns.

¹ See Cmty. Oriented Policing Servs. & Police Exec. Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* 5 (2014), <https://www.justice.gov/iso/ojp/resources/472014912134715246869.pdf>.

² Thomas Tracy, *De Blasio Pushing for Every Cop, Detective on Patrol to Wear a Body Camera by Year's End*, N.Y. Daily News (Jan. 30, 2018, 7:53 PM), www.nydailynews.com/new-york/de-blasio-wear-body-camera-year-article-1.3788661.

³ *Body-Worn Cameras*, Elec. Frontier Found., www.eff.org/pages/body-worn-cameras (last updated Oct. 18, 2017).

⁴ Mark Blunden, *Police Bodycams with Facial Recognition to Pick Out Criminals from the Crowd*, Evening Standard (June 24, 2019, 8:54 AM), www.standard.co.uk/news/uk/bodyworn-cctv-cameras-to-pick-out-criminals-from-the-crowd-a4174061.html.

II. The Need for Greater Statutory Oversight on the Release of Bodycam Footage

Last month, after years of delay, the NYPD released its critical incidents response policy.⁵ The two-page order, which is supposed to reassure the public about how footage will be released in the most high-profile cases, lists more than a dozen considerations for whether videos should be made public. Sadly, the order provides discretion in lieu of certainty. Worst of all, the discretion is invested in an individual with a clear conflict of interest: the police commissioner himself. If bodycams are to hold the NYPD accountable, it cannot be the police who choose when images are released. The incentive to hide bad data and show favorable footage will always be too powerful.

Alarming, the sole bright-line protection in the entire policy will only benefit the Department. It requires the NYPD to not disclose bodycam video while a use of force investigation is ongoing. Under these directives, when a member of the public is accused of a crime, it’s fine to share their video, but when an officer is accused of beating a bystander, suddenly it’s unfair to share the video while their disciplinary case is ongoing.

Sadly, the department’s track record with prior bodycam policies further undercuts public confidence. Earlier this year, the Civilian Complaint Review Board said approximately 40% of requests⁶ for bodycam video were unfulfilled. Alarming, in more than 100 cases, the NYPD falsely claimed there was no video when there actually was footage.⁷ In addition, the NYPD has repeatedly been denounced by advocates for failing to abide by existing disclosure requirements, such as those under New York’s Freedom of Information Law and criminal and civil discovery.⁸

More alarmingly still, NYPD officials have repeatedly defended the use of facial recognition in conjunction with bodycams. Earlier this year, former NYPD Commissioner James O’Neill justified this Orwellian practice with the canard that “facial recognition technology is used as a limited and preliminary step in an investigation.”⁹ Sadly, this description of facial recognition bears little resemblance to NYPD realities. Officers have been documented texting a “match” to a witness and asking, “Is this the guy?”¹⁰ This leading use of facial recognition can easily contaminate eyewitness memory, leading to misidentification and even wrongful conviction.¹¹

⁵ N.Y. Police Dep’t Operations Order No. 46, Public Release of Body-Worn Camera (BWC) Footage of Critical Incidents (Oct. 18, 2019), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/oo-46-19-bodyworn-camera-footage.pdf.

⁶ Jeffrey Harrell, *Body Cam Backlog: NYPD Lags on Making Footage Public, Report Finds*, Brooklyn Daily Eagle (July 12, 2019), <https://brooklyneagle.com/articles/2019/07/12/body-cam-backlog-nypd-lags-on-making-footage-public-report-finds>.

⁷ Memorandum from Olan Carayannis, Dir. of Quality Assurance and Improvement, Civilian Complaint Review Bd., to Members of the Civilian Complaint Review Bd. 2 (July 5, 2019), https://brooklyneagle.com/wp-content/uploads/2019/07/20190710_boarding_BWC_memo-2-1.pdf.

⁸ Tim Cushing, *NYPD Finally Comes Up With A Body Camera Policy, And It’s Terrible*, Tech Dirt (Apr. 19, 2017), <https://www.techdirt.com/articles/a20170416/14021937162/nypd-finally-comes-up-with-body-camera-policy-terrible.shtml>

⁹ James O’Neill, *Opinion, How Facial Recognition Makes You Safer*, N.Y. Times (June 9, 2019), www.nytimes.com/2019/06/09/opinion/facial-recognition-police-new-york-city.html.

¹⁰ Clare Garvie, *Garbage In, Garbage Out: Face Recognition on Flawed Data*, Georgetown Law Ctr. On Privacy & Tech., (May 16, 2019), <https://www.flawedfacedata.com>.

¹¹ *False Testimony/Confessions*, Cal. Innocence Project, <https://californiainnocenceproject.org/issues-we-face/false-confessions> (last visited Nov. 15, 2019).

Each of these problems have their own solutions. For bodycams that means new privacy safeguards and limits on officer discretion when to record. And for facial recognition, it means a moratorium or permanent ban. Following the lead of California, which recently passed a statewide ban on bodycam facial recognition,¹² state Sen. Brad Hoylman recently authored a measure that would go even further for New York's police bodycams.¹³

Intro 1136 will require the NYPD to produce much of the data that reformers and academics need to scrutinize the existing bodycam policies and practices. While transparency is important, it is far from a complete solution. It will be incumbent on lawmakers to then respond to this data and implement the safeguards needed to ensure that NYPD bodycams truly protect the public.

III. The Persistent Call for Police Accountability

As flawed as the NYPD's bodycam policies may be, it is also clear that the public has profound discomfort at the thought of eliminating, or even curtailing, bodycam adoption. Just over a week ago, hundreds of protesters took to the streets in opposition to the hiring of 500 new MTA officers to target fare evasion. I join these advocates in opposing the additional officers, but I fear that MTA bodycams would not be the remedy these protesters hope.

Even if each and every one of those MTA officers had a bodycam, it would still raise the exact same questions we see with the NYPD: who controls the footage? Until we have a clear answer, there is simply no way to know if these cameras will be a tool of police accountability or the latest form of mass surveillance. Fears of public spying are rooted in our understanding of existing NYPD and MTA surveillance practices.

Just as importantly, they are rooted in an understanding of what information we don't have. The lack of public information on police surveillance is why for more than two years, I've fought for enactment of the only bill to comprehensively regulate NYPD surveillance regime: The Public Oversight of Surveillance Technology ("POST") Act.¹⁴ Beyond expanding use of bodycams, the NYPD has already secured an arsenal of invasive spy tools on the public's dime while thwarting any public disclosure or debate. These tools include items like facial recognition, x-ray vans, and automated license plate readers that can monitor a vehicle's location throughout the city. Facial recognition alone has led to the arrests of thousands of New Yorkers, many wrongly accused of crimes they didn't commit.

These tools pose a privacy threat to all of us, but they pose a particularly potent threat to members of our immigrant communities. All too often, these systems create a risk of information-sharing with federal agencies, including ICE. For example, the NYPD for years has contracted with the private firm Vigilant Solutions, which operates a nationwide database of over two billion license-plate data points.¹⁵ Shockingly, in 2016 we learned that Vigilant Solutions was not just contracting with local

¹² Albert Fox Cahn, *Police Bodycams Shouldn't Surveil the People They're Supposed to Protect*, Daily Beast, (Oct. 17, 2019, 5:45 AM), <http://www.thedailybeast.com/facial-recognition-tech-is-a-blatant-misuse-of-police-bodycams>.

¹³ S.B. S6776, 242d Leg., Reg. Sess. (N.Y. 2019), <https://www.nysenate.gov/legislation/bills/2019/s6776>.

¹⁴ Public Oversight of Surveillance Technology (POST) Act, N.Y.C. Council Bill Int 0487-2018.

¹⁵ See Rocco Parascondola, *Exclusive: NYPD Will Be Able to Track Fugitives Who Drive Past License Plate Readers Across the U.S.*, N.Y. Daily News (Mar. 2, 2015), <https://www.nydailynews.com/new-york/nypd-track-fugitives-drive-license-plate-readers-article-1.2133879>.

police departments, but also with ICE.¹⁶ Perhaps most disturbingly, the NYPD relies on Vigilant Solution’s artificial intelligence to map out social networks, label New Yorkers as “criminal associates,” and create databases based on the company’s unproven algorithms.¹⁷

The POST Act is not just a comprehensive response, but also a modest one. The NYPD can continue using these tools—no matter how problematic—by complying with limited protections against waste, discrimination, and misuse. In fact, the POST Act would be one of the weakest surveillance reform bills in the country,¹⁸ especially when viewed in comparison to San Francisco’s¹⁹ and Oakland’s outright bans on facial recognition technology²⁰ and Massachusetts’s proposed state-wide moratorium.²¹

The evidence is clear: civilian oversight of surveillance enhances the public’s trust in police departments and is absolutely necessary for public safety.²² Now, with twenty-nine city council members and the Public Advocate signed on as POST Act cosponsors, the time is long overdue for a hearing before the public safety committee and a vote of the full council. I hope that New York City rises to this challenge before it is too late. We urge the Council to build on the momentum it generates securing a hearing on the POST Act before the end of the year.

¹⁶ The Domain Awareness System collects the license plate data scanned by the approximately 500 license plate readers operated by the NYPD and combines it with footage from cameras and other surveillance devices around the city. The NYPD holds on to the license plate data for at least five years regardless of whether a car triggers any suspicion. See Mariko Hirose, *Documents Uncover NYPD’s Fast License Plate Reader Database*, ACLU (Jan. 25, 2016, 10:30 AM), <https://www.aclu.org/blog/privacy-technology/location-tracking/documents-uncover-nypds-fast-license-plate-reader-database>.

¹⁷ See *id.*

¹⁸ See *Community Control Over Police Surveillance*, ACLU, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance> (last visited Nov. 15, 2019).

¹⁹ See Kate Conger et al., *San Francisco Bans Facial Recognition Technology*, N.Y. Times (May 14, 2019), <https://www.nytimes.com/2019/05/14/us/facial-recognition-ban-san-francisco.html>.

²⁰ See Opinion, *San Francisco Banned Facial Recognition. New York Isn’t Even Close*, N.Y. Times (May 18, 2019), <https://www.nytimes.com/2019/05/18/opinion/nypd-post-act-surveillance.html>.

²¹ See S.B. 1385, 191st Gen. Court, Reg. Sess., (Mass. 2019), <https://malegislature.gov/Bills/191/S1385>.

²² Oakland, California, and Seattle, Washington, have enacted similar police oversight laws without deteriorating public safety. See Opinion, *supra* note 20.

Testimony of
The Legal Aid Society

In support of:

**Int. No. 1136: A Local Law to amend the Administrative Code of the City of
New York, in relation to requiring the New York City Police Department to
issue public reports on the Department's use of body-worn cameras**

at a public hearing on November 18, 2019

Presented to:

The New York City Council Committee on Public Safety

Presented by:

Steven Wasserman

Attorney
Criminal Practice – Special Litigation Unit

November 18, 2019



Introduction

I am Steven Wasserman, an attorney with The Legal Aid Society's Criminal Practice. The Legal Aid Society welcomes the opportunity to testify at this public hearing before the New York City Council Committee on Public Safety, concerning the need for oversight and quarterly reports detailing the use of body cameras by the NYPD.

Since 1963, The Legal Aid Society has served as the primary defender of poor people prosecuted in the State court system. In our capacity as New York City's public defender, we receive and review thousands of body-worn camera recordings each year that document stops, searches and arrests of our clients who have been charged with crimes. As a Plaintiff in the Federal Monitorship of the NYPD, we are participating in the implementation and evaluation of the Court ordered Body-worn Camera pilot project. The Legal Aid Society has a strong stake in the success of the NYPD's Body Worn camera program.

Int. No. 1136

The Legal Aid Society supports the proposal before this Committee to require quarterly reports and public disclosure of how body-worn cameras are being utilized in police-civilian encounters. The proposed reporting and disclosure requirements include such critical details as the race, age and gender of the civilian subject, the nature of the law enforcement activity that prompted the encounter, whether the recording was disclosed to the subject, and whether it involved the use of force or resulted in a civilian complaint. The Department would also be required to report upon the existence of incidents that should have been recorded but were not. The reporting requirements of the proposed statute, Admin. Code §14-176, exceed and improve upon the Department's internal reporting regulations contained in NYPD Patrol Guide 212-123.

The Need for Legislation

Recent studies that have been commissioned by the NYPD reveal a persistent problem of under-recording of critical events in the criminal process, including arrests and use-of-force incidents. A recent audit by the Rand Corporation reveals a substantial number of “must record” incidents that were not recorded by patrol officers despite intensive oversight. The reluctance of police to comply with recording regulations is reflected in a survey of police and civilians by the Policing Project of NYU Law School’s Marron Institute. The survey reveals a wide gulf between police and civilian opinion on what should be recorded and whether recording should be disclosed. The study reflects considerable resentment within the NYPD of a requirement to record “low level” encounters, to notify the subject, and to begin recording before engaging with civilians – in time to reveal the basis for the encounter and the response of the police.

The Legal Aid Society has a large body of tangible evidence of the problem of under-recording. We have dozens of useless body cam recordings provided by NYPD in connection with pre-trial discovery -- recordings which begin with an image of a suspect who is already under arrest and in handcuffs. Had the camera been promptly activated, as required, these recordings, which include both pedestrian and automobile stops, should have contained the observations that led police to stop, approach and question the defendants we represent.

The cameras are designed to save images that were gathered one minute before the “record button” is pressed. However, the cameras usually do not show the officers’ prearrest observations, or even the ensuing questioning and how the arrest was effected. Truncated recordings, which are of no evidentiary value, result from a willful failure by some patrol officers to activate their cameras, or to press the “record” button in time to show what they saw and how they responded.

The NYPD body worn camera program is the largest and among the most costly in the nation. This legislation is needed to help the program fulfill its promise of more respectful, lawful and restrained police-civilian interaction.



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

Jacqueline Caruana – Senior Trial Attorney, Criminal Defense Practice

Presented before:

The New York City Council Committee on Public Safety

Hearing on NYPD’s Use of Body Worn Cameras

November 18, 2019

My name is Jacqueline Caruana and I am a Senior Staff Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for over 30,000 clients in Brooklyn every year. I thank Chairperson Donovan Richards and members of the Committee on Public Safety New York for their leadership on improving police oversight and accountability.

BACKGROUND

A lack of transparency by the New York Police Department remains a major concern for public defenders and the communities we represent. Body worn cameras, if utilized properly, can help to shed light on the thousands of law enforcement interactions many New Yorkers, particularly Black and Latinx people, experience each day. Police misconduct continues to go unmonitored and unchecked and the secrecy of police disciplinary systems perpetuates this misconduct and precludes public scrutiny of law enforcement officers. The ability to capture misconduct with body worn cameras can and should provide judges, prosecutors, and other law enforcement

officers with the tools necessary to call into question officers' credibility, preclude officers from testifying, appropriately dismissing certain cases, and removing officers from the force.

The use of body worn cameras, according to Mayor Bill de Blasio, can deliver "the transparency and policing reforms at the center of effective and trusted law enforcement."¹ It's clear that the use of body worn cameras is significant for transparency. However, members of the NYPD are given full control over when and whether to activate their body-worn cameras, and they have not delivered the transparency that was promised.

Research has shown that officers wearing body cameras were involved in fewer use-of force incidents and body worn cameras can also increase the likelihood that an officer acting on racial biases [or committing misconduct] will be discovered, investigated, and disciplined.² Again, as iterated above, body cameras are only a useful tool to assist in transparency and accountability if they are used properly and judges, prosecutors, and law enforcement officers investigate and carry out disciplinary measures for incidents of misconduct.

VIOLATIONS OF PATROL GUIDELINES ON BODY WORN CAMERAS

The NYPD's use of body-worn cameras is covered by section 212-123 of the NYPD Patrol Guide. This section includes who wears body cameras, when the cameras must be activated, and procedures for reporting a failure to activate.

Pursuant to the patrol guide, uniformed members of the NYPD are required to wear body cameras and activate them during almost all interactions with civilians. They must be activated during any investigation, any search, any arrest, any interaction that becomes antagonistic, and any law enforcement activity. The footage must then be uploaded in its entirety to the NYPD database and made accessible to the district attorney.

If NYPD officers fail to activate their camera under any of these circumstances, they must record an explanation as to why they failed to abide by the Patrol Guide.

However, we as public defenders routinely see failure to activate cameras during situations that are clearly defined as mandatory recording scenarios by the Patrol Guide. We often do not receive body-worn camera footage at all. When we do receive footage, it often only begins once a person is in custody, and after the contested events, such as a search, have taken place.

Body-worn camera footage is almost always missing or incomplete in cases where police accounts are later contradicted by surveillance or witness footage. Body-worn camera footage is available largely in cases where it serves the police narrative and is "missing" in cases where it would be inconvenient. The rollout of body-worn cameras has revealed a problem that many activists, community members and defenders anticipated: they are being used to the advantage of the police, and not in furtherance of transparency.

¹ <https://www.gothamgazette.com/city/6879-thousands-of-low-profile-cases-could-turn-on-police-body-camera-footage>

² See Columbia Journal of Race and Law; IS IT RECORDING?—RACIAL BIAS, POLICE ACCOUNTABILITY, AND THE BODY-WORN CAMERA ACTIVATION POLICIES OF THE TEN LARGEST METROPOLITAN POLICE DEPARTMENTS IN THE USA, Julian R. Murphy

The Patrol Guide, which is meant to be followed by all members of the NYPD, is unambiguous about the activation of body-worn cameras. However, officers routinely fail to abide by the rules set forth by the Department, and we have yet to ever see meaningful disciplinary action for this failure. The Patrol Guide is already supposed to govern the behavior of officers. **Any legislation that establishes reporting requirements for body-worn camera usage will likely be ineffectual if it does not also impose a consequence for failure to follow them, and if the Department itself remains generally unwilling to penalize officers for misconduct.**

It is important to note here that NYPD's policies governing use of body worn cameras are known as a "limited discretion activation policy," as opposed to a "minimal discretion activation policy," which is used in Chicago, Illinois. Limited discretion essentially means that officers have discretion as to whether or not to record certain activities while on duty. Chicago's minimal discretion policy starts from a presumption that all enforcement activities will be recorded subject to narrow exceptions.³ When body camera footage is provided to attorneys at BDS, it is often clear that police officers are not turning on their cameras until after much of the initial police-citizen encounter. In addition to reporting body worn camera usage data to the city, NYPD needs to change their camera activation policies and report and discipline officers who are not in compliance.

We have additional concerns about the misuse of body worn camera footage that is obtained in certain cases. Specifically, we are aware of situations where police officers are reviewing body camera footage before writing their police reports, therefore tailoring their reports and testimony. This allows police officers to use body camera footage as a tool to invent their own narrative surrounding a case that may help to "explain" misconduct or excessive use of force. It should go without saying that once body camera footage is obtained it must be turned over to defense counsel. And this includes body camera footage recorded by every officer involved in the incident, not just the arresting officer. In Brooklyn, we have seen that the district attorney's office is capable of finding out which cases have body camera footage associated with a particular incident and specifically which officers recorded footage. The Kings County District Attorney's Office has created forms to track the existence and availability of these recordings, so there can be no excuse for failure to turn over body camera footage to defense attorneys. NYPD must comply with correct use of these cameras, along with the storage and maintenance of footage, for there to be any meaningful level of transparency and accountability.

CITY COUNCIL INTRODUCTION No. 1136-2018

Brooklyn Defender Services supports Int. No. 1136, which would require NYPD to issue public reports on the department's use of body worn cameras. However, this legislation should only be seen as a start, because it does not go far enough. The City Council needs to address the lack of disciplinary measures taken by NYPD for misuse of body worn cameras. Specifically, BDS recommends that Int. No. 1136 include a provision that would require NYPD to report incidents where an officer was disciplined for failure to use a body worn camera pursuant to patrol guidelines. The way that these cameras are used and who has access to the footage is extremely

³ See Columbia Journal of Race and Law; IS IT RECORDING?—RACIAL BIAS, POLICE ACCOUNTABILITY, AND THE BODY-WORN CAMERA ACTIVATION POLICIES OF THE TEN LARGEST METROPOLITAN POLICE DEPARTMENTS IN THE USA, Julian R. Murphy

important. There is not much in the current NYPD policy that even references a plan to improve transparency and accountability. And based on NYPD's staunch and vocal opposition to State Senator Jamaal Bailey's plan to fully repeal Civil Rights Act 50-a, it does not appear that the department intends to use body worn cameras to enhance transparency, but instead intends to expand police power and surveillance.⁴

In reference to NYPD's expansion of surveillance techniques, the City Council is also considering legislation that would require reporting of all surveillance techniques used by NYPD, not just body worn cameras. BDS encourages the council to pass the Public Oversight of Surveillance Technology Act ("POST Act") so that there is further oversight, transparency, and accountability for NYPD as technology advances and the privacy rights of New York City residents are further infringed upon.⁵

CLIENT STORIES:

Mr. G - Body-worn camera footage reveals planted evidence - Mr. G was on his way home from picking up dinner for his family when his car was stopped by NYPD officers. The officers had recently been outfitted with new body-worn cameras that began recording one minute prior to manual activation by the officers, rather than the previous 30-second period. When the footage starts, it is clear that an officer places a weapon in the glove compartment of Mr. G's car. The officer is then seen waiting before activating his camera. He then goes back into the glove compartment of Mr. G's car and pretends to discover the weapon he had placed there. Mr. G was arrested and charged with possession of a weapon, which he adamantly denied during the entirety of his case. The body camera footage was turned over several months after his initial arraignment. This case was then dismissed after defense counsel pointed out the obvious planting of evidence to the Brooklyn DA's office.

Mr. Y - Officers declined to record stop-and-frisk - Mr. Y is a teenager who was stopped for alleged jaywalking and then searched by officers. The officers claimed that they then found a small amount of drugs in his pocket. The legitimacy of this search was questionable, at best, given the nature of the underlying allegation of jaywalking. However, despite the officers being outfitted with body-worn cameras, no footage of the search or arrest was recorded. The recording on the officer's body-worn camera begins in this case when the officer is back at his desk, filling out arrest paperwork.

Mr. A - Body-worn camera footage reveals excessive use of force

Mr. A and his friend got into a fight with each other in a bar. The police were called and Mr. A's friend was immediately put in cuffs. Body camera footage revealed that Mr. A was walking freely amongst police officers and not under arrest when an officer grabbed Mr. A's arm from behind, and Mr. A pulled his arm away. As he pulled away he was slammed on to the floor and surrounded by 8 officers. There was a knee in his back. He was handcuffed and searched. To search him, they lifted his handcuffed arms directly into the air while his body lay flat (stretching the joint). He told the officers he was going to sue and an officer told him to "shut the fuck up"

⁴ See New York State Senate and Assembly Bills: S.3695/A.2513

⁵ See New York City Council Introduction: Int. No. 0487-2018

and punched him in the back. He was pulled up, put against the wall and taken down a second time.

The police involved later said they saw him go for a knife. Mr. A was never charged with possessing an illegal weapon.

Mr. B - Officer not following patrol guidelines when using body worn camera

Mr. B was walking home at night with his sister from the local deli. Further up the sidewalk two other individuals, unknown to Mr. B, were in a physical fight with each other. A police officer in plain clothes and in an unmarked police car observed the fight. The police officer says he also observed someone throw a gun on the ground. That police officer got out of his car with his gun drawn. The two people in the fight took off running and Mr. B and his sister stopped on the sidewalk. The police officer pointed his gun at Mr. B and told him to put his hands up, which he did. The police officer then physically walked Mr. B over to a nearby fence and handcuffed him to it. At that point, he turned his body camera on and claimed that he saw Mr. B throw a firearm on the ground. Pursuant to the patrol guide, he should have turned on his body cam at the point he observed the fight, or at the very least, at the point he drew his gun and exited his car. The only reason his defense counsel had footage of anything prior to Mr. B being handcuffed to the fence is because the body camera recorded 30 seconds of buffering time. Nowhere on the video is Mr. B observed touching, holding, or throwing a firearm. The other two people were not arrested. After his Mr. B's arrest, DNA was recovered from the firearm. Mr. B voluntarily submitted his own DNA sample for comparison, and his DNA was not a match to the DNA on the firearm. The police officer claimed that the body camera footage did not capture Mr. B throwing the firearm because that supposedly happened before the officer turned on the body camera. After a year and a half, the prosecutor reduced their plea offer from a felony with 2 years in prison to a misdemeanor with community service. The prosecutor refused to dismiss the case, saying that he believed the police officer was credible even through the body camera footage and the lack of DNA did not corroborate the police officer's story. This officer has not been disciplined for failure to follow the body worn camera patrol guidelines.

RECOMMENDATIONS

We thank Council Member Donovan Richards and the committee on Public Safety for holding this hearing, as well as the Public Advocate, Mr. Williams, and Council Member Lancman for sponsoring In. No. 1136. We continue to encourage the Council to advocate for police transparency and accountability. It is paramount not only to the people we serve and their communities, but to all New York City residents, that NYPD is held accountable for police misconduct at all levels. This, of course, is only the beginning of the work that needs to be done to mitigate discriminatory policing.

If you have any question, please feel free to reach out to Jackie Caruana, Senior Staff Attorney, at jcaruana@bds.org.

**The Bronx
Defenders**

**Redefining
public
defense**

**New York City Council
Committee on Public Safety**

**Hearing re: Body Worn Cameras
November 18, 2019**

Written Testimony of The Bronx Defenders

By Lenora Easter, Team Leader of the Early Defense Team, Criminal Defense Practice

Chairman Richards and Public Advocate Williams, my name is Lenora Easter and I am an attorney and Team Leader of the Early Defense Team for the Criminal Defense Practice at The Bronx Defenders.

The Bronx Defenders (“BxD”) is a public defender non-profit that is radically transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called holistic defense that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

I. Introduction

BxD expresses our qualified support for the Int. No. 1136, which requires the NYPD to track and report important information about the use of body-worn cameras (“BWCs”). While the legislation is an important step towards addressing the lack of transparency of the police

department, there remain important gaps in the overall BWC program that must be addressed in order to fulfill important goals of police accountability and transparency. Below we outline the history of the BWC program and explain how it is failing to live up to its promise and intended purpose. We then discuss problems with the NYPD's BWC policy and provide illustrative examples from cases our office has handled. Finally, we offer some specific recommendations that we believe would make the BWC program more effective. We ask the Council to work in its oversight capacity to:

- Close the vague “exigency” loophole which gives officers too much discretion in choosing when to record civilian encounters;
- Ensure that officers are subject to discipline when they fail to comply with the BWC protocol; and
- Increase the pre-event “buffering period” on all BWCs to two minutes.

II. The Unfulfilled Promise of the NYPD's Body Worn Camera Program

On August 12, 2013, the Federal District Court for the Southern District of New York found that the City's use of stop-and-frisk was unconstitutional in the case of *Floyd v. City of New York*.¹ In a separate Opinion and Order dated the same day, the Court directed the NYPD to “institute a pilot project in which body-worn cameras (BWC) will be worn for a one-year period.”² In so doing, the Court identified the potential benefits of outfitting officers with BWCs, noting that the cameras would “provide a contemporaneous, objective record of stops and frisks, allowing for the review of officer conduct by supervisors and the courts. The recordings may either confirm or refute the belief of some minorities that they have been stopped simply as a result of their race, or based on the clothes they wore, such as baggy pants or a hoodie”³

The NYPD eventually began the BWC pilot in April of 2017. At that time, Mayor DeBlasio billed it as a transparency measure aimed at reducing “mistrust between police and community.”⁴ By the end of 2017, approximately 1,300 police officers in 20 precincts across the city were outfitted with BWCs while on evening shifts.⁵ In December 2017, the department commenced Phase 2 of the BWC rollout equipping officers on all shifts in every precinct, transit district and Police Service Area citywide. At this time, the Mayor promised the program would make the city “fairer, faster and grow trust between police and communities.”⁶ Phase 3 began in March of 2019, with approximately 4,000 BWCs given to specialized units such as the Emergency

¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

² *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013)

³ *Id.*

⁴ <https://www.gothamgazette.com/city/8880-nypd-body-camera-footage-district-attorneys-ccrb>

⁵ <https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page>

⁶ <https://www.nydailynews.com/new-york/de-blasio-wear-body-camera-year-article-1.3788661>

Services Unit, Strategic Response Group and Critical Response Command. This Phase was completed in August of 2019.

A. The NYPD's Body Worn Camera Policy

In the midst of the rollout, in January of 2018, the NYPD formulated a BWC policy which was added to the Patrol Guide. Procedure No. 212-123 (the "NYPD policy") lays out procedures that apply to "all uniformed members of the service issued a [BWC]" as well as those supervising them.⁷ It outlines how to use the camera, when to activate it, and when an officer may view the footage among other things. A section of the NYPD policy entitled "mandatory activation of BWC" *requires* officers to record certain events, including:

- All uses of force
- All arrests and summonses
- All interactions with people suspected of criminal activity
- All searches of persons and property
- Any call to a crime in progress
- Some investigative actions
- Any interaction with emotionally disturbed people

According to the NYPD, these events "must be recorded from start to finish."⁸

B. The Vague "Exigency" Loophole Gives Officers Too Much Discretion

However, the NYPD policy contains a major loophole which essentially allows officers full discretion over whether or not to actually activate their BWCs in these "mandatory" situations. The loophole states that, "[i]n the event of an unanticipated or exigent occurrence, activate the BWC as soon as it is feasible and safe to do so after taking necessary police action to preserve human health and safety."⁹ While this exception seems reasonable on its face, we have found that officers have exploited it in order to avoid recording stops and searches of individuals "suspected of criminal activity" altogether.

The entire premise of the BWC depends on the cameras being activated properly, and provided to defense counsel, and ultimately, the public. As the ACLU noted presciently, "policies and technology must be designed to ensure that police cannot 'edit on the fly'—i.e., choose which encounters to record with limitless discretion. If police are free to turn the cameras on and off as

⁷ https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf

⁸ https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf

⁹ https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf

they please, the cameras' role in providing a check and balance against police power will shrink and they will no longer become a net benefit.”¹⁰ Selective recording by police officers threatens to undermine the goal as contemplated by policymakers which led New York City residents to embrace BWC in the interest of police accountability and transparency despite the potential for greater surveillance.

As the New York Daily News recently pointed out, “The great promise of body cameras, the very rationale for their becoming equipment as standard as a baton on cops, is their ability to shine an objective light on police and civilian conduct.”¹¹ As a practicing public defender in the Bronx, I’m here to tell you that this promise remains unfulfilled.

III. How the Body Worn Camera Program is Actually Playing Out

As public defenders, our practice has changed over the last two years as BWCs have become the norm. According to spokespeople from several NYC District Attorney’s Offices, “when an arrest is made, the arresting officer sends complete BWC footage of the event to prosecutors almost immediately and in raw, unedited form.”¹² This footage is supposed to be provided to defense counsel in the normal course of discovery. While the practice of turning over footage from BWC may differ from one borough to another, in the Bronx, we have seen many instances where footage is not turned over, and when it is, officers failing to capture vital interactions with our clients.

In addition, we have seen that officers have developed codes and hand motions to signal to each other that their BWCs are recording. Often officers will stop talking after receiving this signal, or the officer with the BWC will turn and stop recording in order to have a conversation. This only perpetuates the culture of resistance to transparency that has historically defined the NYPD.

A. Mark’s Case¹³

Occasionally, the BWC footage provided reveals police misconduct. Our client Mark—a government employee who had no criminal record—was arrested on the sidewalk outside of his apartment building and charged with resisting arrest. When he came through arraignments his face was badly injured. Two months later Mark’s attorney was provided with BWC footage which showed a crowd of at least 15 officers surrounding him, yelling at him to vacate the

¹⁰ Jay Stanley, ACLU, *Police Body-Mounted Cameras: With Right Policies In Place, A Win For All Version 2.0* (March 2015) (available at https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf)

¹¹ <https://www.nydailynews.com/opinion/ny-edit-unrady-for-their-closeup-20191112-qyuglak7ezhfltdtnbpl16vzn7y-story.html>

¹² <https://www.gothamgazette.com/city/8880-nypd-body-camera-footage-district-attorneys-ccrb>

¹³ Pseudonyms used throughout to protect client confidentiality.

sidewalk, and then mobbing him as an officer screamed “taze him.” The footage did not show Mark committing any crime. After a bureau chief at the DA’s office reviewed the footage, the case was dismissed.

This example, while striking, is atypical. Although the outcome was favorable for the client, it is one of a vast majority of instances where officers fail to record their initial interactions with our clients, such as stops and searches. The NYPD policy requires officers to activate their BWC “prior to engaging in” any interaction “with persons suspected of criminal activity.”¹⁴ But as we’ve seen, in many cases officers do not activate the BWC until midway through the encounter, or at the point of arrest. This practice deprives the court and the defense a neutral and objective view of the initial street encounter—the purpose for which the BWC program was instituted by the federal court.

B. Nicholas’s Case

Since the roll out of BWC, attorneys at The Bronx Defenders have seen these problems arise over and over again, especially in cases where the legality of a street encounter between the NYPD and a civilian is at issue. Take the case of our young client Nicholas who was charged with possession of ammunition after police approached him on the street. At the suppression hearing in the case, the officer testified that while sitting in a car with two other officers, he noticed Nicholas walking down the sidewalk. The officer said he didn’t recognize Nicholas from the area and that he was moving in a “suspicious” manner. Based on these observations, the officer made the decision to get out of the car and approach Nicholas to “say hello to him.” This approach initiated a series of events which ended with Nicholas being tackled and arrested.

Though the officer was wearing his BWC the entire time, he *failed to press record* until after Nicholas had been tackled and placed in handcuffs. When asked in court why he didn’t activate the BWC before getting out of the car and approaching our client, the officer responded “I don’t have an answer to that,” and later, “I didn’t have to turn it on until I thought it was okay to turn it on and I didn’t have to turn it on before I exited the vehicle.” Moreover, the officer did not even have the BWC turned on and in “buffering mode” as required by protocol.¹⁵ If it had been, the BWC would have captured the 30 seconds prior to the officer pressing record. The officer had no explanation for why the camera wasn’t in buffering mode.

This officer had been wearing his body camera for a year and a half at the time of the incident. Because of his failure to record the interaction as required by the NYPD protocol, the Court was deprived of the best evidence of what *actually* took place during the street encounter. The stated

¹⁴ https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-cameras-patrol-guide.pdf

¹⁵ See discussion, *infra*, Part IV.A

purpose of the BWCs—to “provide a contemporaneous, objective record of stops and frisks, allowing for the review of officer conduct by supervisors and the courts”—was thwarted.

C. Susan’s Case

In another case handled by our office, Susan, a 59-year-old woman with no prior contact with the criminal legal system whatsoever, was in her house cleaning her oven when the police and fire department arrived and banged on her front gate. When she told them she was fine and didn’t need assistance they broke the gate, stormed into the apartment, and tackled her. She was arrested and charged with resisting arrest and obstructing governmental administration. In the process she sustained serious injuries to her knees and back which later required surgery. Though both police officers who participated in the arrest were wearing BWCs, the cameras were not turned on until the officers had arrested Susan—after they had forced their way into her home and assaulted her. Once again the BWCs were not recording when they should have been.

These are just two of many instances in which officers have failed to follow their own stated policy, or have relied on a loophole in that policy in order to avoid recording interactions with our clients. In both instances, these officers used discretion in deciding to not record their interactions. This practice allows the NYPD to control the narrative and simply conduct more surveillance on marginalized populations. This is not transparency. Without accountability, the BWC program will serve to further increase the building mistrust between police and communities

IV. What Needs to Change

It is imperative that New York evaluate and adopt policies for the use of BWC that are consistent with the law and public expectation of privacy and accountability. BWCs are not a cure-all to the historical divisions between the department and the communities that it polices. However, we have witnessed firsthand how they can be useful tools to help prevent misconduct and improve community relations, but only when they actually capture the full story. In the courtrooms, we have seen how footage from a body camera helps create a more neutral narrative for our clients who do not have to contend only with the officer’s version of events.

Nevertheless, it’s clear that the current policies put in place by the NYPD prioritizes the interests of law enforcement over that of the public. This has become clear based on our experience seeing the inconsistent use of body cameras by the rank and file officers as well as from the departmental policies issued by the NYPD that fail to address troubling flaws on the use, access, and retention of body camera footage.

The Bronx Defenders applauds the City Council for introducing legislation that demands more transparency and requires the NYPD to report important information about the use of BWC. The public would certainly glean insight into information that has been held solely by the department. However, we believe the City Council can go further in their role in overseeing the BWC program. **The Bronx Defenders respectfully offer the following recommendations to the Council regarding the NYPD BWC program:**

A. Increase the “Pre-Event Buffering Period” to Two Minutes

All BWCs are programmed to record a pre-event “buffering period” which captures a certain amount of video prior to an officer pressing record. The purpose of this feature is to both increase accountability for officers, but also to capture events when an officer is not able to immediately press record because for the exigency of the situation. The NYPD has set the buffering period on their cameras for 30 seconds despite the fact that the cameras are capable of recording up to two minutes.¹⁶ This policy must change and the buffering period must be increased.

Other big cities have already moved to longer buffering periods for their BWCs. After an officer-involved shooting in Washington DC that was not captured on BWC despite the fact that the officer was wearing one, DC police moved to increase the pre-event buffering period on their cameras to two minutes.¹⁷ Police departments in both Atlanta¹⁸ and Houston¹⁹ also have their buffering period set for two minutes. New York must do the same. This increase would reduce the likelihood of incomplete footage and problems associated with officers who fail to activate the recordings.

B. Close the “Exigency” Loophole and Provide Clearer Guidance to Officers and the Public

The current policy which gives police officers complete discretion in determining when to start recording on the basis of “unanticipated or exigent occurrences” leads to too many critical encounters that will not be recorded or partially recorded. The reality of policing in New York City or any other urban area, and in fact what police officers are trained to do, is to respond to unanticipated situations. Turning on BWC should be as second nature as to calling on the radio to the station house. The current policy de-prioritizes an important piece of police activity using

¹⁶ <https://help.axon.com/hc/en-us/articles/115000394554-Body-Camera-Settings>

¹⁷ <https://www.wusa9.com/article/news/local/would-proper-use-of-body-cams-help-solve-a-fatal-dc-police-shooting/459182965>

¹⁸ http://www.atlaudit.org/uploads/3/9/5/8/39584481/apd_bwc_december_2018.pdf at 3

¹⁹ <https://www.bwscorecard.org/static/policies/2017-08-11%20Houston%20BWC%20Policy.pdf> at 5

vague guidelines that can be interpreted to include a vast number of police encounters. This loophole, while presumably present to ensure safety, raises more questions than the problem it seeks to address and must be eliminated. The failure to record should be limited to rare occasions and specific scenarios such as risk to the officer's safety or civilian's safety.

C. Impose Meaningful Sanctions on Officers who Fail to Comply with the NYPD Policy

The current NYPD BWC policy does not include a disciplinary policy for violations of the policies that are in place. Nor does the public know how many, if any, officers have been sanctioned for not following it. The only way to ensure that BWC serves the intended purpose of enhancing police accountability is by specifying clear consequences for failing to record critical encounters, in violation of department policy. The lack of a clear disciplinary action undermines public trust and further suggests that the NYPD's interest lies not in the service of accountability and transparency but in placing the bare-minimum of responsibility on its officers.

The department must make clear to its officers and to the public the measures that are in place to ensure compliance. There should be requirements in the instance where officers fail to record or partially record, they must put their reasoning either in on-camera or in writing immediately after the encounter and before the footage is uploaded. As legal commentators have noted, "If a camera is not activated during an act of deliberate racial profiling, then the camera is serving little deterrence function; it is not going to catalyze a disciplinary response and it will not result in any responsive training."²⁰

V. Conclusion

As public defenders we understand that the impact of BWC is not only in recording those incidents that capture the public's attention, but also in the hundreds of stops and arrests conducted by police officers every day. We regularly hear our clients express dismay that their voices will be unheard or disregarded when it comes to their encounters with the police, that an officer's word will hold greater weight than their own. The footage of interactions between the police and civilians caught on BWC provides an opportunity for a more objective narrative to be developed and reduces the reliance on words and memory alone. However, unless strict protocols are formulated and enforced, this promise will remain unfulfilled, and BWCs will become just another tool for surveillance used by the NYPD to further control marginalized communities.

²⁰ Murphy, Julian, *Is It Recording? Racial Bias, Police Accountability, and the Body-worn Camera Activation Policies of the Ten Largest U.S. Metropolitan Police Departments in the USA* (April 10, 2019). 9 Columbia Journal of Race & Law 141 (available at <https://ssrn.com/abstract=3369579>).

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I represent: CTR FOR CONSTITUTIONAL RIGHTS

Address: 666 BROADWAY 7th FLR 10012

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